N E B R A S K A

JAIL BULLETIN

Number 89 **August, 1992**

STRIP SEARCH CASE LAW

Revisions to Nebraska Jail Standards that took effect in October, 1986 established specific guidelines for searching inmates prior to their initial court appearance. Although several individual standards were added or modified to regulate the various types of searches employed during the admission process, the most profound are those that involve the conduct of strip searches. The revisions have effectively prohibited:

- Facility staff from strip searching every person admitted to the jail;
- Established policies and procedures that prescribe "blanket" strip searches during admission;
- Strip searching non-violent misdemeanors without first establishing a "reasonable suspicion"; and
- Strip searches without proper documentation.

The 1986 revisions to the Standards are a direct result of several federal court cases, most notably the Jones v. Edwards et al case, which are the subjects of this "Jail Bulletin". The text of which is a legal opinion prepared July 10, 1986 by Mr. Michael W. Amdor, a Deputy County Attorney in Douglas County. The letter is addressed to Mr. Joseph C. Vitek, Douglas County Director of Corrections, who had requested the opinion. The letter is reproduced in full for this month's "Jail Bulletin" because it provides an excellent description of court rulings on the issue of strip searches and the rationale judges have used when making their decisions. The opinion also provides some very clear terminology to define the various forms of searches.

After reading this material, jail officers, supervisors and administrators should take a look at their written policies, procedures and practices regarding strip searches during admission to ensure consistency with the case law and Nebraska Jail Standards.

Listings of strip search cases and brief descriptions of the court's decisions are available from Jail Standards. If you would like a copy of this material, please contact the Jail Standards staff at (402) 471-2194. Our thanks to Mr. Amdor and Mr. Vitek for allowing us the use of this legal opinion.

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July 10, 1986

Mr. Joseph C. Vitek
Director of Corrections
17th & Leavenworth Streets
Omaha, Nebraska 68102

Re: Strip Search Policy

Dear Mr. Vitek:

You have posed to this office the following inquiry:

QUESTION: What strip search procedures are acceptable in light of Jones v. Edwards, 770 F.2d 739 (CA 8, 1985) and Giles v. Ackerman, 746 F.2d 614 (CA 9, 1984)?

ANSWER: A blanket policy of strip searching all incoming inmates is per se unconstitutional. A strip search should be considered an extreme intrusion into a person's privacy and is justified only when a "reasonable suspicion" of wrongdoing exists. The standard of a reasonable suspicion expands or contracts depending upon a wide variety of factors and particular care must be taken when a strip search is performed. It is my recommendation that strip search procedures in your facility be abolished entirely for incoming misdemeanant, traffic, or child support arrestees, and that the proposed Nebraska Jail Standards be implimented.

Discussion of this question is not easy because of the large amount of recent litigation on point. Therefore, I have broken up my analysis under what I hope will be manageable topic headings.

(1) Introduction

Prior to 1979 the tendency of the federal courts on the topic of strip searches was to generally defer to the judgment of jail officials. Beginning in 1979 a line of cases emerged under 42 U.S.C. 1983 which usually involved women arrestees being detained on very minor charges. They were cases in which strip searches were obviously abused and they provided the springboard for the federal courts to take a new look at strip search procedures. There was only a handful of these cases between 1979 and 1983, but there were nine in calendar year 1984 and seventeen in calendar 1985. See Appendix I attached hereto.

I think we have to assume that the progression of federal decisions will continue. The cases heretofore have dealt primarily with arrestees; I suspect that future cases will extend the "reasonable suspicion" reasoning to post-arraignment inmates and perhaps even sentenced offenders. It will thus become essential for you, your staff and your officers to begin approaching all strip searches with considerable caution. This will not be my last letter to you on this subject, and my limited goal here is to simply outline for you the concerns which the federal courts have emphasized.

(2) Topics Not Covered

This letter will be limited to an analysis of those cases dealing with inmates, either raw arrestees, post-arraignment detainees, or sentenced offenders. The cases I will be discussing are those set forth in Appendix II.

I will not discuss cases dealing with strip searches of visitors (See Appendix III), nor will I examine cases on strip searches of suspicious employees (See Appendix IV). I also will not discuss in this letter a topic which is no doubt of considerable concern to you: the potential liability of Douglas County and/or its officers or employees for strip searches which have been conducted in the recent past. You should expect that sooner or later somebody will target the Douglas County Department of Corrections. (A disturbing note: in Jones v. Edwards, 770 F.2d 739 (1985), a three-judge panel of the 8th Circuit stated in fn. 4 at 770 F.2d 742 that strip search law was so well established in 1981 that the North Platte police could not claim the defense of good-faith immunity. It is my sincere hope that Jones is not the last word on the good-faith defense. If jailers are going to be held to the meager state of the law as it existed in 1981, then we will have a rough time of it.)

I must note also that I have examined this issue solely from the perspective of civil liability for damages or injunctive relief under 42 U.S.C. 1983. I have not attempted to address the implications of these cases in criminal prosecutions. The "reasonable suspicion" which your corrections officers will need to justify a strip search should be sufficient to admit into evidence at a criminal trial the fruits of any such search. Both the civil law and the criminal law fundamentally address the "legality" of the search. However, because the goals of the civil law and the criminal law are different, there may be occasions when a different slant is given in the criminal law. When in doubt, contact a criminal division deputy county attorney.

(3) Terminology

Part of the difficulty in discussing this topic is the fact that terms vary so widely. In one court decision, Sec. & Law

Enfcmt. Emp. Dist. 82 Council v. Carey, 737 F.2d 187 (C.A. 2 1984), a series of definitions was set out and is from time to time quoted in other opinions. However, I do not believe the Carey case makes enough distinctions in the degrees of intrusiveness posed by the different types of body searches involved. Therefore, I have developed my own set of terms which are scaled from the least to the most intrisive:

1) PATDOWN SEARCH: In this type of search all clothes stay on the arrestee and a thorough patdown is performed, including search of linings and of pockets. This type of search seeks weapons and is per se reasonable as incident to arrest. U.S. v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

2) PARTIAL STRIP SEARCH: In this type of search articles of clothing are loosened or unfastened so that they may be held away from the body and weapons or contraband permitted to fall out. See Mary Beth G. v. City of Chicago, 723 F.2d 1263 (C.A. 7 1983).

3) COMPLETE STRIP SEARCH: Few if any of the cases make reference to this type of search in which a person is required to entirely disrobe and submit to visual inspection of the exterior of the person. It does not contemplate a visual inspection of body cavities but does rely upon the removal of all clothing in the presence of a jailer so as to permit most contraband to fall to the ground and to permit the visual inspection of the surface of the body by the jailer.

4) VISUAL BODY CAVITY SEARCH: In this type of a search the subject is required to expose oral, anal, and vaginal body cavities for visual inspection by jailers. The search usually requires the subject to assume a posture facilitating ready examination of these areas. See Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

5) CONTACT BODY CAVITY SEARCH: In this type of search there is an actual physical examination of oral, anal or vaginal cavities. Because this type of search involves internal penetration, probable cause and a warrant are needed. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). (To paraphrase one of your questions to me, "If you see a string, get a warrant.")

You should know that the different types of searches described above may run together in a given case. For instance, in Mary Beth G. v. City of Chicago, supra, the partial strip search

involved in the loosening of clothing was combined with a visual body cavity search.

I emphasize again that the courts make much of the increasing degrees of intrusiveness involved in the searches described above. The greater the degree of intrusiveness, the greater degree of justification for the search. This rises all the way to the level of a warrant for actual penetration of the body.

(4) General Analysis of Decisions

Strip searches in general and visual body cavity searches in particular have struck a nerve in the federal judiciary. In Bell v. Wolfish, at 99 S. Ct.2d 1884, even the majority which approved a body cavity search under certain circumstances describes it as a practice which ". . . instinctively gives us the most pause." In some cases there is a sense of judicial squemishness at the very thought of such a procedure and in other cases an anger that strip searches were used as simply the easiest way of checking an inmate into the system. Some opinions emphasize that there is no more degrading institutional procedure than a visual body cavity search, while other opinions dwell at length on the obvious abuses of such procedures, such as the application to all female misdemeanor arrestees. Some opinions such as those comparing jail searches to border searches sound very much like criminal law cases on search and seizure issues while others sound like prisoner's rights cases.

There are few generalizations that can easily be made except to say that courts do not like the blanket application of strip search procedures and they are particularly offended when body cavity searches are performed on persons charged with only minor offenses. In almost all of the cases reference is made to the "balancing test" described in Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L.Ed.2d 660 (1979). It may be recalled that the 4th Amendment to the Constitution prohibits only "unreasonable" searches, and in Prouse the U.S. Supreme Court struggled once again to outline those searches which are unreasonable. In an 8-to-1 opinion the court emphasized that there must be a balance between the intrusiveness of any given search and the societal ends which are to be achieved. Prouse is cited repeatedly for the proposition that if something as "degrading and demeaning" as a body cavity search is to be performed, then the reasons and the suspicions for that search must be very significant. Some cases say there must actually be probable cause for such a search; others say that a "reasonable suspicion" will suffice. In any event, it is the state of the law today that strip searches, whether partial, complete, or visual body cavity, must be done according to an individualized suspicion that a particular person is carrying contraband or a weapon on their body or in a body cavity. The suspicion itself must be susceptible to objective analysis to determine whether it is reasonable. This means that there have to be reasons for a search which can be clearly and rationally stated. It is not sufficient

that strip searches be carried out on hunches or in blind adherence to an established policy.

(5) Barriers to Strip Searching All Inmates

As increasing numbers of strip search cases have been filed, an increasing variety of defenses have been raised and almost uniformly cast aside. The courts have shown a particular hostility to blanket policies of searching all incoming inmates regardless of charge, sex, age, etc. Although a jailer might defend his strip search policy by claiming that he applied it uniformly to all, and for good reason at that, the courts have nonetheless found the policy unconstitutional and the jailer liable.

Many correctional facilities commingle felony and misdemeanor arrestees and justify blanket strip searches as a means of preventing misdemeanants from being used to ferry in contraband. However, as early as 1982 in Smith v. Montgomery County, 547 F. Supp. 592(D., Md.), a court rejected commingling as insufficient reason by itself. The judge in Smith did not say it in so many words, but he leaves little doubt that if intermingling is a problem, then it simply should not be done.

A blanket policy was established in 1974 in Arlington County, Virginia, because a deputy was shot by a misdemeanant arrestee who had not been strip searched. This was not sufficient to justify the 1979 visual body cavity search of a female attorney arrested on a drunk driving charge. See Logan v. Shealy, 660 F.2d 1007(C.A. 4, 1981), cert. denied sub nom. Clements v. Logan, 455 U.S. 942, 102 S. Ct. 1435, 71 L.Ed.2d 653 (1982). The court in Logan was blunt: drunk driving is not by its very nature associated with contraband and the strip search of a woman awaiting bail bore "no discernible relationship" to the security needs of the jail. As in many subsequent cases, the court in Logan sharply declared that an indiscriminant visual body cavity search policy ". . . cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations."

In a couple of cases the defendants have attempted to present statistical data on contraband found on the person of inmates. These efforts have left the courts singularly unimpressed because the numbers reveal only a relative few items among many hundreds of inmates. The courts assume that reasonable cause would have been found to have performed body cavity searches on those inmates anyway. I note also that the recommendations of national correctional associations have also held little weight. See Tinetti, supra, at 479 F.Supp. 489.

I mention all of this to underscore the hostility of the courts toward blanket strip search policies. The general rule today is that a body cavity search or anything like it cannot be performed upon arrestees unless there is an individualized "reasonable

suspicion" that the arrestee is concealing in his or her body contraband or weapons.

(6) "Reasonable Suspicion" to Search

The early cases up to and including Smith v. Montgomery County, 547 F. Supp. 592 (D. Md., 1982) required probable cause to perform body cavity searches on arrestees. This is the same standard necessary to secure a search warrant and is the highest or most difficult standard which could be imposed upon a jailer. Most of the recent cases have required the less stringent standard of an "individualized reasonable suspicion" that an arrestee is carrying contraband or weapons in a body cavity. It is this standard with which you and your officers must become familiar.

Even the U.S. Supreme Court has said, Bell v. Wolfish, at 99 S.Ct. 1884, that the test of reasonableness is not capable of precise definition or mechanical application. Rather, it requires a balance between the need for the search and the intrusivness of the search itself. The court decisions pay lip service to the needs of a correctional facility to maintain stringent security; however, the same decisions also say that if a jailer is going to perform a search as intrusive as a visual body cavity examination, then he must be serving some substantial security interests. (This is the reasoning that underlies the comment in one case that drunk driving is not usually associated with contraband. The governmental interest to be served by a visual body cavity search of a DWI arrestee is only a minimal interest at best.) In considering whether any given search is reasonable, the courts will look at the scope or intrusivness of the search, the manner in which it was performed, the justification that is put forward for the search, and the place where the search is carried out.

It thus becomes axiomatic to say that a visual body cavity search, or any lesser strip search, must be reasonable in light of all of the circumstances. The first circumstance to be considered is the arrestee or inmate himself: I think it is safe to assume that for the time being a convicted inmate can be required to undergo a strip search including a visual body cavity examination after being with visitors from the outside, after movements inside the facility such as to and from the law library, gymnasium, etc., or any time an inmate moves from one module to another. For the time being this same policy can be applied in these same circumstances to inmates who have been arraigned and are awaiting trial. In both cases I rely on Bell v. Wolfish as my authority, but I hasten to note that a body cavity search is most clearly justified only when there is some precipitating event, such as a move from one part of the facility to another. There are cases in which sentenced offenders or inmates awaiting trial have been strip-searched at random, but I consider these types of searches most susceptible to challenge in the next wave of lawsuits on this topic.

The vast bulk of litigation has occurred over arrestees or detainees who are in the facility for a relatively short period of time. I emphasize again that blanket policies of strip searching them must now be deemed per se unconstitutional. Instead, the first element that must be considered is the type of offense with which the detainee has been charged. If you are going to perform any type of strip search on a traffic offender, a drunk driver, a person charged with failure to pay child support, a person charged with violating regulatory city ordinances, or a person charged with a nonviolent, nondrug related offense, then you will have to have a very good reason indeed. On the other hand, if you have a reliable tip, if you have prior experience with a person smuggling contraband in your facility, or if the nature of the offense lends itself to a reasonable suspicion that the person has contraband on his person, then a body cavity search could be justified. However, I hasten to emphasize in as strong a set of words as I possibly can that the suspicion upon which your officers perform a visual body cavity search must be an individualized one. Just as you cannot rely on hunches, you cannot rely on, say, the mere fact that one prostitute was in a group of prostitutes who were smoking marijuana. There must be a reason why a particular inmate is singled out.

I realize fully that none of what I am suggesting is easy to comply with. You are going to have to keep very good records on people upon whom you perform body cavity or other types of strip searches. You will have to have decisions on body cavity and other strip searches made by your highest ranking officers. These officers will themselves have to be schooled in the problem areas which the courts have highlighted. I regret that I cannot give you a simple set of hard and fast rules. Such a set simply does not exist, and in the future your officers are going to have to stop and consider each and every strip search or visual body cavity search which they undertake.

(7) The Conduct of the Search

The great volume of strip search cases has produced a litany of do's and dont's regarding strip searches or visual body cavity searches. I alluded to these in the preceding section when I mentioned recordkeeping and necessity of having well-trained command-level officers making decisions. In addition to deciding whether the situation requires a strip search of any kind, the officer will also have to decide whether a less intrusive means would suffice. That is to say, if you have a metal detector and that would detect the weapon or contraband about which you are concerned, then by all means you should begin by using it. In the next step an assessment should be made as to whether a thorough patdown and search of pockets and seams would be sufficient. The next level of intrusion might be the simple loosening of garments to permit contraband to fall out. The next might require an inmate to disrobe behind a screen so as to permit contraband to fall to the floor and to permit the officer to thoroughly examine the clothing. The next level

might involve having the inmate take a few steps either in front of or behind the screen to facilitate the disposal of any contraband hidden on the surface of the body.

Finally, the officer will have to decide whether a visual body cavity examination is to be performed. Even then the officer will have to decide the method in which the visual body cavity search is to be carried out. Some courts have been highly offended at the notion of having an inmate squat or bend over and cough. Courts have also questioned the necessity of having male inmates lift the scrotum or having females remove tampons. I emphasize again that the level of intrusiveness must be justified by a reasonable suspicion that a particular inmate is concealing drugs or contraband within or without the body, and that the drugs or contraband are accessible only by the level of search performed.

The next recommendation is one that I am sure will anger your officers because it goes to the heart of their personal safety. However, it is a point on which the courts have been virtually unanimous. A strip search of whatever degree must be performed by an officer of the same sex in an area with literally no one else present. If the officer fears for his or her personal safety because an inmate is belligerent or otherwise combative, then that fact must be carefully documented. The general rule remains that no one should be present except the inmate and the officer performing the search. However, a combative situation will justify the presence of enough other officers to perform the search and preserve order. The courts have expressed repeated concern about "the prying eyes of passing strangers." There simply cannot be officers of the opposite sex, other inmates, open blinds, open doors or searches in open areas. To put it bluntly, you cannot perform strip searches on inmates as though they were army recruits; instead you must treat them as though they are all delicate souls with sensitive thresholds of embarassment.

It is also vitally important that you not treat inmates inconsistently with your alleged need to perform a strip search upon them. In other words, if one of your officers has a reasonable suspicion that someone has concealed contraband on their persons, then the officer must not wait an hour before strip searching them. In some cases inmates were permitted to wander through a booking area before the strip search was performed, and the courts always asked why the search was justified if the inmate had been given free rein. In a couple of cases guards expressed a reluctance to immediately strip search inmates because they were combative and abusive. In those cases the courts rhetorically asked why the inmates were not hit with additional charges for their combativness.

All of this comes down to the degree of importance which is attached to a strip search of any kind. If a person is suspicious enough to justify a strip search, then they have to be treated as

though they are dangerous. If the situation is serious enough to require a strip search, then it must be treated as such. If the situation is so critical as to require a severe invasion of privacy, then that invasion must be accompanied by a commeasurate level of respect.

(8) Comment on Proposed DCCC & Jail Standards Policy

I do not believe that the procedure which you outlined in proposed Bulletin 3-86 is sufficient to meet the requirements of the immerging case law on this topic. The standards which have been proposed by the Nebraska Jail Standards Commission are almost a middle-of-the-road proposal when viewed against some of the more stringent requirements of the case law. It is extremely difficult to reach a common denominator among the many cases which have emmerged in this area. I am reluctant to comply with each and every case because I believe some of them impose excessive requirements. I have concluded that the cases, particularly those from the 8th Circuit Court of Appeals, are strict enough to require rules such as those proposed by the Jail Standards Commission.

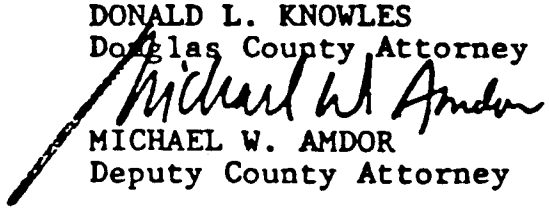
The problem with any set of standards is that one cannot substitute written rules for what is fundamentally a judgment call by an officer in a close situation. I would like to say to you that when in doubt the search should be performed. However, the case law makes clear that strip searches and visual body cavity searches are not to be the rule when nonviolent misdemeanants are arrested. Therefore, any set of rules is going to have to take second place to the development in decision-making officers of the good judgment they will have to have to perform strip and body cavity searches in the future.

(9) Conclusion

I began this letter by telling you that this will not be my last on this topic. I am sure that as other cases come down the line we will revise our considerations. I leave you with this one thought: any problems attendant to visual body cavity searches have resulted because of excesses in the past. We have to expect the pendulum of reform to swing far. I think we have to assume that sooner or later we will be sued, regardless of our best efforts. All we can do is make good records and use good judgment.

Very truly yours,

DONALD L. KNOWLES
Douglas County Attorney



MICHAEL W. AMDOR
Deputy County Attorney

MWA:smb
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QUIZ

Nebraska Jail Standards require that jail staff receive eighteen (18) hours of in-service training each year. The Jail Bulletin may be used to supplement in-service training if an officer studies the Bulletin, completes the quiz, and this process is documented by the jail administrator for review during annual jail inspections.

SUBJECT: STRIP SEARCHES
CASE LAW

NAME _____

DATE _____

1. It is permissible to strip search all misdemeanant arrestees only if they cannot be separated from felony arrestees already lodged in the jail.

   _____ TRUE _____ FALSE

2. Strip searches, whether partial, complete, or visual body cavity, must be done according to an _____ suspicion that a particular person is carrying contraband or a weapon on their body or in a body cavity.

3. Good records should be maintained on all people subjected to a

   A. Strip search

   B. Body cavity search

   C. Both A & B

4. Strip searches must be performed by an officer of the same sex, only if there is a same sex officer available.

   _____ TRUE _____ FALSE

5. Strip searches must be performed in privacy, away from "the prying eyes of passing strangers."

   _____ TRUE _____ FALSE

6. If a person is suspicious enough to justify a strip search, then they have to be treated as though they are _____.

CREDIT: 1/2 HOUR CREDIT FOR JAIL INSERVICE TRAINING REQUIREMENT

ANSWER SHEET SHOULD BE RETAINED BY JAIL ADMINISTRATOR OR TRAINING OFFICER

QUIZ

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SUBJECT: STRIP SEARCHES
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NAME _____

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1. It is permissible to strip search all misdemeanant arrestees only if they cannot be separated from felony arrestees already lodged in the jail.

   _____ TRUE XX FALSE

2. Strip searches, whether partial, complete, or visual body cavity, must be done according to an INDIVIDUALIZED suspicion that a particular person is carrying contraband or a weapon on their body or in a body cavity.

3. Good records should be maintained on all people subjected to a

   A. Strip search

   B. Body cavity search

   (C.) Both A & B

4. Strip searches must be performed by an officer of the same sex, only if there is a same sex officer available.

   _____ TRUE XX FALSE

5. Strip searches must be performed in privacy, away from "the prying eyes of passing strangers."

   XX TRUE _____ FALSE

6. If a person is suspicious enough to justify a strip search, then they have to be treated as though they are DANGEROUS.

CREDIT: 1/2 HOUR CREDIT FOR JAIL INSERVICE TRAINING REQUIREMENT

ANSWER SHEET SHOULD BE RETAINED BY JAIL ADMINISTRATOR OR TRAINING OFFICER