ACLU
AMERICAN CIVIL LIBERTIES UNION of NEW MEXICO

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Thomas Swisstack
Deputy County Manager
One Civic Plaza NW
Albuquerque, NM 87102

Dear Mr. Swisstack,

We write to discourage your jail from implementing routine strip searches of all arrestees without reasonable suspicion. In a widely maligned ruling, including the vigorous dissent of four justices, the United Supreme Court recently held that the U.S. Constitution does not prohibit jails from routinely strip searching arrestees, even those who are booked into a facility for a minor offense and for whom officials have no reason to suspect they are carrying contraband. Far reaching as this ruling may appear, the U.S. Supreme Court recognized limits to this authority. More importantly, we are confident that the New Mexico Constitution prohibits such routine searches altogether.

In Florence v. Bd. of Chosen Freeholders of County of Burlington, 132 S. Ct. 1510, 1522 (2012), Albert Florence, a passenger in a vehicle, was arrested on an out-of-date warrant for failure to pay fines. Before this mistake was corrected and he was released, Mr. Florence was subjected to two invasive strip searches in six days, searches the facilities admit were routine and not based on any particularized concern that Mr. Florence had attempted to smuggle contraband into the facilities. During these searches, he was forced to manipulate his genitals and squat and cough, while corrections officers peered closely at his naked body.

Although the U.S. Supreme Court held these suspicionless searches constitutional under federal law, it made clear that this authority was limited to the facts before it and noted that strip searches conducted on arrestees who had not been arraigned and/or would not be introduced to the general population may be unconstitutional.[1] Further, the court

[1] "This case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees." Florence v. Bd. of Chosen Freeholders of County of Burlington, 132 S. Ct. 1510, 1522 (2012). And "[i]t is important to note, however, that the Court does not hold that it is *always* reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population. Most of those arrested for minor offenses are not dangerous, and most are released from custody prior to or at the time of their initial appearance before a magistrate. In some cases, the charges are dropped. In others, arrestees are released either

emphasized that a facility must have evidence that routine searches are necessary to maintain safety and order; therefore, any routine strip search policy must be supported in fact.[2] A facility that has not deemed it necessary to conduct such routine searches historically, and implements routine searches only because it believes it can do so following this ruling, demonstrates that it does not have substantial justification for the new policy.

That said, even if you believe your facility satisfies the conditions cited by the U.S. Supreme Court, be aware that New Mexico courts have consistently "interpreted Article II, Section 10 of the New Mexico Constitution [our state constitutional equivalent to the Fourth Amendment] to guarantee a 'broad right' to be 'free from unwarranted governmental intrusions.'"[3] It is highly unlikely that our state courts would permit routine strip searches without reasonable suspicion that an arrestee is likely to be smuggling contraband. In fact, the New Mexico court soundly rejected the case on which the Florence court relied most in reaching its astonishing decision: Atwater v. City of Lago Vista, 532 U.S. 318, 323, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).

In Atwater, "[t]he petitioner [ ] argued the Fourth Amendment prohibited a warrantless arrest when being convicted of the suspected crime could not ultimately carry any jail time and there was no compelling need for immediate detention."[4] The Atwater Court rejected both of petitioner's arguments, holding that officers should not be held accountable for knowing whether an offense carried jail time or not in the field and that it was too burdensome to require officers to articulate facts justifying the need for immediate detention, even when an offense did not carry jail time. In so holding, the U.S. Supreme Court opted for a bright-line rule that officers could arrest anyone they witness commit a crime in their presence, whether that crime could result in jail time or not.[5]

In direct contrast to the holding in Atwater, warrantless arrests for crimes that do not result in jail time are unconstitutional in New Mexico.[6] If New Mexico courts can point to either flawed federal analysis, distinctive state characteristics, and/or a history of providing greater protection on a given constitutional issue than the federal courts, they can, and often do, provide greater protection under the New Mexico Constitution.[7] Noting this, the Rodarte court rejected the Atwater court's bright-line rule and put the onus on the officer in the field to determine whether an offense carries potential jail time and whether in an individual case there are specific and articulable facts that reasonably warrant the intrusion of a full

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on their own recognizance or on minimal bail. In the end, few are sentenced to incarceration. For these persons, admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible." Id. at 1524.

[2] Id. at 1518.

[3] See State v. Rodarte, 2005-NMCA-141, ¶12, 138 N.M. 668, 670-72, 125 P.3d 647, 649-51.

[4] Florence v. Bd. of Chosen Freeholders of County of Burlington, 132 S. Ct. 1510, 1522 (2012) (internal quotes and citations omitted).

[5] See Atwater at 354.

[6] See Rodarte at 2005-NMCA-141, ¶20.

[7] State v. Gomez, 1997–NMSC–006, ¶¶ 21–22, 122 N.M. 777, 932 P.2d 1.

custodial arrest when the offense does not carry jail time.[8] To do otherwise, according to the Rodarte court, would be unreasonable.[9]

We believe the New Mexico courts would likewise view as "unreasonable" any strip search of someone who had been booked for a minor offense and whom corrections officers had no cause to believe was carrying contraband.

Given our courts' demonstrated commitment to permitting only reasonable government intrusion, any analysis of routine strip searches under our constitution would have to give close consideration to the factual realities of our penal system, in general, and strip searches, in particular--realities largely ignored by the Florence majority. First, routine strip searches do not appear to further correctional facilities' stated interest in ensuring safety. In his dissent, U.S. Supreme Court Justice Stephen Breyer cited the study of an Orange County, N.Y. correction facility in which 23,000 strip searches revealed only one inmate with contraband.[10] Indeed, if facilities truly wish to cut down on contraband, evidence suggests they would meet with greater success by improving policies and practices that prevent staff from introducing illicit items rather than performing routine and suspicionless strip searches of arrestees. [11]

Second, the Florence court sidesteps an especially significant issue in New Mexico corrections facilities: staff on inmate sexual assault. New Mexico is home to two of the nation's jails with the highest incidence of rape.[12] It is indisputable that the more intimate and unnecessary encounters inmates have with corrections officers the more likely those encounters will become illegal and abusive. Apart from constitutional concerns, facilities should be concerned about the potential increase in sexual assaults and resulting liability for those assaults from routine, unregulated, and suspicionless strip searches.

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[8] See Rodarte at 2005-NMCA-141, ¶ 14.

[9] Id.

[10] See Florence at 1528.

[11] See, e.g., http://www.chron.com/news/houston-texas/article/Prison-staffers-who-smuggle-contraband-rarely-1585261.php ("Prison staffers who smuggle contraband rarely fired: Illicit goods keep flowing into prisons"); http://www.thefix.com/content/drug-smuggling-prison-guards-pose-widespread-problem-9211 ("Drug-Smuggling Prison Guards Are Widespread Problem"); http://www.denverpost.com/news/ci_19571608 ("Between 2001 and 2010, the annual number of federal correctional officers arrested nearly doubled, according to a Justice Department report released in September. During that period, 272 officers were arrested, with many of those cases involving contraband-smuggling."); https://docs.google.com/viewer?a=v&q=cache:Ki8_jRcFC0oJ:www.justice.gov/oig/reports/2011/e1102.pdf+&hl=en&gl=us&pid=bl&srcid=ADGEESg3ejbnrWLCz193PO4ICz7vgF4kAzI_c0SwWOCafujPH5RjEjRvRuG9G2WtIAf788N_XZQoQlna_M_h2dTHBP_WQSl503vK27dAHeiz82JQjZYstFu8CcNBtMcI8QS60Ijf9uQZ&sig=AHIEtbSUt093fhk0whCKOXO20KDM4hRrww&pli=1; http://articles.latimes.com/2011/sep/29/nation/la-na-prison-guards-20110930 ("Federal prison guard arrests increase dramatically, report finds").

[12] http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_finalreport_081229.pdf

According to the New Mexico Department of Health, 15 percent of New Mexicans—one in four women and one in twenty men—have been forcibly raped.[13] For all arrestees, strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive."[14] For the significant number of arrestees who have been raped, a strip search constitutes cruel and unnecessary revictimization.

In recognition of the many perils and scant evidence of any benefits associated with routine and suspicionless strip searches, your facility should not adopt a blanket policy in the wake of Florence. Routine strip searches of minor offenders are unnecessary and unreasonable. The ACLU is committed to ensuring that the Florence decision does not give rise to the gratuitous use of strip searches and violations under the New Mexico constitution in New Mexico's jails.

Thank you for your attention.

Sincerely,

Laura Schauer Ives
Managing Attorney

Steven Robert Allen
Director of Public Policy

[13] http://www.nmcsap.org/Betty_Caponera_Sex_Crimes_2010_Report_Oct2011_web5.pdf
[14] Chapman v. Nichols, 989 F.2d 393, 395 (10th Cir. 1993) (internal cites omitted).