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Visitation

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Sincerely,

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Visitation

Reference Number: CTAS-1412

Pursuant to state regulations, the jail must have a written policy defining the facility's visitation policies. State regulations require that each prisoner be allowed one hour of visitation each week, that prisoners submit a list of visitors, and that prisoners be allowed to visit with their children. Visitors shall register before being admitted to the facility and may be denied admission for refusal to register, for refusal to consent to a search, or for any violation of posted institutional rules. Probable cause must be established in order to do a strip or body cavity search of a visitor. When probable cause exists, the search must be documented. Rules of the Tennessee Corrections Institute, Rule 1400-1-.11 (8).

Regulation of Inmate Visitation

Reference Number: CTAS-1413

Convicted prisoners "have no absolute, unfettered constitutional right to unrestricted visitation with any person, regardless of whether that person is a family member or not. Rather, visitation privileges are subject to the discretion of prison officials." *Bazzetta v. McGinnis*, 902 F.Supp. 765, 769 (E.D. Mich. 1995), *aff'd*, 124 F.3d 774 (6th Cir. 1997) (citations omitted) (upholding regulations restricting visitation by minors to children, stepchildren, or grandchildren of prisoners and the overall number of visitors a prisoner may see to 10). *See also Spear v. Sowders*, 71 F.3d 626, 629-30 (6th Cir. 1995) ("It is clear that a prisoner does not have a due process right to unfettered visitation .... A fortiori, a citizen simply does not have a right to unfettered visitation of a prisoner that rises to a constitutional dimension.") (citations omitted).

The United States Supreme Court has recognized that "[t]he very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner." *Overton v. Bazzetta*, 539 U.S. 126, 131, 123 S.Ct. 2162, 2167, 156 L.Ed.2d 162 (2003). Prison inmates retain only those constitutional rights that are consistent with their status as prisoners or with the legitimate penological objectives of the corrective system. The "freedom of association is among the rights least compatible with incarceration. Some curtailment of that freedom must be expected in the prison context." *Id*.

In *Overton*, the United States Supreme Court addressed prison regulations affecting prisoners' visitation privileges. The regulations in question excluded minor nieces and nephews and children as to whom parental rights had been terminated from noncontact visitation of inmates, required children who were authorized to visit to be accompanied by an adult family member or legal guardian, prohibited inmates from visiting with former inmates, and subjected inmates with two substance-abuse violations to a ban of at least two years on future visitation. The Supreme Court held that the challenged regulations did not violate the prisoners' constitutional rights under the First and Eighth Amendments or violate their 14th Amendment substantive due process rights.

> Turning to the restrictions on visitation by children, we conclude that the regulations bear a rational relation to MDOC's valid interests in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury. The regulations promote internal security, perhaps the most legitimate of penological goals, by reducing the total number of visitors and by limiting the disruption caused by children in particular. Protecting children from harm is also a legitimate goal.
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> To reduce the number of child visitors, a line must be drawn, and the categories set out by these regulations are reasonable. Visits are allowed between an inmate and those children closest to him or her - children, grandchildren, and siblings. The prohibition on visitation by children as to whom the inmate no longer has parental rights is simply a recognition by prison administrators of a status determination made in other official proceedings.
>
> As for the regulation requiring children to be accompanied by a family member or legal guardian, it is reasonable to ensure that the visiting child is accompanied and supervised by those adults charged with protecting the child's best interests.

Id. at 133, 123 S.Ct. at 2168 (citations omitted).

> MDOC's regulation prohibiting visitation by former inmates bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes. We have recognized that "communication with other felons is a potential spur to criminal behavior."

Id. at 133-134, 123 S.Ct. at 2168 (citations omitted).

> Finally, the restriction on visitation for inmates with two substance-abuse violations, a bar which may be removed after two years, serves the legitimate goal of deterring the use of drugs and alcohol within the prisons. Drug smuggling and drug use in prison are intractable problems. Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose. In this regard we note that numerous other States have implemented similar restrictions on visitation privileges to control and deter substance-abuse violations.

Id. at 134, 123 S.Ct. at 2168-2169 (citations omitted).

In addition, the court found that the two-year ban on visitation for inmates with two substance-abuse violations did not violate the Eighth Amendment prohibition against cruel and unusual punishment.

> The restriction undoubtedly makes the prisoner's confinement more difficult to bear. But it does not, in the circumstances of this case, fall below the standards mandated by the Eighth Amendment. Much of what we have said already about the withdrawal of privileges that incarceration is expected to bring applies here as well. Michigan, like many other States, uses withdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline. This is not a dramatic departure from accepted standards for conditions of confinement. Nor does the regulation create inhumane prison conditions, deprive inmates of basic necessities, or fail to protect their health or safety. Nor does it involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur.

Id. at 136-137, 123 S.Ct. at 2170 (citations omitted).

In *Bazzetta v. McGinnis*, 423 F.3d 557 (6th Cir. 2005), the Sixth Circuit, addressing the same substance abuse regulation addressed in *Overton*, found that the regulation did not, on its face, violate the inmates' 14th Amendment procedural due process rights. The Sixth Circuit noted that "although the issue was not directly before the *Overton* Court, Court precedent and dictum has signaled against our finding a liberty interest on the face of the substance abuse regulation." *Id*. at 565. The Sixth Circuit found that the *Overton* Court had "foreclosed a facial procedural due process challenge under the standard set forth in" *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). *Id*. The court noted, however, that the Supreme Court's decision in *Overton* did not preclude individual prisoners from challenging a particular application of the substance abuse regulation on First Amendment, Eighth Amendment or 14th Amendment grounds.

In *Wirsching v. Colorado,* 360 F.3d 1191, 1198-1201, 1205 (10th Cir. 2004), the Tenth Circuit, applying *Overton*, held that prison officials did not violate a convicted sex offender's familial association and due process rights by refusing to allow prison visits by his daughter due to his refusal to comply with requirements of the prison's treatment program for sex offenders, and "that visitation with a particular person does not constitute basic necessity, the denial of which would violate the Eighth Amendment."

In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 1884-1885, 60 L.Ed.2d 447 (1979), the Supreme Court considered whether it was permissible to conduct warrantless strip and body cavity searches of prisoners and pretrial detainees on less than probable cause after contact with outside visitors. The court held that requiring inmates to submit to a visual bodycavity search after every contact visit with a person outside the institution did not violate the Fourth Amendment.

> The Fourth Amendment prohibits only unreasonable searches and under the circumstances, we do not believe that these searches are unreasonable.
>
> 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 in this record and in other cases.

441 U.S. at 558-559, 99 S.Ct. at 1884-1885. *See also Wood v. Hancock County Sheriff's Dept*., 2003 WL 23095279 (1st Cir. 2003) (Except in atypical circumstances, a blanket policy of strip searching inmates after contact visits is constitutional.).

In *Block v. Rutherford*, 468 U.S. 576, 588, 104 S.Ct. 3227, 3234, 82 L.Ed.2d 438 (1984), the Supreme Court found that a county jail's blanket prohibition of contact visits between pretrial detainees and their spouses, relatives, children, and friends was an entirely reasonable nonpunitive response to the legitimate security concerns identified in the case and was consistent with the 14th Amendment.

Monitoring Inmate Conversations

Reference Number: CTAS-1414

Jail administrators may monitor and record an inmate's conversations with visitors. "[T]o say that a

public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument.... In prison, official surveillance has traditionally been the order of the day." *Lanza v. New York*, 370 U.S. 139, 143, 82 S.Ct. 1218, 1220-1221, 8 L.Ed.2d 384 (1962).

In *United States v. Hearst*, 563 F.2d 1331, 1344 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed.2d 90 (1978), the defendant challenged the secret recording of a conversation between herself and her visitor, which took place in the jail visiting room over a telephone-like communication system while the two looked at each other through a bulletproof glass window. The conversation was monitored and recorded through a switchboard-type device operated by a deputy sheriff pursuant to an established jail policy to watch for security problems within the jail. The Ninth Circuit Court of Appeals stated:

> An intrusion by jail officials pursuant to a rule or policy with a justifiable purpose of imprisonment or prison security is not violative of the Fourth Amendment. Under this rule, a prisoner is not deprived of all Fourth Amendment protections; the rule recognizes, however, the government's weighty, countervailing interests in prison security and order.

*Id.*at 1345 (citations omitted). As a result, the court found that the defendant's Fourth Amendment rights had not been violated and noted that the government "adequately established that its practice of monitoring and recording prisoner-visitor conversations was a reasonable means of maintaining prison security." *Id.* at 1346. *See also Christman v. Skinner*, 468 F.2d 723, 726 (2d Cir. 1972) (Monitoring county jail inmate's conversations with visitors violated no right of privacy possessed by inmate.); *Rodriguez v. Blaedow*, 497 F.Supp. 558, 559 (E.D. Wis. 1980) ("[A]n inmate's right of privacy is not violated when prison officials monitor his conversations with visitors."); *State v. McKercher*, 332 N.W.2d 286 (S.D. 1983) ("The United States Supreme Court has stated, however, that prisoners' constitutional rights are subject to some restrictions. These restrictions allow jail officials to monitor and record conversations between detainees and their visitors for security reasons and to use the conversation as evidence against the detainee without violating the Fourth Amendment."); *People v. Clark*, 466 N.E.2d 361, 365 (Ill. App. 1984) (holding that the defendant had no reasonable expectation of privacy in his conversation with another detainee in jail where electronic monitoring system was designed and used to maintain safety at jail); *People v. Myles*, 379 N.E.2d 897, 936 (Ill. App. 1978) ("It has also been held that there is no reasonable expectation of privacy in an ordinary jailhouse conversation between spouses.").

Likewise, in *United States v. Peoples*, 71 F.Supp.2d 967, 978 (W.D. Mo. 1999), the district court found that the visitor of prisoner did not have a reasonable expectation of privacy in conversations with the prisoner or in telephone calls involving the prisoner necessary to support a claim that his Fourth Amendment rights were violated when the prison recorded the conversations as part of a general recording program undertaken to maintain prison safety and order by reducing the flow of contraband into prison.

Regulation of Visitors

Reference Number: CTAS-1415

"[A] citizen simply does not have a right to unfettered visitation of a prisoner that rises to a constitutional dimension. In seeking entry to such a controlled environment, the visitor simultaneously acknowledges a lesser expectation of privacy." *Spear v. Sowders*, 71 F.3d 626, 630 (6th Cir. 1995) (citations omitted). *See also Gray v. Bruce*, 26 Fed.Appx. 819, 824 (10th Cir. 2001) (Neither prisoners nor their visitors have a constitutional right to unfettered visitation.); *Johnson v. Medford*, 208 F.Supp.2d 590, 592 (W.D. N.C. 2002) ("Moreover, it is well settled that neither prisoners nor their would-be visitors have a constitutional right to prison visitation.").

Individuals who wish to visit inmates are subject to jail visitation policies and regulations**.** "Prison authorities have both the right and the duty by all reasonable means to see to it that visitors are not smuggling weapons or other objects which could be used in an effort to escape or to harm other prisoners. They have a duty to intercept narcotics and other harmful contraband." *Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977). For similar language, *see Roach v. Kligman*, 412 F.Supp. 521, 525 (E.D. Pa. 1976); *Seale v. Manson*, 326 F.Supp. 1375, 1379 (D. Conn. 1971).

> Prison officials are responsible for the safety and security of inmates, employees and visitors of their institutions. They have a great deal of discretion in establishing policies and rules which further the penological purposes of safety and security. It is well established that visitation of prisoners is subject to regulation. Spear v. Sowders, 71 F.3d 626, 630 (6th Cir. 1995). Persons who seek to enter a prison in order to visit an inmate do not have unfettered rights to such visitation. Id. Where visitors' interests may be affected by prison limitations on visits, courts have generally "'[struck] the balance in favor of institutional security,' and accorded great weight to the

> 'professional expertise of corrections officials.'" Id. (citations omitted).
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> [B]ecause of the need for prison security, visitors do not have the same right of unimpeded access to prisoners, without government scrutiny, that they would have to persons in society outside prison.... [T]he government's power to intrude depends on the fact that the person insists on access. Id. at 630, 632.
>
> Similarly, an inmate's family member has no constitutional right to contact visitation, including no First Amendment right of association. Bazze*tta v. McGinnis,* 124 F.3d 774, 779 (6th Cir. 1997).

Boles v. Tennessee Dept. of Correction, 2001 WL 840283, *3 (Tenn. Ct. App. 2001) (upholding policy imposing behavior requirements on children who are brought to visit incarcerated individuals).

> The natural extension of this principle is that prison authorities have much greater leeway in conducting searches of visitors. Visitors can be subjected to some searches, such as a pat-down or a metal detector sweep, merely as a condition of visitation, absent any suspicion. However, because a strip and body cavity search is the most intrusive search possible, courts have attempted to balance the need for institutional security against the remaining privacy interests of visitors. Those courts that have examined the issue have concluded that even for strip and body cavity searches prison authorities need not secure a warrant or have probable cause. However, the residual privacy interests of visitors in being free from such an invasive search requires that prison authorities have at least a reasonable suspicion that the visitor is bearing contraband before conducting such a search.

Spear v. Sowders, 71 F.3d 626, 630 (6th Cir. 1995) (citations omitted).

In *Spear*, the Sixth Circuit observed that the law is clearly established that the Fourth Amendment requires reasonable suspicion before authorizing a body cavity search of a prison visitor. *Id*.

> Reasonable suspicion does not mean evidence beyond a reasonable doubt, or by clear and convincing evidence, or even by a preponderance of the evidence. Reasonable suspicion is not even equal to a finding of probable cause. Rather, reasonable suspicion requires only specific objective facts upon which a prudent official, in light of his experience, would conclude that illicit activity might be in progress.
>
> The Supreme Court has examined the definition of reasonable suspicion on several occasions. Each time, the Court has made it clear that "[r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is *less reliable* than that required to show probable cause."

Id. at 631, *citing Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 2416, 110 L.Ed.2d 301 (1990) (emphasis added). *Accord State v. Putt*, 955 S.W.2d 640, 646 (Tenn. Crim. App. 1997) (We take this opportunity to note that had the defendant been subjected to a strip search or a body cavity search, our analysis would not be the same. A reasonable suspicion standard generally applies to these types of searches and nothing in this opinion shall be construed to hold otherwise.) (citations omitted). *But see Laughter v. Kay*, 986 F.Supp. 1362, 1374 (D. Utah 1997) (Due to the level of intrusiveness, "manual body cavity search" must be based upon the more stringent "probable cause" standard, rather then "reasonable suspicion" standard.).

It is important to note that, while a strip search or a body cavity search of a visitor can be sustained based upon a reasonable suspicion alone, the person to be subjected to such an invasive search must be given the opportunity to depart. *Spear* at 632. Moreover, pursuant to state regulations, probable cause must be established in order to do a strip or body cavity search of a visitor. Rules of the Tennessee Corrections Institute, Rule 1400-1-.11 (8).

It has been held, however, that vehicle searches on prison property are constitutional under the state and federal constitutions despite the fact that they are conducted without a warrant, probable cause, or reasonable suspicion. *State v. Putt*, 955 S.W.2d 640, 646 (Tenn. Crim. App. 1997). In *Putt*, the Court noted that people entering a correctional facility have a lesser expectation of privacy, that the state has a substantial interest in keeping drugs out of prisons, and that searching all incoming cars was a sufficiently reasonable method of preventing drugs from entering the facility. *Id*. at 645-646. Moreover, the court held that, based upon the facts of the case, the denial of the visitor's request to leave was not a violation of her constitutional rights. *Id*. at 647. *See also Neumeyer v. Beard*, 421 F.3d 210, 216 (3d Cir. 2005) (holding that prison policy of subjecting prison visitors' vehicles to random searches is reasonable, supportable as a special needs search, and hence constitutional despite the lack of individualized suspicion).

Subjecting a prison visitor to a noninvasive swab search using an ion spectrometer to test for drug residue

is not a per se violation of the visitor's Fourth Amendment right to be free from unreasonable searches when balanced against the state's interest in keeping drugs out of prisons. *Gray v. Bruce*, 26 Fed.Appx. 819, 823 (10th Cir. 2001).

Regulations that require visitors to identify themselves are not unconstitutional. *State v. Jackson*, 812 N.E.2d 1002, 1005 (Ohio App. 2004) ("This court finds that a regulation that requires prison visitors to identify themselves is, for security reasons, a reasonable regulation."). *See also Flournoy v. Fairman*, 897 F.Supp. 350, 352 (N.D. Ill. 1995) (finding policy requiring visitors to produce proper identification was reasonably related to the need to maintain internal security at the jail, unquestionably a legitimate governmental objective)

Prison administrators can enact regulations that restrict the number of visitors an inmate can have for purposes of maintaining institutional security. *Kikumura v. Hurley*, 242 F.3d 950, 957 (10th Cir. 2001) (finding that a prison regulation allowing pastoral visits only when the prisoner initiated the request and only when the clergy member was from the inmate's faith group was reasonably related to legitimate penological goals).

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