



March 12, 2025

Regulation of Visitors

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Sincerely,

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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).

[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. *Bazzetta 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 than "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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