UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY BULL, ET AL., Plaintiffs - Appellees, vs. CITY AND COUNT OF SAN FRANCISCO, ET AL., Defendants - Appellants.	9th Circuit Case No. 06-15566 Consolidated with Docket No. 05-17080 U.S. Dist. Ct, N.D. CA, San Francisco, Case No. No. CV-03-01840-CRB/EMC

PLAINTIFFS'/APPELLEES' RESPONSE TO DEFENDANTS'/APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC* (FRAP 35, 40)

On Appeal from the United States District Court
for the Northern District of California
The Honorable Charles R. Breyer

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

Defendants-Appellants ("Defendants") seek Rehearing and Rehearing *En Banc* of the panel decision upholding the lower Court's order that Defendants' policy to strip search all pre-arraignment detainees classified for housing at the San Francisco jail violated the Fourth Amendment.[1]

Defendants once again take the position they previously asserted that the problem of smuggling at the San Francisco jail – which is pervasive – justifies the strip search at issue here, which involves a limited, innocuous subset of the tens of thousands of arrestees who were booked and processed at the San Francisco jail during the relevant period. However, as the panel's majority decision succinctly stated:

> The fact that San Francisco had documented a significant problem of contraband smuggling does not muddy the clarity of the law. The evidence defendants produced . . . shows only that contraband smuggling was a significant problem in the San Francisco jails; it does not demonstrate that persons eligible for inclusion in the class in this case contributed significantly, *or even at all*, to that problem. *Bull v. City and County of San Francisco*, 539 F. 3d 1193, 1201. [emphasis added].

The evidence, in other words, simply does not support, and even contradicts, Defendants' assertion that members of the class here were engaged in illicit smuggling.

Defendants' claim that their strip search of the Plaintiff class was lawful because "many persons arrested for minor violations, such as shoplifting and traffic violations…often hid drugs or weapons on their body [sic] or inside their bodily orifices in an effort to evade confiscation," is misleading. (Defendants' Petition, p.1.) It implies, incorrectly, that the District Court and Ninth Circuit panel decisions have prohibited the jail from strip searching persons arrested for minor violations. Yet, it is

[1] Orders of U.S. District Court Judge, Charles R. Breyer, September 22, 2005, and February 23, 2006 – consolidated on appeal.

well established, and Plaintiffs have never disputed, that the jail is entitled to strip search minor offense arrestees for a number of reasons. The arrest charge is only one factor in determining whether an arrestee can and should be strip searched; prior arrest history, parole/probation status, as well as "appearance and conduct" (including gang affiliation) are all important factors in making this determination, and provide a lawful basis for a strip search. *Kennedy* 901F.2d at 716. Contrary to the concern expressed by the panel dissenter, the Defendants have never taken the position that they "know very little about the arrestee" and are therefore unable to determine whether an arrestee should be strip searched under the reasonable suspicion standard. (539 F.3d at 1211.)

Given the importance of the factual record in this case, it is especially egregious that Defendants have withheld information concerning the prior arrest history and other information relevant to the strip search of arrestees charged with minor offenses in the past, possibly leading the dissenter on the panel to believe that the instances cited were class members. (591 F.3d at 1210-1211.) The fact remains that – setting aside the instances where Defendants have willfully concealed the relevant documentation concerning the security justification for the strip search – *every single citation to the record* by Defendants demonstrates the falsity of their central claim that it was reasonable and necessary to strip search this class.[2] Defendants argue that the

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[2] Defendants' citations to the evidence to substantiate its claim of smuggling by the class before the Court are contained in two footnotes of their petition. (fn 3 and 4.) The citations are based on various jail records which sometimes show the arrest charge or otherwise indicate the reasons for the search; in some instances, as noted above, Defendants have not seen fit to release information about the arrestee or the circumstances of the strip search, even though such records are, of course, available to them. As to these incomplete records, there is no way to know why or when the person was strip searched, and therefore their relevance to this case is impossible to determine.

The first group of citations supposedly supports the claim that strip searches have uncovered various items of contraband – knives, scissors, syringes, cocaine, heroin. (Defendants' Petition, p.6, fn. 3.) As demonstrated in Plaintiffs' Statement of Facts, *infra*,

unfortunate death of an inmate due to a drug overdose somehow supports their policy, yet there's no evidence that this inmate obtained drugs because a new arrestee was not strip searched or that a strip search of persons in this class would have prevented this death.

This is why the panel decision concluded that "Defendants' claim that they have documented instances of eligible class members engaging in smuggling contraband is not credible and is not supported by the record." (539 F.3d at 1198.) And this is why, as the panel further found, "we cannot conclude there is any reasonable relationship between the criteria triggering a search (classification for housing) and the interest in conducting the search (eliminating the introduction of contraband.)" (539 F.3d at 1199.)

Notwithstanding their failure to present a security justification for the strip search of the limited class of arrestees whose Fourth Amendment rights are at issue here, Defendants assert three different bases for their attack on the panel decision. First, they assert that *Bell v. Wolfish*, 441 U.S. 520 (1979) mandates absolute, unconditional deference to the judgment of jail officials, and requires this Court to reverse and repudiate twenty five years of precedent holding that jail officials must show a reasonable *factual* relationship between the strip search policy and the security problem it is supposed to address. (Defendants' Petition, p.2-3; 8-9.)

Yet in *Bell*, the Supreme Court made crystal clear that courts should defer to jail administrators only when there is an "absence of substantial *evidence* in the record" to indicate that the officials have "exaggerated" their response to "the problems that arise

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every documented instance involved persons who were *lawfully* strip searched precisely because there was a security justification to do so.

The second group of citations supposedly substantiates the assertion that "persons not arrested for crimes involving drugs, weapons, and violence secreted drugs and other dangerous contraband in their bodily orifices." Again, all the documented instances cited involve *lawful* strip searches, since of course there are security reasons to strip search arrestees which are based on factors other than the nature of the arrest charges, and which are not contested here. (Defendants' Petition, p.7, fn. 4.)

in the day-to-day operation of a corrections facility." (441 U.S. at p.548.) This case presents the very situation discussed by *Bell* in which jail administrators "exaggerated" their response to the problem of contraband smuggling at the jail by sweeping within their blanket strip search policy a clearly defined, innocuous class which demonstrably does not engage in such illicit and dangerous activity.

Therefore, the blanket strip search policy at issue here is not "constitutional" just because *Bell* found it appropriate to defer to jail administrators in that case, which presented different circumstances relating to the security need for the strip search. In other words, the strip search policy in that case did not represent an "exaggerated" response to a security threat, while here it does, rendering deference unwarranted.

Second, Defendants attack the panel decision by arguing that *Powell v. Barrett*, 541 F3d 1298 (11th Cir 2008) throws new light on Ninth Circuit precedent, revealing that this Court of Appeals has been wrong all along in deciding such cases as *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984); *Ward v. County of San Diego*, 791 F.2d 1329 (9th Cir. 1986); *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989); and *Kennedy v. Los Angeles Police Department*, 901 F.2d 702 (9th Cir. 1990). There is a short, but dispositive, answer to this contention. *Powell* did not, as here, involve the visual inspection of each arrestee's *body cavity*, the type of strip search that has consistently given the Courts, as *Bell* itself said, "instinctively the most pause" and which has been widely viewed inside and outside of this circuit as "dehumanizing and humiliating." (*Bell*, 441 U.S. at 558; *Kennedy*, 901 F.2d at 711.)

Instead, in *Powell*, arrestees were required to shower together in groups of up to thirty inmates and then, while standing in a line or singly, "show [their] front and back sides while naked" to a guard. 541 F.3d at 1300. The intrusion upon individual privacy in *Powell* was minimal, and perhaps it is for this reason that the Court found it self-evident that deference to the jail administration was appropriate under *Bell*. In any case, the privacy interests at stake in *Powell* are not those at issue here, and there is no

need for this Court to grant rehearing or rehearing en banc "to address this intercircuit conflict." (Defendants' Petition, p. 3.)

In addition, any decision by this Court would not alter the arguable existence of an inter-circuit conflict since every other circuit to address the issue, aside from the Eleventh Circuit, has concluded that post-arrest placement in the general population is a relevant *factor* in the Fourth Amendment calculus, but, standing alone, is inadequate to justify a routine strip search policy. (*Compare, e.g., Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (general population a factor); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989) (same); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1447 (9th Cir. 1989) (same); *Hill v. Bogans*, 735 F.2d 391, 394-95 (10th Cir. 1984) (same) *with Powell v. Barrett*, 541 F3d 1298 (11th Cir 2008) (general population a per se justification for strip search).)

Finally, Defendants' third attack on the panel decision is that the security justification in San Francisco is distinguishable from *Giles, Kennedy, Thompson, Ward*, and all the District Court decisions that have followed these cases. With regard to this *factual* contention, it is puzzling that the Defendants do not accurately present the facts before both the District Court and the Court of Appeals, or disclose consistent and complete documentation of the circumstances surrounding the strip searches advanced as justification for the blanket policy.

Contrary to Defendants' attacks on this Court's opinion, there is a compelling record based on hundreds of thousands of strip searches over a period of many years that shows the class before this Court *is not involved in illicit smuggling*. Given this key fact, there is no reason to lump Plaintiffs with the class of arrestees who do present a security risk. Rather, it is reasonable to look at the members of this class individually. The respect we show to individuals' bodily privacy under our Constitution requires no less. Indeed, the standard Defendants must meet to lawfully strip search such individuals is so minimal – any articulable reason to search is arguably enough under

the "reasonable suspicion" standard – the jail is fully protected. Defendants have never made the claim that it is *not* feasible to ferret out contraband by strip searching this class on a case-by-case basis.

STATEMENT OF THE CASE

On August 22, 2008, a panel of the 9th Circuit Court of Appeals filed its decision upholding the decision of District Court Judge Charles R. Breyer that the policy of the City and County of San Francisco and its Sheriff Michael Hennessey to strip search all pre-arraignment detainees classified for housing, violated the Fourth Amendment's prohibition against unreasonable searches with respect to the class certified in the case, which included only a limited subset of the arrestee population – those "who were arrested for an offense not involving drugs, weapons, violence, or a violation of parole or probation; who did not have a criminal history involving drugs, weapons, or violence; and whose behavior did not create individualized suspicion warranting the search." (539 F.3d at 1198.)

The panel's opinion, authored by Judge Thomas, was joined by Judge Ikuta who filed a concurring opinion; Judge Tallman dissented. The panel followed a long line of 9th Circuit precedent which outlawed the pre-arraignment blanket strip search of arrestees unless there is "some reasonable relationship between the criteria used to identify the specific individuals eligible for a strip search and the interest in preventing the introduction of contraband", or, in other words, that the strip search policy "'bear some discernible relationship to security needs.'" (539 F.3d at 1197-1198, [internal quote omitted].)

Defendants petitioned for rehearing and rehearing en banc and the Court directed Plaintiffs to file their answer to that petition by November 20, 2008.

Lest the twin towers of rationality and stare decisis which underpin our rule of law crumble, Defendants' arguments must fail.

STATEMENT OF FACTS

A. The Class Before the Court

The class of arrestees before the Court in this case consists of those alleged minor offenders who were brought to the San Francisco jail on charges *not* involving drugs, weapons, or violence, who had no criminal history of such offenses, who were *not* on parole or searchable probation, and who also were *not* reasonably suspected of concealing or seeking to smuggle contraband that could only be discovered by a strip and visual body cavity search, but who were nonetheless strip searched. (E.R. V: 1063-1064, [Summary Judgment Memorandum and Order, pp.3:17-4:5]; Plaintiffs' E.R. 28-37 [Amended Order]).) This strip search invariably involved inspection of the naked body and rectal and vaginal cavities, requiring the arrestees to squat, spread their cheeks and, if female, their labia, and to cough while under observation. (E.R. I: p.115 [Jail Policy E-03, p.3].)

B. The Jail's Strip Search Policies

As Defendants state, arrestees in San Francisco were initially brought to County Jail 9 which was used as an intake facility to hold arrestees before releasing or housing them. (Defendants' Petition, p.5.) When first brought to the holding area of County Jail 9, and booked, all arrestees were searched, "either a 'pat search' performed in conjunction with a hand held metal detector, and/or a strip search." (E.R. I: p.14 [Policy].) Numerous categories of arrestees were strip searched at the time of booking without regard to whether they were later classified for housing – including those arrested on charges involving drugs, weapons or violence; those with a criminal history of such charges; those who were parolees or probationers; those who were individually suspected of concealing contraband; as well as others not in the class before the Court. (E.R. I: 115 [Policy E-03 II A, p.2]; E.R. I: 93-94, 106-109 [Arata Depo, 1:20-42;

43:763:1-65:9.) This booking search was not challenged by Plaintiffs.

Arrestees who did not fall into these categories were not strip searched at the time of booking. But, if they were not released from the intake facility, or if they did not or could not make bail in the time allowed, they were subjected to a strip search when they were "assigned a custody level by Classification and scheduled for custodial housing." (E.R. I: p.115 [Policy II.A.10].) Arrestees were "classified" and strip searched even if they were to be immediately transported directly to Court and never housed at the jail. This strip search occurred before the arrestees were interviewed for release on their own recognizance. (E.R. I: 193, 181 [Humphrey Depo 94:9-18; 66:5-21].) Indeed, an arrestee could not be considered for release on his or her own recognizance without bail ("O.R.") until "stripped in." (E.R. I: 181-182 [Humphrey Depo 66:15-67:1].)

In fact, "classification" of arrestees could be, and was, routinely *advanced* in time so that it occurred immediately after booking, if the arrestee declined to "consent" to a strip search when initially received at the jail, under a policy in effect until February 2003. (E.R. I: 138-139 [McConnell Depo 36:13-23; 38:18-39:4]; E.R. I: 200-203, 206 [Oaks Depo 31:1-12; Depo Ex 46; 30:18-24; 31:7-14; 47:1-6]; E.R. II: 220-221 [Quock Depo 16:1-22; 17:12-25]; E.R. I: 155-157 [Hawkins Depo 14:21-16:15]; E.R. I: 123 [Dyer Depo, Ex. 15].)

The body cavity inspection and strip search of arrestees in Plaintiff class solely because they had been unable to make bail or otherwise gain release (and were therefore "classified" for housing) is the sole search challenged herein.

C. The Classification Process

If they were to be housed at the jail before arraignment, arrestees were "classified", that is, assigned a bunk in an appropriate area other than County Jail 9. "Classification" was done in order to segregate arrestees who were housed separately in accordance with their level of criminal sophistication, criminal history, criminal

charges, past incarceration behavior, vulnerability, gang affiliation, and other relevant factors such as age and sex. (E.R. I: p.89-92 [Arata Depo 36:18-39:17; 60:18-65:9].)

Defendants claim that the arrestees in the class were, once classified, housed in the "general population" of the jail. But there is no evidence that there *is* a "general population" within the San Francisco jail in which arrestees in the class were indiscriminately mingled once they were housed, given the classification process. Significantly, while searches of *unspecified* areas of the jail found contraband *within* the jail between 2000 and 2003, there is no evidence that arrestees in the Plaintiff class were ever housed in the areas where those items of contraband were found. (Defendants' Petition, pp.6-7.)

Once classified and/or housed, arrestees in the class had to be taken before a magistrate for arraignment "without unnecessary delay" under California law, and, in any event, could not be detained for more than two days, excluding Sundays and holidays.[3]

D. The Smuggling Problem and the Security Justification for the Strip Search of the Class before the Court

While Defendants presented evidence of smuggling at the San Francisco jail, there is not a single shred of evidence which shows that an arrestee within the class before the Court *ever* tried to smuggle *anything* through the intake facility of the San Francisco jail at the time of the pre-arraignment classification strip search, or, indeed, at any other time or in any other area of the jail. Nor was there any evidence that the "reasonable suspicion" standard for strip searching an individual minor offense arrestee before arraignment was inadequate to protect jail security. Neither was there any evidence that the innocuous arrestees in the class were "intermingled" indiscriminately with other arrestees when placed in the "general population".

Indeed, the Defendants' Statement of Facts demonstrates that there is no security

[3] The period could be extended by one day only if Court was not in session until the following day. (Cal. Penal Code § 825.)

justification for the classification strip search of class members.[4] (See, Defendants' Petition, p.6 fn. 3.)

The instances of discovery of contraband cited by Defendants to show that arrestees do secrete contraband is misleading because:

1. This evidence does not show a security justification for the strip search of arrestees in the class certified in this case. The arrestees searched in connection with these discoveries were ineligible to join the class and/or the strip search was lawful [E.R. III: 463; 474; 478; 506; 522; 534; 577; 595; 607; 612-614; 617; 621; 632; 633; 634; 636; 637];

2. The discoveries did not involve a visual body cavity search or the inspection of the naked body [E.R. III 464; 525; 583];

3. In many instances Defendants have suppressed the documentation relating to the reason for the strip search (such as the arrest charge or criminal history) or the eligibility of the arrestee for membership in the class; without this relevant documentation, there is no way to know if the discovery of contraband has any bearing on the security justification for the strip search at issue here, and in fact it can be presumed that the missing evidence is unfavorable to Defendants under well established evidentiary presumptions. [E.R. III: 474; 476; 480; 483; 484-5; 486; 487; 497; 498; 499; 502; 517; 521; 525; 526; 532; 535; 544; 545; 547; 548; 551; 553; 558; 560; 563; 565; 567; 571; 576; 579; 582; 584; 586; 591; 604; 609];

4. The discoveries occurred after the discontinuance of the policy challenged here [E.R. III: 611; 612-614; 617; 623; 627; 628; 629; 630].

Defendants also claim that persons "not arrested for crimes involving drugs, violence or weapons have secreted drugs and other dangerous items in their bodily orifices". (Petition, p.7.) The instances of discovery of contraband cited by Defendants in support of this proposition are similarly irrelevant or unsupportive of this conclusion

[4] The evidence has been exhaustively analyzed in Plaintiffs' Opening Briefs in the course of the appeal and also in Plaintiffs' Opposition to Defendants' Request for Judicial Notice. Due to space limitations, the analysis here presents only the barest outline of the lack of evidentiary support for the strip search policy at issue here. The *Yorke* record did nothing to strengthen Defendants' case.

because:

1. This evidence does not show a security justification for the strip search of arrestees in the class certified in this case: the arrestees searched were ineligible to join the class and/or the strip search was lawful [E.R. III:474; 478; 534; 577; 595; YER 416-19; 435-38; 443-47 (booking search) 448-49 (booking search); 454-57; 464-68; 488-89; 490-91];

2. The discoveries did not involve a visual body cavity search or the inspection of the naked body [E.R. III 601-603; YER 439-42];

3. In many instances, the Defendants have suppressed the documentation of the reason for the strip search or the eligibility of the arrestee for membership in the class, which is, of course, readily available to Defendants since they are in possession of arrest and criminal records; as noted above, it can be presumed that the missing evidence is unfavorable to Defendants [E.R. III:532; 609; YER 414-15; 427-28; 439-42; 450-53];

4. The discoveries involved a strip search incident to "safety cell" placement on the basis of combative behavior or some other type of search which is not at issue here. [E.R.III: 527; 612-615].

Finally, with regard to the contention that jail administrators knew that new arrestees were the "most likely smugglers" of contraband, nowhere in the record does any San Francisco jail official opine that the members of *this class* posed a threat to jail security at the time they were classified or at any other time, and in the absence of any objective support for such an opinion, it is entitled to no weight.

ARGUMENT

A. *BELL V. WOLFISH* DOES NOT REQUIRE JUDICIAL DEFERENCE TO JAIL OFFICIALS' JUDGMENT WHEN THEY, AS HERE, EXAGGERATE THEIR RESPONSE TO SECURITY CONSIDERATIONS

Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed. 2d. 447 (l979) is a seminal case because it set forth the operative principles for analyzing the constitutionality of jail strip searches under the Fourth Amendment, articulating a

"balancing test" which requires the Court to balance "the need for the particular search against the invasion of personal rights that the search entails." Under the circumstances presented there, the Court upheld a policy of strip searching inmates of the jail after contact visits that were afforded to inmates as a privilege or benefit.

The Court had no occasion to distinguish between classes of inmates, since the Plaintiffs apparently argued the validity of the strip search as an "all-or-nothing" proposition. As this circuit observed in *Kennedy*, "the majority was not focusing on the individual basis for each search; the majority's constitutional inquiry instead centered around the soundness of the policy as a whole." (901 F.2d 702.) The consideration of whether a strip search policy could be applied constitutionally to particular categories of jail inmates arose, of necessity, when individual Plaintiffs, as in this case, began to challenge strip search policies applied to them in particular. In applying *Bell's* balancing test to determine whether particular categories of arrestees can be lawfully strip searched under a challenged policy, this circuit has not strayed from the principles enunciated in *Bell*, but has simply applied them to the facts before it.

In *Bell*, the factors weighed by the Court on the scale, in favor of upholding the strip search policy, included the fact that many of the inmates would be held for months pending trial, were charged with serious offenses, could not qualify for bail under the liberal pretrial release policy, presented an escape risk, had contact visits planned in advance, were not closely supervised, and thus presented a perfect opportunity to obtain contraband. (*Bell*, 441 U.S at 447, fn28; 559-560.*)* Deference was deemed due to federal jail administrators because, given the afore mentioned circumstances, there was a reasonable relationship between the strip search and the security objective. (*Bell*, 441 U.S. at 561.)

Here, the converse is true. Unlike the inmates in *Bell*, here the members of the class before the Court have <u>not</u> been charged with any criminal offenses or appeared in Court for determination of whether they should be released on bail or O.R; they have

only been arrested, on the basis an "educated guess", as the *Kennedy* Court observed, by police officers. (901 F.2d at 714.) Unlike the inmates in *Bell*, a population that included those charged with serious and violent offenses, here the Plaintiff class had been arrested for minor, non-violent, non-drug or weapon related charges, were not on parole or probation, and had no criminal history of such offenses. In contract to the inmates in *Bell*, the members of the class here could be detained for only a few days pending their arraignment, and have never smuggled anything into the jail. There is also no evidence that they were "intermingled" with the general jail population once classified. And unlike contact visits which justified the search in *Bell*, the arrests which brought the class members to the jail in this case were unplanned events.

In sum, as both the District Court and the panel majority found, the evidence failed to show that "persons eligible for inclusion in the class in this case contributed significantly, *or even at all*, " to the problem of smuggling at the jail, Defendants have simply "exaggerated their response" to the risk posed by this class and, by so doing, destroyed the deference otherwise due them.

B. THE ELEVENTH CIRCUIT'S DECISION IN *POWELL V. BARRETT* IS NEITHER CONTROLLING NOR PERSUASIVE AND FAILS TO FOLLOW *BELL V. WOLFISH'S* ANALYTICAL APPROACH OF BALANCING SECURITY NEEDS AND PRIVACY INTERESTS

In *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008), as previously mentioned, the Court ruled on Defendants' motion to dismiss and held that a "shower-search" of new arrestees did not violate the Fourth Amendment. To reach this decision the Court engaged in no balancing test as required by *Bell* – apparently finding that the need for the inspection of new arrestees was self-evident. Since there was no record before the Court, we cannot know the purpose of the shower inspection, its security justification, the information that was available to the jail about arrestees, the length of time they were to be housed, or anything else other than that they were booked, inspected after

showering, and then placed in the general population for the first time.

It is clear, however, that the "shower-search" did not involve the visual body cavity inspection which Defendants conducted here, and which Courts have uniformly found so dehumanizing. Therefore this case does not create an inter-circuit conflict and does not weigh in favor of granting Defendants' Petition.

The fundamental reasoning of the *Powell* Court appears to be that the fact that a new arrestee was automatically put in the jail was a per se justification for a strip search. However, this Court has ruled to the contrary several times, aside from this case. *See e.g.*, *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1447 (9th Cir. 1989) ("Although Thompson… was placed into contact with the general jail population, such a factor by itself cannot justify a strip search"); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984) (fact that arrestee may ultimately be intermingled with general jail population does not, by itself, justify strip search as such intermingling is "both limited and avoidable"; factors to be considered in determining whether reasonable suspicion exists to warrant a strip search include "the nature of the offense, an arrestee's appearance and conduct, and the prior arrest record"); *Way v. County of Ventura*, 2006 WL 1028835, 4, 5 (9th Cir. 2006) ("We cannot see how the charge of being under the influence of a drug necessarily poses a threat of concealing (and thereby using or trafficking) additional drugs in jail during the limited time between booking and bail, or booking and placement in the general population"; "as there is no evidence that security concerns require strip searching all arrestees on all drug offenses before placement in the general jail population, and none that all persons arrested for being under the influence of a drug are likely to have concealed more drugs in a bodily

cavity, the Sheriff Department's blanket policy cannot be a proxy for reasonable suspicion"). There is no need to revisit this well established law in this circuit.

C. THIS CASE CANNOT BE DISTINGUISHED FROM PREVIOUS CASES INVALIDATING SIMILAR STRIP SEARCH POLICIES

Defendants argue that the contraband smuggling problem faced by the San Francisco jail is particularly acute such that all previous cases invalidating the strip search of arrestees similar to the members of this class are distinguishable. But as demonstrated by the Plaintiffs' Statement of Facts, rebutting each and every instance that the Defendants rely upon to make their case, and as the panel majority opinion found, this case is *not* distinguishable from other cases on the crucial issue of whether there is a security justification for applying the jail's policy of strip searching arrestees who were classified for housing to the *members of this class.*

CONCLUSION

For all of the reasons stated, the petition to grant rehearing or rehearing *en banc* should be denied.

DATED: November 19, 2008 Respectfully submitted,

LAW OFFICE OF MARK E. MERIN and
CASPER, MEADOWS, SCHWARTZ & COOK

/s/ - "Mark E. Merin"
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. Pursuant to Federal Rule of Appellate Procedure 35(b)(2), this Answer to Petition For Rehearing and Rehearing En Banc does not exceed 15 pages, excluding material not counted under Rule 32.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 19, 2008.

DATED: November 19, 2008 Respectfully submitted,

LAW OFFICE OF MARK E. MERIN and
CASPER, MEADOWS, SCHWARTZ & COOK

/s/ - "Mark E. Merin"
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APPELLATE CM/ECF SYSTEM CERTIFICATE OF SERVICE

I, Kari L. Kalista, CCLS, declare:

I hereby certify that on November 20, 2008 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the following party in this case is a registered CM/ECF user and that service will be accomplished by the appellate CM/ECF system.

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(Courtesy copy sent by U.S. Mail on November 20, 2008.)

/s/ - "Kari L. Kalista"
Kari L. Kalista, CCLS

APPELLATE CM/ECF SYSTEM CERTIFICATE OF SERVICE

I, Kari L. Kalista, CCLS, declare:

I hereby certify that on November 20, 2008 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users.

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