NO. 16-60231

IN THE UNITED STATES COURT APPEALS
FOR THE FIFTH CIRCUIT

NICOLE MABRY, As Mother
and Next Friend of T.M., a Minor PLAINTIFF/APPELLANT

VERSUS

LEE COUNTY DEFENDANT/APPELLEE

On Appeal From The United States District Court
For The Northern District Of Mississippi
Eastern Division

No. 1:13CV214-SA-SAA

Honorable Sharion Aycock, Presiding

BRIEF FOR THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Nicole Mabry, Plaintiff/Appellant;

2. T.M. a Minor, Plaintiff/Appellant;

3. Victor I. Fleitas, Victor I. Fleitas, P.A., Attorney for Plaintiff/Appellant;

4. Gary L. Carnathan, Esq., Carnathan & McAuly, Attorney for Defendant/Appellee;

5. William C. Murphree, Esq., Mitchell, McNutt & Sams, Attorney for Defendant/Appellee;

6. Lee County, Defendant/Appellee.

Respectfully submitted, this the 1st day of July, 2016.

/s/ Victor Israel Fleitas

VICTOR I. FLEITAS
MS BAR NO. 10259

STATEMENT REGARDING ORAL ARGUMENT

The Plaintiff, Nicole Mabry, respectfully requests oral argument to address a question of first impression in the Fifth Circuit regarding the Fourth Amendment rights of children with respect to being subjected to body cavity strip searches upon their intake to juvenile detention. Oral argument is warranted.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over Ms. Mabry's civil rights action pursuant to 28 U.S.C. § 1331 (Federal Question) and 28 U.S.C. § 1343(a)(3) (Civil Rights). This court has appellate jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in granting summary judgment to the Defendant Lee County with respect to Ms. Mabry's claim that the body cavity strip search of her twelve year old daughter upon her intake to a juvenile detention center violated her right to be free from unreasonable searches under the Fourth Amendment.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

On November 12, 2013, the Plaintiff, Nicole Mabry, filed her Complaint alleging various constitutional violations against several "municipal" defendants, individual defendants, and "John Doe" defendants, related to the arrest, detention, and body cavity strip search of her twelve year old daughter, T.M. (ROA.15-25). On March 5, 2014, Ms. Mabry filed her First Amended Complaint substituting an individual defendant, Tasha Fant, for a "John Doe" defendant and dismissing the remaining "John Doe" defendants (ROA.94-105).

The individual defendants filed separate motions for qualified immunity and, on June 16, 2014, the district court entered a stay of the case pending the resolution of the qualified immunity motions. (ROA.180). Of relevance to this appeal, Tasha Fant's motion for qualified immunity specifically concerned the body cavity search of T.M. (ROA.231-32). On October 22, 2014, Ms. Mabry filed her consolidated response to the

individual defendants' qualified immunity motions. (ROA.478-80). On March 30, 2015, the district court entered its Memorandum Opinion holding that the individual defendants were entitled to qualified immunity. (ROA.657-69).

On May 13, 2015, Ms. Mabry filed her Second Amended Complaint removing the dismissed individual defendants from the pleadings and clarifying her Fourteenth Amendment due process claims. (ROA.689-99).

Of relevance to this appeal, on December 4, 2015, the Defendant Lee County filed a motion for partial summary judgment regarding the constitutionality of the body cavity strip search of T.M. (ROA.781-82). Ms. Mabry filed her response to the Defendant Lee County's motion for partial summary judgment, on the constitutionality of the body cavity strip search, on January 14, 2016. (ROA.814-15). On March 9, 2016, the district court entered its Memorandum Opinion granting summary judgment to the remaining "municipal" defendants, including the Defendant Lee County. (ROA.1245-57.)

On March 21, 2016, the district court entered Final Judgment as to all parties and all claims. (ROA.1261). Ms. Mabry timely filed her Notice of Appeal on April 19, 2016. (ROA.1262-63).

(ii) Statement of Facts

As a consequence of Q.W.'s bullying, on November 12, 2010, T.M., a quiet twelve-year-old girl in the 7th grade, who played the clarinet in the marching band, and with no history of school disciplinary infractions, got into a fight with Q.W. after leaving the band hall at Tupelo Middle School.[1] While T.M. was sitting in the school nurse's office, as the result of a bloody nose, City of Tupelo School Resource Officer Jon Bramble called the Lee County Youth Court ("LCYC") and received verbal authorization from LCYC Judge Designee David Anthony to transport, T.M. and Q.W. to the Lee County Juvenile Detention Center ("LCJDC"). (ROA.837-39). Officer Bramble was advised by Mr. Anthony to notify T.M.'s parents that he was

[1]T.M.'s Assistant Principal, Dr. Kristy Luse, described her as, "a good student. Polite. Sweet. Good personality. I know she was talented with a band piece." (ROA.547). Dr. Luse also knew T.M.'s older sister, "and had a special place for her." (ROA.547).

taking her to the LCJDC and what she was charged with.[2] (ROA.840).

While in the school nurse's office, Officer Bramble called T.M.'s mother at work and told her that T.M. had been in a fight at school and he was going to have to take T.M. to juvenile detention. (ROA.823). Officer Bramble then escorted T.M. outside the school, handcuffed her, and patted her down to make sure she was not in possession of any weapons or contraband. (ROA.841-45).

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[2]During her short conversation with Officer Bramble, T.M.'s mother, Nicole Mabry, asked if she could pick up T.M. at the school and was told that she could pick up T.M. from the LCJDC. (ROA.818-20). Ms. Mabry then rushed to the LCJDC to pick up T.M. but was not permitted to see her and was told that they would not release her daughter to her. (ROA.820-21) Ms. Mabry was told that she would have to speak to Mr. Anthony to see whether or not her daughter would be released to her or if T.M. was going to have to remain at the LCJDC all weekend. (ROA.820-21). Ms. Mabry spoke with Mr. Anthony by phone and he told her that he would decide whether or not T.M. would be released to her that day or whether she would have to spend the weekend in detention. (ROA.821). Ms. Mabry told Mr. Anthony that T.M. had never been in trouble before and she could not understand why she would have to spend a weekend in detention. (ROA.821). Mr. Anthony told Ms. Mabry that he would call her back when he had decided. (ROA.821). Concerned for her daughters well-being, Ms. Mabry chose not to wait and went directly to Mr. Anthony's office to talk to him about releasing her daughter. (ROA.821).

Upon entering the LCJDC, T.M. was told to take her shoes and socks off and read a list of rules. (ROA.827). T.M. was then told she had to shower and to apply lice shampoo to her hair before showering. (ROA.827-28). Also, before showering, T.M. was body cavity searched and then booked as she described:

> We walked in there and she told me I had to take my clothes off. After I took my clothes off she gave me the lice shampoo, and then she told me she had to do a strip search. I said, what is that? She said, you just have to bend over, you have to spread your butt cheeks, and you have to cough. I was like, I have to do that in front of you? And she said, yes. I was like, but I'm a baby. She said, apparently you weren't a baby if you got into that fight. And after she -- I had to bend down, and I turned around slowly ,and then I coughed. But at first I did like this and then I turned around (Indicating). I was like, I can't do it. And she was just like, well, you're going to have to do it some time. So then I turned around, and I coughed, and I coughed again. And then she was like, okay. Well, you can rinse that stuff out of your hair now. And then I got the lice shampoo out of my hair. Then I took a shower with the soap. And then after I took my shower she came back and I had to put on my clothes. And after I put on my clothes they took my measure -- they measured my height. After they measured my height I went to the front desk and the man asked me a bunch of questions, had me like just -- I think he had me sign something. And then after that I had to get back into the shower so I could put on the yellow jumpsuit. After I put on the yellow jumpsuit

> then I went into this cellblock thing because they were letting [Q.W.] in and they didn't want us to be in there together.

(ROA.829-30).

T.M. was held in a holding cell in the lobby for approximately twenty minutes while Q.W. was body cavity searched and booked. (ROA.831). T.M. and Q.W. were then escorted to their cells to drop off their bedrolls before being left in a common area with other girls. (ROA.824-25). Several hours later, while in the midst of showering a second time, T.M. was told that she could leave. (ROA.825-26). Her hair still soaking wet, T.M. was released from the LCJDC at approximately 6:00-6:30 p.m. (ROA.826).

At the time T.M.'s detention, the Defendant Lee County's policy regarding body cavity strip searches of juveniles at the LCJDC provided that a juvenile would be subjected to a body-cavity strip search: (1) based on probable cause; (2) when moved to or from a visiting room; (3) based on a direct observation of a specific act; and (4) upon intake when charged with an act of violence whether a felony or a misdemeanor. (ROA.233-34).

Tasha Fant worked at the LCJDC as a correctional officer and was the

individual responsible for conducting the body cavity search and booking of T.M.[3] (ROA.860-61). According to Officer Fant, policy dictated that all juveniles entering the LCJDC were subjected to a pat down search and had a metal detecting wand passed over their bodies to check for weapons or contraband. (ROA.865-67). At the time that T.M. was searched, according to Officer Fant, Lee County had a policy which mandated strip searches of all juveniles upon intake who were charged with a violent, theft or drug offense. (ROA.867). Strip searches would also be conducted in situations where reasonable suspicion existed regardless of the charge. (ROA.867).

When a juvenile is brought to the LCJDC, unless the LCYC immediately informs LCJDC personnel upon intake that the juvenile is to be held as a "non-detainee," that juvenile is processed for placement in the general population.[4] (ROA.863-64). If a juvenile is classified as a "non-

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[3]At the time of her deposition, August 13, 2014, Ms. Fant worked at the LCJDC as a Corporal, a first line supervisor. (ROA.862).

[4]"General population" for female detainees at the LCJDC consists of "C pod" which contains three cells with two beds per cell and a common area. (ROA.873-74.)

detainee" by the LCYC, that juvenile is not placed in the general population but is kept in a holding cell in the booking area. (ROA.863-64).

According to Officer Fant, when T.M. was brought to the LCJDC she was subjected to a pat down search and had the metal detecting wand passed over her body. (ROA.868-69). After the pat down search and "wanding" of T.M., Officer Fant harbored no suspicion or concern that T.M. was in possession of any weapons or contraband. (ROA.870-71). The only reason that Officer Fant performed the body cavity search on T.M. was because she was charged with fighting at school and policy required that she be strip searched upon intake. (ROA.871). At the time that T.M. had been subjected to a body cavity search, booked and placed in the general population of the LCJDC, Officer Fant had received no information from the LCYC regarding her detention status and placed her in general population in accordance with LCJDC practice. (ROA.872-74).

The alleged delinquent acts which resulted in T.M.'s detention and body cavity strip search were dismissed. (ROA.1246).

SUMMARY OF THE ARGUMENT

In this matter of first impression, concerning the legal standard by which a body cavity search of a twelve year old girl in juvenile detention will be judged under the Fourth Amendment, the district court had several persuasive precedents from which it could choose its course. The district court could have applied the "special needs" test used in the Second Circuit and the Eighth Circuit which balanced the legitimate concerns of the juvenile facility with the privacy interests of the child. The district court could have applied a "reasonable suspicion" test based on a decision from the Eleventh Circuit, in a non-detention setting. The district court have adopted the "penological interest" standard used in the Third Circuit.

Ultimately, the district Court adopted the "penological interest" standard and granted the Defendant Lee County partial summary judgment. The district court's wholesale adoption of a legal standard applicable to adult detainees in general population to a child held in a six-bed juvenile detention center for a brief period due to fighting offends the

Fourth Amendment requirement that a search be reasonable and effectively insulates from judicial review an abhorrent practice which manifestly injures children.

The judgment of the district court granting the Defendant Lee County partial summary judgment on this issue constitutes reversible error and remand to the district court for the application of a proper legal standard is appropriate.

ARGUMENT & AUTHORITIES

1. Standard of Review

This Court reviews the district court's summary judgment ruling *de novo*, applying the same standard as the district court. Davis v. Fort Bend County, 765 F.3d 480, 484 (5th Cir. 2014). In doing so, this Court interprets all facts and draws all inferences in favor of the nonmovant, Ms. Mabry. Ion v. Chevron USA, Inc., 731 F.3d 379, 389 (5th Cir. 2013). Summary judgment is appropriate only when the record reveals, "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

2. The District Court Erred in Granting Summary Judgment to the Defendant Lee County in Light of Genuine Issues of Material Fact Regarding the Constitutional Propriety of its Body Cavity Strip Search of T.M. at the Lee County Juvenile Detention Center.

In granting summary Judgment to the Defendant Lee County, the district court acknowledged that the question of the appropriate legal standard to apply, under the Fourth Amendment, to children subjected to

body cavity strip searches upon intake to a juvenile detention center is one of first impression in the Fifth Circuit. Faced with several possible approaches to assess the constitutionality of such searches, the district court adopted a standard which rejected a balancing of interests between the child and the juvenile detention facility, in favor of a rigid standard that abandons judicial scrutiny of searches which have been variously described as "[d]emeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983) (citations omitted).

In arriving at its holding that body cavity searches of children upon intake to a juvenile detention facility are subject to analysis under a "penological interests" standard, see J.B. v. Fassnacht, 801 F.3d 336, 342 (3d Cir. 2015), the district court assessed and rejected persuasive authority from other jurisdictions which previously addressed this question. (ROA.1251-57). A review of these authorities highlights the different

approaches available to the district court and its error in adopting a standard that effectively abandons all judicial oversight over a highly questionable and damaging law enforcement practice to which children are routinely and often unquestioningly subjected.

In N.G. v. Connecticut, 382 F.3d 225, 226 (2d Cir. 2004), the Second Circuit vacated the judgment of a district court which found that the multiple strip searches of two female children in juvenile detention were reasonable. Applying the "special needs" test, from Board of Education v. Earls, 536 U.S. 822, 829-30 (2002), the Second Circuit balanced the intrusiveness of the strip searches of the juveniles against the promotion of legitimate governmental interests. Id. at 230-31. In so doing, the Second Circuit found that only the initial intake strip searches of the juveniles were reasonable after assessing "the risks to the psychological health of the children from performing the searches and the risks to their well-being and to institutional safety from not performing the searches." Id. at 237. Of special relevance to this case, the initial intake strip searches upheld by the

Second Circuit were not body cavity strip searches like the one T.M. was subjected to at the LCJDC. Id. at 228-29 & n.4.

In Smook v. Minnehaha County, 457 F.3d 806, 811-12 (8th Cir. 2006), the Eighth Circuit applied the Fourth Amendment balancing test used by the Second Circuit in N.G. and concluded that the strip search of the named plaintiff and class representative during intake into a juvenile detention center was reasonable. In balancing the intrusion and the institutional interests in safety, the Eighth Circuit found the strip search performed on the named plaintiff reasonable where the search consisted of having the juvenile remove her outer garments and be visually observed in her undergarments by a female officer in a private room. Id. at 812. While not minimizing the intrusiveness of such a search, the Eighth Circuit found the search at issue "*a lesser invasion of privacy than a full strip search*." Id. (empasis added).

Both N.G. and Smook stand for the relevant proposition that a court must conduct a balancing of the institutional interest in the safety of the

juveniles in their charge and the greater intrusiveness and damaging effects of strip searches on children and adolescents. Id. at 811. In fact, the Eight Circuit in Smook remanded the case to the district court so that a reasonableness analysis of the claims of other juveniles who were subjected to more intrusive strip searches could be assessed. Id. at 814-15.

Were the district court to have applied a Fourth Amendment standard, to the body cavity strip search of T.M., based on the "special needs" test, which took into account the Defendant Lee County's institutional interests in the safety and well being of the employees and detainees of the LCJDC with T.M.'s substantial interest in freedom from a highly intrusive and humiliating body cavity strip search, the strip search T.M. was subjected to would not pass constitutional scrutiny.

First, the Defendant Lee County failed to identify, in the record, its institutional interest in enforcing a policy which mandates body cavity strip searches of children in the admitted absence of any reasonable suspicion whatsoever. Though the Defendant Lee County makes much of

T.M.'s placement in general population to justify the body cavity search, "general population" at the LCJDC consists of six beds and a common area. In addition, T.M.'s body cavity search immediately upon intake before her detention status had ever been determined. In fact, no evidence exists that T.M. should have been placed in the "general population" as opposed to being held in a holding cell awaiting Ms. Mabry's arrival.

Second, the Defendant Lee County's policy does not compel all juvenile detainees to submit to body cavity strip searches, resulting in a haphazard mix of juvenile detainees who were and were not subjected to such humiliating searches. This haphazard approach would appear to amplify the alleged harm, the introduction of contraband into the general population of the LCJDC, which the strip search policy is ostensibly designed to prevent. An objective standard based on the "special needs" implicated by a given search would provide guidance, consistency, and reasonable judicial oversight to an admittedly harsh and damaging practice.

Third, as previously mentioned, these degrading strip searches are conducted upon intake, before the LCJDC even knows whether or not the child is going to be detained in the general population as opposed to being held awaiting the arrival of a parent or guardian. In fact, by adopting a policy which channels all children into the general population before a determination has been made by the LCYC, regarding the detention status of the child, the Defendant Lee County condemns innumerable children subject to being held for a short period of time, such as T.M., to needless body cavity strip searches in the absence of reasonable suspicion.

Finally, neither N.G. nor Smook support the district court's determination to grant the Defendant Lee County summary judgment on this critically important constitutional question. The balancing of interests required by those cases, to determine the reasonableness of the body cavity search at issue here, calls for an assessment of facts which can only be developed through a hearing and trial. See Smook, 457 F.3d at 814 (remanding claims of individual class members for development of facts

given determination of reasonableness of search is highly contextual). By rejecting the "special needs" test, the district court pretermitted any factual assessment of the propriety of the subject body cavity strip search.

The searches of the juveniles upheld in N.G. and Smook were fundamentally less intrusive than the body cavity search T.M. was subjected to. Ultimately, application of the "special needs" legal standard would have compelled the rejection of the Defendant Lee County's motion for partial summary judgment. The district court's failure to apply the "special needs" test as the proper constitutional test constituted reversal error and compels remand to the district court.

Further authority for rejecting the approach adopted by the district court can be found in the Sixth Circuit. Though not discussed by the district court, in its adoption of the holding in Fassnacht, in T.S. v. Doe, 742 F.3d 632, 637 (6th Cir. 2014), the Sixth Circuit expressly declined to apply the holding in Florence to determine the constitutionality of suspicionless strip searches of juvenile detainees. See Fassnacht, 801 F.3d at 341 n.28

("the Sixth Circuit failed to rule explicitly one way or the other on the applicability of Florence to juveniles.") In declining to adopt the holding in Florence to determine the constitutionality of strip searches of juveniles in detention, the Sixth Circuit expressed reservations about subjecting "juvenile and adult detainees . . . to the same rules." T.S., 742 F. 3d at 637. Ultimately, the Sixth Circuit refused to address, on an appeal from a denial of qualified immunity, the constitutionality of the strip searches at issue stating, '[w]e need not, and do not, opine on the constitutionality of the strip searches. Id. The same reservation expressed by the Sixth Circuit, about applying a legal standard applicable to adults in adult detention to children in juvenile detention, apply here and compel reversing the judgment of the district court.

Rejecting Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992), as a decades-old case which was factually inapplicable, the district court rejected the application of a "reasonable suspicion" standard for juvenile detainees in favor of the "penological interests" standard from

Fassnacht. In Justice, 961 F.2d at 193 the Eleventh Circuit upheld the strip search of a female juvenile arrestee at the police station, who was required to strip down to her panties while in a room with two female officers. Id. at 193. Unlike the Third Circuit in Fassnacht, which considered the existence of reasonable suspicion to search immaterial to its analysis, the key to supporting the constitutionality of the subject strip search was the existence of reasonable suspicion on the part of the officers to believe that the juvenile was harboring contraband on her person. Id. at 194.

The Eleventh Circuit found it axiomatic "that people harbor a reasonable expectation of privacy in their "private parts." Id. at 191. Further, the Eleventh Circuit emphasized the particular harm which can come to juveniles subjected to strip searches. Id. at 192-93. In noting the strip search in question was not a body cavity search, the Eleventh Circuit made clear that only the existence of reasonable suspicion to believe that a juvenile harbored weapons or contraband could support such a search. Id. at 193. Given the admitted absence of any reasonable suspicion to body

cavity search T.M., application of a reasonable suspicion standard would compel reversing the judgment of the district court.

N.G., Smook, T.S., and Justice all support the proposition that any evaluation of the propriety of a strip search (in this case a body cavity search) of a juvenile in custody must weigh the intrusiveness of the search accounting for the particular sensitivities of children to such searches against the institutional need to promote safety and security at a juvenile detention facility. Admittedly, Justice goes further than N.G. and Smook in requiring that any strip search of a juvenile be supported by reasonable suspicion that the juvenile in question is harboring a weapon or contraband. Application of these standards to this case would seemingly result in a determination that the body cavity search performed on T.M. in the complete absence of reasonable suspicion violated her rights under the Fourth Amendment.

In contrast to N.G. and Smook, the Third Circuit's decision in Fassnacht fully supported the position advanced by the Defendant Lee

County and adopted by the district court. In Fassnacht, the Third Circuit held that suspicionless body cavity searches of juveniles admitted to the general population of a juvenile detention facility were constitutional. Fassnacht, 801 F.3d at 347. In so doing, the Third Circuit adopted the Supreme Court's decision and reasoning in Florence v. Board of Chosen Freeholders of Burlington County, 566 U.S. ___, 132 S. Ct. 1510, 1518 (2012), which held such strip searches were constitutional in the context of *adult* detainees admitted to the general population of a prison or jail, absent a substantial showing that such searches were unnecessary or an unjustified response to the problem of jail security. The Third Circuit's and by extension the district court's adoption of Florence in the context of *juvenile* detainees is highly problematic legally and factually.

The district court's wholesale adoption of Florence, from the adult detention setting to the juvenile detention setting, and application of a formalistic approach runs counter to the balancing approach applied by the Second Circuit in N.G., and the Eighth Circuit in Smook, and seemingly

approved by the Sixth Circuit in T.S., and does a disservice to children.

The Third Circuit arrived at its decision in Fassnacht only after considering and giving short shrift to the Supreme Court's decision in Safford Unified Sch. Dist. No.1 v. Redding, 557 U.S. 364 (2009).

In Redding, 557 U.S. at 368, the Supreme Court held a strip search by school officials of a female thirteen year old middle school student violated the Fourth Amendment. Based on a report from another student, Savana Redding was suspected by school officials of providing prescription and non-prescription pain pills to other students in violation of school policy. Id. Savana was taken to the principal's office where a search of her backpack revealed nothing. Id. The principal then sent Savana to the school nurse's office, where the nurse and an administrative assistant instructed Savana to strip down to her bra and panties, pull out the waistband of her panties and pull her bra to the side. Id. at 369. This strip search yielded no contraband. Id.

In finding the strip search unconstitutional, the Supreme Court

emphasized a search which forced the child to expose her breasts and pelvic area was "categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings." Redding, 557 U.S. at 374. The Supreme Court found Savana's subjective expectation of privacy inherent in her accounts of embarrassment and the reasonableness of that expectation "indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure." Id. at 375. In balancing the indignity of the search with the degree of suspicion justifying the search, to determine its reasonableness, the Court stated, "[t]he scope will be permissible, that is, when it is 'not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'" Id. (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).

In rejecting the relevance of the Redding decision to its inquiry regarding the propriety of the juvenile strip search at issue in Fassnacht,

the Third Circuit and the district court refused to consider the applicability of Redding outside of the school setting. Fassnacht, 801 F.3d at 344 ("[Redding] may set the law for conducting strip searches of children *in schools*, but it falls far short from setting the law for strip searches of juvenile detainees.") (emphasis in original)). Interestingly, neither the Third Circuit nor the district court were nearly so hesitant to apply a ruling in Florence which addressed only adult detainees at an adult correctional facility to children in juvenile detention. Id. ("Plaintiffs argue that the holding in Florence is limited to its facts - that is to say, Florence is limited in application to adult detainees. We disagree for several reasons.").

Both the Third Circuit and the district court arrived at the conclusion that Florence pretermitted the constitutional question at issue here, despite the fact that the majority in Florence expressly left open the applicability of its holding in other contexts and other facilities. See Florence, 132 S. Ct. at 1523 ("The Court makes a persuasive case for the general applicability of the rule it announces. The Court is nonetheless wise to leave open the

possibility of exceptions, to ensure that we 'not embarrass the future.'") (quoting Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 300 (1944) (Frankfurter, J.)) (Roberts, C.J. concurring).

The Redding decision's balancing test, weighing the degree of the intrusion of the strip search with the reasonable suspicion and institutional safety concerns in a school setting, is conceptually identical to the Fourth Amendment standard used by the Second Circuit in N.G., the Eighth Circuit in Smook, seemingly approved by the Sixth Circuit in T.S., and consistent with the Eleventh Circuit's requirement of reasonable suspicion in Justice. In performing that balancing the Supreme Court ultimately held that the principal's search of the backpack and Savana's outer clothing was constitutionally permissible but the strip search violated the Fourth Amendment. Redding, 574 U.S. at 373-74, 376-77.

Application of Redding to the strip search at issue in this case is consistent with the approach taken by several other circuit courts and consistent with the manner in which the Fourth Amendment question in

the context of juvenile searches has been evaluated in the past. The district court's decision to apply Fassnacht and disregard the spirit if not the letter of Redding, in its analysis of the strip search at issue here, undermines the value of Fassnacht as persuasive authority to uphold the body cavity search of T.M.

An approach which mandates the consideration of the reasonableness of a suspicionless strip search of a juvenile under the Fourth Amendment is consistent with existing precedent, the best interests of children and legal scholarship. See Nelson, Emily J., Custodial Strip Searches of Juveniles: How Safford Informs a New Two-Tiered Standard of Review, 52 B.C. L. Rev. 339 (2011) (urging courts to adopt a two-tiered standard of review based on Redding which considers the age and sex of the of-fender as well as the nature of the offense committed when considering the constitutionality of strip searches of juveniles who have committed minor offenses). The application of such a standard to the body cavity search in this case compels the conclusion that T.M.'s Fourth

Amendment rights were violated and the district court's grant of partial summary judgment on this question was inappropriate,

First, in considering the extent of the Fourth Amendment intrusion in this case, T.M. was subjected to one of the most extreme forms of a strip search, a visual body cavity search. Second, T.M. was a twelve year old female child with no prior juvenile history or disciplinary problems. Third, as the district court noted, the offense for which T.M. was detained was unquestionably a minor offense. See Jimenez v. Wood County, 660 F.3d 841, 848 (5th Cir. 2011) (holding that a misdemeanor is a minor offense for Fourth Amendment analysis). Fourth, the Defendant Lee County's strip search policy permits many juveniles detained for other infractions (i.e. violation of juvenile probation) or offenses to be placed in general population without undergoing any body cavity search. A proper weighing these factors leads to the conclusion that the Defendant Lee County was not entitled to the summary disposition of Ms. Mabry's claim.

CONCLUSION

For the reasons stated above, the Plaintiff, Nicole Mabry, respectfully requests that this Court reverse the judgment of the district court granting the Defendant Lee County partial summary judgment on her claim of unreasonable search under the Fourth Amendment and remand this civil action to the district court.

Respectfully submitted, this the 1st day of July, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 5,354 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief has ben prepared in a proportionally spaced typeface using WordPerfect X7 in 14-point Palatino Linotype.

Respectfully submitted, this the 1st day of July, 2016.

/s/ Victor Israel Fleitas

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2016 I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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