# Is It Time to Review Your Strip Search Policy?

*By David B. Oakley, Esq.*

Can a jail inmate be subjected to a strip search? What if the inmate was arrested for a minor offense and has no prior history of violent behavior or drug use? Under the recent decision from the United States Supreme Court, all jail inmates may be subjected to a strip search—defined as a close visual inspection, but not necessarily a body cavity search—if the inmate is being processed for admission to the jail's general population. *Florence v. Bd. of Chosen Freeholders of the County of Burlington*, 132 S. Ct. 1510 (2012)[1]. In such circumstances, there is no need for a search warrant or even a suspicion of the inmate having drugs, weapons, or other contraband hidden on their body. Rather, close visual inspections may be conducted as a matter of course for all inmates headed for the general population as part of the intake procedures of a jail.

In the *Florence* case, Albert Florence was arrested in New Jersey during a routine traffic stop because an outstanding bench warrant was in the state trooper's computer system. The bench warrant had been issued for his failure to appear in court and pay certain fines. Although the warrant should have been dismissed several years earlier when Mr. Florence paid all of his outstanding fines, he was detained for six days at the Burlington County Detention Center and transferred to the Essex County Correctional Facility before being released the next day.

As part of the standard intake procedures at both facilities, Mr. Florence underwent strip searches to check for scars, marks, gang tattoos, and contraband. During these searches Mr. Florence was required to open his mouth, turn around, lift his genitals, and cough in a squatting position while officers visually inspected his entire body. At both facilities, Mr. Florence was admitted to more than just a holding cell and shared space with other inmates. In other words, he was admitted to the general population.

After being released, Mr. Florence sued the governmental entities operating the jails, one of the wardens and some of the deputies working at the jails. He claimed the strip searches violated his rights under the Fourth and Fourteenth Amendments since he was arrested for only a minor offense.

The United States Supreme Court disagreed with Mr. Florence and found the searches did not violate his constitutional rights. Rather, the Court, in the 5-4 decision, found deferring to the judgment and discretion of correctional officers was required to maintain safety for both the facilities' staff and the inmate populations.

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[1] A free copy of the full opinion is available at: http://www.supremecourt.gov/opinions/11pdf/10-945.pdf.

The Court found it was important to allow searches without predictable exceptions. Otherwise, inmates would find ways to adapt and exploit any available loopholes in the jail's search policies. For example, if low risk or non-violent arrestees were not subject to searches, they could easily be coerced into smuggling drugs, weapons, cellphones, or other contraband into the jail. The prevalence of gangs and organized crime in the jails only exacerbates the problem of smuggling contraband. Therefore, reasonable search policies by jails are permitted to not only find contraband being smuggled in but to deter inmates from attempting to smuggle any contraband.

The Supreme Court followed their prior rulings and found "deference must be given to officials in charge of the jail unless there is 'substantial evidence' demonstrating their response to the situation is exaggerated." When an inmate is processed for intake into the general population, the severity of the offense charged against the inmate does not exclude them from being strip searched. The Court recognized "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals."

Moreover, it would be extremely dangerous to place the herculean task of determining which inmates pose a potential threat and which inmates cannot be strip searched during the brief intake process. If a jail had to perform such a screening for every incoming inmate, many jails or officers may err on the side of caution and not perform searches to avoid potential liability. Such a policy would open the flood gates of drugs, weapons and contraband pouring into our jails, thereby increasing the risk of harm to deputies and all inmates. Therefore, the Court found jails may conduct close visual inspection strip searches of all inmates being admitted to the general population.

**The limits and aftermath of *Florence v. Bd. of Chosen Freeholders of the County of Burlington*.**

Unfortunately, the *Florence* case does not address all situations where strip searches may be utilized. For example, the opinion does not discuss the circumstances where a more invasive body cavity search would be warranted. Similarly, the opinion stops short of deciding whether or not a close visual inspection strip search would be appropriate for all detainees being held without assignment to the general population and without substantial contact with other detainees. For instances not specifically covered by the *Florence* opinion, the Supreme Court's general test of reasonableness for conducting strip searches still applies:

> 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.

*Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

Now is a good time for all jails and correctional facilities to review their written policies regarding strip searches to ensure compliance with state law and in the light of this new guidance by the United States Supreme Court. The American Civil Liberties Union ("ACLU") and similar groups will likely place these written policies under close scrutiny in search of possible violations.

Just one week after the decision in the *Florence* case was handed down, the ACLU issued FOIA requests via email to 145 Virginia Sheriffs' offices and jail superintendents requesting copies of their policies on the use of strip searches. Similarly, ACLU attorneys recently filed multiple lawsuits against Bill Watson, the Portsmouth Sheriff, and several of his personnel related to strip searches of employees working for a health care contractor.

The Portsmouth Sheriff's Office had a policy that any person, including deputies and contractors, moving in or out of secure areas of the jail were subject to search. After an investigation indicated cigarettes, drugs and cellphones were being smuggled by contractor employees, several contractor employees were subjected to visual strip searches. The contractor employees claim these searches violated their Constitutional rights.

This case is currently pending in the Eastern District of Virginia federal court, and the defendants have moved for summary judgment based in part upon the ruling in *Florence*. While some anticipate the court will grant the motion for summary judgment on behalf of Sheriff Watson and the other defendants, close attention should be paid to the outcome of this and any similar cases. The outcome of such cases could require modification of your jail's search policy. Your facility's search policy should protect the safety of inmates and your staff while not going so far as to produce what would be considered an exaggerated response to any particular situation.

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