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Felony Arrestees

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Sincerely,

The University of Tennessee
County Technical Assistance Service
226 Anne Dallas Dudley Boulevard, Suite 400
Nashville, Tennessee 37219
615.532.3555 phone
615.532.3699 fax
www.ctas.tennessee.edu

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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 misdemeanor [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).

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