98-06144

No. 98-6144

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SHARON MACILL, ET AL.,

Plaintiffs-Appellants,

v.

LEE COUNTY, ALABAMA, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF APPELLEES

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APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND ENTITIES

The undersigned counsel of record for Defendants-Appellees, certify that the following persons or entities have an interest in the outcome of this case:

1. Albritton, W. Harold, III - U. S. District Judge below;
2. Bennitt & Bufford, L.L.C. - law firm representing Plaintiffs-Appellants below;
3. Bennitt, Jeffrey W. – attorney for Appellants;
4. Harmon, Bart - attorney for Appellees;
5. Hudmon, Sherrer – Plaintiff-Appellant;
6. Magill, Sharon – Plaintiff-Appellant;

7. Webb & Eley, P.C., law firm representing Appellees;

8. Webb, Kendrick E. - attorney for Appellees.

This representation is made so that the judges of this Court may evaluate possible disqualification and recusal.

Kendrick E. Webb 1/6

KENDRICK E. WEBB - WEB022

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Attorneys for Defendants-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Appellees do not request to be heard orally on the issues as such are adequately addressed herein, but will participate if the Court deems oral argument necessary.

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STATEMENT REGARDING JURISDICTION

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II. WHETHER SHERIFF CHAPMAN WOULD HAVE BEEN ENTITLED TO QUALIFIED IMMUNITY, HAD THE DISTRICT COURT FOUND IT NECESSARY TO REACH THE ISSUE OF INDIVIDUAL LIABILITY?

III. WHETHER THE SEARCH POLICIES OF THE SHERIFF'S DEPARTMENT ARE NOT ATTRIBUTABLE TO THE LEE COUNTY, AS A MATTER OF LAW?

STATEMENT OF THE CASE

(i.) Proceedings below

Appellees adopt and incorporate by reference the Appellant's statement of the course of proceedings below, on page 8 of their brief.

(ii.) Statement of Facts

The following facts are undisputed and are set out in a light most favorable to the Appellants who were Plaintiffs below. These facts are substantially the same as those found by the district court on pages 3 through 7. R2-62-3 through 7. Appellees do not find the Appellants' statement of facts particularly objectionable except to the extent it omits many facts which gives proper context to the policy and the individual searches performed. All record references below are derived from a single document styled "Evidentiary Materials Supporting Defendants' Motion for Summary Judgment." R2-54. For simplicity sake, the referent R2-54 is not repeated for each record citation but that is the source of all materials cited below.

Lee County Detention Facility's General Policies and Procedures.

Sheriff Chapman and Chief Deputy and Jail Administrator Cary Torbert, Jr., are responsible for formulating jail policy at the Lee County

Detention Facility. Their general policy is contained in the jail's policy and procedure manual. With regard to inmate searches, a general jail policy can be found at Section 7, Title 7.05, which is entitled "Security; Searches". See R2-54-Exhibit B, ¶ 2; Deposition of Herman Chapman (hereafter "Exhibit E"), p. 5, ll. 2-9; Deposition of Jennifer Reason (hereafter "Exhibit F"), p. 7, ll. 12-23; p. 8, ll. 1-8.

As with all the jail policies, the written statement of policy is only a beginning point. The details of the practice and procedure are transmitted orally. See Exhibit B, ¶ 3. Aspects of the jail search policy not specifically covered by the written policy include the following:

All arrestees or inmates who enter the jail are subjected to a "pat down." See Exhibit B, ¶ 4(a); Deposition of Maxine Gline (hereafter "Exhibit G"), p. 22, ll. 3-6.

All inmates or pre-trial detainees who actually enter a jail cell should be subjected to a *limited* strip search or outer clothing search (as described below). Persons who have already obtained a bond for their release prior to their booking are not subjected to the limited strip search or clothing search described above.

Additionally, persons who are in the process of obtaining a bond (i.e., using the jail telephone to summon a bondsman) and who appear capable of arranging for the appropriate bond, may be allowed to remain outside a cell and normally would not be subjected to the limited strip search or clothing search described below. See Exhibit B, ¶ 4(b); Exhibit E, p. 18, ll. 21-23; p. 19, ll. 1-10; Exhibit F, p. 33, l. 23; p. 34, ll. 1-13; Exhibit G, p. 22, ll. 6-11; p. 23, ll. 13-18; p. 25, ll. 1-15; p. 37, ll. 4-11; p. 39, ll. 12-23; p. 40, ll. 1-22; p. 51, ll. 6-13; p. 54, ll. 7-23; p. 55, ll. 1-12.

The limited strip search or outer clothing search is conducted by an officer of the same sex in the "search room" to the left of the holding cells. The utmost respect should be given to the arrestee or inmate's privacy as is possible under the circumstances. The person being searched is required to move *only* their outer clothing and their shoes and socks. The person being searched should never be asked to remove their underwear, except when there is reasonable suspicion justifying a body cavity search as described in the written policy and when proper procedure is followed, as discussed in Exhibit B, paragraph 9.

The officer conducting the limited strip search stands in such a way as to block any view of the person being searched from those outside the

property/search room. The only window in the property room is a narrow, oblong window approximately three inches wide and thirty inches long. This window was originally built into the door of the search room when the jail was constructed in 1984, and it has not been changed. See Exhibit B, ¶ 4(c); Exhibit E, p. 14, ll. 2-6; p. 17, ll. 9-23; Exhibit F, p. 27, ll. 15-23; p. 28, ll. 1-9; p. 32, ll. 1-6; Exhibit G, p. 43, ll. 2-14.

No one is allowed to approach the door to the search room or stand in the hallway outside the search room in a manner which would permit them to observe a person being searched in the property room. At all times, a jail officer would be on duty in the control room and would prohibit any such attempted observation. Another arrestee, inmate, or trusty attempting such an observation would be disciplined appropriately. An employee attempting such observation would be disciplined appropriately, if not terminated. See Exhibit B, ¶ 5; Exhibit E, p. 16, ll. 4-10; Exhibit F, p. 33, ll. 6-19; p. 35, ll. 9-21.

Sheriff Chapman and Major Torbert established a policy of subjecting all inmates or arrestees entering a jail cell to a limited strip search because of their serious concerns about the safety and security of those persons inside the jail, including both Sheriff's Department employees and inmates.

Sheriff Chapman and Major Torbert have determined that the only way of preventing the introduction of contraband into the jail is to require a limited strip search of all those arrestees or inmates who will be placed in a cell. A pat-down search, although sufficient to discover large weapons or large items of contraband, is not sufficient to prevent the introduction of smaller weapons or smaller items of contraband into the jail. In formulating this policy, Sheriff Chapman and Major Torbert balanced the arrestee's entitlement to privacy with the need to provide security by requiring only a limited strip search, that is, one which requires the arrestee to remove their outer clothing only and allows the arrestee to leave on his or her underwear (briefs or boxers for male arrestees and panties and bra for female arrestees). Although the circumstances are obviously different, the level of undress required in this search is no greater than that observable at any beach or pool. See Exhibit B, ¶ 6; Exhibit E, p. 18, ll. 21-23; p. 19, ll. 1-10.

It has been the experience of Sheriff Chapman and Major Torbert at the jail that the pending charges and/or criminal history of an arrestee are not necessarily reliable indicators of whether the arrestee may attempt to introduce contraband into the jail. It has been their experience that those persons addicted to drugs (whether illegal drugs, prescription medications,

or legal intoxicants) have a tendency to attempt to introduce this contraband into the jail. Once inside the jail, the arrestee or other inmate may attempt to use these materials to become intoxicated or to harm himself or others. The very presence of these materials tends to create conflict as inmates fight over possession. Of course, any inmate or arrestee may attempt to bring a weapon into the cell which could be used to harm himself or others. Sheriff Chapman and Major Torbert have found that it is often first time offenders or weaker inmates, which have heard horror stories of inmate violence, who will try to smuggle in a weapon for their own protection. See Exhibit B, ¶ 7.

Sheriff Chapman and Major Torbert also decided that it was necessary to search not only the inmates going into the general population, but also those being placed in a holding cell. Sheriff Chapman and Major Torbert determined it was necessary to search those in the holding cells because they could just as well harm themselves or other inmates while in the holding cell as they could while they are back in the general population areas. Furthermore, because of the presence of trusties and incoming inmates in the area (including those serving meals), contraband could easily be passed from holding cells to the general population via inmates or trusties walking through the front area of the jail. See Exhibit B, ¶ 8.

Although the jail's policy does provide for full strip searches which include the search of body cavities when there is reasonable suspicion that such search is necessary, when the search is approved by the sheriff or chief deputy and when it is performed by medical personnel only (see written policy), Major Torbert never remembers a single time that anything beyond their limited strip search was actually conducted. In other words, Major Torbert does not recall a single instance where a person was required to remove anything more than their outer clothing. If this had ever happened, Major Torbert would or should know. See Exhibit B, ¶ 9; Exhibit E, p. 9, ll. 19-23; p. 10, ll. 1-19; p. 23, ll. 13-16; p. 23, ll. 22-23; p. 24, ll. 1-14; p. 32, ll. 18-20; Exhibit F, p. 19, ll. 12-23; p. 20, ll. 1-3; Exhibit G, p. 32, ll. 8-15, 23; p. 33, ll. 1-7; p. 34, ll. 15-23; p. 35, ll. 1-13; p. 37, ll. 17-22; p. 46, ll. 21-23; p. 47, ll. 1-23; p. 48, ll. 1-13.

If a member of the Lee County jail staff ever asked an arrestee to remove anything more than their outer clothing without following the policy on full strip search and body cavity searches, that staff member would be acting directly contrary to jail policy and would be disciplined appropriately, if not terminated. See Exhibit B, ¶ 10; Exhibit E, p. 24, ll. 15-22; p. 28, ll. 12-23; p. 29, ll. 1-8; Exhibit G, p. 32, ll. 1-7.

Major Torbert is regularly in the jail area and among inmates. Until the Magill-Hudmon lawsuit was filed, no one had ever, to his knowledge, even alleged that they were treated improperly while being searched before admission to the jail. See Exhibit B, ¶ 11; Exhibit E, p. 18, ll. 1-4; p. 20, ll. 6-8; p. 32, ll. 13-17 (no prior report of any improper strip searches).

Sharon C. Magill

Sharon Cantrell Magill, a forty-two year old female, was arrested during the early morning hours of June 3, 1996, at approximately 2:26 a.m. by State Trooper James D. Patterson in Opelika, Alabama, on U. S. Highway 280. Magill, who lives in Birmingham, Alabama, had been called by her friend, who was pregnant and going into labor, to come to Columbus, Georgia in order to assist her with her labor as her friend's husband was hesitant and didn't [sic] want to do labor." See Deposition of Sharon Magill (hereafter "Exhibit A"), p. 10, ll. 7-19. Magill was called by her friend on Friday night, June 2, 1996, around 11:00 p.m., and Magill left the restaurant in which she was having dinner to meet her friends in Opelika. See Exhibit A, p. 11, ll. 1-7. From 11:00 p.m. until she was arrested at 2:30 a.m., Magill had several beers, including those she had before she left Birmingham, see

Exhibit A, p. 13, ll. 11-14, a beer that she drank on the way from Birmingham to Opelika, id. at ll. 14-15, and a beer that she drank on the way from Opelika to Columbus, Georgia, which was purchased by Magill at a gas station in Opelika after she met her friends, Exhibit A, p. 13, ll. 16-22.

Magill and her friends, who were driving in a car ahead of Magill, were pulled over by State Trooper James Patterson for speeding. See Exhibit A, p. 12, ll. 2-5. After Magill and her friends had a discussion with State Trooper Patterson, he allowed her friends to return to their car to go on to the hospital; however, Trooper Patterson specifically instructed Magill not to leave as he felt that she had been drinking. Id. at p. 12, ll. 21-22; p. 13, ll. 1-7. Neither of Magill's friends had been drinking prior to this time. Id. at p. 18, ll. 10-12. Patterson then administered one or two breathalyzer tests to Magill and advised her that she was over the legal limit. Id. at p. 14, ll. 13-23; p. 15, ll. 1-4. Trooper Patterson administered a series of field sobriety tests to Magill and then advised Magill that he was taking her to the county jail. Id. at p. 16, ll. 1-7.

Upon being informed of her arrest for DUI, Magill begged Trooper Patterson not to arrest her, cried a lot, and was visibly upset. See Exhibit A, p.16, ll. 8-20. Despite Magill's being very upset and begging Trooper

Patterson not to arrest her, Magill was placed under arrest and taken to the Lee County Detention Facility. Id. at p. 19, ll. 1-4. Upon arriving at the Lee County Detention Facility, Magill was taken into the photo/identification room where she was administered one or two more breathalyzer tests and signed the ticket issued to her by State Trooper Patterson. See Exhibit A, p. 21, ll. 1-3. Magill was then escorted by Trooper Patterson to the control/booking room, which is a glassed-in cubicle in the holding area. Id. at ll. 13-17. Magill turned in all of her personal effects, including her jewelry and purse and was placed in a holding cell by a jailer, as Trooper Patterson turned her over to the custody of the Lee County Detention Facility. Id. at p. 21, ll. 18-23; p. 22, ll. 11-12; p. 23, ll. 6-21. Throughout the time prior to being placed into the holding cell, Magill was visibly upset and sobbing. Id. at p. 23, ll. 22-23; p. 24, ll. 1-13.

Within a few moments, an African-American female jailer, came to Magill's cell and escorted her to the property/search room. See Exhibit A, p. 25, ll. 13-22. Once inside the room, the officer instructed Magill to remove her clothing and Magill removed her entire clothing except for her bra and panties. The officer then placed latex gloves on her hands and Magill asked

the officer what she was about to do. Id. at p. 30, ll. 3-6. The officer asked Magill what she was in jail for, and Magill responded that she was in for a DUI charge. Id. at ll. 6-7. The jailer then removed the gloves from her hand and told Magill to get dressed. Id. at ll. 7-8.

At no time during the jailer's search of Ms. Magill did she ever ask her to remove her undergarments, either her bra or panties, nor did the officer ever physically touch Magill in any way. See Exhibit A, p. 30, ll. 9-11; p. 31, ll. 3-4. At no time was any other officer, male or female, present in the room, nor does Magill recall having seen anyone looking in the small rectangular window in the door. Id. at p. 31, ll. 9-12; p. 35, ll. 3-6 and ll. 20-23; Exhibit H. At no time did the jailer say anything to Magill that she found offensive or inappropriate. See Exhibit A, p. 37, ll. 21-23; p. 38, ll. 1-3. Rather, the only thing that Magill found to be offensive was the fact "that another woman [was] looking at my breasts and at the lower area of my body." Id. at p. 38, ll. 4-8. Magill was never asked to remove her underwear by the jail officer, but Magill was wearing a "white French-cut bra and it was revealing" and "white sheer panties." Id. at p. 38, ll. 11-16.

During the time in which Magill was undressing, she asked the jailer why she had to undress in front of the window, and the jailer moved over in

front of the window, located in the door, in order to block the window. See Exhibit A, p. 31, ll. 14-19. However, Magill claims that the officer was shorter than she and did not fully cover the window. Id. at ll. 19-20; p. 32, ll. 16-22; Exhibit H.

Magill was then returned to her holding cell, where she remained for approximately five hours until she was allowed to bond out. See Exhibit A, p. 36, ll. 11-17. Throughout the time of the Plaintiff's booking and being searched, Magill continued to cry a lot, be very upset, and be visibly shaken. Id. at p. 40, ll. 1-20. At no time, however, did Magill express to anyone in the jail that she had a problem with the fact that she had to remove her clothes. Id. at p. 45, ll. 19-22.

Magill later plead guilty to the DUI charge and was required to pay a fine and have her license suspended for three months. See Exhibit A, p. 54, ll. 15-23; p. 55, ll. 1-4.

Sherrer Hudmon

Plaintiff Sherrer Cooper Hudmon, 34-year old female, was arrested by the Lee County Sheriff's Department on March 17, 1995, along with her husband, Ken Hudmon, due to their having written approximately

$63,000.00 in bad checks.[1] See Deposition of Sherrer Hudmon (hereafter "Exhibit C"), p. 15, ll. 9-16; Deposition of Ken Hudmon (hereafter "Exhibit D"), p. 88, ll. 4-23; p. 92, ll. 11-21 (seven charges of Negotiating Worthless Negotiable Instruments in the amount of $9,000.00 each, totaling $63,000.00 in worthless checks).[2] The Hudmons were first made aware of the outstanding warrants for their arrests on the NWNI charges after

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[1] Mr. and Ms. Hudmon were arrested on March 17, 1995, on four counts of Negotiating Worthless Negotiable Instruments. However, Mr. and Ms. Hudmon had a total of seven charges against them for Negotiating Worthless Negotiable Instruments.

[2] Ms. Hudmon was tried on one of the worthless check charges and found guilty. Ms. Hudmon planned to appeal her conviction. In the interim, the six remaining NWNI charges were tried against Ms. Hudmon and she was found not guilty. Prior to appealing the conviction on one of the NWNI charges, a settlement was reached between the Hudmons and the person who brought the charges, to whom the money was owed, in which releases were signed and $4,500.00 was paid by the Hudmons in satisfaction of this settlement agreement. See Exhibit C, p. 92, ll. 11-21; p. 96, ll. 2-23; p. 97, ll. 1-23.

receiving the arrest warrants in the mail from the Worthless Check Unit of the District Attorney's office in Lee County, Alabama. See Exhibit C, p. 33, ll. 4-14. In response, Ms. Hudmon called the Worthless Check Unit on March 16, 1995, and spoke with Yolanda Fears, who advised Ms. Hudmon to come in and sign some papers the following day. Id. at p. 35, ll. 21-23; p. 36, ll. 1-7, ll. 19-22. The Hudmons went to the District Attorney's office the following day, March 17, 1995, to meet with Ms. Fears. Id. at p. 37, ll. 9-10, ll. 18-23. Ms. Fears then directed the Hudmons to the Sheriff's Department, wherein Ms. Fears turned over paperwork to an officer working at the front window of the Sheriff's Department. Id. at p. 38, ll. 5-10.

A sheriff's deputy then came and got the Hudmons and escorted them to a conference/interview room in the jail facility. Id. at p. 40, ll. 1-23; p. 41, ll. 1-12. The deputy explained to the Hudmons that he was trying to find out information on their bond "because [they] . . . need[ed] to make bond." Id. at p. 42, ll. 9-11. The officer eventually determined that the Hudmons' bond was to be set at one hundred eighty-nine thousand dollars ($189,000.00), and suggested to the Hudmons that they call a bondsman in order to make their bond. Id. at p. 42, l. 23; p. 43, ll. 1-3. The Hudmons

then contacted Corey Marmaduke of Cherokee Bonding, who came to the Lee County Detention Facility to meet with the Hudmons. After learning of the significant amount of the Hudmons' bond, Mr. Marmaduke informed the Hudmons that he was unable to "help [them] out at that amount of money." Id. at p. 43, ll. 4-12. Throughout the entire time in which the Hudmons were allowed to contact a bonding agency in order to make bond, they remained in the interview/conference room, were never placed into a lockup cell, nor were they booked into the jail. Id. at p. 40, ll. 20-23; p. 41, ll. 1-4.

After failing to make bond, the Hudmons were escorted into the jail area to the booking/control room where a white female booking officer[3] took inventory of the Hudmons' personal possessions. See Exhibit C, p. 43, ll. 12-16; p. 45, ll. 1-15; p. 46, ll. 5-15. Ms. Hudmon then signed an inventory sheet for her belongings that were turned over to the booking officer and was escorted to the property/search room. Id. at p. 56, ll. 15-18, 23; p. 57, ll. 1-4. A white female officer, different from the officer who booked Ms. Hudmon into the jail, escorted Ms. Hudmon into the

[3] The booking records for Sherrer Hudmon on March 17, 1995, indicate that the booking officer was Jennifer Reasor, a white female officer.

property/search room. Id. at p. 55, ll. 6-12; p. 56, ll. 5-7.

The property/search room in which Ms. Hudmon was taken had a window in the door which measured approximately 3 inches wide and 2 1/2 feet long, but there were no other windows in the room or other entrances in which people could enter the room. See Exhibit C, p. 59, ll. 7-23; p. 60, ll. 1-6; Exhibit H. Upon entering the search room, the officer "told [Ms. Hudmon] to take off [her] clothes." See Exhibit C, p. 64, l. 3; p. 65, ll. 13-15. Ms. Hudmon then removed her clothes, including her undergarments, although the officer never specifically directed Ms. Hudmon to remove her undergarments. Id. at p. 65, ll. 2-10; p. 66, ll. 1-7 ("Q. When she said remove your clothes, you interpreted that to include your undergarments? A. Yes. That's what she meant, whether she said that specifically or whether it was implied. But she told me to take off my clothes and I did."). The officer then instructed Ms. Hudmon to pull her hair up and shake her head, open her mouth and bend over. Id. at p. 67, ll. 2-5. Ms. Hudmon was then told to put her clothes on. Id. at ll. 5-6. After redressing, the officer took Ms. Hudmon from the property/search room to a holding cell.

Throughout the time of Ms. Hudmon's strip search, at no time was the officer rude or offensive to her, see Exhibit C, p. 62, ll. 15-20; the

officer did not touch Ms. Hudmon in any way, id. at p. 95, ll. 6-7; nor did the officer make any comments about Ms. Hudmon's appearance or proposition her in any way. Id. at p. 75, ll. 12-14.

Although Ms. Hudmon was upset prior to being searched, the search escalated her crying and being upset. Id. at p. 74, ll. 2-8. During this entire time, Ms. Hudmon was upset, visibly shaken, crying, and scared to death. Id. at p. 73, ll. 7-22. Furthermore, at no time in which Ms. Hudmon was being strip searched did she see anyone peering in the window in the door, id. at p. 72, ll. 16-23; p. 73, ll. 1-4; rather, Ms. Hudmon only "felt like this woman [the officer conducting the search] was getting her eyes full." Id. at p. 73, ll. 5-6. The Plaintiffs' main complaint about the strip search is that "someone that looks extremely 'bull-dikey' [who] is making me take all my clothes off and is looking like she is enjoying it, it doesn't matter whether 700,000 people can see me or not. . . . [My] main complaint is . . . I would still have a problem if no one could see me but her . . . I've been around gay and lesbian people a lot. I can pretty much tell by their mannerisms and things like that, and I could tell by the look on her face [that she was enjoying it]. . . . That's my impression." Id. at p. 93, ll. 21-23; p. 94, ll. 1-3, 7-9, 16-19, 23.

Throughout the time in which Ms. Hudmon was in the holding cell, which was for some six or seven hours, she was in the cell alone and was allowed to talk to her husband, who officers allowed to use the phone in an effort to make bond.[4] See Exhibit C, p. 78, ll. 6-23; p. 79, ll. 1-12. Eventually, the Hudmons found a surety to sign for their bond and they were released at 6:45 p.m. on March 17, 1995.

(iii.) Standard of Review

Appellees agree with the Appellant that the proper standard of review is *de novo*. See Cole v. U.S.D.A., 133 F.3d 803, 805 (11th Cir. 1998) ("This Court applies a de novo standard of review to a district court's grant of summary judgment.").

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[4] Upon having his personal effects inventoried, Mr. Hudmon was not placed into a holding cell; rather, he was allowed to use the telephone, for a time period of approximately six hours, in an attempt to make bond. See Exhibit D, p. 24, ll. 14-23. At one point, Mr. Hudmon was placed into a holding cell for approximately 10 minutes but was allowed to return to the common area, in which the phone was located, to continue making phone calls in an attempt to make bond. See Exhibit C, p. 79, ll. 4-12.

SUMMARY OF THE ARGUMENT

It is undisputed that Sheriff Herman Chapman of the Lee County Sheriff's Department requires all detainees who actually enter a jail cell to undergo a limited strip search, that is, where the detainee is taken to an enclosed room and required to remove only his or her outer clothing to allow a visual inspection for contraband which may have escaped detection in a pat-down search. It is also undisputed that Appellants Sharon Magill and Sherrer Hudmon underwent such a strip search before they were placed in a holding cell at the jail awaiting release. The district judge determined, after balancing the detainees' privacy interests against Sheriff Chapman's interest in maintaining the security of the jail, the search policy did not offend the Fourth Amendment. This conclusion is consistent with the United States Supreme Court opinion in Bell v. Wolfish, 441 U.S. 520 (1979). Because the district court found the search to be constitutionally valid, the lower court did not reach the issues of county liability and qualified immunity. If the court had reached those issues, it should have found that Sheriff Chapman's search policies are not attributable to Lee County and that Sheriff Chapman is entitled to qualified immunity.

The district court's opinion is due to be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND SHERIFF CHAPMAN'S SEARCH POLICIES TO BE CONSISTENT WITH THE FOURTH AMENDMENT.

The district court below, after thoroughly analyzing the Lee County Jail strip search policy, found it to be consistent with the Fourth Amendment and cases interpreting it in the context of strip searches: "Searches of all newly-admitted detainees who are going to be locked-up, and in contact with other prisoners, are justified." R2-2-17. The district court's ruling is due to be affirmed.

Appellants Magill and Hudmon's primary objection appears to be that Sheriff Chapman's policy--calling for the limited strip search (removal of outer clothing only) of *all* detainees who actually enter a jail cell—is an "automatic strip search policy." Appellants' Br., p. 20. They are correct in characterizing the search as being "automatic" to the extent that they mean that everyone who enters a jail cell is to undergo the limited strip search; no further justification, i.e., reasonable suspicion, is required. If they use the term to mean "automatic" to mean that no balancing of interests has been performed by Sheriff Chapman and his subordinates in the development of

the policy, the Appellants are wrong. The undisputed record reveals that the policy was developed in an effort to reach a compromise between jail security and the detainee's privacy interest. Although some detainees will experience discomfort in disrobing down to their underwear—even if done privately with only an officer of the same sex present—that discomfort is outweighed by the threat that a detainee will smuggle in contraband, undetected in a pat-down search, and use it to injure or kill jail staff, other inmates or himself.

This type of balancing appears to be the same used by the United States Supreme Court when it explicitly approved – against challenges made under both the Fourth and Fourteenth Amendments – a "blanket" strip search policy (including body cavity search) of all pre-trial detainees who have had contact visits with outsiders.[5] Bell v. Wolfish, 441 U.S. 520 (1979). In terms of the Fourth Amendment, the Court explained that

> assuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a

[5] Certainly, the approval of such searches after a mere contact visit, assumes the validity of such searches upon admission to the detention facility from the outside.

> corrections facility,... ***we nonetheless conclude that these searches do not violate that Amendment.*** The Fourth Amendment prohibits only unreasonable searches, ...and under the circumstances, ***we do not believe that these searches are unreasonable.***

441 U.S. at 558 (emphasis added). In terms of the Due Process Clause, the Court again found no violation:

> Nor do we think that the four MCC security restrictions and practices described in Part III, supra, constitute 'punishment' in violation of the rights of pretrial detainees under the Due Process Clause of the Fifth Amendment.... Ensuring security and order at the institution is a permissible nonpunitive objective, whether the facility houses pretrial detainees, convicted inmates, or both.

441 U.S. 560-61.

Nothing about the facts of the instant case distinguishes it from the facts of Bell v. Wolfish. The Plaintiffs in both Bell and the instant case were adult pre-trial detainees. In both cases, blanket search policies were established for security purposes. If anything, Sheriff Chapman's search policy is *less intrusive* than the one in Bell: Sheriff Chapman did not require a "total" strip search, underwear was not removed; and, no body cavity search was allowed by the search policy except under exceptional circumstances.

Another case from this Court approved strip searches anytime "close confinement" inmates[6] left their cell for any reason. Harris v. Ostrout, 65 F.3d 912 (11th Cir. 1995). The Court relied upon a "presumption of reasonableness which [the court] must attach to such prison security regulations." Id. (citing Turner v. Safley, 482 U.S. 78, 83-85 (1987) and Bell). Sheriff Chapman, in administering a jail containing both convicted inmates and pre-trial detainees, should benefit from the same "presumption of reasonableness" when he formulates safety-oriented search policies.

The holding of Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992), relied upon by Appellants Magill and Hudmon is distinguishable from the instant case and does not indicate that Sheriff Chapman's policy is unconstitutional.[7] First, it must be remembered that Justice *upholds* the

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[6] The Harris Court never defined "close confinement" but Appellees take the position that the placing of Magill and Hudmon into holding cells amounted to "close confinement."

[7] Justice's reliance upon the Fourth Amendment is doubtful in light of Graham v. Connor, 109 S. Ct. 1865, 1871 (1989), which questions, in the context of an excessive force claim, whether the Fourth Amendment provides protection *after arrest* is completed.

strip search of a juvenile in an effort to recover contraband. 961 F.2d at 193. In Justice, the juvenile female was required to remove all her clothing (including her bra) except her panties. Id. at 191. In the instant case, the policy was not to require anything to be removed beyond the outer clothing. The *policy* was for female detainees to leave their panties and bra on – nothing more revealing than what is generally observable at any beach or poolside. But perhaps most notably, the fourteen year old girl in Justice was subjected to this more obtrusive search *although her mother was already at the detention facility waiting for her daughter's release.* Id. at 190. The juvenile was released to the mother immediately after the strip search found no contraband. Id. In other words, in Justice, there was no threat whatsoever to the security of the detention facility or the inmates and staff therein: the juvenile was never placed in a cell; she had no contact (directly or indirectly) with the general population of the facility; she never had the opportunity to harm herself or others. On the other hand, both Magill and Hudmon were placed in holding cells for significant amounts of time when in the custody of the Sheriff's Department at the jail. In the Hudmon case, it was unknown at the time of booking whether Hudmon would even have had the opportunity to bond out quickly or whether she

would have been taken back to general population (in the event she did not make bond). With Magill, officers were certain she would remain in a cell for several hours as required by law for DUI arrestees. They, unlike the Justice juvenile, could have used smuggled contraband to harm themselves or others or could have passed it to the general population via contact with inmates or trusties working in the front area. Despite dictum that could be expansively read, there is nothing in the *holding* of Justice which controls the outcome of the instant case especially since the holding of Bell v. Wolfish appears to be much more "on point."

The district court properly awarded the Appellees summary judgment because the search policy of the Lee County jail is a justified balance between a detainee's right to privacy and the need for jail security.

II. SHERIFF CHAPMAN WOULD HAVE BEEN ENTITLED TO QUALIFIED IMMUNITY, HAD THE DISTRICT COURT FOUND IT NECESSARY TO REACH THE ISSUE OF INDIVIDUAL LIABILITY.

Appellants Magill and Hudmon contend on pages 24 and 25 that there was no basis for the granting of qualified immunity. The district court, however, pretermitted any discussion of qualified immunity due to its

conclusion that the search policies were, in fact, constitutional. R2-62-14, 15 n.9. The court did take the time though to signal its receptivity to the qualified immunity defense if the policy was determined to be unconstitutional. Id.

If this Court were to find Sheriff Chapman's policies unconstitutional, qualified immunity should be granted. The principles of qualified immunity are set out in detail in Lassiter v. Alabama A & M University, 28 F.3d 1146, 1149-51 (11th Cir. 1994) (en banc opinion). Under those principles, Sheriff Chapman is entitled to be granted summary judgment based on qualified immunity.

The primary reason Sheriff Chapman is entitled to qualified immunity is the failure of the Plaintiffs to show that "pre-existing law...dictate[d], that is, truly compel[led] (not just suggest[ed] or allow[ed] or raise[d] a question about), the conclusion for every like-situated, reasonable government agent that [Chapman's search policy]...violate[d] federal law in the circumstances." 28 F.3d 1150. To the contrary, as discussed supra, in Part V, pre-existing law, if anything, compels the *contrary* conclusion: Chapman's policy of subjecting all detainees who would be placed in a cell (as opposed to arrestees who would not be placed in a cell) to a limited strip

search was constitutional. In Bell v. Wolfish, the highest court in the land condones a very similar, although more intrusive, policy. In Harris v. Ostrout, this Court places its *imprimatur* on the full strip searching of all "close confinement" inmates whenever they leave their cell.

The Appellants rely on Justice v. City of Peachtree City as clearly establishing the constitutional infirmity of Sheriff Chapman's policy. However, undisputed facts brought out through discovery show that the instant case is distinguishable from Justice with respect to several *material* facts:

1. The plaintiff in Justice was a juvenile;[8]

2. The plaintiff in Justice was subjected to a more obtrusive search than Sheriff Chapman's policy called for;

3. The plaintiff in Justice was never placed in a cell but searched as her mother waited for her release which came directly after the search; and,

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[8]Clearly, any impact the Justice opinion may have on adult cases is dicta and "[d]icta is particularly unhelpful in qualified immunity cases where we seek to identify clearly established law." Hamilton By and Through Hamilton. Cannon, 80 F.3d 1525, 1530 (11th Cir. 1996).

4. There is no discussion of whether the plaintiff in Justice posed a suicide threat while, in the instant case, the distraught Plaintiffs arguably fit potential suicide profiles.

A reasonable officer in the position of Sheriff Chapman could reasonably (even if mistakenly) have considered Bell and Ostrout, both ***adult confinement*** cases, to control over Justice, a search of a juvenile which was made incident to an arrest without expectation of confinement. As argued above, the plaintiff in Justice presented no threat of self-harm or harming others while being incarcerated; she was never incarcerated and therefore would never have had the opportunity to use secreted contraband. Bell and Ostrout are much more to the point because they both address security concerns *unique to confinement.* While the loss of personal privacy is a factor to be considered – and remember Chapman's policy limited exposure and sought to protect privacy from all others except the search officer – it is clearly outweighed by the threat that a detainee or inmate might hide a weapon or contraband which would be used to cause harm if not death while the person is in the custody of the sheriff. After all, who will be the first person sued when an inmate commits suicide with a hidden razorblade or crack supply? Who will be blamed when the detainee is

assaulted by another inmate able to procure a weapon from new admittees? The sheriff, of course. And the first question will be, "Why wasn't that person searched before he or she was admitted to the jail?"

Additionally, even though there is no evidence that either Magill or Hudmon were subjectively considered suicide risks and searched as a precaution therefor, if a reasonable officer could have concluded that a strip search was justified on that basis, Chapman would be entitled to qualified immunity.

Finally, the presence of doubt as to whether the Plaintiff's claim properly falls under the Fourth Amendment or Fourteenth Amendment justifies the granting of qualified immunity. In Graham v. Connor, 109 S. Ct. 1865 (1989), the United States Supreme Court explained the tension between the Fourth Amendment and Fourteenth Amendment with respect to pretrial detainees:

> Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins and we do not attempt to answer that question today. It is clear however, that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.

Id. at 1871 n.10 (citing Bell v. Wolfish, 441 U.S. 520, 535-39 (1979). Although the Court was speaking in terms of excessive force, the same reasoning should apply to the search of a pretrial detainee once he or she is in custody. The point where Fourth Amendment protection ends and Fourteenth Amendment protection begins has not been clearly established, not to mention the content or quality of that protection. The Eleventh Circuit Court of Appeals has granted qualified immunity to law enforcement officers in the context of excessive force, where it was unclear whether the plaintiff's rights were established by the Fourth or Fourteenth Amendment. See Wright v. Whiddon, 951 F.2d 297, 301 (11th Cir. 1992) (explaining the uncertainty as to when the Fourth Amendment ends and the Fourteenth Amendment begins before holding that "[t]he presence of such doubt about the existence and content of the constitutional right that [the defendant] is alleged to have violated is enough to entitle him to qualified immunity").

III. THE SEARCH POLICIES OF THE SHERIFF'S DEPARTMENT ARE NOT ATTRIBUTABLE TO THE LEE COUNTY, AS A MATTER OF LAW.

Appellants Magill and Hudmon raise, as their initial issue, the

question of whether Sheriff Chapman's search policy is attributable to Lee County. The district court below, however, never reached that issue since it found the search policy to be constitutional. R2-62-20 n.14.

Assuming for the sake of argument that the liability of Lee County was properly before the Court on this appeal, it is clear that Sheriff Chapman is not a county policymaker with respect to the jail search policy. This conclusion directly follows from the Court's en banc holding in Turquitt v. Jefferson County, Ala., 137 F.3d 1285 (11th Cir. 1998). Turquitt held that Jefferson County is not "liable under 42 U.S.C. § 1983 for injuries befalling a county jail inmate arising from the sheriff's management of the jail." Id. at 1286. Sheriff Chapman's search policy, like the inmate classification and supervision policies at issue in Turquitt, clearly falls under the sheriff's management of the jail and has nothing to do with the county's responsibility to erect and maintain the jail. As this Court observed in Turquitt, "Alabama counties have no duties with respect to the daily operation of the county jails and no authority to dictate how the jails are run." Id. At 1291. Alabama law bestows only upon the sheriff "legal custody and charge of the jail in his county." Ala. Code § 14-6-1 (1995).

Contrary to the Appellants' position, the holding of the United States

Supreme Court in McMillian v. Monroe County, 117 S. Ct. 1734 (1997) lends support to the conclusion that the sheriff is a state rather than county policymaker in terms of jail management; McMillian is cited throughout the Turquitt opinion. Just as the county commission, in the law enforcement context, "cannot instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime," McMillian, 117 S. Ct. at 1739, the county commission cannot instruct the sheriff, in the jail context, when or in what manner arrestees, detainees or inmates are to be searched, or how to otherwise provide for inmates' security once they are in the sheriff's care.

Finally, construing the Sheriff of Lee County to be county policymaker is inconsistent with the well-settled law that a sheriff is a *state* officer for purposes of Eleventh Amendment immunity. See Parker v. Williams, 862 F.2d 1471, 1476 (11th Cir. 1989); Free v. Granger, 887 F.2d 1552, 1557 (11th Cir. 1989); see also Carr v. City of Florence, Ala., 960 F.2d 1521, 1526 (11th Cir. 1990).

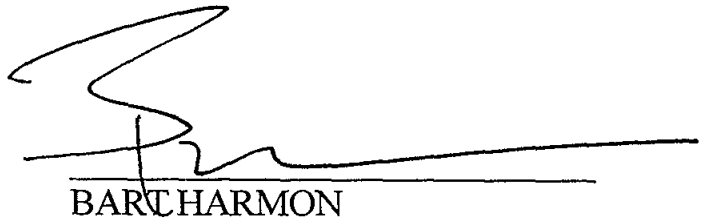
Because the district court found Sheriff Chapman's search policy to be constitutional, its consideration of county liability was pretermitted. Had it reached this issue, application of Turquitt's en banc holding would have

required that Lee County be granted summary judgment.

CONCLUSION

Based on the foregoing, Appellees request that this Court affirm the district court's holding below in all respects.

Respectfully submitted this the 29th day of July, 1998.



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CERTIFICATE OF SERVICE

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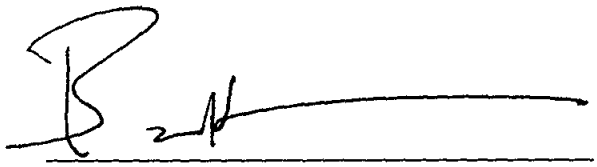
by placing same in the United States mail, postage prepaid on this the 29th day of July, 1998.



OF COUNSEL