No. 09- 09-451 OCT 14 2009

Supreme Court of the United States

TRAVIS SAULSBERRY and LORETTA JAMES,
in their individual and official capacities,

Petitioners,

v.

LORRI MYERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ERIC D. COTTON
Counsel of Record
CHRIS J. COLLINS
STEPHEN L. GERIES
COLLINS, ZORN & WAGNER, P.C.
429 NE 50th – Second Floor
Oklahoma City, OK 73105
(405) 524-2070

Attorneys for Petitioners

225590

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

Whether the circuit courts that require reasonable suspicion prior to strip searches of pretrial detainees in a jail have contradicted this Court's longstanding precedent stated in *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), that probable cause is not required to conduct strip searches which further the overwhelmingly important interests of jail security and safety.

Whether the law surrounding visual, non-body cavity searches of jail detainees was sufficiently settled to be considered "clearly established" at the relevant time, when a split exists among the circuits' interpretation of this Court's precedent and a large number of the circuits set precedents that conflict with this Court's decision in *Bell v. Wolfish*.

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OPINION BELOW

The opinion of the Court of Appeals is unreported and is set out at pages 1a-8a of the Appendix to the Petition for Writ of Certiorari ("Pet. App."). The District Court's opinion is unreported and is set out at pages 10a-27a in the Pet. App.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on July 16, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST, amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. XIV, § 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

> make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case presents an opportunity for the Court to review the manner in which some circuit courts, including the United States Tenth Circuit Court of Appeals, have departed from this Court's decision in *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), and to remedy the split which has occurred among the circuits regarding the standard required to perform a strip search of a pretrial detainee being booked into a jail. The case also presents an opportunity for this Court to review the clarity of the law on this issue in the context of a qualified immunity analysis.

This case arises out of Respondent Lorri Myers' ("Myers") brief incarceration in the LeFlore County Detention Center in Poteau, Oklahoma following her arrest for Public Intoxication. Myers filed this lawsuit under 42 U.S.C. § 1983, alleging violations of her constitutional rights, including a claim that Petitioners Travis Saulsberry ("Saulsberry") and Loretta James ("James") violated her Fourth and Fourteenth Amendment rights when she allegedly was strip searched. The basis for the district court's jurisdiction was 28 U.S.C. § 1331.

1. Factual Background

On August 31, 2006, police officers stopped Lorri Myers ("Myers") and her husband at a traffic checkpoint in Pocola, Oklahoma. Myers was arrested for public intoxication and was processed into the LeFlore County Detention Center ("LCDC") in the early morning hours of September 1, 2006. James, a female jailer, processed

Myers. Saulsberry was the Jail Administrator. However, he was not even present at the facility during the time of the events at issue.

Pursuant to the jail's routine booking procedure, James, a female employee, escorted Myers into the shower room and, according to Myers account of the incident, had Myers remove her clothing, visually inspected Myers without performing a body cavity search and then Myers showered and dressed in jail-issued clothing. Myers concedes that James was the only officer involved during the procedure. This process was performed in private. Myers was subsequently placed in a detoxification cell for approximately four hours and then released on bail.

2. Procedural Background

Myers filed a § 1983 lawsuit alleging that the events of August 31 – September 1, 2006, including the clothing exchange and strip search, violated her Fourth and Fourteenth Amendment rights. The Petitioners filed Motions for Summary Judgment based, in part, on qualified immunity. Saulsberry and James argued their conduct did not violate clearly established constitutional rights of which a reasonable person in their positions would have known. As they argued in both the district court and the Tenth Circuit Court of Appeals, the Tenth Circuit's precedent, requiring reasonable suspicion to conduct a visual strip search of a pretrial detainee being booked into a jail, contradicts this Court's precedent set forth in *Bell*, 441 U.S. 520, and a split in the circuits has developed regarding the standard required for such

a strip search. Therefore, as the law regarding visual strip searches of pretrial detainees is far from being "clearly established."

The district court granted Saulsberry and James' Motions for Summary Judgment in part, but denied summary judgment on the claim that the alleged strip search violated Myers' Fourth Amendment rights. Instead of evaluating whether Saulsberry and James were entitled to qualified immunity based on Myers' version of the facts, the district court found that Saulsberry and James were not entitled to qualified immunity regarding that claim because "unresolved factual issues" exist. On appeal, the Tenth Circuit affirmed the district court's decision, stating that the circuit's law concerning strip searches was clearly established at the time of the search. However, the order and opinion did not address the circuit's deviation from this Court's longstanding strip search precedent which did not require probable cause and did not expressly require reasonable suspicion when the searches of pretrial detainees are conducted for the important interests of jail safety and security. *Bell*, 441 U.S. at 520.

Furthermore, the Tenth Circuit found that Jail Administrator Saulsberry was not entitled to qualified immunity against the claims based on the alleged failure to train and supervise jailer James and based on allegedly unconstitutional policies; however, these claims were necessarily dependent upon a finding that the law surrounding visual strip searches was clearly established and that the visual search James performed violated the clearly established law. As Saulsberry and James demonstrated in the district court, James received

substantial training which guided her to act in compliance with constitutional law and in accordance with the jail's procedures; these procedures upheld inmates' constitutional rights and did not violate clearly established law. Because Saulsberry and James demonstrated the law regarding this type of search was far from clearly established and that James' actions did not violate clearly established law, both Saulsberry and James are entitled to qualified immunity.

SUMMARY OF THE ARGUMENT

This case presents exceptionally important questions of federal law on which this Court has provided guidance; unfortunately, the circuits (including the Tenth Circuit) have strayed from this Court's guidance and are now in conflict with the precedent set in *Bell*. The foundational question in this case is whether constitutional principles require reasonable suspicion for the visual, non-body cavity strip search of a pretrial detainee who is being processed into a jail facility. A second question is whether the law surrounding visual, non-body cavity strip searches of jail detainees was sufficiently settled to be considered "clearly established" at the relevant time, September 1, 2006. Finally, if the law was not clearly established at that time, then the jailer who performed the visual, non-invasive strip search and the jail administrator, who was not even present at the facility during the time of the search, are entitled to qualified immunity.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUIT COURTS' DIVERGENCE FROM *BELL* AND THE RESULTING LACK OF CLARITY IN THE LAW.

Based on the opinions of the circuit courts since the time this Court considered the constitutionality of policies permitting strip searches of pretrial detainees, it is clear that the law surrounding this issue is anything but clearly established. One recent opinion from the Eleventh Circuit specifically pointed out the extent to which numerous opinions from the various circuit courts have diverged from the principles this Court established in the seminal case of *Bell.*

A. *Bell v. Wolfish,* 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)

In *Bell*, pretrial detainees challenged the constitutionality of Metropolitan Correctional Center's practice of conducting visual body-cavity searches of all[1] inmates following contact visits. This Court ultimately upheld the constitutionality of such searches, even absent probable cause.

In *Bell*, the record established that all inmates in the New York City federal facility (regardless of the

1. Some inmates housed in the detention facility were charged with no wrongdoing and were merely being held as witnesses in protective custody. *Bell*, 441 U.S. at 524. Even these inmates were subjected to the invasive body cavity searches. *Bell*, 441 U.S. at 558.

reason for their detention) were required to expose their body cavities for visual inspection as part of a strip search conducted after every contact visit with a person from outside the institution. *Bell*, 441 U.S. at 558. The invasive visual body cavity searches conducted in *Bell* were not always performed in private; as Justice Marshall noted in his dissenting opinion, "as the Court neglects to note, because of time pressures, this humiliating spectacle is frequently conducted in the presence of other inmates." *Bell*, 441 U.S. at 577 (Marshall, J., dissenting). In addition to the body cavity searches, inmates were required "to disrobe, to have their clothing inspected, and to present open hands and arms to reveal the absence of any concealed objects." *Bell*, 441 U.S. at 595 (Stevens, J., dissenting). Corrections officials asserted that visual cavity searches were necessary not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the institution. *Id.*

In *Bell*, this Court balanced the need for the search against the degree of invasion and considered "the scope of the particular intrusion, the manner in which it [was] conducted, the justification for initiating it, and the place in which it [was] conducted." *Bell*, 441 U.S. at 559. This Court further noted that "[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 . . . ." *Bell*, 441 U.S. at 559. After considering these factors, this Court concluded that, under the circumstances, the very invasive visual inspection of body cavities, absent

probable cause, was not unreasonable pursuant to the Fourth Amendment. *Bell*, 441 U.S. at 558-59.

Notably, although Justice Stevens (joined by Justice Brennan) dissented from the Court's Opinion upholding visual body cavity searches, he agreed that it was acceptable to perform the additional strip search consisting of requiring the inmates to disrobe, have their clothing inspected, and present open hands and arms to reveal the absence of any concealed objects as described in his dissent. *Bell*, 441 U.S. at 595 (Stevens, J., dissenting). This additional search which Justice Stevens described and agreed was acceptable was much more similar in nature to the strip search that occurred in the instant case than the body cavity search upheld in *Bell*.

This Court's longstanding precedent stated in *Bell* established that even visual body cavity inspections of pretrial detainees without probable cause may be constitutional. *Bell*, 441 U.S. at 558. This Court determined that valid and important interests support the need for strip searches. *Bell*, 441 U.S. at 559-60. It further determined that prison and jail officials must be entitled to great deference in determining the need for security-related measures such as strip searches. *Bell*, 441 U.S. at 547. *Bell* was valid and binding law at the time of the relevant events in 2006 and remains valid and binding law. *See, Powell v. Barrett*, 541 F.3d 1298, 1302 (11th Cir. 2008) ("[u]ntil the Supreme Court tells [courts] that the *Bell* approach no longer applies where that Court applied it, [courts] are inclined to continue using it.").

B. The Divergence of the Circuit Courts from *Bell*.

In the years since this Court examined the issue regarding strip searches of pretrial detainees in *Bell*, the circuit courts have taken diverging paths when applying *Bell*'s precedent to numerous variations of strip search fact patterns. In *Bell*, this Court stated, "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Bell*, 441 U.S. at 559. In fact, as discussed more thoroughly *infra* Part I.B., Justice Powell specified that he was dissenting, in part, from the Court's Opinion in *Bell* solely on the basis that the Court had not required reasonable suspicion. *Bell*, 441 U.S. at 563 (Powell, J., concurring in part and dissenting in part). Yet, the Tenth Circuit and other circuits have done exactly what this Court cautioned against – they have attempted to apply a precise definition or mechanical approach with the reasonable suspicion test.

Although this Court upheld even invasive body cavity searches of detainees without requiring probable cause for the searches and without expressly requiring reasonable suspicion, several circuits have required reasonable suspicion prior to even less invasive strip searches.[2] Some have focused, in part, on whether the

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2. *See, Wood v. Hancock County Sheriff's Dep't*, 354 F.3d 57, 62 (1st Cir. 2003) (an individual detained on a misdemeanor charge may be strip searched as part of the booking process only if officers have reasonable suspicion that he is armed or carrying contraband); *Kelsey v. County of Schoharie*, 567 F.3d 54, 62 (2d Cir. 2009) (Fourth Amendment requires reasonable (Cont'd)

inmate was to be placed in general population (*See, Logan v. Shealy,* 660 F.2d 1007, 1013 (4th Cir. 1981); *Fuller v. M.G. Jewelry,* 950 F.2d 1437, 1448 (9th Cir. 1991); *Archuleta,* 523 F.3d 1278; *Cottrell,* 994 F.2d 730) and some have focused on the crime with which the detainee was charged (*See, Wood,* 354 F.3d 57; *Weber,* 804 F.2d at 802; *Bull,* 539 F.3d at 1199). However, these considerations stray from the guidance given by this Court in *Bell.*

As previously stated, the *Bell* opinion recognized the crucial importance of institutional safety and security

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(Cont'd)
suspicion that misdemeanor detainee is concealing weapons or contraband before strip search may occur); *Weber v. Dell,* 804 F.2d 796, 802 (2d Cir. 1986) (the Fourth Amendment precludes officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband); *Mary Beth G. v. City of Chi*cago, 723 F.2d 1263, 1273 (7th Cir. 1983) (strip searching without a reasonable suspicion that arrestees were concealing contraband or weapons was unreasonable); *Jones v. Edwards,* 770 F.2d 739, 741-42 (8th Cir. 1985) (strip search of a detainee was held unconstitutional where officials had no reason to suspect detainee was concealing weapons or contraband on his person); *Bull v. City & County of San Francisco,* 539 F.3d 1193, 1199 (9th Cir. 2008) (policy of conducting blanket strip searches of detainees regardless of severity of charge and without reasonable suspicion held unconstitutional) (*rehearing en banc granted,* 558 F.3d 887 (9th Cir. 2009); *Archuleta v. Wagner,* 523 F.3d 1278, 1284 (10th Cir. 2008)(search of detainee who was never placed in general population was not justified when no reasonable suspicion existed that she was concealing weapons or contraband); *Hill v. Bogans,* 735 F.2d 391, 394-95 (10th Cir. 1984) (same); *Cottrell v. Kaysville City, Utah,* 994 F.2d 730, 734-35 (10th Cir. 1993) (same).

and concluded that even body cavity searches were warranted regardless of whether the detainee had been charged with wrongdoing. *Bell*, 441 U.S. at 524, 558. Although the Court did not evaluate the degree of security required for different locations in the jail, the Court placed great emphasis on the fact that jails, in general, are "fraught with serious security dangers" and that smuggling of dangerous items or substances into the jail was a significant, serious concern. *Bell*, 441 U.S. at 559-60. Thus, given the Court's focus on the importance of jail safety and its unwillingness to differentiate between different crimes (or even between detainees charged with a crime and those charged with no wrongdoing) or between different locations in the jail, the circuit courts' decisions based on these factors have wandered far from the Court's precedents.

Other courts have noticed the divergence from this Court's directives and have made attempts to realign with this Court's precedent. In *Powell,* 541 F.3d at 1298, the Eleventh Circuit examined the principles set out in *Bell* and upheld a policy of the Fulton County Jail requiring every person booked into the jail's general population to undergo a visual strip search, conducted without an individual determination of reasonable suspicion to justify the search and regardless of the crime with which the person was charged. *Id.* at 1300. The court in *Powell* was critical of the manner in which circuit courts had strayed from the decision in *Bell.*

In *Powell*, five of the eleven detainees who filed the lawsuit were strip searched without reasonable suspicion upon being booked into the facility. *Id.* at 1300. Four of those five had been arrested on minor charges

such as a traffic ticket warrant, a DUI charge, and a failure to pay child support charge.[3] *Id.* at 1301. The booking procedure in question required having an arrestee enter a large room with up to forty other inmates, remove all his clothing, place the clothing in boxes, take a group shower, and then submit to a visual inspection of the body while naked. *Powell* at 1301.

As the *Powell* court determined, the strip searches at issue in that case were less invasive than the body cavity searches involved in *Bell* and, as the court noted, the security interests which the Supreme Court had found to justify searching the body cavities of an inmate re-entering the jail in *Bell* were clearly no greater than those which justify searching an arrestee being initially booked into a jail. *Powell* at 1302. The *Powell* court further determined that, following the *Bell* opinion, the courts which had required reasonable suspicion prior to a strip search of a pretrial detainee had simply misapplied *Bell*. *Powell* at 1306-07. According to the Eleventh Circuit,

> [t]he *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 certainly is inconsistent with the conclusion

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3. In *Powell*, the Eleventh Circuit remanded the proceedings to the district court for further factual development regarding the other groups of inmates.

> that reasonable suspicion is required for detention facility strip searches that do not involve body cavity inspections.

Powell at 1307.

As further support for its conclusion that the Supreme Court's *Bell* opinion did not require reasonable suspicion prior to subjecting inmates to the invasive body cavity searches evaluated in that case, the Eleventh Circuit pointed out the significance of Justice Powell's dissenting opinion in that case. As the *Powell* court noted, Justice Powell had dissented for one reason and one reason only – the Court had not required reasonable suspicion for the body cavity searches. *Id.* at 1307-08. In *Bell*, Justice Powell stated,

> 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 reasonable suspicion, should be required to justify the anal and genital searches described in this case.

Bell, 441 U.S. at 563 (Powell, J., concurring in part and dissenting in part). Therefore, Justice Powell understood the Court's opinion to mean that no reasonable suspicion was required even for the invasive body cavity searches that occurred in that case. Yet reasonable suspicion is precisely what the Tenth Circuit requires for any strip search, not just for a visual body cavity inspection.

The *Powell* court also found fault with certain opinions of the Fifth, Sixth, Seventh, and Ninth Circuits, which had drawn a distinction between arrestees charged with felonies and those charged with a lesser violation. As the *Powell* court stated,

> [I]n each . . . case, the court of appeals concludes that because the plaintiffs were "minor offenders who were not inherently dangerous," detention officials could conduct a strip search only where there was "a reasonable suspicion that the individual arrestee is carrying or concealing contraband. . . . Those decisions are wrong. The difference 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.

Powell at 1309-10 (citations omitted).

The *Powell* court went on to stress that the need for strip searches is not exaggerated. *Id.* at 1310. Officials at a facility such as a county jail typically know very little about the new inmates being booked or the security risks they present. *Powell* at 1311. For example, any arrestee could potentially be a gang member who committed a lesser charge in an attempt to enter the jail and smuggle contraband to a fellow gang member. *Id.* Additionally, arrestees being booked into a facility typically have had a large degree of contact with

outsiders. *Powell* at 1313. Because of the risks inherent in operating such a facility, jail officials should "be accorded wide-ranging deference" in adopting policies to further facilitate order and security. *Powell* at 1311, *citing Bell*, 441 U.S. at 547.

As the *Powell* decision thoroughly explains, the circuit courts and lower courts have sharply diverged from the principles stated in *Bell* on multiple points. A split among the circuits as to the proper application of *Bell* has clearly emerged. As previously noted, several circuits have rendered decisions contradictory to *Bell* and *Powell* by requiring reasonable suspicion for a minimal strip search. (*See infra* n.2, pp. 8-9.) However, in a case with facts very similar to the facts of this case, the Seventh Circuit found that a strip search of a jail detainee was constitutional even though she was never placed in general population. *See, Stanley v. Henson*, 337 F.3d 961, 962, 966-67 (7th Cir. 2003) (upholding as constitutional a clothing-exchange procedure that requires inmates to disrobe in front of same-sex officers and put on jail-issued uniforms).

Florence v. Bd. of Chosen Freeholders of County of Burlington, 595 F. Supp. 2d 492 (D.N.J. 2009), *order amended by Florence v. Board of Chosen Freeholders of County of Burlington*, ___ F. Supp. 2d ___, 2009 WL 1971328 (D.N.J. June 30, 2009), further supports Saulsberry and James' arguments that the decisions in this area have strayed from the holding in *Bell* and that a split exists as to its proper application. In *Florence*,

the Defendants requested the court certify the following question for interlocutory appeal:

> [W]hether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment. . . .

Florence, 2009 WL 1971328 at *5.

One of the factors the Defendants had to establish for certification was that "substantial grounds for difference of opinion" existed regarding the resolution of the law. *Id.* at *3. On June 30, 2009, the district court granted the motion certifying the order for interlocutory appeal to the Third Circuit. *Id.* at *2-*5. In its opinion, the court discussed the recent decisions among the district and circuit courts and noted the decisive split regarding the resolution of the Fourth Amendment law, namely the proper application of this Court's opinion in *Bell.* Based on this, the court concluded that substantial grounds existed for difference of opinion as to whether the Fourth Amendment required reasonable suspicion to conduct a search at a jail facility and, if so, under what circumstances. *Id.* at *3-*4.

Likewise, in *Bull,* 558 F.3d at 887, the Ninth Circuit issued an order on February 20, 2009, granting an en banc rehearing of *Bull,* 539 F.3d 1193. As stated *infra* n.2, pp. 8-9, *Bull*, 539 F.3d at 1193, found a policy of conducting blanket strip searches of detainees

regardless of the severity of the charge and without reasonable suspicion to be unconstitutional. *Bull*, 539 F.3d at 1199. In a concurring opinion, Circuit Judge Ikuta stated,

> I concur in the majority's opinion [finding the blanket strip searches without reasonable suspicion to be unconstitutional] with reluctance and grave concern. While compelled by Ninth Circuit case law, the disposition is in tension with Supreme Court precedent. Moreover, by disregarding the jail administrators' urgent concerns about a serious contraband smuggling problem, I agree with the dissent that we are potentially putting lives in the San Francisco detention system at risk.

Bull, 539 F.3d at 1202 (Ikuta, J., concurring). Judge Ikuta went on to describe how the Ninth Circuit had strayed from principles this Court established in *Bell*. *Bull*, 539 F.3d at 1202-05 (Ikuta, J., concurring). Noting that, in the *Bell* opinion, this Court had dictated that courts must accord "wide-ranging deference" to the judgment of detention facility administrators regarding order and security and, further, this Court considered that detention centers are "fraught with serious security dangers" and rejected any requirement for evidence to support a suspicion that detainees had smuggled contraband into the facility. *Bull*, 539 F.3d at 1202-03 (Ikuta, J., concurring). As previously stated, a rehearing of that case has been granted. *Bull*, 558 F.3d at 887.

Based on the acknowledged split among the circuit courts regarding this issue and their divergence from the principles in *Bell*, the conclusion must be that the law regarding the constitutionality of strip searching arrestees being booked into a facility is cloudy and far from resolved. Furthermore, to the extent that the precedents in this circuit have required reasonable suspicion, have considered the arrestee's charge or reason for detention, or have considered whether the search occurred pursuant to the booking process, these considerations deviated from the principles stated in *Bell*. *Bell* required neither probable cause nor reasonable suspicion prior to subjecting inmates to a visual inspection of body cavities. *Bell*, 441 U.S. at 558-59. Thus, this case presents an excellent opportunity for this Court to revisit the issue and resolve the confusion.

II. THE LAW REGARDING STRIP SEARCHES OF PRETRIAL DETAINEES WAS NOT CLEARLY ESTABLISHED AT THE TIME THE STRIP SEARCH OCCURRED IN THIS CASE.

In *Pearson v. Callahan*, __ U.S. __, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009), this Court reiterated its longstanding doctrine of qualified immunity protecting government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson*, 129 S. Ct. at 815, *citing Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of

law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson*, 129 S. Ct. at 815, *citing Groh v. Ramirez*, 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (Kennedy, J., dissenting) (further citations omitted). An official is entitled to qualified immunity where clearly established law does not show that his actions violated constitutional rights. *See, Pearson,* 129 S. Ct. at 816. The qualified immunity inquiry turns on the objective legal reasonableness of the action, evaluated in light of the law which was clearly established at the time it was taken. *Wilson v. Layne*, 526 U.S. 603, 614, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999). The defense of qualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful. *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

In *Pearson*, this Court stressed the importance of the "clearly established" factor of qualified immunity. The principles of qualified immunity shield an officer from personal liability when an official reasonably believes that his or her conduct complies with the law because, as the Supreme Court stated, officials are "entitled to rely on existing lower court cases without facing personal liability for their actions." *Pearson*, 129 S. Ct. at 823.

Where a divergence exists among the circuits and/or lower courts on the interpretation of the law relevant to the lawsuit, the law cannot be described as "clearly established." Officials are justified in relying upon current cases without exposing themselves to liability. *Pearson,* 129 S. Ct. at 823. For the analysis in this case,

Bell remains valid and binding law. *See, Powell* at 1302. According to this Court, "[i]f judges thus disagree on a constitutional question, it is unfair to subject [officials] to money damages for picking the losing side of the controversy." *Pearson*, 129 S. Ct. at 823, *citing Wilson*, 526 U.S. at 618.

Based on the opinions which have issued from this Court and from the circuits, it is indisputable that the law surrounding the constitutionality of visual strip searches of pretrial detainees being booked into a jail is anything but clearly established. In *Serna v. Goodno*, 567 F.3d 944 (8th Cir. 2009), the Eighth Circuit recently recognized that *Powell* "at a minimum" highlights the fact that whether the law requires reasonable suspicion for strip searches of detainees is unclear. *See, Serna* at 95-51 (finding that, although this Court did not expressly articulate a standard, "some unarticulated level of individualized suspicion" must have been present in *Bell*). While the parties may disagree on whether *Bell* did indeed require some standard of suspicion, the fact that a federal appellate court can only describe the standard as existing only at "some unarticulated level" mandates a finding that the law on this issue is not clearly established. This Court has repeatedly held that officers are entitled to qualified immunity if their actions do not violate clearly established law. To deny an officer this immunity and hold him liable under a standard courts cannot articulate is directly contrary to the doctrine of qualified immunity.

Furthermore, the fact that a rehearing and the interlocutory appeal were granted in *Florence* for the express purpose of reconsidering the strip search issue

in light of the acknowledged lack of clarity in the law on strip searches, coupled with the fact that a rehearing was also granted in *Bull* for the same purpose, further supports Saulsberry and James' argument that the issue is far from "clearly established." If such a vast discrepancy exists in courts' interpretations of the status of the law surrounding strip searches of detainees, a jail staff member cannot be held responsible for choosing which court precedent to follow. Jailers cannot be expected to be on notice that conducting a visual strip search – as Myers alleges in the instant case – violates clearly established law. *See, Pearson*, 129 S. Ct. at 823, *citing Wilson*, 526 U.S. at 618.

III. BECAUSE THE LAW APPLICABLE TO THIS CASE WAS FAR FROM "CLEARLY ESTABLISHED" AND BECAUSE SAULSBERRY AND JAMES' ACTIONS COMPLIED WITH THIS COURT'S PRECEDENT IN *BELL*, SAULSBERRY AND JAMES ARE ENTITLED TO QUALIFIED IMMUNITY.

Based on the principles stated in *Bell*, no constitutional violation even occurred in this case. As this Court concluded in *Bell*, no constitutional violation occurred because the "significant and legitimate security interests" justifying the very invasive body cavity searches outweighed the privacy interests of the inmates. *Bell*, 441 U.S. at 559-60. Here, Myers did not allege that a search of her body cavities, such as the very invasive search that was upheld as constitutional in *Bell*, occurred. She alleged only that she was required to disrobe and shower and that a "visual" search of her person – not an invasive body cavity search as occurred

in *Bell* – was performed. If the much more invasive searches in *Bell* were justified under the Fourth Amendment based on safety and security concerns, the search Myers alleges occurred clearly was justified based on those same concerns.

The search Myers alleges occurred in this case was much less invasive than the searches in *Bell* and *Powell*. In *Bell*, the detention facility conducted visual body-cavity searches of all inmates, including pretrial detainees, following contact visits. In that case, all inmates (regardless of the reason for their detention) were required to expose their body cavities for visual inspection as part of the strip search conducted after every contact visit. *Bell*, 441 U.S. at 558. However, as this Court concluded, given the overwhelming safety and security reasons for the searches, the very invasive visual inspection of body cavities absent probable cause was not unreasonable pursuant to the Fourth Amendment. *Bell*, 441 U.S. at 558-60. Likewise, in *Powell*, the Eleventh Circuit upheld a Fulton County Jail policy requiring every person booked into the jail's general population to enter a large room with up to forty other inmates, remove all his clothing, place the clothing in boxes, take a group shower, and then submit to a visual inspection of the body while naked. *Powell* at 1301. In this case, even based on Myers' allegations, the search of her person was conducted privately. Her allegation is that she was "visually searched," but no "body search" occurred. Myers conceded that James, a female employee, was the only officer present, and it has been established there was no evidence that any other individual viewed the search. In *Bell*, the visual body cavity searches were upheld as constitutional even

though "because of time pressures, this humiliating spectacle [was] frequently conducted in the presence of other inmates." *Bell*, 441 U.S. at 577 (Marshall, J., dissenting). Thus, the search to which Myers alleges she was subjected was much less invasive and much more private than those in *Bell* and in *Powell*.

Furthermore, *all* pretrial detainees who had received contact visits in *Bell* were subjected to that very invasive body cavity search. *Bell*, 441 U.S. at 558. *See also, Powell*, 541 F.3d at 1301-02 (policy requiring every person booked into the general population to be subjected to a strip search conducted without an individual determination of reasonable suspicion regardless of the crime with which the person was charged was held to be constitutional). As the *Powell* court noted, the search policy upheld in *Bell* recognized that an inmate's entry or re-entry into the facility posed a strong opportunity for concealment of contraband and the searches should, therefore, be performed "when an inmate is processed into the facility for the first time, when an inmate returns from having any contact with the public, such as during a contact visit, and so on." *Powell* at 1308-09. Thus, the fact that all inmates who had received contact visits in *Bell* and all inmates being processed into the facility in *Powell* were subjected to the searches did not render the searches unconstitutional.

Here, the same concerns supporting the searches of inmates entering the facility existed, specifically, deterring the smuggling of weapons, drugs, and other contraband into the facility. Myers was being processed into the facility from the public, and the concerns the

Powell court noted were present. *Powell* at 1308-09. As this Court stated in *Bell*, "[p]rison administrators [. . .] should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgement are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547. Thus, based on the balancing of interests set forth in *Bell*, no constitutional violation even occurred in this case, and James is entitled to qualified immunity for her acts in performing the search of Myers on this basis alone.

Myers' allegations that James had her disrobe and shower and subjected her to a "visual" search and not a body cavity search involve actions far less invasive than the visual body cavity searches evaluated in *Bell*. As Justice Powell's dissent in *Bell* noted, the anal and genital searches described in that case constituted a "serious intrusion on one's privacy." *Bell*, 441 U.S. at 563 (Powell, J., concurring in part and dissenting in part).

Furthermore, Saulsberry was not even personally involved in the search of Myers and is entitled to qualified immunity. Personal participation is an essential element in a § 1983 claim, and a plaintiff's failure to establish that a government official was personally involved in violating her constitutional rights is fatal to her claim. *Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir.1996). Because Myers did not and cannot demonstrate Saulsberry's participation in the relevant events, she did not and cannot demonstrate that he violated clearly established law. Therefore, he is entitled

to qualified immunity from Myers' claims. *Pearson*, 129 S. Ct. at 815. Furthermore, even if Myers had demonstrated Saulsberry's involvement based on a failure to train jailer James regarding strip searches or based on the search policy, he still would be entitled to qualified immunity based on the fact that the policy complied with this Court's precedent and was constitutional. As Saulsberry and James demonstrated in the district court, James received substantial training which guided her to act in compliance with constitutional law and to act in accordance with the jail's procedures; these procedures upheld inmates' constitutional rights and did not violate clearly established law. Because Saulsberry and James demonstrated that the law regarding this type of search was far from clearly established and further demonstrated that James' actions did not violate clearly established law, both Saulsberry and James are entitled to qualified immunity.

CONCLUSION

In the years following this Court's decision in *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), a split has developed among the circuits regarding the standard required to perform a strip search of a pretrial detainee being booked into a jail. This case presents an opportunity for this Court to remedy the dissension among the circuits regarding the standard required. Given the number of circuit court cases which have strayed from the principles stated in *Bell* and given the recent trend in courts realigning their decisions with *Bell*, it is not clearly established that the conduct of Petitioners, Travis Saulsberry and Loretta James even based on Respondent Lorri Myers' version of the facts, violated her rights. Therefore, the Tenth Circuit erred in determining that Petitioners Travis Saulsberry and Loretta James were not entitled to qualified immunity regarding the strip search of Respondent Lorri Myers, and the petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIC D. COTTON
Counsel of Record
CHRIS J. COLLINS
STEPHEN L. GERIES
COLLINS, ZORN & WAGNER, P.C.
429 NE 50th – Second Floor
Oklahoma City, OK 73105
(405) 524-2070

Attorneys for Petitioners