SEARCH WARRANTS, PENIS PICS, AND THE FOURTH AMENDMENT

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On December 5, 2017, the Fourth Circuit Court of Appeals of decided the *Sims v. Labowitz et al.*[i], in which the court examined whether it was reasonable for a detective to apply for and execute a search warrant for photos of a 17-year-old male's flaccid and erect penis in furtherance of a distribution of child pornography investigation where the male sent a video of himself to his 15-year-old girlfriend. The relevant facts of *Sims*, taken directly from the case, are as follows:

> In June 2014, the Commonwealth of Virginia filed felony charges against Sims as a juvenile for manufacturing and distributing child pornography in violation of Virginia Code §§ 18.2-374.1, 18.2-374.1:1. The charges arose based on Sims' conduct of "film[ing] a video of himself and fondling his erect penis" and sending the video to his minor girlfriend using his cellular telephone. After Sims declined to enter into a plea agreement, the Assistant Commonwealth's Attorney for Prince William County, Virginia, Claiborne T. Richardson, II, sought a nolle prosequi, and the juvenile court dismissed the charges against Sims.
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> The investigation against Sims continued and, at Richardson's direction, Abbott obtained a search warrant from a Virginia magistrate. The warrant authorized a search for "[p]hotographs of the genitals, and other parts of the body of [Sims] that will be used as comparisons in recovered forensic evidence from the victim and suspect's electronic devices. This includes a photograph of the suspect's erect penis."
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> Richardson and Abbott also obtained a detention order for Sims, which authorized Abbott to transport Sims from his home to a juvenile detention center. In a "locker room" in the center, Abbott and two uniformed, armed officers executed the search warrant. Abbott ordered Sims to "pull down his pants so that photos could be taken of his penis." After Sims complied, Abbott instructed Sims "to use his hand to manipulate his penis in different ways" to obtain an erection. However, Sims was unable to achieve an erection. Nonetheless, Abbott took photographs of Sims' flaccid penis using Abbott's cellular telephone.

> The next day, Sims was arraigned on charges of possession and distribution of child pornography. Abbott informed Sims' attorney that Abbott again "proposed to take photographs of [Sims'] erect penis" to be used as evidence. Abbott also stated that if Sims could not achieve an erection, Sims would be taken "to a hospital to give him an erection-producing injection." Abbott obtained a second search warrant from a Virginia magistrate, which authorized additional photographs of Sims' naked body, including his erect penis.
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> Before the second search warrant was executed, however, the Manassas City Police Department issued a statement explaining that the department's policy did not permit "invasive search procedures of suspects in cases of this nature." Additionally, the Prince William County Commonwealth's Attorney, Paul B. Ebert, condemned the first search of Sims.
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> Sims' attorney filed a motion to quash the second search warrant. Before the juvenile court ruled on the motion, Richardson informed the court that the Commonwealth "would let the warrant expire without service." Richardson also stipulated that he would not use as evidence the photographs of Sims' penis that had been taken pursuant to the first search warrant.
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> After the juvenile court reduced the charges to felony possession of child pornography, the court found that the evidence was sufficient to convict Sims but did "not make a finding of guilt[]" and suspended imposition of sentence for one year. The court ordered Sims to comply with certain terms of probation, including performing 100 hours of community service, barring Sims from "access to social media," and prohibiting Sims from sending "text messages." After Sims completed the terms of his probation in August 2015, the court dismissed the charge against him.[ii]

Detective Abbott subsequently passed away, and Sims sued the Administrator of his Estate, Labowitz. Sims alleged that Abbott violated his rights under the Fourth and Fourteenth Amendments and violated a federal child pornography statute. The district court granted qualified immunity to the Administrator on the constitutional claims and dismissed the other claim.

Sims appealed the grant of qualified immunity on the Fourth Amendment claim and the dismissal on the federal child pornography statute.

The first issue the court examined on appeal was whether the Administrator of the Estate, was entitled to qualified immunity for executing the search warrant for photos of Sims' flaccid and erect penis and having him masturbate in the presence of three adults in order to try to obtain an erection.

The court of appeals first noted that, in order to determine if qualified immunity is warranted, they must (1) determine if a federal protected right was violated, and (2) determine if the right was clearly established such that another reasonable officer in the same situation would have known he was violating that right.

The court then set out to determine if Detective Abbott violated Sims' rights by taking photos of his flaccid penis and having him masturbate in the presence of adults in order to obtain and erection so he could photograph it regarding a child pornography investigation.

The court first noted the legal principals involved regarding this issue. The court stated

> The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v*. *California*, 384 U.S. 757, 767 (1966).
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> **A search is lawful only when it is reasonable**. *Amaechi v*. *West*, 237 F.3d 356 (4th Cir. 2001). **When, as in the present case, a search involves "movement of clothing to facilitate the visual inspection of a [person's] naked body," the search qualifies as a type of "sexually invasive search.**" *United States v*. *Edwards*, 666 F.3d 877, 882-83 (4th Cir. 2011) (citations omitted). **To determine whether a sexually invasive search is reasonable, we employ the test adopted in *Bell v*. *Wolfish*,** 441 U.S. 520, 559 (1979). *See King v*. *Rubenstein*, 825 F.3d 206, 214-15 (4th Cir. 2016); *Edwards*, 666 F.3d at 883.
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> **Under the *Bell* framework, we balance the invasion of personal rights caused by the search against the need for that particular search**. 441 U.S. at 559. **Pursuant to *Bell*, we examine the search in its complete context and consider the following factors: (1) the scope of the particular intrusion; (2) the manner in which the search was conducted; (3) the justification for initiating the search; and (4) the place in which the search was performed**. *Id*.[iii] [emphasis added]

The court first addressed whether the Administrator (based on Abbotts conduct) was entitled to qualified immunity. The court first set out to examine the first prong of the qualified immunity analysis, particularly whether Abbott violated Sims' rights under the Fourth Amendment.

To do this, the court then set out to analyze Sims' case in light of *Bell* above and balance the severity of the intrusion Sims received by the search against the government's interest in conducting the search. As to the first and second factors, the court stated that the search was "sexually invasive" and therefore constituted an "extreme intrusion upon personal privacy, as well as an offense to" Sims' dignity.[iv] It was noted that the detective did more than simply inspect Sims' penis. Rather, he attempted to photograph Sims' penis in a sexually aroused state. Further, he ordered him to masturbate in the presence of three armed officers in order to obtain an erection. As such, the court stated

> Such alleged conduct necessarily invaded Sims' bodily integrity even though no part of Sims' body was penetrated or physically harmed. Abbott's search directed at forcing Sims to achieve an erection intruded "upon an area in which our society recognizes a significantly heightened privacy interest."[v]

After determining that the search was extremely intrusive, the court then set out to balance the government's interest in conducting the search. The reason Abbott sought to obtain the photos of Sims' penis was for evidence that could be compared to evidence found in Sims' and his girlfriend's phones. However, the court noted that the government ultimately chose not to use the photographs of Sims' body taken by Abbott in its case, and despite this, the juvenile court convicted Sims of possession of child pornography. The court then stated

> **We cannot perceive any circumstance that would justify a police search requiring an individual to masturbate in the presence of others**. *See id*. at 767 (explaining that when searches intrude upon heightened privacy interests, a more substantial justification is required). **Sexually invasive searches require that the search bear some discernible relationship with safety concerns, suspected hidden contraband, or evidentiary need**. *See Logan v*. *Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981). **Thus, we discern no justification for Abbott's alleged conduct executing the search of Sims' body, and we conclude that the semi-private location of the search did not mitigate the overall circumstances of this exceptionally intrusive search. Accordingly, we hold that Sims sufficiently alleged a violation of his Fourth Amendment right to be free from the sexually invasive search of his person**.[vi] [emphasis added]

Therefore, the court held that Detective Abbott did violate the Fourth Amendment, which satisfies the first prong of the qualified immunity analysis.

The court then moved to the second prong of the qualified immunity analysis, whether the law was clearly established. The court stated

> **To be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right**." *Id*.
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> **In this analysis, we review "cases of controlling authority in [this] jurisdiction, as well as the consensus of cases of persuasive authority from other jurisdictions**." *Amaechi*, 237 F.3d at 363 (internal quotation and citation omitted). **We observe that the "exact conduct at issue need not" previously have been deemed unlawful for the law governing an officer's actions to be clearly established**. *Id*. at 362 (citing *Anderson*, 483 U.S. at 640). **Instead, we must determine whether pre-existing law makes "apparent" the unlawfulness of the officer's conduct**. *Clem v*. *Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002) (quoting *Anderson*, 483 U.S. at 640). "**Accordingly, a constitutional right is clearly established for qualified immunity purposes not only when it has been specifically adjudicated but also when it is manifestly included within more general applications of the core constitutional principle invoked." *Id***. (internal quotation and citation omitted).[vii] [emphasis added]

Here, the government's need was to obtain evidence to prosecute Sims for violating child pornography laws for making a video of himself fondling his erect penis and sending it to his 15-year-old girlfriend. The court stated

> **The Supreme Court and this Court have developed an entire body of jurisprudence establishing limits on sexually intrusive searches. This precedent has made clear that when a search of a person's body would significantly invade that individual's right of privacy, the basis for the search requires greater justification under the Fourth Amendment.** *Winston*, 470 U.S. at 767; *see*, *e.g*., *Florence v*. *Bd*. *of Chosen Freeholders of Cty*. *of Burlington*, 566 U.S. 318, 330-38 (2012) (holding that invasive search procedures at jail struck a reasonable balance between inmate privacy and the security needs of the institutions); *Illinois v*. *Lafayette*, 462 U.S. 640, 645 (1983)

> (explaining that an officer cannot disrobe an arrestee publicly without justifying factors); *Bell*, 441 U.S. at 558-60 (holding that practice of conducting visual body-cavity searches of inmates following contact visits did not violate the Fourth Amendment because of significant security interests);…[viii] [emphasis added]

The cases above describe significant state interest in the intrusive searches discussed. However, in Sims case, the prosecutor ultimately agreed not to use the photographs that Abbott took; Sims was still convicted. As such, the Fourth Circuit concluded the need for the photographs was low. Furthermore, at the time, Sims was a minor under state law, which should have merited concern. The court then held

> Accordingly, officials taking minors into custody must "preserv[e] and promot[e] the welfare of the child." *Schall v*. *Martin*, 467 U.S. 253, 265 (1984) (citation omitted). **In conducting sexually invasive searches of minors, officials must employ extreme caution because minors are "especially susceptible to possible traumas" affiliated with such searches.** *N*.*G*., *S*.*G*. *ex rel*. *S*.*C*. *v*. *Connecticut*, 382 F.3d 225, 244 (2d Cir. 2004) (citation omitted). Thus, Abbott should have been aware that any assessment of the legality of a sexually invasive search of a 17-year-old required additional considerations based on the child's age.
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> **Because there was no justification for the alleged search to photograph Sims' erect penis and the order that he masturbate in the presence of others, we conclude that well-established Fourth Amendment limitations on sexually invasive searches adequately would have placed any reasonable officer on notice that such police action was unlawful.** *See Amaechi*, 237 F.3d at 365. Thus, the alleged conduct plainly did not qualify as the type of "bad guesses in gray areas" that qualified immunity is designed to protect. *Braun v*. *Maynard*, 652 F.3d 557, 560 (4th Cir. 2011) (quoting *Maciariello v*. *Sumner*, 973 F.2d 295, 298 (4th Cir. 1992)).

Therefore, the court held that the law was clearly established and Abbott should have known he was violating Fourth Amendment by his conduct.

The second issue before the court was whether the fact that Abbott was executing a search warrant for photos of Sims' flaccid and erect penis should entitle him to immunity since a "neutral magistrate" determined there was probable cause and authorized the search. However, the court noted

> **[T]he fact that a search warrant has been obtained "do[es] not confer immunity if it was objectively unreasonable" for the officer to rely on the warrant.** *See Graham*, 831 F.3d at 183 (citations omitted) (discussing arrest warrant).[ix]

In light of the above, the court held that the "obvious, unconstitutional invasion of Sim's'" Fourth Amendment rights that was required to execute the warrant was objectively unreasonable. Therefore, since another reasonable officer in the same situation would have recognized the unconstitutionality of executing that search warrant, qualified immunity is not appropriate.

The final issue before the court was whether the detective violated a federal child pornography law in photographing Sims. This particular statute allows for civil penalties as well as criminal penalties.

The court stated

> The statutory pornography offense relied on by Sims prohibits an individual from persuading or coercing a minor to engage in "any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." 18 U.S.C. § 2251(a). "Sexually explicit conduct" includes "graphic or simulated *lascivious* . . . masturbation" and "graphic or simulated *lascivious* exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2)(A) (emphasis added).
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> The term "lascivious conduct" means "tending to excite; lust; lewd; indecent; or obscene." *See* "Lascivious," *Black's Law Dictionary* (10th ed. 2014).[x]

The court then affirmed the dismissal of this claim because the detective did not intend the photograph to elicit a sexual response from the view; rather, the photographs were taken as evidence.

In conclusion, the court of appeals reversed the grant of immunity on the Fourth Amendment claims and affirmed immunity on the child pornography claim.

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[i] No. 16-2174 (4th Cir. Decided December 5, 2017)
[ii] Id. at 5-7
[iii] Id. at 9
[iv] Id.
[v] Id. at 10-11
[vi] Id. at 12
[vii] Id. at 12-13
[viii] Id. at 13-14
[ix] Id. at 16-17
[x] Id. at 18