UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 16-60231

NICOLE MABRY, as Mother and
Next Friend of T. M., A Minor PLAINTIFF/APPELLANT

VS.

LEE COUNTY, MISSISSIPPI DEFENDANT/APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

NO. 1:13CV214-SA-SAS

HONORABLE SHARION AYCOCK, PRESIDING

BRIEF FOR THE APPELLEE

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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 & McAuley, Attorney for Defendant/ Appellee;

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

6. Lee County, Defendant/Appellee;

7. Trident Insurance Services, LLS;

8. Argonaut Great Central Insurance Company;

9. Argo International Holdings.

Respectfully submitted, this the 11th day of August, 2016.

LEE COUNTY, MISSISSIPPI,
DEFENDANT/APPELLEE

BY: */s/ William C. Murphree*
WILLIAM C. MURPHREE,
MB# 3661

STATEMENT REGARDING ORAL ARGUMENT

The Supreme Court has recently held that visual body cavity searches of adult pretrial detainees do not violate the Fourth Amendment. Other courts of appeal applying this decision have held that visual body cavity strip searches of minor pre-trial detainees do not violate the Fourth Amendment. Lee County submits, therefore, that this case does not warrant oral argument.

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SUMMARY OF THE ARGUMENT

As Nicole Mabry set out in the Statement of the Case and in her Summary of the Argument, this lawsuit concerns whether a visual body cavity search of a minor pre-trial detainee violates the Constitution of the United States.

The United States Supreme Court in Florence v. Board of Chosen Freeholders of Burlington, 132 S.Ct. 1510, 182 L.Ed. 2d 566 (2012), held that detention center officers can subject adult arrestees committed to the general population of the detention center to visual body cavity strip searches. The Third Circuit Court of Appeal applying Florence to visual body cavity strip searches of minor arrestees has concluded that Florence is not limited in application to adult detainees. This conclusion is sound; therefore, Lee County submits that this Court should uphold the summary judgment of the district court.

ARGUMENT AND AUTHORITIES

THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO LEE COUNTY

As Mabry pointed out in her brief, the Lee County Sheriff's Department had a policy which stated that the Juvenile Detention Center officers would conduct a visual body cavity search of all minors (to be admitted to the general population) charged with acts of violence -- (including misdemeanors), those charged with drug offenses, and any others suspected of concealing contraband.

No dispute exists that the City of Tupelo charged T.M. with an act of misdemeanor violence, and no dispute exists that Tasha Fant, a Juvenile Detention Center officer, conducted a visual body cavity search of T.M. Likewise, no dispute exists that Juvenile Detention Center officers placed T.M. in the Center's general population.

1. Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed. 2d 447 (1979)

Inmates of a federal facility housing pretrial detainees and others such as witnesses not charged with crimes brought a class action challenging among other things strip searches of inmates conducted after

every contact visit with anyone from outside the facility. These searches included visual inspections of body cavities.

The Supreme Court first emphasized that a court must determine whether a restriction or condition reasonably relates to a legitimate governmental interest. The Court observed that administrators and officers must have the ability to maintain security and order which includes making certain that neither weapons nor illicit drugs come into the facility. Thus, the court reasoned that steps reasonably related to maintaining security do not -- without more -- constitute unconstitutional punishment even if these measures cause some measure of discomfort. Bell, at 539-540.

The Court observed that no easy solutions exist regarding the problems encountered in operating a corrections facility. Therefore, the Court emphasized that courts should accord wide-ranging deference to the judgment of detention facility administrators as to the policies and the execution of those policies needed to maintain order, discipline, and institutional security. Bell at 547. The Court went on to state that the

adoption of these policies and the execution of these policies lie within the professional expertise of the corrections officials. Unless substantial evidence exists that officials have exaggerated their response to considerations of safety and security, courts should defer to the judgment of officials regarding safety and security. Bell, at 548. The Court acknowledged that a visual body cavity search significantly invades a person's personal privacy. However, the Court also acknowledged that inmates can conceal money, drugs, weapons, and other contraband in body cavities. Under these circumstances the court concluded that officers could conduct visual body cavity searches without violating the Fourth Amendment. Bell, at 559-560.

2. Post Bell Decisions

After the Supreme Court ruled in Bell, at least seven circuit courts of appeals decided cases where visual body cavity searches occurred involving misdemeanors including driving while intoxicated, failure to appear in court on misdemeanor charges, outstanding tickets, violation of animal leash laws, and falsely reporting an incident to police. Weber v.

Dell, 804 F.2d 796 (2nd Cir. 1986); Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981); Stewart v. Lubbock Cnty., 767 F.2d 153 (5th Cir. 1985); Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983); Jones v. Edwards, 770 F.2d 739 (8th Cir. 1985); Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984) (*per curium*); Hill v. Bogans, 735 F.2d 391 (10th Cir. 1984). The facilities involved had policies providing for body cavity searches of all persons detained in a facility regardless of the charges against them. In every case the courts of appeal held that such policies violated the Fourth Amendment and held that detention officers could not lawfully conduct these searches unless they had a reasonable suspicion that the arrestee/detainee had concealed weapons or other contraband in his or her body cavities. The circuit courts of appeal based their rulings upon the Supreme Court's statement in Bell:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. Bell, at 559.

While courts of appeal held visual body cavity searches unconstitutional, the Supreme Court rendered several opinions regarding various constitutional issues. In each case the Court reiterated the hands-off approach, which the court set out in Bell and which trial and appellate courts must apply. Hudson v. Palmer, 468 U.S. 517, 522-23, 104 S.Ct. 3194, 82 L.Ed. 2d 393 (1984) (reversing the holding that random shakedowns must be conducted pursuant to an established policy); Turner v. Safley, 482 U.S. 78, 91-93, 107 S.Ct. 2254, 96 L.Ed. 2d 64 (1987) (affirming a prohibition on inmate-to-inmate-correspondence); O'Lone v. Estate of Shabazz, 482 U.S. 342, 350, 107 S.Ct. 2400, 96 L.Ed. 2d 282 (1987) (prison officials do not have to prove that no reasonable method exists by which prisoners' religious rights can be accommodated without creating bonafide security problems); Thornburgh v. Abbot, 490 U.S. 401, 416, 109 S.Ct. 1874, 104 L.Ed. 2d 459 (1989) (prison administrators enjoy broad discretion to forbid certain incoming publications received by prisoners because of threat to security and order they might pose).

In Lewis v. Casey, 518 U.S. 343, 362, 116 S.Ct. 2174, 135 L.Ed. 2d 606 (1996) the court overturned an injunction placed on access to the prison law library. The court stated:

> One need only read the order . . . to appreciate that it is the *ne plus ultra* of what our opinions have lamented as a court's "in the name of the constitution becom(ing) . . . enmeshed in the minutiae of prison operations." (Citing Bell v. Wolfish, at 562)." Lewis, at 362.

In Overton v. Bazzetta, 539 U.S. 126, 123 S.Ct. 2162, 156 L.Ed. 2d 162 (2003), the Court upheld certain regulations and stated that "[t]he burden . . . is not on the state to prove the validity of prison regulations but on the prisoner to disprove it."

By 2008 the Eleventh Circuit Court of Appeals had questioned the validity of the legal position of those opinions rendered by circuit courts of appeal in the 1980's. In Powell v. Barrett, 541 F.3d 1298 (11th Cir. 2008) *en banc*, the Fulton County (Georgia) sheriff instituted a policy requiring detention officers to conduct visual body cavity strip searches of every person booked in and entering the general detention population "without an individual determination of reasonable suspicion to justify the search,

and regardless of the crime with which the person is charged." Powell, at 1300. Five plaintiffs all charged with non-violent offenses filed suit challenging the policy.

The court first noted that the Supreme Court in Bell had upheld the visual body cavity search at issue in that case and stated:

> The security needs that the Court in Bell found justifies strip search in an inmate re-entering the jail population after a contact visit are no greater than those that justify searching an arrestee when he is being booked into the general population for the first time. Powell, at 1302.

The court noted that these cases from the 1980's (including one from the Eleventh Circuit) had struck down policies for conducting visual body cavity searches when no reasonable suspicion existed that the arrestee/detainee had concealed weapons or contraband in the body cavities. The court then stated:

> Those decisions are wrong. The difference between felonies and misdemeanors or other lesser offenses is without constitutional significance when it comes to detention facility strip searches. It finds no basis in the Bell decision, and the reasoning of that decision, or in the real world of detention facilities. The Supreme Court made no distinction in Bell between detainees based on whether they had been charged with misdemeanors or

> felonies or even with no crime at all. Powell, at 1310; Accord, Bull v. City and Cnty. of San Francisco, 964, 980-991 (9th Cir. 2010) (*en banc*).

3. The Florence Decision

In 2012 the Supreme Court decided Florence v. Board of Chosen Freeholders of the County of Burlington, 132 S.Ct 1510, 182 L.Ed. 2d 566 (2012). A state trooper arrested Florence during a traffic stop and after checking a data base found that Florence had an outstanding bench warrant for failing to appear at a hearing to enforce a fine. Officers detained Florence at detention centers where he underwent strip searches including a body cavity search. When officers determined that Florence had, in fact, paid the fine, they released him. Florence then filed a §1983 action asserting that detention officials cannot subject persons arrested for minor offenses to these invasive searches unless the officials have reason to suspect these arrestees have concealed weapons, drugs, or other contraband.

The Supreme Court looked back to Bell as "the starting point for understanding" why courts must defer to correctional officials regarding

regulations concerning safety and security in detention facilities. The Court reiterated that Bell had held that such searches are "reasonably related to "legitimate penalogical interests." Florence, at 574-575.

The Court discussed the dangers of concealed contraband and observed that arrestees for minor offenses could bring concealed contraband into detention centers just as those charged with more serious offenses. The court further noted that "many justifications" justified imposing a general ban rather than trying to carve out exceptions for certain detainees. Florence, at 575. The Court discussed prior decisions regarding jail administration and stated:

> These cases establish that correctional officials must be permitted to devise reasonable search policies to detect and to deter the possession of contraband in their facilities. . . . This Court has repeated the admonition that "in the absence of substantial evidence in the record to indicate that officials have exaggerated their response to these considerations courts should ordinarily defer to their expert judgment in such matters. Florence, at 576.
>
> [A] responsible Fourth Amendment balance is not well served by standards requiring sensitive, case by case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. Florence, at 577.

> The question here is whether undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt for more invasive search procedures at issue absent reasonable suspicion of a concealed weapon or other contraband. The court has held that deference must be given to the officials in charge of the jail unless there is "substantial evidence" demonstrating their response to the situation is exaggerated. Florence, at 578.

The Court concluded that indeed no substantial evidence existed to demonstrate that having arrestees charged only with minor offenses going into the jail general population should be exempted from visual body cavity searches. Florence makes clear, as did the Powell court, that strip search decisions of the 1980's are wrong.

The question in this case is whether juveniles charged with minor offenses must be exempt from visual body cavity searches unless detention officers have reason to believe that they have concealed contraband in their body cavities. Prior to the Supreme Court's Florence decision both the Second Circuit and the Eighth Circuit Courts of Appeals addressed strip searches in the context of juvenile detention centers. Mabry argues in her

brief that both cases support her argument. Neither case supports her position.

In N.G. v. Connecticut, 382 F.3d 225 (2d Cir. 2004), the parents of a minor sued under §1983 alleging that officers at a juvenile detention center made their daughter undergo several strip searches while she was held in the juvenile detention center. The district court held that the searches of the daughter did not violate the Fourth Amendment. On appeal the Second Circuit held that the initial search when the minor entered the juvenile detention center did not violate the Fourth Amendment. The court held, however, that the subsequent searches did violate the Fourth Amendment unless the officers had reasonable suspicion that the minor had acquired contraband.

The court noted that a juvenile detention center has an enhanced responsibility to take reasonable action to protect juveniles from the hazards of contraband. The facility also has a protective function of locating and removing concealed items that could be used for self-mutilation or suicide. Also, the facility has a duty to look for evidence of

abuse. N.G., at 236. The court concluded that because the facility was exercising legitimate custodial authority over the juvenile, its responsibility obligated it to protect those juveniles in its charge. Therefore, the strip search at the time of intake justified subordinating the juvenile's liberty interest to the facility's interest in preserving and promoting the welfare of the child. N.G., at 232, 237. Thus, the court held that a suspicionless search at the time of intake of a juvenile does not violate the Fourth Amendment. N.G., at 237.

The Eighth Circuit Court of Appeals in Smook v. Minehaha Co., 457 F.3d 806 (8th Cir. 2006), also considered the suspicionless search of a juvenile upon intake at a juvenile detention center. The Eighth Circuit extensively citing N.G., supra, held that a strip search upon initial admission did not violate the Fourth Amendment because the search is reasonable within the meaning of the Fourth Amendment. Smook, at 810-812.

4. After Florence

In T.S. v. Doe, 742 F.3d 632 (6th Cir. 2014), the Sixth Circuit Court of Appeals addressed strip searches in the context of a juvenile detention center after the Florence decision. In T.S. police officers arrested several minors for underage drinking. Officers transported two sisters to a juvenile facility where same-sex officers visually strip searched them. The parents sued various defendants asserting that the facility's "strip search policy violated clearly established Fourth Amendment law prohibiting the suspicionless strip search of juveniles accused of non-violent misdemeanor offenses." T.S., at 633. In T.S., the individual defendants moved for qualified immunity. Before the district court ruled, the Supreme Court rendered its decision in Florence. The district court held that Florence had no relevance and held that the Sixth Circuit's holding in Masters v. Crouch, 872 F.2d 1248 (6th Cir. 1989) disposed of the constitutional issue. The district court held that Masters "clearly established the right of both adults and juveniles to be free from strip searches absent individualized suspicion" and denied the motions for qualified immunity. T.S., at 635.

The Sixth Circuit found that the district court had clearly erred. The court stated:

> [No] pre-established principal of constitutional law -- not then and certainly not now -- forbids a juvenile detention center from implementing a generally applicable search policy upon intake into the facility. T.S., 634.

The court then cited a number of decisions from other circuits which had re-evaluated the legal positions set out in Masters and other cases. T.S., at 638. The court then stated, "citation for Florence is, in large respect, shorthand for the fundamental shift in the law that has taken place over the past three decades and that is so weak in the foundation of Masters as to bring about its final collapse in Florence." T.S., at 639.

T.S. also cited N.G. v. Connecticut, supra and Smook v. Minehaha County, supra. These plaintiffs also argued that these two decisions supported their position. The appellate court thought differently:

> We have yet to address this issue. However, two of our sisters have. See, N.G. v. Connecticut, 382 F.3d 225 (2nd Cir. 2004); Smook v. Minehaha County, 457 F.3d 806 (8th Cir. 2006). Neither case is helpful to the plaintiffs. N.G. involves suspicionless searches of juvenile detainees during their intake into the general population of the juvenile detention center. N.G., 382 F.3d at 228-30. The

> majority found the reasonableness of the suspicionless searches observing that the status in *loco parentis* over the juveniles created an enhanced responsibility to keep the detention center free of contraband, discover items that could be used for self-mutilation or suicide, and detect signs of abuse. Id. at 236-38.
>
> Far from establishing clear law in the plaintiff's favor, the N.G. majority supports the defendant's contention that the strip search at issue here is constitutional. Smook is similarly helpful to the plaintiffs, as the Eighth Circuit adopted the reasoning of the N.G. majority in granting qualified immunity to prison officials who conducted a partial strip search of the juvenile detainee. 457 F.3d, at 811-12. Both of these cases further undermine the plaintiff's cause. T.S., at 640.

Since the court decided the question of qualified immunity in that case, it did not have to opine on the constitutionality of the strip search. However, the court made it clear that a "fundamental shift in the law" regarding suspicionless searches had occurred. T.S., at 638-639. The court at this point held that the defendants were indeed entitled to qualified immunity and remanded the case for proceedings consistent with the opinion. T.S., at 641.

Recently, the Third Circuit Court of Appeals rendered its decision in J.B., a Minor, v. Fassnacht, 801 F.3d 336 (3rd Cir. 2015). Officer Fassnacht

received notice that J.B., a twelve year old minor, had threatened several young girls who had teased him. Fassnacht filed a juvenile allegation against J.B. The Lancaster (Pennsylvania) County Juvenile Court ordered J.B.'s detention, and his parents surrendered him to the authorities.

Officers transported J.B. to the Lancaster County Youth Intervention Center. Officers at the center processed J.B., and then an officer conducted a visual body cavity strip search of J.B. J.B.'s parents sued Fassnacht and others individually and in their official capacities under §1983. The parents alleged among other things that the defendants had subjected J.B. to an unreasonable search by conducting the visual body cavity strip search. Defendants then moved for summary judgment on all claims. The district court granted the motion in part and denied it in part. The district court rejected the defendants' argument that plaintiffs' unreasonable search claim failed pursuant to the Supreme Court's decision in Florence, supra. The district court held that Florence only addressed strip searches of adults and made no reference to juveniles.

Defendants appealed, and the Third Circuit Court of Appeals reversed the district court. The court noted all the reasons that the Supreme Court had held the Florence strip search valid and concluded, "strip searches of all detainees prior to the admission to the general population of the jail served such penalogical interests." J.B., at 342.

The court rejected the plaintiffs' argument that Florence applied only to adults:

> Plaintiff 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. First, the institutional security reasons identified in Florence similarly implicate juvenile detention centers. Indeed juveniles present the same risks to themselves, staff, and other detainees as adults in similar facilities. J.B., at 342.

The court then further explained why Florence applied to juveniles:

> In addition, juveniles pose risks unique from those of adults as the state acts as the minors' *de facto* guardian or *in loco parentis*, during a minor's detention period. This status creates an intense responsibility to screen for signs of disease, self-mutilation, or abuse in the home. . . .
>
> There is no easy way to distinguish between juvenile and adult detainees in terms of the security risks cited by the Supreme Court in Florence. Indeed, "[a] detention center, police station, or jail holding cell is a place fraught with

> serious security dangers. These security dangers to the institution are the same whether the detainee is a juvenile or an adult."
>
> Juvenile detainees present risks both similar and unique to those cited in Florence. At bottom these risks pose significant danger to the detainee, himself, or other detainees, and juvenile detention center staff. J.B., at 343-344.

The Third Circuit also rejected the plaintiffs' argument that jail officers should not strip search juveniles unless they have reasonable suspicion that a juvenile has on his person a concealed weapon or contraband. Likewise, the court rejected the plaintiffs' argument that juveniles charged with non-serious offenses should not be strip searched:

> [A]ny individualized, or reasonable suspicion inquiry falters in juvenile detention centers for the same reasons it does so in adult facilities. . . .
>
> Because officers in any detention facility have residual interest in readily administrable rules, blanket strip search policies upon admission to the general population of the jail, regardless of whether the detainee is a juvenile or adult, make good sense. Any other policy would limit the intrusion of the privacy of some detainees but at the risk of increased danger to everyone else in the facility. Thus, to the extent the Supreme Court addressed this type of inquiry in rejecting petitioners' argument for an exclusion for non-serious offenders, would similarly

> reject plaintiffs' argument that juveniles are to be excluded, or moreover, that non-serious juvenile offenders be excluded. J.B., at 345-346.
>
> The court concluded its opinion emphasizing that jail administrators could strip search all juvenile arrestees admitted to the general population of the jail. "The only qualification is that the detainee must be admitted to the general population." J.B., at 347.[1]

CONCLUSION

The Supreme Court has made it clear that visual body cavity strip searches without more do not violate the Fourth Amendment. As discussed above, the Supreme Court has also made it clear in Bell and in subsequent opinions regarding jail detention administration that a court should always defer to the judgment of detention facility administrators unless these policies have no reasonable relation to a legitimate governmental interest. Likewise, the Supreme Court has made it clear that the party challenging the detention's regulations has the burden of disproving the validity of the regulation. Mabry simply has not met that burden in this case.

[1] Mabry has acknowledged in her brief that no dispute exists that the officers placed T.M. in the general population.

The Third Circuit has articulated why the rationale of Bell and the subsequent decisions should apply to policies providing visual body cavity searches of all minors upon intake into a facility. Lee County submits that the holding in Fassnacht, supra, is rational, sound, and logical and urges this Court to follow that decision.

Respectfully submitted, this the 11th day of August, 2016.

LEE COUNTY, MISSISSIPPI,
DEFENDANT/APPELLEE

BY: */s/ William C. Murphree*
WILLIAM C. MURPHREE,
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CERTIFICATE OF SERVICE

I hereby certify that I, William C. Murphree, have electronically filed the foregoing Brief for the Appellee with the Clerk of the Court using the court's ECF system which sent notification of such filing to counsel of record by using their electronic mailing addresses as follows:

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DATED, August 11, 2016.

/s/ William C. Murphree
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,972 words, excluding the parts of the brief exempted by Fed.R.App. P. 32(a)(7)(B)(iii).

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

Respectfully submitted, this the 11th day of August, 2016.

/s/ William C. Murphree
WILLIAM C. MURPHREE, MSB# 3661