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Strip Searches (Visual Body Cavity Search)

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Sincerely,

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Strip Searches (Visual Body Cavity Search)

Reference Number: CTAS-1356

As used in T.C.A. § 40-7-119, "strip search" means having an arrested person remove or arrange some or all of the person's clothing so as to permit a visual inspection of the genitals, buttocks, anus, female breasts or undergarments of the person. No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon, a controlled substance, a controlled substance analogue or other contraband. T.C.A. § 40-7-119(a) and (b). Public Chapter 848 (May 15, 2012) amends Tenn. Code Ann. §§ 40-7-119(b) and 40-7-121(a) by adding under Section 29 controlled substance analogue to list of items that may be searched for during a body cavity search.

In *Timberlake by Timberlake v. Benton*, 786 F.Supp. 676 (M.D. Tenn. 1992), the district court noted that, while T.C.A. § 40-7-119 explicitly sets guidelines for custodial searches of arrested persons, it does not set rules for the location of the search or the manner in which a search is to be conducted. The court stated that this "oversight is critical since the law governing the reasonableness of strip searches is founded upon such factors." *Id*. at 695. Regarding municipal liability, the district court stated that the failure to set a policy governing such a highly intrusive police action can render a municipality's actions as culpable as if they had a policy permitting unreasonable searches themselves. "A local governing body does not shield itself from liability by acting through omission. Thus, when a city provides no guidance to its officers regarding such intrusive actions as strip searches, it must face the consequences of its inaction by being subject to suit." *Id*. at 696, *citing Marchese v. Lucas*, 758 F.2d 181, 189 (6th Cir. 1985), *cert. denied*, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 685 (1987) (sheriff's failure to train and ratification of unconstitutional behavior subjects county to suit).

Pursuant to state regulations, each jail must have a written policy and procedure providing for searches of facilities and inmates to control contraband. Each newly admitted inmate must be thoroughly searched for weapons and other contraband immediately upon arrival in the jail, regardless of whether the arresting officer has previously conducted a search. A record must be maintained on a search administered to a newly admitted prisoner. The procedure must differentiate between the searches allowed (pat down, strip, or orifice) and identify when these may occur and by whom such searches may be made. Inmates must be searched by jail personnel of the same sex except in emergency situations. All orifice searches must be done under medical supervision. The jail's policy and procedures must require that all inmates, including trusties, be searched thoroughly by jail personnel whenever the inmates enter or leave the security area. Rules of the Tennessee Corrections Institute, Rule 1400-1-.07(2) - (6).

"Courts have repeatedly held that strip searches that include visual inspection of the anal and genital areas are inherently invasive." *Calvin v. Sheriff of Will County*, --- F.Supp.2d ----, 2005 WL 3446194, *5 (N.D. Ill. 2005).

> In United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), the Court adopted a presumption that a "full search" incident to custodial arrest and aimed toward the discovery of weapons and contraband would be reasonable under the Fourth Amendment, but warned that "extreme or patently abusive" searches might not be. 414 U.S. at 227-236, 94 S.Ct. at 473-77. United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), authorized warrantless searches of the clothing of arrestees who were confined overnight. As in Robinson, the court in Edwards reaffirmed that custodial searches incident to arrest must be reasonable. Neither Robinson nor Edwards specifically addressed "the circumstances in which a strip search of an arrestee may or may not be appropriate." Illinois v. Lafayette, 462 U.S. at 646 n.2, 103 S.Ct. at 2609 n.2.

Fann v. City of Cleveland, 616 F.Supp. 305, 310-311 (D.C. Ohio 1985).

The United States Supreme Court's opinion in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), is the seminal strip search case. In *Bell*, the Court held that strip and visual body cavity searches may, in certain instances, be conducted on inmates with less than probable cause.

> The application of the Fourth Amendment to warrantless strip searches has been developed largely in cases involving such searches in prisons and in schools. In Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Supreme Court held that visual body cavity inspections during strip searches of pre-trial detainees and convicted prisoners after they had contact with outsiders were not "unreasonable" searches under the Fourth Amendment. The searches were conducted at the "federally operated short-term custodial facility in New York City designed primarily to house pretrial detainees." Id. at 523, 99 S.Ct. 1861. The Court stated that applying "[t]he test of reasonableness under the Fourth Amendment... [i]n each case ...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, 99 S.Ct. 1861. It pointed out 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." Id.

Reynolds v. City of Anchorage, 379 F.3d 358, 362 (6th Cir. 2004).

> Despite holding that particular policy constitutional, *Bell* did not validate a blanket policy of strip searching pretrial detainees. Rather, *Bell* held that pretrial detainees retain constitutional rights, including the Fourth Amendment's protection against unreasonable searches and seizures, which are subject to limitations based on the fact of confinement and the institution's need to maintain security and order.

Calvin v. Sheriff of Will County, --- F.Supp.2d ----, 2005 WL 3446194, *4 (N.D. Ill. 2005) (citations omitted).

> Courts, beginning with *Bell,* have consistently held that institutional security is a legitimate law enforcement objective, and may provide a compelling reason for a strip search absent reasonable suspicion of individualized wrongdoing. Courts have given prisons latitude to premise searches on the type of crime for which an inmate is arrested. When the inmate has been charged with only a misdemeanor or traffic violation, crimes not generally associated with weapons or contraband, however, courts have required that officers have a reasonable suspicion that the individual inmate is concealing contraband.

Id. at *5 (citation omitted).

Misdemeanor Arrestees

Reference Number: CTAS-1357

Under the law regarding strip searches of persons arrested on a misdemeanor charge it is well established that the Fourth Amendment requires that strip and visual body cavity searches must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons.

In *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989), the Sixth Circuit Court of Appeals held that "authorities may not strip search persons arrested for traffic violations and nonviolent minor offenses solely because such persons ultimately will intermingle with the general population at a jail when there [are] no circumstances to support a reasonable belief that the detainee will carry weapons or other contraband into the jail." *Id*. at 1255.

> It is objectively reasonable to conduct a strip search of one charged with a crime of violence before that person comes into contact with other inmates. There is an obvious threat to institutional security. However, normally no such threat exists when the detainee is charged with a traffic violation or other nonviolent minor offense.
>
> The decisions of all the federal courts of appeals that have considered the issue reached the same conclusion: a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence and concerning whom there is no individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband, is unreasonable.

Id. *See, e.g., Skurstenis v. Jones*, 236 F.3d 678, 682 (11th Cir. 2000) (holding jail policy violated the Fourth Amendment because it did not require reasonable suspicion as a predicate to strip searching newly admitted detainees); *Shain v. Ellison*, 273 F.3d 56, 64-66 (2d Cir. 2001) (holding county's policy of conducting strip searches of misdemeanor arrestees remanded to local jail following arraignment, absent reasonable suspicion that arrestees were carrying contraband or weapons, violated the Fourth Amendment); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (holding that the Fourth Amendment precludes jail 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 based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053, 105 S.Ct. 2114, 85 L.Ed.2d 479 (1985) (holding jail policy requiring all persons booked into the county jail to be strip searched unconstitutional); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (holding city's policy of subjecting women, but not men, who had been arrested and detained on misdemeanor charges, to a strip search regardless of the charges against them or whether detention officers had any reasonable suspicion that a particular woman was concealing weapons or contraband, violated the Fourth Amendment); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981)

(holding indiscriminate strip search policy routinely applied to all detainees cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations); *Tinetti v. Wittke*, 620 F.2d 160 (7th Cir. 1980) (per curiam) (holding strip searches of persons arrested and detained overnight for non-misdemeanor traffic offenses without probable cause to believe that detainees are concealing contraband or weapons on their bodies are unconstitutional). *But see Dobrowolskyj v. Jefferson County*, 823 F.2d 955 (6th Cir.1987) (holding that a pretrial detainee's Fourth Amendment rights were not violated when he was searched immediately before being transferred to a situation where he would have contact with the general prison population); *Evans v. Stephens,* 407 F.3d 1272, 1278 (11th Cir. 2005) (en banc) ("Most of us are uncertain that jailers are required to have reasonable suspicion of weapons or contraband before strip searching-for security and safety purposes-arrestees bound for the general jail population. Never has the Supreme Court imposed such a requirement.").

In other situations, at least one court has found that it is not *per se* unconstitutional to strip search pretrial detainees charged with minor, nonviolent offenses. In *Richerson v. Lexington Fayette Urban County Gov't*, 958 F.Supp. 299, (E.D. Ky. 1996), the federal district court, while noting that a blanket policy allowing strip searches of all pretrial detainees during the booking/intake process, including those detained on minor misdemeanor charges or traffic offenses, is unconstitutional, held:

> [W]here pretrial detainees, including those charged with minor, nonviolent offenses, are kept in a detention center's general population prior to arraignment, and are thereafter ...put in a position where exposure to the general public presents a very real danger of contraband being passed to a detainee, a policy of strip searching the detainees upon their return from the courthouse and prior to their being placed back in the general population of the detention center is both justified and reasonable. The detention center's legitimate security interests outweigh the detainees' privacy interests in such a situation.

Id. at 307. *See also Black v. Franklin County*, 2005 WL 1993445 (E.D. Ky. 2005).

Felony Arrestees

Reference Number: CTAS-1358

It is unclear whether the strip search of an arrestee charged with a felony offense is *per se* constitutional when it is based solely on the offense charged (i.e., absent a reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband.) In one case, the Sixth Circuit Court of Appeals, the circuit under which Tennessee falls, found that the strip search of a felony arrestee was constitutional even though reasonable suspicion was lacking. However, other federal circuits do not agree and this issue has not been decided by the United States Supreme Court.

In *Dufrin v. Spreen*, 712 F.2d 1084 (6th Cir. 1983), the court held that the visual body cavity search conducted at a county jail by a female jailer did not violate the Fourth Amendment rights of a female inmate who had been arrested for felonious assault. Finding the search constitutional, the court noted: "It is enough here that (a) the arrestee was formally charged with a felony involving violence, (b) that her detention was under circumstances which would subject her potentially to mingle with the jail population as a whole, and (c) that the search actually conducted was visual only, and was carried out discreetly and in privacy." *Id*. at 1089.

In *Black v. Franklin County*, 2005 WL 1993445 (E.D. Ky. 2005), the district court found that the strip search of an arrestee did not violate the constitutional rights of the arrestee who was charged with driving on a suspended license, possession of a controlled substance in the first degree, and possession of a controlled substance in the third degree. *Id*. at *9.

Both the First and Fifth Circuit Courts of Appeal have approved of strip searches based upon the nature of the crime charged. *See Roberts v. Rhode Island,* 239 F.3d 107, 112 (1st Cir. 2001) ("The reasonable suspicion standard may be met simply by the fact that the inmate was charged with a violent felony."); *Watt v. City of Richardson Police Dep't*, 849 F.2d 195, 198 (5th Cir. 1988) ("Reasonableness under the fourth amendment must afford police the right to strip search arrestees whose offenses posed the very threat of violence by weapons or contraband drugs that they must curtail in prisons."). *Cf. Giles v. Ackerman,* 746 F.2d 614, 617 (9th Cir. 1984) ("Reasonable suspicion may be based on such factors as the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record.").

In contrast, the Ninth Circuit Court of Appeals, in *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702 (9th Cir.1990) (as amended), found the Los Angeles Police Department's blanket policy of performing strip and body cavity searches on all felony arrestees was unconstitutional. However, the court noted that a body cavity search could be justified where officials had "reasonable suspicion" to conduct a particular search. *Id*. at 715. *See also Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991) (Applying *Kennedy*, the court again found that the policy of the Los Angeles Police Department to subject all felony arrestees to

strip/visual body cavity searches was unconstitutional.).

One federal district court has held that it is unconstitutional to strip search arrestees charged with a nonviolent, nonweapon, nondrug felony offense, absent a reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband. *Tardiff v. Knox County*, 397 F.Supp.2d 115 (D. Me. 2005).

> While the First Circuit has not directly addressed the appropriate test for the validity of a strip search during the booking process at a local jail and incident to a felony arrest, this Court concludes that, with respect to detainees charged with a non-violent, non-weapon, non-drug felony, the particularized reasonable suspicion test is applicable, rather than strip searches of all felony arrestees being authorized based solely on the fact that they had been arrested on a charge categorized under state law as a felony. *Swain,* 117 F.3d at 7 ("[I]t is clear that at least the reasonable suspicion standard governs strip and visual body cavity searches in the arrestee context...."). This conclusion is based in part on the First Circuit's clear statements about constitutional protections applicable to individuals who are the subject of a governmentally initiated strip search. The law in this Circuit does not countenance a policy permitting strip searches of all non-violent, non-weapon, non-drug felony detainees upon arrival at a local correctional facility simply because they stand accused of a felony. The distinction between felony and misdemeanor detainees alone fails to address the likelihood that a detainee would be concealing drugs, weapons, or other contraband. *See Tennessee v. Garner,* 471 U.S. 1, 14, 105 S.Ct. 1694, 85 L.Ed.2d 1, (1985) ("[T]he assumption that a 'felon' is more dangerous than a misdemeanant [is] untenable."). Moreover, a non-violent, non-weapon, non-drug felony charge fails to create a presumption of reasonable suspicion required to perform a strip search.
>
> Though the crime for which a detainee is charged is an important factor for consideration, it does not independently establish reasonable suspicion necessary under the Fourth Amendment. Officers should evaluate whether the crime charged involves violence, drugs, or some other feature from which an officer could reasonably suspect that an arrestee was hiding weapons or contraband as well as other factors like the circumstances of the arrest and the particular characteristics of the arrestee. When these factors are considered, it is possible that the strip search of many accused felons may be legitimate. Nevertheless, strip searching all individuals charged with felony crimes that do not involve violence, weapons, or drugs as part of the booking process at a local jail is unconstitutional.

Id. at 130-131. *See also Dodge v. County of Orange*, 282 F.Supp.2d 41, 85 (S.D. N.Y. 2003), *app. dismissed, case remanded on other grounds,* 103 Fed.Appx. 688, 2004 WL 1567870 (2d Cir. 2004) (finding county policy was unconstitutional insofar as it called for strip searching all newly-admitted detainees arrested on suspicion of a felony); *Sarnicola v. County of Westchester*, 229 F.Supp.2d 259, 270 (S.D. N.Y.2002) (holding that the mere arrest for felony drug charges does not permit strip search absent reasonable suspicion that the individual is secreting drugs or other contraband within body cavities).
