No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF ATLANTIC COUNTY AND GARY MERLINE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*[1]

Atlantic County is a municipality located in the State of New Jersey. The Atlantic County Correctional Facility ("ACCF") is maintained within its borders. Gary Merline is an ACCF administrator. Both *amici* Atlantic County and Mr. Merline have been named as Defendants in a pending proposed class action suit[2] in which it is alleged that ACCF conducted strip searches of non-indictable detainees pursuant to a policy violative of the *Fourth Amendment* to the United States Constitution.

This proposed class action is venued in the United States District Court for the District of New Jersey. Class action litigation based on allegedly improper inmate searches is enticing inmate action, resulting in extensive costs and time. This Court's determination as to the pending matter will affect not only the outcome of numerous pending inmate actions, one of which the *amici* are actively defending, but will also correctional facility

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, the *amici curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici curiae*, or its counsel has made a monetary contribution to the preparation or submission of this brief.

[2] The action is *Moore v. Atlantic County*, D.N.J., Civil No. 07-cv-05444, before the Hon. Joseph H. Rodriguez. *Moore* is presently stayed pending the decision of this Court on the appeal in *Florence*. The issue of class certification has not yet been addressed in *Moore*, which therefore remains a proposed class action.

operation throughout the State of New Jersey, and the nation as a whole.

The *amici* have a compelling interest in this case, because the issues decided directly affect their ability to safely operate and maintain their prison system. Prison officials and municipalities have the unenviable task of preserving order under difficult circumstances. See *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed. 2d 447 (1979). The decision rendered by this Court, in this matter, will affect prison operation, and policy administration, throughout both the State of New Jersey, and the nation. The prohibition of strip searches, in as broad a category as pre-trial detainees held on non-indictable offenses, severely undermines a key tool in insuring the safety of staff and inmates from the smuggling of weapons, drugs, and other harmful items into the prison system. Such a prohibition affects the health, safety and welfare of all persons who are incarcerated in, work in and visit correctional facilities.

The far reaching implication of a reversal of the Third Circuit's decision would be detrimental to the operation and safety of the entire prison system of the State of New Jersey, as well as the thousands of state, county and municipal prisons throughout the United States.

SUMMARY OF THE ARGUMENT

The *Fourth Amendment* of the United States Constitution is not violated where a detention facility implements a policy of strip searching all detainees upon admission, regardless of the pending charges, and regardless of the existence of "reasonable cause."

This Court, in *Bell v. Wolfish*, did not determine that the *Fourth Amendment* imposed a requirement for the existence of "reasonable suspicion" prior to conducting a strip search of "non-indictable" detainees upon admission to a detention facility. The holdings by certain courts, including the District Court below, that such a "reasonable suspicion" requirement had been found or imposed by the holding in *Bell v. Wolfish*, are in error.

There exists no rational basis for the distinction which has been made between the strip searching of indictable detainees as opposed to non-indictable detainees. No rational distinction can or has been made between the security and safety concerns presented by indictable detainees and those presented by non-indictable detainees.

The Third Circuit Court of Appeals correctly determined that the searches at issue in this matter were not violative of the Fourth Amendment, *Florence v. Board of Chosen Freeholders*, 621 F.3d 296 (3d Cir. 2010), and its decision should therefore be affirmed.

ARGUMENT

More than thirty years following its cornerstone decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court is poised to consider for the first time an issue which it is respectfully suggested that ten Courts of Appeal,[3] and a variety of District Courts, have wrongly decided.

In *Bell*, this Court upheld the blanket strip search/visual body cavity search policy of the federal Metropolitan Correctional Center (MCC) in New York City, which had been predicated upon "less than probable cause." 441 U.S. at 523-24. The MCC had a blanket policy of subjecting all inmates to a strip search which included a visual body cavity search, following all contact visits at the prison. *Id.* at 558. The facility housed pre-trial detainees along with convicts awaiting assignment to a prison. *Id.* at 524. The searches were conducted on every inmate

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[3] That number currently stands at eight. *See, e.g.*, *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), *cert. denied sub nom Clements v. Logan*, 455 U.S. 942 (1982); *Stewart v. County of Lubbock*, 767 F.2d 153 (5th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Mary Beth G. v. Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); and, *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984). *But see*, *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (*en banc*), overruling *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001); and *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (*en banc*), overruling *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989), and *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984).

following a contact visit, without regard to the nature or seriousness of the charges, or consideration of any other factor. *Id.* at 528. The searches were "frequently conducted in the presence of other inmates." *Id.* at 577 (Marshall, J., dissenting) This Court also noted that the visits were neither conjugal nor private in nature, and the inmates were "in full view during the visits and fully clad."

The District Court had ordered that the prison cease the anal and genital inspections, absent probable cause, but permitted the basic strip search portion of the policy to continue. *Id.* at 528-530, 558. In reversing the Second Circuit, this Court in *Bell* upheld the constitutionality of the "visual body-cavity searches" as utilized at the MCC. *Id.* at 558, 563.

In upholding the policy at issue, this Court in *Bell* looked not at whether there existed justification for such a search as to any particular individual, but whether the policy itself was "reasonable" in light of a balance between the "invasion of personal rights" entailed and the legitimate governmental interest at stake. *Id.* at 559.

Keeping in mind that the policy at issue in *Bell* was a blanket search policy, applied across-the-board to all inmates upon return from any visit, regardless of any individual circumstances, this Court held that "these searches" (*i.e.*, those occasioned by the policy under consideration) were not unreasonable:

> [A]ssuming 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 prohibits only unreasonable searches, . . . and under the circumstances, we do not believe that these searches are unreasonable.

Id. at 558 (internal citations omitted).

The Court explained that "reasonableness" under the *Fourth Amendment* was not "capable of precise definition or mechanical application," but that 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.

Id. at 559 (internal citations omitted).

Finally, in upholding the constitutionality of the blanket body cavity search at issue, the *Bell* Court, in language which numerous courts have accepted as directing their courses through the

ensuing three decades of legal debate, explained that:

> [W]e deal here with the question 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.[4]

Id. at 560. Thus, the Supreme Court in *Bell* held that a blanket strip/body cavity search policy that was reasonable, in light of the balance between a

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[4] Interestingly, at this point, the *Bell* Court noted the existence of holdings by a number of lower courts, likewise upholding the constitutionality of similar visual body-cavity search policies, including the District of New Jersey:

> When an inmate has a contact visit with a friend or relative, he is accorded complete privacy during the visit. As has been noted, the state's interest in preventing contraband from entering the prison is very strong and private contact with an individual from outside the institution presents an excellent opportunity for the introduction of all types of contraband into the prison community. The prison officials must be able to completely shut off this port of entry for contraband. To do so, an anal examination, degrading though it is, as part of the strip search, is not, in view of the state's compelling interest, an unreasonable requirement.

Hodges v. Klein, 412 F.Supp. 896, 901 (D.N.J. 1976) (Fisher, J.)

legitimate governmental interest (*i.e.*, the security interest) and the invasion of personal rights, was constitutional. *Id.*

The "balance" to which this Court looked included several factors which, in the final analysis, were resolved in favor of permitting the searches at issue. First, this Court looked to the "scope of particular intrusion," which was described as follows:

> Inmates . . . are required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution. . . .

Id. at 558. The scope of the intrusion at issue in *Bell* is either equivalent to or greater than the scope of the intrusion at issue in the present appeal. In *Bell*, the intrusion included the full body-cavity visual inspection, that included visual observation of genitals, lifting of the male's testicles, and the bending over and spreading of buttocks to permit visual observation. While there may be some dispute as to the extent of the intrusion in the Essex and Burlington County strip searches, there is no question but that they no greater than those at issue in *Bell*.

Second, "the manner in which it is conducted" was described as follows:

> If the inmate is a male, he must lift his genitals and bend over to spread his

> buttocks for visual inspection. The vaginal and anal cavities of female inmates also are visually inspected. The inmate is not touched by security personnel at any time during the *visual* search procedure.

Id. at 559. Again, as with the "scope" of the intrusion, the procedures at issue in the present appeal are similar to, though not in excess of that which was upheld in *Bell*.

Next, this Court considered "the justification for initiating it," and made the following observations:

> 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[5]. . . . That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part

[5] The Court noted, however, that "petitioners proved only one instance in the MCC's short history where contraband was found during a body-cavity search, . . ." *Id.* at 557.

> of the inmates to secrete and import such items when the opportunity arises.

Id. (internal citations omitted). Again, the "justification" for the strip search policies at issue in this appeal are in accordance with those discussed in *Bell*. Respondents herein noted, in their brief to the Third Circuit, that the searches were a response to "the overriding need to maintain safety, security and health at the facility" (App.J.Brief, at 14)[6], to "discover potential weapons and controlled dangerous substances," (App.J.Brief, at 8), as well as addressing the need to identify the gang membership of incoming detainees (App.J.Brief, at 15-16 and n. 2), and the necessity to identify the presence of MRSA infection (App.J.Brief, at 16).

The final factor in this Court's strip search balancing test was "the place in which it is conducted." Neither this Court, nor the Second Circuit, explicitly noted the "place" where the searches occurred, however, the District Court, in one of its opinions, stated that:

> every inmate -- including pre-trial detainees held on charges ranging from mail embezzlement through stock fraud to narcotics dealings and bank robbery -- undergoes a strip search upon returning to his quarters from any visit.

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[6] *Amici* herein refer to the Brief of Respondents (as Appellants) to the Third Circuit Court of Appeals, as their Brief to this Court was not available during the writing of this brief.

United States ex rel. Wolfish v. Levi, 439 F.Supp. 114, 146 (S.D.N.Y. 1977). However, as noted only by the dissent in *Bell*, the searches are "frequently conducted in the presence of other inmates." *Id.* at 577 (Marshall, J., dissenting) The locus of the strip searches at issue in this appeal is not clear, although there is no indication that it falls afoul of *Bell*.

The strip searches policies, and the strip searches procedures at issue on this appeal, are not distinguishable in any meaningful way from those upheld by the Supreme Court in *Bell*. There exists no principled distinction between the MCC search upheld in *Bell*, and the searches at issue in Essex and Burlington Counties. The *difference* which lies beyond this lack of *distinction*, is found only in the superimposition of the "reasonable suspicion" requirement upon this Court's analysis in *Bell*.

Beyond the four factors considered by this Court in balancing need against intrusion, is one additional factor which was *not* at issue: the *nature or seriousness of the offenses* with which the inmate had been charged. Essential in almost every application of the "reasonable suspicion" standard in the decades since *Bell*, has been the threshold question of whether the detainees at issue have been charged with less serious offenses, offenses that do not rise to the level of a crime (*i.e.*, the *non-indictable* offenses); or with more serious or criminal offenses, (*i.e.*, *indictable* offenses or crimes). And yet, the *Bell* decision is devoid of this consideration. Thorough scrutiny of this Court's opinion in *Bell* fails to reveal *any relevance whatsoever* of the

seriousness of the offenses charged to the determination of whether the MCC's strip search policy was constitutional. This Court did find, however, that "there is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates." *Id.* at 547, n. 28.

This Court, in *Block v. Rutherford*, 468 U.S. 576 (1984), further acknowledged this lack of distinction between pretrial detainees and sentenced convicts, but explained further:

> It is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits. Additionally, identification of those inmates who have propensities for violence, escape, or drug smuggling is a difficult if not impossible task, and the chances of mistaken identity are substantial.

Id., 468 U.S. at 587. Likewise, the Third Circuit has acknowledged this distinction:

> In *Bell*, the Court stated that the government must be able to take steps to maintain security and that 'restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment . . . .' *Bell*

> further noted that there is no reason to distinguish between pretrial detainees and convicted inmates in reviewing challenged security practices because there is no basis to conclude that pretrial detainees pose any lesser security risk than convicted inmates.

Fuentes v. Wagner, 206 F.3d 335, 347 (3d Cir. 2000), quoting *Valencia v. Wiggins*, 981 F.2d 1440, 1146 (5th Cir. 1993).

In view of the foregoing, what is perhaps most striking is that the "reasonable suspicion" requirement came to be at all.

The inquiry begins with the *Bell* Court's oft-cited and relied-upon question and answer:

> [W]e deal here with the question 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.

441 U.S. at 560.

Justice Powell, who concurred in part and dissented in part, became the first to seize upon this language, and provide an interpretation:

> I join the opinion of the Court except the discussion and holding with respect to body-cavity searches. In view of the serious intrusion on one's privacy occasioned by such a search, I think at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case. I therefore dissent on this issue.

Id., at 563. Powell's few words are particularly significant for several reasons. First, he notes his *concurrence* with the majority's opinion in all respects, *except* with respect to body-cavity searches. Second, Powell specifically notes the source of his dissent, that being the failure of the majority to impose *some level of cause* with respect to the performance of body-cavity searches. Finally, Powell states that the imposition of a "level of cause" which would have resulted in his concurring entirely with the majority, would have been "reasonable cause." *Id.* As the majority in *Bell* did not impose *any* level of cause, let alone *reasonable cause*, Justice Powell dissented.

In 2008, the Eleventh Circuit Court of Appeals sitting *en banc*, reversed course, and overruled its prior determination requiring the existence of "reasonable suspicion" for the strip search of non-indictable detainees. In *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (*en banc*), overruling *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001); and *Skurstenis v. Jones*, 236 F.3d 678, 682 (11th Cir. 2000). In

Powell, the issue which the Eleventh Circuit *en banc* considered was:

> Whether a policy or practice of strip searching all arrestees as part of the process of booking them into the general population of a detention facility, even without reasonable suspicion to believe that they may be concealing contraband, is constitutionally permissible. We answer that question in the affirmative, at least where the strip search is no more intrusive than the one the Supreme Court upheld in *Bell v. Wolfish*, 441 U.S. 520 … (1979).

Powell, 541 F.3d at 1300. The Court applied the balancing test from *Bell*, and concluded that there was no justification for holding such searches constitutionally infirm, in light of the searches permitted in *Bell* by this Court:

> The reasoning that leads us to uphold the searches [in this case] is simple. After balancing the privacy interests of detention facility inmates against the important security interests involved, the Supreme Court upheld the visual body cavity strip searches at issue in the *Bell* case against a *Fourth Amendment* attack. The security needs that the Court in *Bell* found to justify strip searching an inmate re-entering

> the jail population after a contact visit are no greater than those that justify searching an arrestee when he is being booked into the general population for the first time.
>
> And the searches conducted in the *Bell* case were more intrusive, and thereby impinged more on privacy interests, than those conducted in this case. It follows from the Bell decision that the less intrusive searches in this case do not violate the *Fourth Amendment*.

Id. at 1302. The strip search procedure at issue in *Powell* was set forth by the Court as follows:

> 'Every person booked into the Fulton County Jail general population is subjected to a strip search conducted without an individual determination of reasonable suspicion to justify the search and regardless of the crime with which the person is charged.' . . . The booking process includes 'having the arrested person go into a large room with a group of up to thirty to forty other inmates, remove all of his clothing, and place the clothing in boxes.' . . . The entire group of arrestees then takes a shower in a single large room. . . . After the group shower each arrestee 'either singly, or standing in a line with others, is

> visually inspected front and back by deputies.' . . . 'Then each man [takes] his clothes to a counter and exchange[s] his own clothes for a jail jumpsuit.'

Id. at 1301 (internal citations omitted). Clearly, the full body-cavity visual inspection permitted by the *Bell* Court is significantly more intrusive than the search at issue in *Powell*.

The Eleventh Circuit concluded that those courts, including itself, which had previously required "reasonable suspicion" as a pre-requisite for conducting strip searches of pre-trial detainees, has mis-read *Bell*:

> The *Bell* decision, correctly read, is inconsistent with the conclusion that the *Fourth Amendment* requires reasonable suspicion before an inmate entering or re-entering a detention facility may be subjected to a strip search that includes a body cavity inspection. And the decision is certainly inconsistent with the conclusion that reasonable suspicion is required for detention facility strip searches that do not involve body cavity searches.

Powell, at 1307.

Justice Powell's *brief* dissent in *Bell* has frequently been dismissed by courts applying *Bell*, including the District Court below. Justice Powell's

first-hand, contemporaneous observation in *Bell* that the majority, with whom it is reasonable to conclude he debated the issue at some length, failed to impose any level of cause, including reasonable suspicion, has been given far too little credence. The District Court below, for example, casually dismisses Justice Powell's sharp and concise explanation of his reason for dissenting by asserting that "other reasons for the dissent are equally plausible." The Court below speculates that Justice Powell may have dissented "out of protest" to a compromise ruling or, as a result of the majority's unwillingness to decide "the particular question of reasonable suspicion [which] was not before the Court." *Florence v. Board of Chosen Freeholders*, 595 F.Supp.2d 492, 510 (D.N.J. 2009).

Justice Powell's single-paragraph dissenting opinion, however, is neither unclear about his intentions, nor does it leave room for such speculation. It is straight-forward, to the point, and unambiguous, and it should be respected for the insight which it provides into the majority's failure to positively articulate a level of "cause."

The Eleventh Circuit also found Justice Powell's meaning clear: "Justice Powell dissented for one and only one reason, which was that the Court did not require reasonable suspicion for conducting the strip searches in that case":

> From his perspective inside the Court, Justice Powell (like Justice Marshall) had a far better sense of the majority's

> decision in *Bell* than any of us lower court judges could, and he understood that the decision permitted the body cavity inspection strip searches without reasonable suspicion.

Powell, 541 F.3d at 1307-1308. As the Eleventh Circuit noted, Justice Marshall also dissented from the majority's opinion in *Bell*, on bases that included the lack of "cause" for the strip search upheld:

> Without question, these searches are an imposition of sufficient gravity to invoke the compelling-necessity standard. It is equally indisputable that they cannot meet that standard. Indeed, the procedure is so unnecessarily degrading that it 'shocks the conscience.' *Rochin v. California*, 342 U.S. 165, 172 (1952). Even in *Rochin*, the police *had reason to believe* that the petitioner had swallowed contraband. Here, the searches are employed *absent any suspicion of wrongdoing*.

Bell, 441 U.S. at 578 (Marshall, J., dissenting) (emphasis added).

The Eleventh Circuit correctly points out that had the majority in *Bell* found fault with Justice Powell's conclusion (as well as Marshall's) that no "cause" had been required for the strip search being upheld, it certainly could have addressed it in the opinion:

> Confronted with the dissenting statements, the majority, if it had not intended to permit those searches of pretrial detainees without reasonable suspicion, would have noted as much in its opinion. It would have been a simple matter to do that. The majority, however, did not change its opinion to state that reasonable suspicion was required because Justice Powell's (and Justice Marshall's) reading of its opinion was accurate. The *Bell* decision means that the *Fourth Amendment* does not require reasonable suspicion for this type of strip search in detention facilities.

Powell, 541 F.3d at 1308. Such "back-and-forth" between majority and dissent in Supreme Court opinions is common, arising from the deliberative process in which the Court's opinions are shaped[7], and can be found in the *Bell* opinion itself. Justice Rehnquist, writing for the majority, takes exception to the "claim" by Justice Stevens in his dissent that the Court's holding that "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law" constituted "a departure from our prior due process cases." *Bell*,

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[7] See, *e.g.*, Maltzman, F., Spriggs, J.F. and Wahlbeck, P.J., *Crafting Law on the Supreme Court* (New York: Cambridge University Press, 2000), 6-10, *et seq.* (Selection available online at: http://catdir.loc.gov/catdir/samples/cam032/ 99047720 .pdf)

441 U.S. at 535, and n.17. Justice Rehnquist proceeds to correct what he finds to be Justice Stevens' erroneous interpretation. It is apparent that he also could have done so had he found fault with Justice Powell's point.

The Eleventh Circuit in *Powell* succinctly sets forth some of the other problems with the rationale of requiring "reasonable suspicion":

> While those decisions vary in detail around the edges, the picture they pain is essentially the same. The arrestee is charges with committing a misdemeanor or some other lesser violation and, while being booked into the detention facility, she is subjected to a strip search pursuant to the facility's policy. She later sues the officials asserting that the search was unconstitutional because the guards did not have any reasonable basis for believing that she was hiding contraband on her person. *See, e.g.*, *Mary Beth G.* 723 F.2d at 1266. In each cited case, the court of appeals concludes that because the plaintiffs were 'minor offenders who were not inherently dangerous,' *id.* at 1272, detention officials could conduct a strip search only where there was 'a reasonable suspicion that the individual arrestee is carrying or concealing contraband,' *Giles*, 746 F.2d at 617. In

> each of the cases where reasonable suspicion was lacking, the search is held to violate the Fourth Amendment.
>
> Those decisions are wrong. The differences between felonies and misdemeanors or other lesser offenses is without constitutional significance when it comes to detention facility strip searches. It finds no basis in the *Bell* decision, in the reasoning of that decision, or in the real world of detention facilities. The Supreme Court made no distinction in *Bell* between detainees based on whether they had been charged with misdemeanors or felonies or even with no crime at all. Instead, the policy that the Court treated categorically, and upheld categorically, was one under which all '[i]nmates at all Bureau of Prison facilities, including the MCC, are required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution.' *Bell* 441 U.S. at 558 ... It was a blanket policy applicable to all.

541 F.3d at 1309-1310. Indeed, contrary to the implication of the Seventh Circuit in *Mary Beth G.*, that the detainees in *Bell* did *not* include those being held on lesser or non-indictable charges - "the detainees were awaiting trial on serious federal

charges," 723 F.3d 1263, 1272 (7th Cir. 1983) - the MCC actually housed detainees on a variety of charges:

> Among the '[i]nmates at all Bureau of Prison facilities, including the MCC,' were detainees facing only lesser charges, people incarcerated for contempt of court, and witnesses in protective custody who had not been accused of doing anything wrong. See [*Bell*] at 524 & n.3, 558, 99 S.Ct. at 1866 & n.3, 1884. The MCC was hardly a facility where all of the detainees were 'awaiting trial on serious federal charges,' as some of the opinions incorrectly state. *See, e.g.*, *Mary Beth G.*, 723 F.2d at 1272.

541 F.2d at 1310.

Although this Court has not directly addressed the issue of the improvidently applied "reasonable suspicion" requirement, as it has come to be imposed by the lower courts in the post-*Bell* period, the issue has resulted in at least some critique from members of this Court. In 1981, in his capacity as Circuit Justice, Justice Rehnquist temporarily stayed the decision of the Fourth Circuit Court of Appeals in *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), *cert. denied sub nom Clemens v. Logan*, 455 U.S. 942 (1982), finding it to be "so at odds" with *Bell* that the full Court should have the opportunity to consider:

In my view, the decision of the Court of Appeals is so at odds with this Court's resolution of a similar issue in *Bell v. Wolfish*, *supra*, that its mandate ought to be stayed temporarily pending consideration by the full Court. *Bell v. Wolfish* was a class action initiated by inmates of a federally operated short-term detention facility challenging the constitutionality of numerous conditions of confinement and related administrative practices. The facility was primarily used to house persons charged with a crime but not yet brought to trial. One of the challenged practices was the requirement that inmates submit to a strip search and visual inspection of their body cavities after every contact visit with someone from outside the institution. This Court ultimately held that under the circumstances, such searches were not unreasonable under the *Fourth Amendment*, 441 U.S., at 558-560. Rather, they were 'reasonable responses . . . to legitimate security concerns,' *id.*, at 561, and could be conducted in the absence of probable cause, *id.*, at 560.

The Court of Appeals recited from *Bell v. Wolfish* the general standard by which searches are judged under the *Fourth Amendment*, but it chose to ignore the Court's application of that

> standard to the practice of conducting strip-searches of persons detained after being charged with a crime. Respondent in this case was arrested and charged by a Magistrate with driving while intoxicated and unlawful refusal to submit to a breath-analysis examination. The Magistrate authorized her release from the Detention Center only when a responsible individual arrived to take custody. Until that time, respondent remained officially under arrest and subject to those measured adopted for the maintenance of internal security at the jail. Her position was no difference, for constitutional purposes, from the pretrial detainees in *Bell v. Wolfish*. If anything, the detainees in that case were subject to more onerous conditions, given the greater intrusiveness of a body-cavity search. The Court nevertheless upheld such searches 'in light of the central objective or prison administration, safeguarding institutional security.' *Id.*, at 547.

Clements v. Logan, 454 U.S. 1304, 1309-1310, vacated, 454 U.S. 1117 (1981).

In more-recent commentary, Justice Scalia, writing for the majority in *Veronica School District 47J v. Acton*, 515 U.S. 646 (1995), considered whether a blanket policy requiring that all student

athletes undergo drug testing, was constitutional. In holding that the school district's drug testing policy comported with the *Fourth Amendment*, the Court rejected the suggestion that individualized "suspicion" of drug use by a student was required prior to testing, in order to meet constitutional requirements:

> In many respects, we think, testing based on 'suspicion' of drug use would not be better, but worse. . . .
>
> There is no basis for the dissent's insinuation that in upholding the District's Policy we are equating the *Fourth Amendment* status of schoolchildren and prisoners, who, the dissent asserts, may have what it calls the 'categorical protection' of a 'strong preference for an individualized suspicion requirement,' *post*, at 681. The case on which it relies for that proposition, *Bell v. Wolfish*, 441 U.S. 520, 60 L.Ed.2d 447, 99 S.Ct. 1861 (1979), displays no stronger preference for individualized suspicion than we do today.

515 U.S. at 664, and n.3 (emphasis added).

The super-imposition of the "reasonable suspicion" requirement upon the holding in *Bell* has not gone unnoticed, as Judge Tallman originally explained in his dissent in *Bull v. City and County of San Francisco*, 539 F.3d 1193 (9th Cir. 2008), two

years prior to the Court's *en banc* decision in that same case:

> Our ship has sailed far from the course charted by the United States Supreme Court in *Bell v. Wolfish*, 441 U.S. 520 … (1979). . . . As the empirical evidence from jail operations now shows, the underlying rationale for Ninth Circuit decisions in this arena suffers from an inherent defect in basic logic. The assumption is that arrestees booked for only minor or nonviolent offenses who will not be promptly released and must be housed with the general inmate population are unlikely to be carrying concealed contraband or dangerous weapons. Experience teaches otherwise. . . .
>
> [T]he majority extends Ninth Circuit restrictions and adopts a per se rul requiring reasonable suspicion to strip search a pretrial detainee transferred into the general population for housing who does not otherwise meet the category of arrestees the majority approves for strip-searching.. But the newly-minted rule runs contrary to Supreme Court precedent, impedes jail administration, and further endangers the safety of jail inmates and employees. Because I would conclude that San Francisco's policy of strip

> searching every arrestee transferred into its general jail population for housing is reasonable under the *Fourth Amendment*, I would find no constitutional violation from the strip search policy. . . .
>
> Never has the Supreme Court required reasonable suspicion of weapons or contraband to justify a strip search of pretrial detainees bound for the general prison population.

539 F.3d at 1205-1206, 1208-1209 (Tallman, J., dissenting).

Judge Tallman's prescient dissent from the Ninth Circuit's panel decision in *Bull*, and Judge Ikuta's "reluctant" concurrence - in which she urged that "a reconsideration of our case law is urgently needed" (*Bull*, 539 F.3d at 1025) - was followed by the Court's grant of rehearing *en banc*, 558 F.3d 887 (9th Cir. 2009), and eventual reversal, *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010).

Judge Ikuta, writing for the majority, explained its reversal of the requirement of reasonable or individualized suspicion, as found in *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989), and in *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984):

> *Thompson* and *Giles* failed to comply with the Supreme Court's direction that

> we not substitute our judgment for that of corrections facility officials. *Bell*, 442 U.S. at 540 n.23.
>
> [O]ur conclusion in *Giles* that strip searches of arrestees heading into the general jail population must be based on individualized suspicion is inconsistent with the approach adopted in *Bell*. The Supreme Court did not require MCC officials to consider the individual characteristics of the persons subject to the strip search policy. Nor did the Court require MCC officials to articulate their suspicions that a particular person subject to the policy was smuggling contraband. Rather, the Supreme court upheld a policy of strip searching all persons who had contact visits as categorically reasonable under the circumstances in the detention facility.

595 F.3d at 978, citing *Bell*, 441 U.S. at 559-60; and *Hudson v. Palmer*, 468 U.S. 517, 534 (1984) (O'Connor, J., concurring). The Ninth Circuit noted that the question of whether individualized suspicion is required was "squarely raised in *Bell*" via Justice Powell's dissent "on the sole ground that 'at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case.'" 595 F.3d at 978, quoting *Bell*, 441 U.S. at 563. Nevertheless, "the [*Bell*] Court declined to impose an

individualized suspicion requirement," despite the critique provided by the dissent. *Id.*

The Court explained that its decision in *Giles* was in error on several additional bases, commonly relied upon by circuits which have embraced the requirement of reasonable suspicion:

> [W]e erred in concluding that arrestees charged with minor offenses 'pose no security threat to the facility.' *Giles*, 746 F.2d at 618. *Bell* did not require MCC officials to modify the strip search policy based on whether a detainee had been charged with a serious or minor offense. Indeed, the detention facility in *Bell* housed witnesses in protective custody and persons detained pursuant to contempt orders, and those persons were included in the class of plaintiffs.[8]
> . . .
>
> . . . *Giles* erred in assuming that a strip search policy could not have a deterrent effect on persons who have been arrested and are being introduced into the general population for the first

[8] The class definition in *Bell* included "pre-trial detainees for whom the facility was primarily designed, sentenced prisoners either awaiting assignment to a prison facility or assigned here to serve their (usually relatively short) terms, prisoners here on writs to testify or to stand trial, witnesses in protective custody, and persons incarcerated for contempt." 595 F.3d at 978-79, quoting *United States ex rel Wolfish v. Levi*, 439 F.Supp. 114, 119 (S.D.N.Y. 1977).

> time, … as opposed to detainees who are already in the general jail population and are engaging in contact visits. In both scenarios, the individuals have access to contraband and can conceal dangerous items on their person.

595 F.3d at 978-79. The Ninth Circuit then set forth, and rejected, a number of bases upon which the circuits have mis-read *Bell*:

> [W]e disagree with those other circuits that have held strip searches of arrestees entering the general jail population per se unreasonable unless the officials have individualized reasonable suspicion that the arrestees are smuggling contraband. *See*, *e.g.*, *Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001); *Shain* [*v. Ellison*], 273 F.3d [56] at 65 [(2d Cir. 2001)]; *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989). These courts have purported to distinguish *Bell* on several grounds: that persons arrested on certain minor offenses do not represent a security concern, *see*, *e.g.*, *Roberts*, 239 F.3d at 111, *Masters*, 872 F.2d at 1255; that persons who are arrested are less likely to smuggle contraband than detainees already in the general jail population who engage in contact visits, *see*, *e.g.*, *Roberts*, 230 F.3d at

> 112; and that a blanket strip search policy for all arrestees entering the general jail population is unreasonable unless officials have demonstrated the existence of a significant smuggling problem and that a blanket policy has a significant deterrent effect, *see*, *e.g.*, *id.*
>
> As explained above, this reasoning is inconsistent with both the general principles enunciated in *Bell* and *Turner*, and with the specific application of those principles to the strip search at issue in *Bell*. Moreover, those decisions are inconsistent with the Supreme Court's warning that federal courts must avoid substituting their judgment for the 'professional expertise of corrections officials' in 'determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion.' 441 U.S. at 540 n.23.

595 F.3d at 980. The Court concluded that "[w]e therefore override our own panel opinions in *Thompson* and *Giles*. *Id.* at 981.

When the Third Circuit rendered the decision *sub judice*, it became the third Court of Appeals to reject a thirty-year history of mistakenly reading *Bell*. A clear, though shifting dichotomy in opinion

as to this reading of *Bell* has developed, and has resulted in this Court's grant of *certiorari* to resolve this split.

The Third Circuit in *Florence*, correctly homed in on each of the major factors which, since 2008, served to convince both the Eleventh and Ninth Circuits to upend their own longstanding precedents, and reject the "reasonable suspicion" requirement. The Court appropriately concluded that the balancing of interests under the Fourth Amendment -- requiring that it balance "the need for the particular search against the invasion of personal rights that the search entails," 621 F.3d at 301, quoting *Bell*, 441 U.S. at 559 -- clearly tilted in favor of "the Jails' security interests at the time of intake before arrestees enter the general population [and] against the privacy interests of the inmates." *Id.* at 311.

The Court in *Florence* agreed that the Circuits which previously concluded that reasonable suspicion was required "failed to give appropriate deference to the judgments of prison administrators and ignored the fact that in upholding visual body-cavity searches, the Supreme Court in *Bell* neither required individualized suspicion of smuggling nor differentiated the degree of suspicion required based on the type of offender." 621 F.3d at 305, citing *Powell*, 541 F.3d at 1307-11. As with the contact visits at issue in *Bell*, the security concerns raised by an inmate's "initial entry into a detention facility" -- likened in *Powell* to having followed "one big and prolonged contact visit with the outside world" --

are equally grave. 621 F.3d at 305, quoting *Powell*, 541 F.3d at 1313.

The Third Circuit concluded, in agreement with the Ninth and Eleventh Circuits, that "the security interest in preventing smuggling at the time of intake is as strong as the interest in preventing smuggling after the contact visits at issue in *Bell*." 621 F.3d at 308. The Court rejected the assertion that blanket searches were unreasonable because the jails had "little interest in strip searching arrestees charged with non-indictable offenses." *Id.* The Third Circuit noted that in *Bell*, this Court "explicitly rejected any distinction in security risk based on the reason for detention." *Id.* This Court held that "[t]here is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates." *Bell*, 441 U.S. at 546 n.28. "It is self-evident," the Third Circuit explained, "that preventing the introduction of weapons and drugs into the prison environment is a legitimate interest of concern for prison administrators," 621 F.3d at 307. Prison officials "must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees." *Bell*, 441 U.S. at 540.

The Petitioners have urged rejection of the jails' security interest argument, absent "evidence of a past smuggling problem or any instance of a non-indictable arrestee attempting to secrete contraband." 621 F.3d at 309. The Third Circuit rejected the argument, finding that the decision in

Bell does not require that such evidence be produced. *Id.*

The contrary is exemplified in *Bell*, as the Third Circuit discussed:

> In *Bell*, the single instance of attempted smuggling did not undermine the MCC's justification for the search. Quite to the contrary, the Court considered the absence of a record to be evidence of the policy's successful deterrent effect. *Bell*, 441 U.S. at 559. Likewise here, strip searches at the time of intake also have significant deterrent value. If non-indictable offenders were not subject to automatic search it would create a security gap which offenders could exploit with relative ease.

Florence, 621 F.3d at 309.

With respect to the Atlantic County Correctional Facility, the county facility at issue in *Moore*, as in the case of virtually any other high-volume detention facility nationwide, examples of the efforts by incoming, pre-trial detainees, to smuggle contraband, including drugs and weapons, are not hard to come by. During a 19-month period, ending November 30, 2009, a total of 34 detainees, being held on non-indictable charges, either attempted to or succeeded in smuggling contraband, including drugs and weapons, into the secured perimeter of the facility. *Amici* App. 1a.

Examples include a detainee arrested and brought into the facility on a non-indictable charge, who was found to have secreted a loaded Pietro Baretta 380 automatic pistol under his groin area. *Id.* at 2a-10a. This detainee had been arrested pursuant to a warrant on a charge of contempt of court, and was subject to a fairly low bail. *Id.*

A second example involves a detainee who turned himself in to the facility, to serve a 10-day sentence for driving while suspended. *Id.* at 11a-14a. Although the inmate in this example was already sentenced, and thus did not fall within the category of pretrial detainee as to whom the "reasonable suspicion" requirement as developed would have been applicable, the inmate's account of the circumstances is highly informative. Unknown to the inmate when he surrendered, as he was already sentenced, he was subject to a strip search. *Id.* at 11a-14a. The search revealed a package of items duct-taped to the underside of the inmate's scrotum, which included "2 dime bags of weed, 1 pack of rolling papers, 20 matches and 5 sleeping pills and a striker." *Id.* at 13a.

Investigation of the incident revealed that the inmate had been under the misapprehension that he *would not* be strip searched "due to the fact that he wasn't strip searched the last time he was incarcerated." *Id.* at 15a. The inmate told officers that "the last time he came into the jail … the searching Ofc did a behind the screen search [and] that he assumed he would be searched the same way and would be able to get away with taping the

contraband to himself to get it into the facility." *Id.* at 22a.

This example highlights the very real danger of detainees "gaming" a system that provides them with the foreknowledge of a class of persons who will be subjected to lesser security requirements, and creates the very "security gap" of which the Third Circuit warned in *Florence*. This "security gap" was not anticipated nor required by this Court when it rendered its decision in *Bell*. Its imposition in the form of the "reasonable suspicion" standard should be ended, and the clear dictates of *Bell* reaffirmed.

CONCLUSION

From Justice Powell to Justice Scalia, as well as those jurists who have taken on the deviation in course from the Court's holding in *Bell v. Wolfish*, it is apparent that a course correction in the jurisprudence relating to pre-trial detainee search policy is required.

More than thirty years ago, the United States Supreme Court, in *Bell v. Wolfish*, held as constitutional a blanket strip search policy which required that all inmates in the New York City prison system to undergo a full visual body-cavity search following every contact visit - regardless of any inquiry into the individual inmate, into the inmate's individual dangerousness, into the charges upon which the inmate was being held, or into any aspect pertinent to an assessment of whether any individual inmate might be secreting drugs, weapons

or other contraband upon or within his or her person.

The caselaw which has developed following *Bell*, and which has imposed a requirement of "reasonable suspicion" for the strip search of pretrial detainees held on lesser or non-indictable charges, finds no support in this Court's decision in *Bell*, is clearly in error, and should be rejected.

Accordingly, *Amici Curiae*, Atlantic County and Gary Merline, respectfully request that the decision of the Third Circuit in *Florence* be affirmed.

Respectfully submitted,
MARKS, O'NEILL, O'BRIEN & COURTNEY, P.C.

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[ATLANTIC COUNTY LETTERHEAD]

INTER-OFFICE MEMO

Date: 12/02/09
To: Warden S. Thomas
From: Lt. J. Giberson, Operations
RE: Non-Indictable Cases

The total number of inmates committed to the Atlantic County Justice Facility from May 01, 2008 though November 30, 2009 was 17554. Out of those numbers there were 31 incident reports filed during this time involving 34 inmates that either attempted to, or brought some type of contraband; e.g. drugs, tobacco, weapons, etc; into the secured perimeter of the facility. All of these inmates were committed on Non-Indictable charges.

The "Most" serious of these offenses was committed on June 25, 2009 Report # 09060518, when inmate [redacted] was committed by one of the local Police Departments. [redacted] was wanted for an ACS warrant out of Galloway Twp Municipal Court with a bail of $1553.00 full cash. While pat searching [redacted] inside the Admissions processing area, staff found a loaded Beretta Pietro Model 85F 380 caliber automatic pistol under his groin with four rounds in the magazine and one in the chamber. The pistol was removed from the inmate by staff without incident. A photo of the weapon seized it attached.

[ORIGINAL FORM DATA OMITTED]

On the above date and time this writer was assigned as the shift #1 commander. While on duty I was contacted by Sgt. D'ambrosio who was assigned as the admissions Sergeant. Sgt. D'ambrosio advised me that a hand gun was just found on a new commitment while being pat searched. I immediately responded to the area to secure the weapon.

Upon entering admissions I proceeded directly to the processing area. While in the admissions processing area I proceeded to secure the weapon from Officer Pereira and remove it from the confines of the institution. The hand gun was identified as a Pietro Beretta 380 Auto Cal.9 Short, model 85F. The serial number was identified as F13063Y. The hand gun along with the magazine and five rounds of ammunition were secured in and evidence bag and the chain of custody was completed. The evidence bag containing the weapon was then secured in the evidence locker inside the armory.

Once the weapon was secure I proceeded to speak with Officer Pereira about the incident. Officer Pereira stated that while working admissions Pleasantville Police Department (Officer Mark Porter) dropped off a new commitment. The commitment identified [redacted] (175990) was brought in on a contempt of court charge. The charge was out of Galloway Township Municipal Court (S20080002860111) in the amount of $1,553.00 Full

by order of Judge Roseanne Lugg (see attached).

After finishing the processing at the booking window, inmate [redacted] into admissions. While in admissions Officer Pereira ordered inmate [redacted] to the booking counter. Inmate [redacted], who was handcuffed in front and still in restraints placed his hands on the counter and Officer Pereira completed the pat search. While conducting the pat search he felt a hard object located under inmate [redacted] groin area. Initially no being able to identify the object Officer Pereira questioned inmate [redacted] about the object. Inmate [redacted] would not respond to the question. Officer Pereira again asked inmate [redacted] what the object is that he was concealing. Inmate [redacted] again refused to respond to the question. While continuing with the search Officer Pereira was able to identify the object as a handgun.

Officer Pereira immediately knocked on the admissions window alerting Sgt D'ambrosio to respond to the admissions booking area. Upon entering the area Sgt. D'ambrosio witnessed Officer Pereira remove the handgun from inmate [redacted] pants. The Handgun Was loaded with the magazine and a round was in the chamber. Officer Pereira pointed the weapon in a safe direction and cleared it for the safety of the officers as well as others.

After removing the weapon inmate [redacted] stated that the police would not give him a phone call and that's why he did not tell them about the

gun. Inmate [redacted] was then escorted into the admissions bathroom by Officer Pereira and Officer Parisi where probable cause dictates he could now be strip searched. During the strip search no other contraband was found. After completion of the strip search inmate [redacted] was placed in full restraints and placed in cell #41 without further incident. Inmate [redacted] will remain housed in admissions for further investigation and upon clearance by the classifications unit. Inmate [redacted] will be charged with a *.201 Possession or introduction of an explosive, incendiary device or any ammunition and a *.202 Possession or introduction of a weapon, such as but not limited to, sharpened instrument, knife or unauthorized tool. Reports were obtained from staff involved and a watch log was completed (see attached). A copy of report was also forwarded to warden for his review.

[ORIGINAL FORM DATA OMITTED]

Body of Report

On the above date and time while working in Admissions Pleasantville Police Department brought in new commitment [redacted] on a contempt of court charge out of Galloway Township. After I/M [redacted] was finished being processed at the booking window I/M [redacted] entered into Admissions. This writer had ordered I/M [redacted] to the booking counter and began pat searching I/M [redacted] while still in restraints. When pat searching the area under the groin, between the legs this writer felt a hard object. This writer then questioned I/M [redacted] as to what was there, I/M [redacted] did not respond. This writer then asked again as to what the object was, I/M [redacted] again did not respond. This writer then confirmed that he had a weapon, a Beretta Pietro Model 85F caliber 380 auto. This writer then knocked on the Sergeant's office window to notify Sgt. D'Ambrosio while securing I/M [redacted] at the booking counter. This writer advised Sgt. D'Ambrosio that I/M [redacted] had a weapon under the groin area. This writer then removed the weapon and then cleared the weapon for the officer's safety as well as others. I/M [redacted] then stated that the Police would not give him a phone call that's why he didn't tell them about the gun. This writer then had probable cause to strip search I/M [redacted] for any other weapons and/or contraband. This writer and along with Ofc. Parisi escorted I/M [redacted] into Admissions bathroom

for a full strip search. After completing the strip search I/M [redacted] was then placed into full restraints and placed into cell 41 with no further incident. This writer will be charging I/M [redacted] with *.201 Possession or introduction of an explosive, incendiary device or any ammunition and *.202 Possession or introduction of a weapon, such as but not limited to, sharpened instrument, knife or unauthorized tool. END REPORT

[ORIGINAL FORM DATA OMITTED]

Body of Report

On the above date and time this writer assigned to Adms #3 was assisting 16-3 Sgt. D'Ambrosio with pulling property for numerous releases left from Shift #3. Officer Pereira Adms#2 was patting down New Commitment that Pleasantville P.D. had brought in and he then knocked on the Sgt's office window. Officer Pereira then motioned for Sgt. D'Ambrosio and myself to come out to the booking window. Officer Pereira stated that he felt a weapon in the underwear of said individual [redacted]. Officer Pereira then took out a loaded gun from inside [redacted] underpants that he had hidden between his legs and private area. The weapon was unloaded by Officer Pereira placed into an evidence bag and turned over to Lt. Zimmerman 17-1. Inmate [redacted] stated that the Police would not give him a phone call that's why he didn't tell them about gun. After the weapon was taken out of the area this writer and Officer Pereira took inmate [redacted] in the bathroom to Conduct a Full strip search and change him into Oranges. Inmate [redacted] was then placed in Full Restraints per Lt. Zimmerman and placed into Cell #41 and watch Log started on inmate [redacted].

[ORIGINAL FORM DATA OMITTED]

Body of Report

While working in Admissions as 16-3, I was motioned by Officer Pereira to come to the Admissions booking desk. Officer Pereira then showed me that Inmate [redacted] #175990 had a handgun between his legs. I watched as Officer Pereira removed the weapon. and secured it. I then notified Lt. Zimmerman who responded to Admissions. Lt. Zimmerman then took over the investigation of the incident.

CMM1106 COPY OF WARRANT

WARRANT NO: S 2008 000286
MUN: 0111
DATE WARRANT ISSUED: 06 03 2009
BAIL AMOUNT: 1,553.00 BAIL TYPE: FL
BAIL WAIVER AUTHORIZED: N
OFFENSE: 2C:35-10A(4)

TO ANY POLICE OFFICER:
YOU ARE HEREBY COMMANDED TO ARREST THE DEFENDANT WHOSE NAME AND ADDRESS ARE SHOWN BELOW AND BRING HIM BEFORE THIS COURT TO ANSWER A COMPLAINT CHARGING AN OFFENSE IN TH8 ,JURISDICTION OF THIS COURT OR HOLD THE DEFENDANT TO BAIL BEFORE AN AUTHORIZED OFFICIAL IF AN AMOUNT OF BAIL IS SHOWN ABOVE.

BY ORDER OF THE JUDGE
CHRISTOPHER A BROWN
GALLOWAY TOWNSHIP MUNICIPAL COURT
300 EAST JIM LEEDS ROAD
GALLOWAY NJ 08205-0000
AUTHORIZED BY
ROSEANNE LUGG

[redacted]
PLEASANTVILLE NJ 08232-0000
DLN: SBI: [redacted] SSN: [redacted]
DOB: [redacted] RACE: B SEX: M
EYES: 2 HAIR: WHT: HGT:

SCARS/MARKS/DESC:
FULL BAIL AMOUNT - NO 10%
PF1-EXC WARRANT-LAW ENF PF2-WARNT HIST
PF3-EXECUTE/SUPRCD PF4-COPY BAIL WAIVER

[handwritten:]
09-27101 @23:23
Executed 6/24/09 @2345 SR705

[DATE STAMP]
2009 jun 25 am 12:22
ADMISSIONS

[ORIGINAL FORM DATA OMITTED]

Body of Report

On the above date and time while assigned to 16-3, I was returning from gathering property from the property room and entering admissions. Once I entered, Ofc. Decicco (who was exiting the search room) stated to me that inmate [redacted] was not cooperating with a strip search being conducted on him by Ofc. Barreto. I looked in the search area and saw Ofc. Barreto who stated that inmate [redacted] had duct tape under his scrotum and was not willing to remove it. Ofc. Barreto stated that inmate [redacted] was sentenced to 10 days for driving while suspended. I identified inmate [redacted] and ordered him to lift his scrotum. Inmate [redacted] did so. I saw that there was duct tape underneath his scrotum. Inmate [redacted] stated that he had a boil and the tape could not be removed. Ofc. Barreto stated to the inmate that medical would be called to treat him if he would cooperate and remove the duct tape. Inmate continued to resist the order.

I instructed Ofc. Barreto to place inmate [redacted] in full restraints and place him in a cell. Ofc. Decicco searched cell #40 for contraband (finding none) Inmate [redacted] was placed in a county issued uniform, secured in leg irons and belly chains and placed in cell #40.

I contacted Lt. Gaunt and advised him of the situation. Based on our conversation, we decided

that it would be best to handcuff inmate [redacted] in the back. I returned to admissions where Ofc. Barreto and myself removed his belly chains and handcuffed him behind his back. Afterward Ofc. Barreto and myself brought the charge nurse into cell #40 to check inmate [redacted] restraints for proper blood flow. Ofc. Barreto and I saw on the floor of the cell multiple matches (loose). The charge nurse was dismissed. I instructed Ofc. Barreto to remain with inmate [redacted] while I went to center control to get the video camera and tape #v09-147. To video any other evidence that might evolve. I returned back to admissions cell #40. Upon returning, Ofc. Barreto stated that he recovered from inmate [redacted] pant leg a plastic bag with 5 red pills in it a small bag with a green leafy substance. I began to run the video camera due to the fact that Ofc. Barreto had already found evidence. Ofc. Barreto began to pat search inmate once again. I asked inmate what his name was, He refused to answer. It appeared that inmate [redacted] had put something into his mouth and was refusing to open it (It appeared that inmate [redacted] placed something in his mouth while in belly chains). I ordered inmate [redacted] to open his mouth. I then asked if he was refusing to open his mouth for a search. He nodded his head confirming that he was refusing. Lt Gaunt arrived told inmate [redacted] of the repercussions he would face if he did not comply with the search and ordered inmate [redacted] to open his mouth. After contemplating the repercussions for a few moments, inmate [redacted] spit out of his mouth into Ofc. Barreto's

hand, green leafy substance. Based on my training and experience, I conclude that the green leafy substance to be marijuana. Ofc. Barreto also found during the pat search, while in the cell, rolling papers. Inmate was escorted to the search room and strip searched again. The duct tape was then discovered. The strip search also revealed that inmate [redacted] did not have a boil. I ended the tape after the search was completed and secured inmate [redacted] in cell #34 (previously searched). All evidence was gathered and secured by Officer Barreto. Lt Gaunt asked inmate if he swallowed any of the green substance. Inmate [redacted] answered no.

I checked with Sgt Illiucci and nurse Marin for the identity Of the pills. They were identified as either Elavil or motrin. They were not scheduled I, II or III drugs. A copy of the pill identifier and nurses report attached.

Due to the work load of the day I couldn't interview inmate [redacted] until 1600 hrs. I instructed Ofc. Teeney to escort inmate [redacted] to the first floor office. There, inmate [redacted] was issued his Miranda Warnings witnessed by Officer Teeney and signed by all. When asked, Inmate [redacted] identified the contraband which he had on him as "2 dime bags of weed, 1 pack of rolling papers, 20 matches and 5 sleeping pills and a striker". He stated that he was going to take the pills himself to sleep during his time while incarcerated and use the weed to trade for food with other

inmates. When asked, inmate [redacted] stated that he [redacted] was incarcerated on 10-24-09. The officer searching him, had him stand behind a curtain. Due to this fact inmate [redacted] stated that he thought he would be searched the same way and would get away with taping the contraband to himself to get it into the facility. I ended the interview and inmate [redacted] was escorted back to admissions by Officer Teeney to be transferred to DR.

Conclusion:

Inmate [redacted] had turned himself in as part of his 10 day sentence for driving wile suspended. Due to the fact that inmate [redacted] was sentenced, Ofc. Barreto was authorized to strip search him. During this strip search duct tape was seen attached to inmate [redacted] under his scrotum. When ordered to remove the tape, inmate [redacted] refused to remove it. Inmate [redacted] was then placed in full restraints and housed in admissions cell #40. During this time, inmate [redacted] had removed the tape and placed some of the "weed" in his mouth. Matches and other contraband was found in the previously searched cell upon staff arriving back to the cell. Inmate [redacted] refused to comply with orders to open his mouth. Upon other orders to open his mouth, inmate [redacted] spit out the green leafy substance in Ofc. Barreto's hand. Inmate [redacted] was issued his Miranda Warnings and agreed to speak with me. During the interview inmate [redacted] identified

the contraband that was removed as his. He stated that he brought the pills in to sleep for himself and the "weed" to use as trade. This was done intentionally and with forethought due to the fact that he wasn't strip searched last time he was incarcerated. He admitted that due to this fact, taping the contraband to his body would be easy to bring into the facility. Inmate [redacted] will be institutionally charged with *.708 refusal to submit to a search, .256 refusing to obey an order of any staff member, *.203 possession or introduction of any prohibited substance and .554 possession of tobacco products or matches. All evidence was secured in the center control and the chain of evidence followed. The video tape was reviewed for contents by myself and Lt. Gaunt. Inmate [redacted] was transferred to DR and placed on high security status. Criminal charges will be addressed by our Professional Development Unit.

[ORIGINAL FORM DATA OMITTED]

Body of Report

On the above date and approximate time as assigned to Admissions 1. [redacted] was in the front lobby turning himself in on a ten day sentence, per Records. This writer reviewed the commitment paper work and escorted [redacted] around to Admissions. Once in the Admissions sally port this writer pat frisked [redacted] no contraband was found on his person.

[redacted] then came into Admissions were Ofc. Barreto started inventorying his (Inmate [redacted]), property. Ofc. Baretto then escorted Inmate [redacted] into the Admissions bathroom, this writer advised Ofc. Baretto that Inmate [redacted] came in on a ten day sentence for driving while suspended and is a full strip search.

About approximately four minutes later this writer heard Ofc, Baretto yell out the bathroom, "DeCicco go get 16-3 this inmate is giving me a problem". This writer went into the Admissions bathroom, and at the same time Sgt. Nilson was walking by from getting property out of the garage. This writer and Sgt. Nilson went into the Admissions bathroom where Ofc. Baretto was ordering Inmate [redacted] to remove the duct tape from around the bottom of his testicles. Inmate [redacted] was refusing the order given and stated it was a boil that he had covered up. Sgt. Nilson then

ordered Inmate [redacted] to remove the duct tape. Inmate [redacted] still refused to remove the tape. Sgt. Nilson then ordered Inmate [redacted] to put the oranges on, in which Inmate [redacted] complied.

Sgt. Nilson ordered this writer and Ofc. Baretto to place full restraints on Inmate [redacted] and place him into a empty searched cell. This writer and Ofc. Baretto placed Inmate [redacted] into full restraints which were adjusted and double locked. This writer and Ofc. Baretto escorted Inmate [redacted] out of the Admissions bathroom and over to cell 0040. This writer searched cell 0040 before Inmate [redacted] went into that cell, no contraband was found in cell 0040. Sgt. Nilson then had Ofc. Baretto take Inmate [redacted] out of the belly chains and had him place handcuffs on Inmate [redacted] behind his back.

At approximately ten minutes later this writer assisted Ofc. Baretto in strip searching Inmate [redacted] in the Admissions bathroom while Sgt. Nilson video taped the search. Duct tape and white rolling papers fell to the floor during the search, which was picked up off the floor and put into the evidence bag with the other contraband Ofc. Baretto had found on Inmate [redacted] before he was escorted out of cell 0040, and then over to the Admissions bathroom to be searched.

No other contraband was found on Inmate [redacted] and he was then escorted out of the Admissions bathroom, sat in the boss chair, and

wand for any other contraband, none was found. Cell 0034 was searched for contraband and none was found. Inmate [redacted] was then placed into cell 0034 without incident.

[ORIGINAL FORM DATA OMITTED]

Body of Report

On the above date and time whilse assigned to admissions two, this writer was conducting a full search of newly committed inmate #180878, [redacted]. Inmate [redacted] was court sentenced to ten days in the County Jail, therefore being subject to a complete strip search. This writer upon ordering inmate [redacted] to remove all clothing and instructed him not to put on any clothes until further advised to. This writer asked inmate [redacted] to lift up his testicles to which he refused. This writer repeatedly asked inmate to lift his testicles and move his hands out of the way, again he refused. This writer visibly saw silver duct tape in the testicle area with a bulge under it. This writer asked inmate [redacted] several times as to what was under the duct tape, to which he replied, "A Boil". This writer informed inmate [redacted] that the duct tape had to be removed and if indeed he had a boil medical staff would be notified and proper treatment would be received. Inmate stated he wanted a sergeant present and began verbally shouting that he was not removing the duct tape, this writer notified Admissions one, Ofc. Decicco to notify 16-3. Inmate [redacted] kept asking this writer as to why he was being fully stripped searched, informing me he was only here for a ten day sentence. This writer informed inmate [redacted] that per policy, being a sentenced commitment he was subject to a full search. Inmate

[redacted] was ordered by 16-3 several times that the tape had to come off, to which he refused. Inmate [redacted] was told he would be placed in full restraints if he didn't comply, to which he stated, "do what you have to do". Inmate [redacted] was then placed in full restraints by this writer and Ofc. Decicco, and escorted to cell # 40. This writer observed Ofc. Decicco search cell # 40 prior to inmate being placed in it and cell was secure. This writer per 16-3, Sgt. Nilson then removed full restraints from inmate [redacted] and placed his hands behind his back, in an attempt to keep inmate [redacted] from retrieving possible contraband. Upon entering cell to remove restraints, this writer saw about fourteen to fifteen single matches on the floor of cell #40, along with ripped clear plastic bags. This writer proceeded to pat frisk inmate [redacted] again, when a bag of green leafy substance, rolling papers, a bag containing approximately five orange pills fell to the ground. Inmate [redacted] would not answer what was in tape, this writer ordered him to open his mouth, he refused several times. Inmate [redacted] then spit out mouthful of green leafy substance in to this writers glove. This writer along with 16-3, admissions one and 17-1, Lt. Gaunt, took inmate in to the admissions bathroom where he was stripped searched again, more rolling papers and the duct tape was recovered, all items were placed in an evidence bag and turned over to 16-3, Sgt. Nilson. Incident was video taped by Sgt. Nilson, inmate was charged by this writer with *.708 refusal to submit to a search, .256, refusing to obey an order of any staff member, *.203, possession or introduction or

making of any prohibited substances, such as drugs, intoxicants or related paraphernalia not prescribed for the inmate by medical or dental staff, .554, possession of tobacco products or matches. Inmate [redacted] will be transferred to D-Right per 16-3, and placed in high security.

[ORIGINAL FORM DATA OMITTED]

Body of Report

On the above date and time while assigned in Admissions, This Ofc was notified by Sgt Nilson to be a witness of I/M [redacted] #180878 Miranda Warning. Sgt Nilson read the above I/M his Miranda Warning. [redacted] signed the Miranda Waiver form along with this Ofc and Sgt Nilson. I/M [redacted] waived his Miranda Warning and decided to speak with Sgt Nilson. When asked the I/M stated to Sgt Nilson that he was going to take the pills to help him sleep and trade the weed for food. The I/M then described what he had on him when he came into the facility, which was as followed: 2 dime bags of weed, 1 pack of rolling paper, 20 matches, and 5 pills. The I/M also stated that the last time he came into the jail on 10/24/09, the searching Ofc did a behind the screen search. The I/M stated that he assumed he would be searched the same way and would be able to get away with taping the contraband to himself to get it into the facility.