DOCKET NUMBER 02-16424-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETER EVANS, DETREE JORDAN, Plaintiffs-Appellees, v. CITY OF ZEBULON, GA, ROBERT LOOMIS, individually and in his official capacity as Police Chief of the City of Zebulon, GA, Defendants, DENIS STEPHENS, Defendant-Appellant.	)	Appeal from the United States District Court for the Northern District of Georgia

EN BANC AMICUS CURIAE BRIEF OF ALABAMA MUNICIPAL INSURANCE CORPORATION AND ALABAMA LEAGUE OF MUNICIPALITIES IN SUPPORT OF APPELLANT DENIS STEPHENS AND SUPPORTING REVERSAL OF THE DISTRICT COURT JUDGMENT

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Docket No. 02-16424-DD
Denis Stephens v. Peter Evans

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for Amicus Curiae, in compliance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, certify that the following listed persons and parties have an interest in the outcome of this case. These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal pursuant to the local rules of the Court.

1. All interested persons contained in that Certificate of Interested Persons and Corporate Disclosure Statement of Appellant's En Banc Brief
2. Alabama League of Municipalities, Amicus Curiae
3. Alabama Municipal Insurance Corporation, Amicus Curiae
4. Burgess & Hale, L.L.C., Attorneys for Amicus Curiae
5. Gosnell, Scott W., Attorney for Amicus Curiae
6. Hale, Thomas S., Attorney for Amicus Curiae

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. This appeal involves constitutional issues which will directly impact every local governmental entity and every single law enforcement officer within this Circuit. The current state of the law regarding the issues presented herein is unclear at best and contradictory at worst, and Amicus Curiae believes that oral argument would be beneficial to this Court in the determination and resolution of said issues.

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STATEMENT OF AMICUS CURIAE

The Alabama Municipal Insurance Corporation is a mutual insurance company organized under the laws of the State of Alabama and owned by more than 370 participating Alabama member municipalities. The Alabama League of Municipalities is an organization which represents the rights and interests of its members, some 200 plus municipalities throughout the State of Alabama. Amicus's interest in this case is based on its belief that the opinion of the District Court will result in increased and uncertain litigation concerning strip searches conducted by law enforcement personnel and agencies of the various Alabama municipalities. Amicus has been and remains committed to representing the rights and interests of its members and municipalities and is authorized by those municipalities to represent municipal interests and to defend those interests whenever and wherever attacked. As such, Amicus is authorized by its members to represent its interests, not only before legislative bodies, but also as it regards court decisions, that Amicus believes will negatively impact its member municipalities.

SUMMARY OF THE ARGUMENT

From approximately 1974 onward, the United States Supreme Court has developed evolving standards for evaluating the constitutionality of prisoners' rights claims. In cases such as Procunier v. Martinez, Pell v. Procunier, and Jones v. North Carolina Prisoners' Labor Union, Inc., the Court considered such standards as whether the regulation or practice in question furthered an important governmental interest of security, order, and rehabilitation, whether the limitation of the constitutional freedom was greater than necessary or essential to the protection of the particular governmental interest involved, and whether there was an alternative means of protecting the disputed rights.

In 1979 the Supreme Court decided Bell v. Wolfish, which spoke directly to the issue of strip search policies in detention facilities. In Bell, the Court applied a balancing test, focusing primarily on the justification for the strip search policy. This balancing test examination resulted in the Court's conclusion that blanket strip searches can be conducted on less than probable cause.

Finally, in Turner v. Safley, the Supreme Court combined many of the tests developed in the aforementioned cases to establish the following four-part algorithm: 1) There must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it; 2) A court must inquire as

to whether there are alternative means of exercising the right that remain open to prison inmates; 3) A court must consider the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally; and 4) A court must recognize that the absence of ready alternatives is evidence of the reasonableness of a prison regulation.

Amicus Curiae argue that, under the Bell balancing test, the introduction of a detainee into the general jail population is *per se* exceptional circumstances which should justify a strip search. Such contact presents the opportunity for contraband to be introduced into the general jail population, where it may result in physical harm to the detainees or the jail personnel.

Further, under the four-part Turner algorithm, such a policy is still constitutionally valid. A detention facility has a legitimate penological interest in preventing the introduction of weapons, drugs, money, and other contraband into the general inmate population. The use of a strip search is both exceptionally effective and directly related to the goal of keeping the general jail population free from such dangerous and/or disruptive paraphernalia. Unfortunately, a strip search necessarily and pointedly infringes on an inmate's constitutional right to privacy, and there is no reasonable way for the detainee to mitigate this infringement. However, the intrusion is substantially outweighed by the institutional interest in protecting its staff, guards,

and the prison population at large. Any accommodation of the inmate's right to privacy, e.g. failure to perform the strip search altogether, would defeat the goal of the policy of maintaining the safety and order of the facility. Alternative methods of search and detection, such as metal detectors, are inherently incapable of revealing the myriad of objects and materials which a visual search would turn up, and are prohibitively costly. Finally, it is apparent that no reasonable alternative to a strip search exists which would accomplish the proper and legitimate goals of a detention facility. Such absence of an alternative, according to the Turner Court, is evidence of the reasonableness of the policy in dispute.

It is apparent from Supreme Court case law that a blanket strip search policy applied to arrestees and pretrial detainees who will come into contact with the detention facility's general population can be reasonable, and therefore constitutional, lack of reasonable suspicion notwithstanding. However, should this Court find otherwise, the questions then remain, for qualified immunity purposes, whether a) the law was clearly established, prior to January 21, 1999, that a police officer needed at least reasonable suspicion before subjecting an arrestee to strip searches prior to introducing him into the general population of the jail, and b) whether a reasonable police officer, situated similarly to the Appellant, would have understood at that time that the policy in place at the jail offended the Constitution.

The only two binding precedents available on January 21, 1999, Bell v. Wolfish and Justice v. City of Peachtree City, both found strip searches constitutional. Therefore, the Appellant could have reasonably thought, based on the relevant controlling case law, that there was room in the law for the blanket strip search policy. To the degree that the facts in these two controlling cases are distinguishable in a fair way from the facts in the case at bar, then neither of them can be said to have clearly established the law for purposes of a qualified immunity determination in the instant case.

ARGUMENT

I. Precedential Case Law Dictates That Arrestees Who Are To Be Detained In The General Jail Population Can Constitutionally Be Subjected To Strip Searches Without A Requirement Of Reasonable Suspicion.

> There was a time not too long ago when the federal judiciary took a completely "hands-off" approach to the problem of prison administration. In recent years, however, these courts largely have discarded this "hands-off" attitude and waded into this complex arena. . . . But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

Bell v. Wolfish, 441 U.S. 520 (1979).

The Fourth Amendment to the United States Constitution states that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. It is long-established that

a strip search[1] is a search and seizure, and therefore subject to the reasonableness test of the Fourth Amendment. While state and federal courts today have unquestionably held that the Fourth Amendment prohibits unreasonable strip searches, there remains the elusive question as to how to define "unreasonable" or, conversely, what context or circumstance endows a strip search with the virtue of "reasonableness." Specifically, for purposes of the case at bar, the question arises as to the reasonableness of a detention facility's blanket policy requiring that arrestees and pre-trial detainees who are to be detained in the facility's general population be subjected to a strip search without prerequisite probable cause. A careful review of authoritative and persuasive case law demonstrates conclusively that such a blanket policy can be constitutionally upheld.

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[1]The term "strip search" has achieved a level and degree of usage which is imprecise, having been applied to conduct ranging from a "visual strip search," wherein a prisoner is required to disrobe completely and perhaps submit to examination of his mouth, hands and feet, to a "visual body cavity strip search," wherein an inmate must lift his genitals (if male), and spread his or her buttocks, for visual inspection. For purposes of this Brief, the use of the term "strip search" will encompass both of the aforementioned activities. However, the definition of "strip search" as contemplated in this Brief specifically does not include any physically intrusive procedure such as manual body cavity search, wherein the genitals and/or anus are penetrated or physically manipulated by the searcher's fingers or other instrument.

A. Procunier v. Martinez

Initially, the United States Supreme Court in Procunier v. Martinez, 416 U.S. 396 (1974) recognized the difficulty inherent in judicial intervention into prison administration.

> Traditionally, federal courts have adopted a broad, hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

Procunier v. Martinez, 416 U.S. 396, 405 (1974). See also Turner v. Safley, 482 U.S. 78, 84-85 (1987).

Nevertheless, despite this acknowledged difficulty the Court went on to describe the principles that frame an analysis of prisoners'[2] constitutional claims. First, the Court stated that "the regulation or practice in question must further an important governmental interest." Martinez, 416 U.S. at 413. The regulation must further "one or more of the substantial governmental interest of security, order, and rehabilitation." Id. Second, the limitation of the constitutional freedom "must be no greater than is necessary or essential to the protection of the particular governmental interest involved." Id. at 413-14.

B. Pell v. Procunier

Following Martinez, but during the same Term, the Supreme Court decided Pell v. Procunier, 417 U.S. 817 (1974). The Court in Pell recognized that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."

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[2]For the purposes of this Brief, and consistent with the applicable case law, the use of the word "prisoner" will apply to arrestees and pre-trial detainees, as well as convicted inmates. See, Bell v. Wolfish, 441 U.S. 520, 547 (1979) (applying the Court's analysis to pretrial detainees as well as convicted prisoners). Further, the use of the words "prison", "jail", "detention facility" or the equivalent are intended to be interchangeable. Id. at 538.

Pell, 417 U.S. at 822 (internal citations omitted).[3] However, in analyzing the plaintiffs' constitutional (First Amendment) claims, the court advanced "alternative means" of protecting the disputed rights as a relevant factor to be balanced against legitimate governmental interest. Id. at 824. The Court went on to say that in matters such as correctional goals and the policies adopted to attain those goals, "such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." Id. at 827.

C. Jones v. North Carolina Prisoners' Labor Union, Inc.

Three years later the Supreme Court decided Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977). Significantly, the Jones Court started its analysis by expressing belief that the District Court "got off on the wrong foot . . . by not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement." Jones, 433 U.S. at 124. The Court, relying heavily on Martinez and

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[3]See Price v. Johnston, 334 U.S. 266, 285 (1948); Cruz v. Beto, 405 U.S. 319, 321 (1972); Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

Pell, *supra*, went on to state that examination of prisoners' constitutional claims must occur within the context of a wide-ranging deference to prison administrators and authorities. Id. at 126-28. Further, the Court reaffirmed its previous holding in Pell that "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." Id. at 132, quoting Pell v. Procunier, 417 U.S. 817, 823 (1974).

D. Bell v. Wolfish

In 1979, the Supreme Court decided the seminal case Bell v. Wolfish, 441 U.S. 520 (1979). Bell specifically addressed "the constitutional rights of pretrial detainees – those persons who have been charged with a crime but who have not yet been tried on the charge." Bell, 441 U.S. at 523.[4] The issues in Bell involved a myriad of conditions and practices implemented at the Metropolitan Correctional Center (MCC), a federally operated custodial facility. Id. Among the complaints brought by the plaintiffs was the institution's practice of conducting body-cavity searches after contact visits. Id. at 527.

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[4]Though many commentators and judges addressing this issue have postulated that Bell applied only to violent offenders or felons, it should be noted that the facility at issue in Bell included, in addition to pretrial detainees, "inmates . . . who are serving generally relatively short sentences in a service capacity . . . witnesses in protective custody, and persons incarcerated for contempt." Bell, 441 U.S. at 524.

At the outset, the Court recognized that "[t]he Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained. . . . For example, the Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees." Id. at 540.[5] The Court then went on to review the relevant propositions of law established by Martinez, Pell and Jones, *supra.*, and reaffirmed the broad deference due to prison administrators in matters of detention policy. Id. at 545-48.[6]

Upholding the constitutionality of the body-cavity searches, the Supreme Court noted that "[c]orrections officials testified that visual cavity searches were necessary not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the institution." Id. at 558. The Court went on to say:

> Admittedly, this practice instinctively gives us the most pause. However, assuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility, we nonetheless conclude that these searches do not violate that Amendment. The Fourth Amendment

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[5]The Bell Court, citing Martinez, Pell and Jones, noted that courts should defer to the expertise of corrections officials in determining whether particular restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion. Bell, 441 U.S. at 540, n. 23.

[6]In fact, the Court chided the 2nd Circuit Court of Appeals for failing to "heed its own admonition not to 'second-guess' prison administrators." Bell, 441 U.S. at 545.

prohibits only unreasonable searches, and under the circumstances, we do not believe that these searches are unreasonable.

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record, and in other cases. . . .
>
> We do not underestimate the degree to which these searches may invade the personal privacy of inmates. Nor do we doubt, as the District Court noted, that on occasion a security guard may conduct the search in an abusive fashion. Such abuse cannot be condoned. The searches must be conducted in a reasonable manner. But we deal here with the question of whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.

Bell, 441 U.S. at 558-60 (internal citations omitted).

As is evident, the Court used standard Fourth Amendment analysis and applied a balancing test, in which it considered the "scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Id. at 559. This "balancing test" examination resulted in the Court's conclusion that blanket strip searches can be conducted on less than probable

cause. Bell, 441 U.S. at 560. It should be noted that the Bell Court upheld strip searches conducted every time a pretrial detainee participated in a contact visit, irrespective of who the detainee was or the crime for which he or she was being detained.

1. A "balancing test" analysis under Bell v. Wolfish.

Jail detainees may constitutionally be subject to strip searches after contact visits[7] and court appearances. The common thread, and discernable security concern, is that in these instances the detainee has had physical access to and contact with the "outside world." Such contact presents the opportunity for contraband to be introduced into the general jail population, where it may result in physical harm to the detainees or the jail personnel. Likewise, any pre-trial detainee who has just been arrested and "booked" has been brought to the jail from the "outside world" and, presumably, has been under no supervision prior to arrest and detainment, as opposed to a detainee who has merely been afforded a contact visit or has attended a court appearance and has presumably been under corrective supervision. Indeed, the

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[7]Bell v. Wolfish, *supra*; Arruda v. Fair, 710 F.2d 886 (1st Cir. 1983) (upholding the constitutionality of subjecting inmates to strip search after they receive visitors); Goff v. Nix, 803 F.2d 358 (8th Cir. 1986) (upholding strip searches of inmates after contact visits).

contact visits in Bell took place under observation, and the Court recognized that it would be extremely hard for a detainee to conceal contraband or weapons under those conditions.[8] Therefore, logically, the potential for a new arrestee to have obtained and secreted illicit contraband is immeasurably greater than that of an incarcerated prisoner. See Bell v. Wolfish, 441 U.S. at 546, n. 28 ("Indeed, it may be that in certain circumstances [pretrial detainees] present a greater risk to jail security and order"); Block v. Rutherford, 468 U.S. 576, 587 (1984) ("It is not unreasonable to assume . . . that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates").

Obviously, every pre-trial detainee does not require a strip search. A detainee who is being kept in a "holding cell" awaiting bail, and who will have no contact with the general jail population, poses little threat, and a strip search is probably not justified absent additional circumstances which would satisfy the "reasonable suspicion" test. However, a detainee who will be introduced into the general jail population is a different problem, in that contact and interaction with the general jail population is *per se* an exceptional circumstance which should justify a strip search.

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[8]"Detainees and their visitors are in full view during all visits, and are fully clad. To insert contraband in one's private body cavities during such a visit would indeed be 'an imposing challenge to nerves and agility.'" Bell, 441 U.S. at 504 (J. Stevens, dissenting).

See Dufrin v. Spreen, 712 F.2d 1084, 1087 (6th Cir. 1983) (upholding a strip search where a pretrial detainee would ultimately come into contact with the general jail population); Dobrowolskyj v. Jefferson County, Kentucky, 823 F.2d 955 (1987) (upholding a strip search where detainee was not strip searched until his movement into the general population of the jail was imminent); compare Logan v. Shealy, 660 F.2d 1007, 1014 (4th Cir. 1981) (stating that unconstitutional strip search bore no discernible relationship to security needs at the jail in that, *inter alia*, "[a]t no time would [the plaintiff] or similar detainees be intermingled with the general jail population"); Swain v. Spinney, 117 F.3d 1, 8 (1st Cir. 1997) ("There was no risk that [the detainee] would come into contact with other prisoners, or be able to smuggle contraband or weapons into a secure environment"); Savard v. Rhode Island, 338 F.3d 23, 29 (1st Cir. 2003) ("There are important differences between detaining an arrestee in virtual isolation and introducing an arrestee into the general population of a maximum security prison.").

E. Turner v. Safley

Finally, eight years later the Supreme Court decided Turner v. Safley, 482 U.S. 78 (1987). Turner is another seminal case which addressed inmate constitutional

issues unrelated to strip searches.[9] Nonetheless, the Turner Court relied heavily on the analysis set forth above, including lengthy analysis of the foregoing case law. The Court summed up its review of the law as follows:

> If Pell, Jones, and Bell have not already resolved the question posed in Martinez, we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators . . ., and not the courts, [are] to make the difficult judgments concerning institutional operations." *Jones v. North Carolina Prisoners' Union, 433 U.S. at 128.* Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration." *Procunier v. Martinez, 416 U.S. at 407.*

Turner, 482 U.S. 78 at 89.

Immediately following that restatement of the law, the Supreme Court went on to discuss four considerations, drawn from previous case law, which it believed are

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[9]This Court has cited Turner in the context of strip searches in Harris v. Ostrout, 63 F.3d 912, 916 (11th Cir. 1995) ("Thus, if Collins' strip searches of Appellant are devoid of penological merit and imposed simply to inflict pain, the federal courts should intervene. *See Turner v. Safley, 482 U.S. 78, 83-85, 107 S.Ct. 2254, 2259, 96 L.Ed. 2d 64 (1987)*").

relevant in determining the reasonableness of a penal regulation. "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[10] Id. Second, a court must inquire as to "whether there are alternative means of exercising the right that remain open to prison inmates."[11] Id. at 90. Third, a court must consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.[12] Id. Fourth and finally, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." Id.

Applying the Turner test to the case at bar, we address the question whether a blanket regulation, subjecting prisoners who are to be put in with the general jail population to a strip search without any requirement of reasonable suspicion, can pass

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[10]Procunier v. Martinez, 416 U.S. 396 (1974).

[11]Pell v. Procunier, 417 U.S. 817 (1974).

[12]The Court recognized that

> [i]n the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order. When accommodation of an asserted right will have a significant "ripple effect" on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.

Turner, 482 U.S. at 80.

constitutional muster. Amicus Curiae submits that it can.

1. There is a valid, rational connection between the disputed policy and the legitimate governmental interest of preventing of contraband into the general population of the facility.

Detention facilities place detainees and prison personnel alike in "peculiar and restrictive circumstances." Jones, 433 U.S. at 124. Prison administrators are responsible for maintaining internal order and discipline of such institutions and for securing the safety, security and, to the extent possible given realistic constraints, the rehabilitation of the inmates committed to it. It cannot be disputed that, with a view toward accomplishing those goals, a detention facility has a legitimate penological interest in preventing the introduction of weapons, drugs, money, and other contraband[13] into the general inmate population. Such paraphernalia can present a danger to inmates, guards, staff and visitors, can result in discipline problems, and can inhibit the rehabilitation of detainees (particularly with regards to drug use). Further, the increasing number of detainees being introduced into the penal system, coupled with ever-shrinking monetary and other resources, presents a serious strain on the means and methods available to law enforcement officers to accomplish these

[13]"[O]ther potentially dangerous items such as handcuff keys are sometimes manufactured from materials already within the prison." Goff v. Nix, 803 F.2d 358, 365 (8th Cir. 1986).

goals. The use of a strip search, though intrusive, is both exceptionally effective and directly related to the goal of keeping the general jail population free from dangerous and/or disruptive paraphernalia.

2. There are no alternative means of exercising the right to privacy that is implicated by the disputed policy.

Unfortunately, a strip search necessarily and pointedly infringes on an inmate's constitutional right to privacy, and there is no reasonable way for the detainee to mitigate this infringement. The point of a strip search is to search the subject's private areas for contraband and illicit material; any alternative to this invasion would render the policy pointless and decidedly unconstitutional as purely punitive.[14] The intrusion of an individual inmate, though highly personal, is substantially outweighed by the institutional interest in protecting its staff, guards, and the prison population at large. It should be noted here that the policy at issue goes no farther than is necessary to accomplish its stated goals; i.e. the policy does not call for a manual body cavity search. Further, there is no evidence in any of the relevant and controlling case law, or in the testimony in the case at bar, that the benefits of this

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[14]"Where an arrestee is wearing blue jeans or another heavy material, even the most thorough patdown search will not necessarily turn up small items such as several hits of LSD on postage stamps, a small rock of crack cocaine, or a razor blade." Kraushaar v. Flanigan, 45 F.3d 1040, 1046 (7th Cir. 1995).

type of blanket policy have been exaggerated by corrections officials, and the judgment of such officials demands judicial deference.

3. Accommodation of the detainee's right to privacy would have a significant negative impact on the facility's guards, staff, visitors and other inmates, and on the allocation of prison resources generally.

As noted above, the purpose of the strip search policy is to prevent the introduction of weapons, drugs, money and other illicit material into the general jail population. By virtue of this goal, and the nature of the strip search itself, the only possible accommodation would be to fail to perform the strip search altogether. However, this "accommodation" would defeat the goal of the policy, which is to maintain the safety and order of the facility. It is clear, and readily acknowledged by the Supreme Court, that "inmate attempts to secrete [contraband] into [detention facilities] by concealing them in body cavities are [well] documented." Bell, 441 U.S. at 559.

Alternative methods of search and detection, such as metal detectors, are inherently incapable of revealing the myriad of objects and materials which a visual search would turn up. Not all weapons are made of metal, and certainly paper money, drugs, stamps, cigarettes, and a host of other materials could pass through such a

device undetected. Ultraviolet and infrared detection devices are similarly unreliable. Further, said devices are costly, and requiring their purchase would further strain the resources of an already under-funded industry.

4. The absence of ready alternatives is evidence of the reasonableness of the disputed policy.

From analysis of the previous three factors, it is apparent that no reasonable alternative to a strip search exists which would accomplish the proper and legitimate goals of a detention facility. Such absence of an alternative, according to the Turner Court, is evidence of the reasonableness of the policy in dispute.[15]

It is apparent from the foregoing Supreme Court case law, spanning a period of thirteen years and remaining binding precedent today, that a blanket strip search policy applied to arrestees and pretrial detainees who will come into contact with the detention facility's general population can be reasonable, and therefore constitutional, lack of reasonable suspicion notwithstanding.

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[15]It should be noted, however, that "[g]overnmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional." Bell, 441 U.S. at 542, n. 25.

II. A Review Of Relevant, Controlling Case Law Reveals That Appellant Could Have Reasonably Believed That The Challenged Strip Search Was Constitutional, And Therefore Appellant Is Entitled To Qualified Immunity.

A defendant's defensive claim of qualified immunity requires that a court balance the need to defend constitutional rights against the need to insulate public officials from civil litigation that might unduly inhibit the studious performance of their duties. See, Anderson v. Creighton, 483 U.S. 635, 638 (1987). In balancing those competing needs, the court must employ a three-part algorithm. The threshold question is whether the plaintiff has established a constitutional violation. Hope v. Pelzer, 536 U.S. 730, 736 (2002); Saucier v. Katz, 533 U.S. 194, 201 (2001). The second question deals with fair warning: it asks whether the law was clearly established at the time of the constitutional violation. Hope, 536 U.S. at 739-41; Anderson, 483 U.S. at 638-40. The final question is whether a reasonable official, situated similarly to the defendant, would have understood that the conduct at issue contravened the clearly established law. Saucier, 533 U.S. at 202.

In the case *sub judice*, the first part of the aforementioned algorithm is extensively addressed in Part I of this Brief. In short, Amicus Curiae argues that though strip searches are intrusive and degrading, the searches conducted in the case at bar, pursuant to a policy of strip searching arrestees and pretrial detainees who will

come into contact with the general prison population, are constitutional. However, should this Court find otherwise, the questions then remain whether a) the law was clearly established, prior to January 21, 1999, that a police officer needed at least reasonable suspicion before subjecting an arrestee to strip searches prior to introducing him into the general population of the jail, and b) whether a reasonable police officer, situated similarly to the Appellant, would have understood at that time that the policy in place at the jail offended the Constitution. The Appellees cannot prevail unless this Court determines both questions favorably as to them.

The fundamental justification for the qualified immunity defense is that public officials performing discretionary functions should be free to act without fear of litigation except when they fairly can expect that their conduct will give rise to liability for damages. Davis v. Scherer, 468 U.S. 183, 195 (1984). That expectation depends, in large part, on the extent to which legal rules are clearly established. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The inquiry, then, must focus on the ascertainable contours of the law at the time of the official's actions. Though it is not necessary that those contours be precisely "on point," they must nevertheless be distinctive enough that a reasonable official can be expected to extrapolate from them and deduce that a certain course of conduct will transgress the law. Saucier, 533 U.S. at 201-02. If the operative legal principles are clearly established only at a level of

generality so high that officials cannot fairly anticipate the legal consequences of his specific actions, the requisite notice is lacking. Savard v. Rhode Island, 338 F.3d 23, 28 (1st Cir. 2003). In short, the qualified immunity defense prevails unless the unlawfulness of the challenged conduct is "apparent." Anderson, 483 U.S. at 640.

It is axiomatic that decisions of the United States Supreme Court, the Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose, are the only legitimate sources from which clearly established law can be inferred for purposes of qualified immunity. Marsh v. Butler County, 268 F.3d 1014, 1032, n.10 (2001); Wilson v. Strong, 16 F.3d 1131, 1135 (1998). With that in mind, we examine the two relevant and controlling decisions that bear most closely on this case.

We start with Bell v. Wolfish, 441 U.S. 520 (1979). As noted above, the plaintiffs in Wolfish were challenging, *inter alia*, the blanket policy of a detention facility that strip searched detainees after every contact visit. The United States Supreme Court declared the strip search policy constitutional.

> A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record, and in other cases. . . . [W]e deal here with the question of whether visual body-cavity inspections . . . can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.

Bell, 441 U.S. at 558-60 (internal citations omitted).

Amicus Curiae argues that Bell clearly established the law in this case. However, even if such a statement is an oversimplification, it is evident that Bell would give a police officer such as the Appellant in this case clear reason to believe that his conduct and actions were constitutional.

This brings us to our second case, Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992). There, this Court upheld the strip search of a juvenile based upon reasonable suspicion that the juvenile was concealing a weapon or contraband, even where the juvenile was in custody after being arrested for an offense that was not a felony. Justice, 961 F.2d at 189. The Court reasoned that because the officers believed they had a reasonable suspicion, in light of their training and experience, that the juvenile was hiding contraband on her person, the search did not violate the Fourth Amendment. Id. at 194.

Again, as in Bell, the Justice Court found the strip search constitutional. Consequently, the only two binding precedents available at the time the Appellant had to make a decision regarding the strip search of the Appellees both found strip searches constitutional. It stretches the imagination to conclude that a reasonable law enforcement official would have had fair warning that the strip search of Appellees would be found unconstitutional. The constitutional line that separates permissible

from impermissible uses of these methods is imprecise and context-specific. Plotting that line involves a complex analysis, as set forth in Part I, above. The law does not expect a public official, faced with the need to make an objectively reasonable real-world judgment, to squarely anticipate the legal conclusions that will be reached by a panel of federal appellate judges after briefing, arguments, and full-fledged, en banc review. See Wilson v. Layne, 526 U.S. 603, 617 (1999). Further, to the degree that the facts in these two controlling cases are distinguishable in a fair way from the facts in the case at bar, then neither of them can be said to have clearly established the law for purposes of a qualified immunity determination in the instant case. Saucier, 533 U.S. at 202-03.

There is a distinction, for qualified immunity purposes, between an unconstitutional but objectively reasonable act and a blatantly unconstitutional act. Saucier, 533 U.S. at 206. Here, the constitutional violation, if one existed at all, was not obvious; the Appellant could have reasonably thought, based on the relevant controlling case law, that there was room in the law for the blanket strip search policy. It is the absence of clear guidance that makes qualified immunity expedient. It would be unfair to hold a public official liable for doing nothing more blameworthy than guessing incorrectly about how the courts ultimately would resolve an issue. Wilson, 526 U.S. at 618. The law does not require public officials to foretell the

course of constitutional law with absolute accuracy in order to obtain qualified immunity. Id. at 617. To the contrary, the doctrine of qualified immunity is designed to protect "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

CONCLUSION

A review of the relevant authoritative and precedential case law conclusively demonstrates the constitutionality of a blanket policy requiring arrestees who are to be detained in the general jail population to be subjected to a strip search, without prerequisite reasonable suspicion that the search will reveal weapons and contraband. Under the Bell balancing test, the introduction of a detainee into the general jail population is *per se* exceptional circumstances which should justify a strip search, in that such contact presents the opportunity for contraband to be introduced into the general jail population, where it may result in physical harm to the detainees or the jail personnel. Further, under the four-part Turner algorithm, such a policy is still constitutionally valid, in that: 1) A detention facility has a legitimate penological interest in preventing the introduction of weapons, drugs, money, and other contraband into the general inmate population, and the use of a strip search is both exceptionally effective and directly related to the goal of keeping the general jail population free from such dangerous and/or disruptive paraphernalia; 2) There is no reasonable way for the to mitigate the infringement on a detainee's right to privacy inherent in a strip search, however the intrusion is substantially outweighed by the institutional interest in protecting its staff, guards, and the prison population at large; 3) Any accommodation of the inmate's right to privacy, e.g. failure to perform the

strip search altogether, would defeat the goal of the policy of maintaining the safety and order of the facility; 4) Alternative methods of search and detection, such as metal detectors, are inherently incapable of revealing the myriad of objects and materials which a visual search would turn up, and are prohibitively costly; and 5) It is apparent that no reasonable alternative to a strip search exists which would accomplish the proper and legitimate goals of a detention facility.

Should this Court find the aforementioned blanket policy unconstitutional, the questions then remain, for qualified immunity purposes, whether a) the law was clearly established, prior to January 21, 1999, that a police officer needed at least reasonable suspicion before subjecting an arrestee to strip searches prior to introducing him into the general population of the jail, and b) whether a reasonable police officer, situated similarly to the Appellant, would have understood at that time that the policy in place at the jail offended the Constitution.

The only two binding precedents available on January 21, 1999, Bell v. Wolfish and Justice v. City of Peachtree City, both found strip searches constitutional. Therefore, the Appellant could have reasonably thought, based on the relevant controlling case law, that there was room in the law for the blanket strip search policy. To the degree that the facts in these two controlling cases are distinguishable in a fair way from the facts in the case at bar, then neither of them can

be said to have clearly established the law for purposes of a qualified immunity determination in the instant case.

WHEREFORE, ABOVE PREMISES CONSIDERED, Amicus Curiae, the Alabama Municipal Insurance Corporation and Alabama League of Municipalities, prays that this Honorable Court:

1. Find that a blanket policy, requiring arrestees who are to be detained in the general jail population to be subjected to a strip search without prerequisite reasonable suspicion that the search will reveal weapons and contraband, is constitutional; or, alternatively,

2. Find that, even if such a policy is unconstitutional, due to the lack of clearly established law on the issue, Appellant is entitled to immunity from suit and liability under the doctrine of qualified immunity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the 7,000 word type-volume limitation of Rules 32 (A)(7)(b) and 29(d) of the Federal Rules of Appellate Procedure. The word processor used to prepare this brief indicates that there are approximately 6,911 words in the brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using WordPerfect 8.0 in fourteen point font size and Times New Roman type style.

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CERTIFICATE OF SERVICE

I hereby certify that on **June 4, 2004** I have served a copy of the above and foregoing on counsel for all parties by:

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