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Monitoring of Inmates by Guards of the Opposite Sex

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Sincerely,

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Monitoring of Inmates by Guards of the Opposite Sex

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Pursuant to state regulations, facilities that are used for the confinement of females must have a trained female officer on duty or on call when a female is confined in the facility to perform the following functions: (1) searches, and (2) health and welfare checks. Rules of the Tennessee Corrections Institute, Rule 1400-1-.16(5).

Numerous courts "have viewed female inmates' privacy rights vis-a-vis being monitored or searched by male guards as qualitatively different than the same rights asserted by male inmates vis-a-vis female prison guards." *Colman v. Vasquez*, 142 F.Supp.2d 226, 232 (D. Conn. 2001) (Female inmate assigned by prison to special unit for victims of sexual abuse retained limited right to bodily privacy under Fourth Amendment, and thus could maintain an action against prison officials for subjecting her to pat down search by male guards based on violations of Fourth Amendment.). *See also Hill v. McKinley,* 311 F.3d 899, 904 (8th Cir. 2002) ("Thus, we hold that Hill's Fourth Amendment rights were violated when the defendants allowed her to remain completely exposed to male guards for a substantial period of time after the threat to security and safety had passed."); *Jordan v. Gardner,* 986 F.2d 1521, 1530-1531 (9th Cir. 1993) (en banc) (holding that the prison's policy, which required male guards to conduct random, nonemergency, suspicionless clothed body searches on female prisoners, constituted cruel and unusual punishment in violation of the Eighth Amendment); *Lee v. Downs*, 641 F.2d 1117, 1120 (4th Cir.1981) (upholding jury verdict for violation of privacy interests of female inmate who was forced to undress in the presence of male guards).

The United States Supreme Court has held that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *See Hudson v. Palmer*, 468 U.S. 517, 526-528, 104 S.Ct. 3194, 3200-3201, 82 L.Ed.2d 393 (1984) (upholding, against Fourth Amendment challenge, a policy permitting random cell searches) ("A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.").

At least one court has construed *Hudson* as holding categorically that the Fourth Amendment does not protect privacy interests within prisons. In *Johnson v. Phelan,* 69 F.3d 144 (7th Cir.1995), *cert. denied,* 519 U.S. 1006, 117 S.Ct. 506, 136 L.Ed.2d 397 (1996), the Seventh Circuit Court of Appeals held that "the [F]ourth [A]mendment does not protect privacy interests within prisons." *Id*. at 150. The court found that permitting female guards to monitor naked male inmates does not violate the inmates' privacy rights and does not constitute cruel and unusual punishment so long as the monitoring policy has not been adopted to humiliate or harass the inmate. *Id*. at 145-150. *See also Canedy v. Boardman*, 16 F.3d 183 (7th Cir.1994), which holds that a right of privacy limits the ability of wardens to subject men to body searches by women, or the reverse. *But see Peckham v. Wisconsin Dept. of Corrections*, 141 F.3d 694, 697 (7th Cir.1998) (narrowing *Johnson v. Phelan*, rejecting interpretation of *Canedy* and *Johnson* that Fourth Amendment does not apply to prisoners).

In 1993, the Ninth Circuit Court of Appeals observed that "prisoners' legitimate expectations of bodily privacy from persons of the opposite sex are extremely limited" and that, while inmates "may have protected privacy interests in freedom from cross-gender clothed body searches, such interests have not yet been judicially recognized. *Jordan v. Gardner,* 986 F.2d 1521, 1524-1525 (9th Cir. 1993) (en banc). However, the court held that the prison's policy, which required male guards to conduct random, nonemergency, suspicionless clothed body searches on female prisoners, constituted cruel and unusual punishment in violation of the Eighth Amendment. *Id*. at 1530-1531.

In *Somers v. Thurman*, 109 F.3d 614 (9th Cir. 1997), the Ninth Circuit considered a male inmate's claim that his Fourth and Eighth Amendment rights were violated when he was subjected to routine visual body cavity searches by female guards and when female guards watched him showering naked. At the outset, the court noted that "we have never held that a prison guard of the opposite sex cannot conduct routine visual body cavity searches of prison inmates ... [n]or have we ever held that guards of the opposite sex are forbidden from viewing showering inmates." *Id*. at 620. The court held that the guards were entitled to qualified immunity on the plaintiff's Fourth Amendment claim. Rejecting the Fourth Amendment claim the court stated: "Thus, it is highly questionable even today whether prison inmates have a Fourth Amendment right to be free from routine unclothed searches by officials of the opposite sex, or from viewing of their unclothed bodies by officials of the opposite sex. Whether or not such a right exists, however, there is no question that it was not clearly established at the time of the alleged conduct." *Id*. at 622. The court also rejected the inmates Eighth Amendment claim noting that "[c]ross-gender searches 'cannot be called inhumane and therefore do[ ] not fall below the floor set by the objective component of

the [E]ighth [A]mendment.'" *Id*. at 623 (citation omitted). The court distinguished *Somers* from *Jordan* by noting that the "psychological differences between men and women," ... "may well cause women and especially physically and sexually abused women, to react differently to searches of this type than would male inmates subjected to similar searches by women." *Id*.

In *Carlin v. Manu*, 72 F.Supp.2d 1177 (D. Or. 1999), female inmates in the state prison brought an action against male correctional officers alleging that skin searches performed on the female inmates in the presence of the male officers violated their Fourth and Eighth Amendment rights. The district court held that the male correctional officers were entitled to qualified immunity on the female inmates' claims that skin searches by female correctional officers in the presence of the male officers violated their Fourth and Eighth Amendment rights, since observation by male guards during strip searches of female inmates was not clearly identified as unlawful under existing constitutional law. Significant to the court's holding were the facts that although the male guards looked at female inmates they did not touch them, and the observation was an isolated event occasioned by emergency removal of female inmates to a male prison. The court concluded "that while precedent indicates that it is possible the Court of Appeals might in the future recognize a right by female inmates to be free from the presence of and viewing by male guards while they were being strip searched, that right is not now, and was not in February 1996, a 'clearly established' one which would foreclose the defendants from qualified immunity." *Id*. at 1178.

Other courts, including the Sixth Circuit, have concluded that inmates retain limited rights to bodily privacy under the Fourth Amendment. In *Cornwell v. Dahlberg,* 963 F.2d 912, 916 (6th Cir.1992) the Sixth Circuit noted that it has joined other circuits "in recognizing that a convicted prisoner maintains some reasonable expectations of privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than those enjoyed by non-prisoners." The court held that "in challenging the conditions of his outdoor strip search before several female OSR correctional officers, Cornwell raised a valid privacy claim under the Fourth Amendment ..." *Id*. The court based its conclusion on the Fourth Amendment but without mentioning *Hudson*. *See also Everson v. Michigan Dept. of Corrections*, 391 F.3d 737, 757 (6th Cir. 2004).

In an earlier case the Sixth Circuit did cite *Hudson* and noted that the United States Supreme Court has never held that the Fourth Amendment "right to privacy" encompasses the right to shield one's naked body from view by members of the opposite sex. *Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir.1987). Nevertheless, the court concluded "that there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex." *Id*. The court went on to hold that "assuming that there is some vestige of the right to privacy retained by state prisoners and that this right protects them from being forced unnecessarily to expose their bodies to guards of the opposite sex, the instant complaint did state a constitutional claim upon which relief can be granted." The court also held that the male inmate had stated a claim under the Eighth Amendment by alleging that female prison guards had allowed themselves unrestricted views of his naked body in the shower, at close range and for extended periods of time, to retaliate against, punish and harass him for asserting his right to privacy. *Id*. at 1227-1228.

In a more recent case, the Sixth Circuit held that the accidental viewing of a female pretrial detainee's bare breasts by a male jailer while she was being searched by two female jailers did not violate the Fourth Amendment in the absence of any evidence that either the normal search policy was unconstitutional or that it was carried out in an unconstitutional manner. *Mills v. City of Barbourville*, 389 F.3d 568, 578-579 (6th Cir. 2004). However, the court noted that "[a]s to jail employees of the opposite gender viewing prison inmates or detainees, we have recognized that a prison policy forcing prisoners to be searched by members of the opposite sex or to be exposed to regular surveillance by officers of the opposite sex while naked--for example while in the shower or using a toilet in a cell--would provide the basis of a claim on which relief could be granted." *Id*. *See also Roden v. Sowders*, 84 Fed.Appx. 611 (6th Cir. 2003) (Strip search of male prisoner in the presence of female sergeant did not violate prisoner's Fourth Amendment privacy rights or Eighth Amendment rights. Search was reasonable under the circumstances and was reasonably related to the legitimate penological interest of security and order.); *Henning v. Sowders*, 19 F.3d 1433 (Table) (6th Cir. 1994) (Involuntary body cavity search of female inmate in the presence of male officers did not violate prisoner's Fourth Amendment privacy rights and was reasonably related to the legitimate penological interests of safety and security.); *Rose v. Saginaw County*, 353 F.Supp.2d 900 (E.D. Mich. 2005) (Jail policy of taking all the clothing from detainees confined in administrative segregation violates the Fourth and Fourteenth Amendments of the Constitution based upon the facts of the case.); *Wilson v. City of Kalamazoo*, 127 F.Supp.2d 855 (W.D. Mich. 2000) (Detaining arrestee in jail without any clothing or covering, with limited exposure to viewing by members of the opposite sex, violates detainee's right of privacy under the Fourth Amendment. The removal of detainee's underclothing was not adequately justified even if they were removed as a suicide prevention measure.); *Johnson v. City of Kalamazoo*, 124 F.Supp.2d 1099 (W.D. Mich. 2000) (Stripping male pretrial detainees to their

underwear after detainees refused to answer intake question as to whether they were suicidal did not violate detainees' right of privacy under Fourth Amendment, even though disrobing occurred in presence of female officers.).

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