RECORD NO. 16-2174

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

TREY SIMS,

Plaintiff/Appellant,

v.

KENNETH E. LABOWITZ, ADMINISTRATOR PURSUANT TO CODE OF VA. SECT. 64.2-454 OF THE ESTATE OF DAVID E. ABBOTT,

Defendant/Appellee.

AND

ESTATE OF DAVID E. ABBOTT;
CLAIBORNE RICHARDSON,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

RESPONSE BRIEF FOR APPELLEE KENNETH E. LABOWITZ

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 16-2174 Caption: Sims v. Labowitz, Administrator

Pursuant to FRAP 26.1 and Local Rule 26.1,

Labowitz, Adminstrator
(name of party/amicus)

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If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: _____ Date: 10/25/16

Counsel for: Kenneth Labowitz, Administrator

CERTIFICATE OF SERVICE

****

I certify that on October 25, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

_____ 10/25/16
(signature) (date)

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Appellee Kenneth E. Labowitz, Administrator pursuant to Code of Va. § 64.2-454 of the Estate of David Abbott ("Abbott Estate"), states as follows in opposition to Appellant Trey Sims' ("Sims") opening brief.

I. Issues presented for review

The issues in this case are:

1. Whether the District Court, in granting the Abbott Estate's Motion to Dismiss, properly found that the Abbott Estate was entitled to qualified immunity.

2. Whether the District Court properly granted the Abbott Estate's Motion to Dismiss Sims' claim that, while executing a search warrant, Detective David Abbott manufactured child pornography in violation of 18 U.S.C. § 2255.

II. Statement of the Case

Sims alleges that, when he was 17 years old, he and his girlfriend exchanged explicit nude photos of themselves, referring to them as "sexts." (Joint Appendix, "JA" 23). The girlfriend's mother became aware of the sexts and reported them to the Manassas City Police Department ("MCPD") in January of 2014. *Id.*

Detective David E. Abbott of the MCPD ("Detective Abbott" or "Abbott") obtained a warrant to "seize evidence related to the sexts," and, along with several other police officers, executed the warrant at the home of Sims' aunt, with whom he lived at the time. *Id.* Sims alleges that Abbott later committed suicide shortly before he was to be arrested for "sexual misbehavior." Based on that, Sims

concludes that Abbott had a "perverse sexual interest" that partially drove the investigation. (JA 22).

Sims was charged with "felony manufacture and distribution of child pornography, i.e. a video he made of himself," and a trial date was set. (JA 23). Prior to trial, Sims was held on "home confinement for allegedly being a flight risk." During that time, a police officer performed random checks at home and at school, and certain other restrictions were placed on his ability to leave the home and go elsewhere, other than to school. *Id*. At trial, Sims alleges that he was offered a plea deal, which he rejected, causing co-defendant, Claiborne Richardson ("Richardson"), Assistant Commonwealth's Attorney for Prince William County, Virginia, to request the charges be dismissed by *nolle prosequi*. (JA 24). Sims claims that decedent Abbott said words to him "menacingly" and showed Sims' lawyer photographs on his laptop. (JA 25).

Later that same day, Richardson "directed" Abbott to obtain a secure detention order for Sims from the juvenile court service unit, which he did. (JA 24). On the same day, also at the direction of Richardson, Detective Abbott obtained a search warrant authorizing photographs of "various parts" of Sims' body including "a photograph of the suspect's erect penis" to be used in

comparison to the sexts that were sent to his girlfriend. (JA 25).[1] Sims initially claimed in District Court that the decision to procure the detention order was "motivated by spite and anger" at Sims' refusal of Richardson's plea bargain offer. *Id*. He now claims, however, that the detention order was a ploy used to obtain the photographs of Sims at the Prince William County Juvenile Detention Center ("JDC"), where his aunt would not be able to interfere.[2] Appellant's Brief, p. 21, fn. 16.

Detective Abbott and several other officers executed the secure detention order at the aunt's home on June 3, 2014, arresting Sims, handcuffing him, and taking him to the JDC. (JA 26). Once there, Sims was taken into a locker room by Abbott and two other uniformed officers where he was told to pull down his pants, at which point Abbott photographed his "unerect penis with his cell phone." (JA

[1] In the District Court, Sims' counsel voluntarily produced the documents from Sims' JDR file. These documents, along with the search warrants obtained from the Prince William County Circuit Court, comprise the Supplemental Joint Appendix. The exhibits were filed with the Abbott Estate's Motion to Dismiss the Second Amended Complaint, and were properly considered by the District Court. "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007).

[2] It should be noted that, depending on the type and degree of interference used, Sims' aunt could have been charged with obstruction of justice, or attempted obstruction of justice under Virginia Code § 18.2-460. See e.g., *Turner v. Commonwealth*, 20 Va. App. 713 (1995) (upholding the conviction of a man for attempted obstruction of justice for attempting to thwart the execution of an arrest warrant).

26-27). Abbott allegedly directed him to "use his hand to manipulate his penis in different ways, presumably to stimulate, or simulate, the erection that Richardson sought…" (JA 27).

The following day, Sims was arraigned on charges of possession and distribution of child pornography. He was appointed defense counsel and a guardian ad litem and a trial date was set. (JA 28). Following the arraignment, Sims was released to the custody of his aunt, again on home confinement. *Id.*

Although both Abbott and Richardson had previously stated that their case against Sims was strong, on June 13, 2014, Detective Abbott told Sims' defense counsel that he "proposed to take photographs of [Sims'] erect penis to compare to the sexts at the heart of the investigation." (JA 28-29). Abbott proposed to the attorney that Sims could either provide these himself or police department personnel could take him to a local hospital and give him an injection. (JA 28).

At the next hearing on July 1, 2014, Sims rejected another plea deal and the trial was continued to August 1, 2014. *Id.* That same day, Abbott, "at the direction of the prosecution," sought and obtained a second search warrant for photographs of Sims' erect penis. (JA 28-29). Sims alleges that a public outcry ensued, with the MCPD declaring that the injection would not proceed. (JA 29). Sims' lawyer filed "motions to quash" the warrant, and in response, Richardson agreed not to

execute the new warrant or to introduce the previously obtained photographs in his case. (JA 30).

At trial on August 4, 2014, in the Juvenile and Domestic Relations District Court ("JDR") for Prince William County, Virginia, the charges against Sims were amended on Richardson's motion to felony possession of child pornography. (JA 30). The court, "making no finding of guilt," suspended imposition of sentence pending Sims' successful completion of one-year of probation. (JA 31; Supplemental Joint Appendix "Supp. JA" 62). The terms of Sims' probation prevented him from leaving the county or City of Manassas for more than 24 hours without obtaining prior approval from his probation officer; set a curfew of 7:00 p.m. on weekdays and 9:00 p.m. on weekends; required completion of 100 hours of community service; prohibited Sims from using social media, sending or receiving text messages except to and from his aunt and certain school personnel; and prohibited him from using the internet function on his cell phone. (JA 30-31, Supp. JA 62). Due to his successful completion of the terms of his probation, the charges against Sims were dismissed in August 2015. (JA 31).

Sims filed suit against both Richardson and the "Estate of David E. Abbott" in May of 2016. Shortly thereafter, he filed an Amended Complaint, changing the Estate of David E. Abbott to the current, procedurally-correct appellee. In both of these first two complaints, all of Sims' claims were made against both defendants.

Sims alleged Fourth Amendment violations for unlawful search and seizure, substantive due process violations for compelling the photographs authorized by the search warrant and for "threatening" Sims with the injection, a violation of the Equal Protection Clause based on only Sims being investigated and charged (as opposed to his younger girlfriend), conspiracy to interfere with Sims' civil rights, conspiracy to engage in sex discrimination, production of child pornography and intentional infliction of emotional distress.

After both defendants filed motions to dismiss and before the District Court ruled on the motions, Sims filed a Second Amended Complaint. In that, Sims alleged – against both defendants again – violations of his rights under the Fourth Amendment of the United States Constitution for seizing him without probable cause, violations of his rights under the Fourth or Fourteenth Amendments for photographing his penis, a violation of his substantive due process rights for "threatening" him with the injection, conspiracy to deprive him of his Fourth and Fourteenth Amendment Rights, and production of child pornography under 18 U.S.C. § 2251(a) and 18 U.S.C. § 2255. (JA 32-34). Richardson and the Abbott Estate both filed motions to dismiss all claims pursuant to Fed. R. Civ. P. 12(b)(6).

By order dated September 19, 2016, the District Court dismissed the case on the basis of absolute immunity for Richardson and qualified immunity for the Abbott Estate. (JA 15, 19). Sims appealed only the dismissal of his unlawful

search and child pornography claims against the Abbott Estate. He did not appeal the dismissal of the conspiracy claim, the seizure claim, or any of the claims against Richardson.

III. Summary of the Argument

The District Court properly dismissed Sims' Second Amended Complaint because he failed to state a claim for which relief could be granted for violation of his Fourth or Fourteenth Amendment rights under 42 U.S.C. § 1983. Established case law shows that Detective Abbott's photographing of Sims, which was authorized by a search warrant, was reasonable. The fact that Sims was a juvenile at the time does not alter the analysis, as established case law also supports the reasonableness of warrantless, custodial strip searches of juveniles. This claim is governed by the Fourth Amendment.

Sims claims that Detective Abbott's conversation with Sims' defense counsel wherein he stated that an injection could be used to produce an erection, violated the substantive due process clause of the Fourteenth Amendment. While the injection never occurred, the photographs of the resulting erection would have been taken as authorized by the July search warrant, and thus this claim is also governed by the Fourth Amendment. Furthermore, it does not "shock the conscience" as required under a Fourteenth Amendment substantive due process analysis.

The photographs that were taken pursuant to the June search warrant do not constitute child pornography, as they were not lascivious and did not simulate masturbation, as required by federal law.

Even if this Court were to find that Detective Abbott's actions violated Sims' constitutional rights, the Abbott Estate would still be entitled to qualified immunity because the law was not sufficiently clear enough to put a reasonable officer on notice that his actions were unconstitutional. The District Court's dismissal of this case based on qualified immunity should therefore be upheld.

Finally, the case was properly dismissed, as all of Sims claims were actually state law issues that were, or should have been, litigated in the state courts and Sims failed to assert substantial federal claims.

IV. Standard of Review

When reviewing the grant of a motion to dismiss, an appellate court reviews the case *de novo*. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009). Like the District Court upon initial review, this Court must draw all reasonable inferences in favor of the appellant; however, this Court is not bound to "accept the legal conclusions drawn from the facts," nor to "accept as true unwarranted inferences, unreasonable conclusions or arguments." *Id.*

V. The District Court properly dismissed Count II(a) as Sims failed to state a claim for which relief could be granted for violation of his Fourth Amendment rights under 42 U.S.C. § 1983.

Sims argued in the Second Amended Complaint that requesting the search warrant was "unreasonable to the point of absurdity." (JA 25-26). However, this Court is not bound to accept this conclusory statement and must instead consider the reasonableness of the search in light of the facts alleged. Sims, a seventeen year old, was charged with felony manufacture and distribution of child pornography, after repeatedly sexting his younger girlfriend. (JA 23). At his first trial date, he rejected a plea offer, so Richardson, the Assistant Commonwealth's Attorney moved for a *nolle prosequi*, and directed Detective Abbott to request the search warrant in question, re-file the charges, and obtain a detention order.[3] (JA 24). A magistrate issued the search warrant, which allowed for photographs of "various parts" of Sims' body including "a photograph of the suspect's erect penis" to be used in comparisons to the sexts that were sent to his girlfriend. (JA 25). When Detective Abbott photographed Sims as authorized by the warrant, Sims did

[3] Sims states several times throughout his Brief that the detention order was a guise to remove him from his aunt's custody and take the photographs without her being able to protest – a new allegation that is pure conjecture. In the District Court, Sims claimed that the detention order was "motivated by spite and anger" because of his rejection of the plea offer. (JA 25). Sims' current argument to the contrary should be disregarded as it contradicts the facts presented to the District Court in the Second Amended Complaint. Additionally, Sims decided not to appeal the dismissal of the detention order claim, and thus that dismissal should continue to govern those issues on appeal, as it is now the law of the case. See e.g., *L.J. v. Wilbon*, 633 F.3d 297, 308 (4th Cir. 2011).

not have an erection. (JA 26-27). Because of this, the photographs were of little evidentiary value to the prosecutor, who later agreed not to use them or execute the second search warrant. (JA 28-30). As Sims only alleges the unreasonableness of that initial search warrant, any facts surrounding the second warrant, such as Sims' allegation that he was threatened with an injection, are irrelevant to the analysis of this claim.

Multiple cases have upheld search warrants that were issued in similar, though not identical, situations. See e.g., *Willis v. Commonwealth*, 1997 Va. App. LEXIS 50, *4 (Feb. 4, 1997) (where a search warrant to examine a suspect's penis for a bump or genital sores, which was issued more than a year after a crime, was reasonable); *Roadcap v. Commonwealth*, 50 Va. App. 732, 737 (2007) (where a warrant was issued to find tattoos, some of which were on the suspect's penis); *Curtis v. Clarke*, 2012 U.S. Dist. LEXIS 85037, *6 (E.D. Va. June 19, 2012) (reasonableness of a search warrant to examine moles on a suspect's penis was not challenged); *Mata v. Hubbard*, 2011 U.S. Dist. LEXIS 143856, *3 (C.D. Cal. Oct. 25, 2011) (warrant was issued to find a scar and vein on the suspect's penis).

Sims' claim that those cases involved different facts than the instant case is accurate, but his conclusion that these "distinguishing features … tipped the scales of reasonableness," Appellant's Brief, p. 25, is not supported by the case law. Most of Sims' "distinguishing features" are irrelevant to whether the warrant was

reasonable. For example, whether the photographs were able to be used at trial is irrelevant because the facts alleged by Sims show that it was only *after* the photographs were taken that Richardson decided not to use them as evidence. Sims will undoubtedly argue that Abbott should not have taken the photographs because Sims' penis was not erect, and the penis in the pornographic sexts was. However, Sims did not allege that Detective Abbott knew prior to the execution of the warrant that Sims would not be erect, nor did he allege that Abbott knew that the photographs would be unusable in the event Sims was flaccid.

Whether Sims had any special penile characteristics is irrelevant because that issue could not be determined until after the search warrant was executed. In fact, if Sims had any usual characteristics that were not visible in the pornographic sexts, the photographs could have helped him because they would have been exculpatory.

Sims' arguments regarding the erection and simulating masturbation are also irrelevant. While the warrant permitted photographs of Sims' erect penis, it did not require it, and Detective Abbott took no action to procure an erection. Sims' claim that being asked to reposition his penis was an effort to stimulate or simulate masturbation, (JA 27), is a conclusory statement that is not supported by the facts, and which may be disregarded by this Court.

Finally, Sims is correct that none of the cases in which search warrants were issued involved juveniles. However, Sims also notes that he was "transported to a place of detention" prior to the warrant's execution. Appellant's Brief, p. 25. These two facts, coupled together, are especially useful in determining that the search was reasonable because there are multiple cases involving custodial strip searches of juveniles. Federal courts have repeatedly found such searches to be reasonable. See, e.g., *J.B. v. Fassnacht*, 801 F.3d 336 (3rd Cir. 2015) (finding the strip search of a juvenile in general population to be reasonable), *Reynolds v. City of Anchorage*, 379 F.3d 358 (6th Cir. 2004) (finding a warrantless strip search of a juvenile in a group home based on reasonable suspicion that she possessed narcotics to be reasonable), *Smook v. Minnehaha County*, 457 F.3d 806 (8th Cir. 2005) (finding reasonable the search of a detained juvenile wearing only undergarments), *Justice v. Peachtree City*, 961 F.2d 188 (11th Cir. 1992) (finding a strip search of a juvenile in custody for loitering and truancy to be reasonable). Given the reasonableness of these warrantless strip searches, it is clear that Abbott's search – which was only made after he had obtained a valid warrant – was reasonable.

Finally, it is important to note that Sims' reliance on certain cases to support his reasonableness argument is misplaced because the cases are readily distinguishable from the instant matter. In *King v. Rubenstein*, 825 F.3d 206 (4th

Cir. 2016), for example, an inmate was forced to have a penile implant surgically removed; no warrant was ever issued. Sims cannot claim that having his penis photographed is akin to having it surgically altered. *Amaechi v. West* is a case about the reasonableness of a search incident to arrest, and also has nothing to do with a warrant. 87 F. Supp. 2d 556, 561 (E.D. Va. 2000). His reliance on *Winston v. Lee*, 470 U.S. 753 (1985), is similarly misplaced. In finding the search in *Winston* unreasonable, the Supreme Court focused on the risks associated with the search, which involved surgery to remove a bullet. The risks included muscle damage and injury to nerves and blood vessels. *Id*. at 763-764. No such risks are inherent in taking a photograph of someone. *Schmerber v. Cal.*, 384 U.S. 757 (1966), involved a forced blood draw at the request of a police officer – again without a warrant.

For the forgoing reasons, Sims has failed to allege facts sufficient to state a claim for violation of his Fourth Amendment rights. For that reason, the District Court's dismissal of this claim should be affirmed.

VI. Sims failed to state any claims for which relief could be granted for violation of his Fourteenth Amendment substantive due process rights under 42 U.S.C. § 1983.

In any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated. *Lewis*, 523 U.S. at 841 (citing *Graham v. Connor*, 490 U.S. 386, 394 (1989)). "Where a particular amendment

provides an explicit textual source of Constitutional protection . . . that Amendment, not the more generalized notion of substantive due process, must be the guide" to analyze the claim. *Id*. at 842.

Sims alleges two violations of his substantive due process rights. First, he claims that, in the alternative to his Fourth Amendment claim above, Detective Abbott violated his substantive due process rights by taking the photographs authorized by the search warrant. His argument on appeal on this subject is limited entirely to a footnote where he acknowledges that the Fourth Amendment is the preferred Amendment for deciding this claim. Appellant's Brief, p. 27, fn. 24. He does not state why this claim should be analyzed under the Fourteenth Amendment, and instead simply sets forth the standard for a substantive due process claim. He does not discuss how this case meets that standard, nor why that standard should even be applied. This claim falls squarely within the auspices of the Fourth Amendment, and Sims has therefore failed to state a claim under the Fourteenth Amendment. For that reason, the District Court's dismissal should be upheld.

Sims also claims that Detective Abbott's conversation with Sims' criminal defense attorney wherein he stated that Sims could be given medication to produce an erection violated the Fourteenth Amendment. He does not claim an "alternative" violation under the Fourth Amendment – apparently because there

was no actual search or seizure. Appellant's Brief, p. 28. His logic is unsound, as the very language of the Fourth Amendment makes clear that it governs not just searches, but the process leading to searches – the obtainment of warrants. Even though the injection in this case was never administered, if it had been, it would have been pursuant to the July search warrant, and therefore governed by the Fourth Amendment. (JA 28-29). As Sims failed to allege a claim under the correct amendment, the District Court properly dismissed that claim.

Even under a Fourteenth Amendment analysis, though, Sims still fails to allege facts that would give rise to a constitutional claim for violation of his substantive Due Process rights. The Due Process Clause of the Fourteenth Amendment forbids states from depriving any person of life, liberty, or property without due process of law. However, the "standard of culpability for substantive due process purposes," has to exceed "both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed 'shocks the conscience.'" *Gedrich v. Fairfax County Dep't of Family Servs.*, 282 F. Supp. 2d 439, 461 (E.D. Va. 2003) (citing *Miller v. City of Philadelphia*, 174 F.3rd 368, 375-76 (3rd Cir. 1999)). See also, *Weller v. Dep't. Social Servs.*, 901 F.2d 387, 391-92 (4th Cir. 1990) (no substantive due process claim where conduct does not shock the conscience); *Wolf v. Fauquier County*, 555 F.3rd 311, 323 (4th Cir. 2009) ("Only abuse of power which 'shocks the conscience' creates a substantive

due process violation.") (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998) ("[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'").

"The protection of substantive due process is indeed narrow and covers only state action which is 'so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation protections or of adequate rectification by any post-deprivation state remedies.'" *Sylvia Dev. Corp.*, 48 F.3d at 827 (quoting *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991)). In order to state a claim, the pleaded facts must demonstrate that decedent Abbott's actions "shocked the conscience." *Lewis*, 523 U.S. at 847, n. 8.

Sims offers absolutely no authority showing that Detective Abbott's violated the Fourteenth Amendment. Instead, he cites to a handful of cases – all focusing on the Eighth Amendment – to support his assertion that Detective Abbott's conversation with Sims' criminal defense attorney violated Sims' constitutional rights. He does not provide any authority to show why an analysis under the Eighth Amendment is applicable here, and, indeed, the case law contradicts any assertion that it may be. "The Eighth Amendment applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. . . . [T]he State does not acquire the power to punish with which the

Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.'" *Deshaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 199, fn. 6 (1989) (citing *Ingraham v. Wright*, 430 U.S. 651, 671-672, n. 40 (1977)). There are no facts alleged to show that Sims was already convicted of an offense, and therefore any analysis under the Eighth Amendment is irrelevant.

Considering a Fourteenth Amendment analysis, the relevant facts, as alleged by Sims, are as follows: Detective Abbott's initial search did not yield photographs of evidentiary value, as Sims penis was not erect. (JA 27). Detective Abbott discussed with Sims' criminal defense attorney the fact that photographs of Sims' erect penis were needed as evidence, and that Sims could either obtain an erection himself, or a medical professional could facilitate the erection through medications. (JA 28). Sims rejected a plea offer, so Detective Abbott, at the prompting of Richardson, obtained another search warrant authorizing the necessary photographs in order to use them as evidence. (JA 28-29). The story led to negative publicity and Richardson agreed not to execute the warrant. (JA 29-30).

Even in Sims' own version of events, the only allegation against Abbott is that he had a discussion with Sims' defense attorney about how Sims could achieve the necessary erection, the photographing of which was later authorized by a

search warrant. A conversation with a defense attorney – even one that later led to a "firestorm of public protest" (JA 29) – does not shock the conscience such that Sims substantive due process rights were violated. Sims failed to plead sufficient facts to show that Abbott's actions were so egregious or outrageous that they shock the conscience, and he therefore failed to state a claim under the Substantive Due Process clause of the Fourteenth Amendment. For these reasons, even if the Abbott Estate was not entitled to qualified immunity, the District Court properly dismissed Counts II(B) and III.

VII. The District Court properly dismissed Count V because Sims failed to state a claim for production of child pornography.

Sims alleged that when Detective Abbott photographed him in the presence of two other uniformed officers after obtaining a presumed valid warrant, he produced child pornography. Aside from the District Court's ruling that the Abbott Estate was entitled to qualified immunity, the court did not specifically address this issue in ruling on the motion to dismiss.

Sims claimed that the photographs taken constituted child pornography because they were "sexually explicit conduct" according to 18 U.S.C. § 2256. "Sexually explicit conduct" includes, "actual or simulated (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of

any person." Clearly, there is no allegation that Sims was engaging in sexual intercourse, bestiality or sadistic or masochistic abuse.

Sims alleged in the Second Amended Complaint that asking him to reposition his penis was "to fulfill [Det. Abbott's] and Richardson's intent to have Trey photographed as though masturbating," and, "to stimulate, or simulate, the erection that Richardson sought…" (JA 27). It must first be noted that these allegations are conclusory statements, the same type warned against in *Nemet Chevrolet*, 591 F.3d at 253. This Court need not accept these "unwarranted inferences, unreasonable conclusions or arguments," *Id.*, as true, and may instead simply consider the facts – that Detective Abbott had Sims reposition his penis with his hand in order to photograph it pursuant to the warrant. Absent Sims' conclusions as to why he was required to move his penis, there are insufficient facts to support a claim that this constituted simulated masturbation.

Similarly, no claim can be made that the photographs at issue in this case were a "lascivious exhibition." This Circuit has had only limited opportunities to consider what constitutes a lascivious exhibition. In *U.S. v. Whorley*, the Eastern District of Virginia stated that "lascivious" is a "commonsensical term." 400 F. Supp. 2d 880, (E.D.Va. 2005), aff'd 550 F.3d 326 (4th Cir. 2008). That language was quoted from *U.S. v. Arvin*, 900 F.2d 1385 (9th Cir. 1990), which in turn quoted *U.S. v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). In *Wiegand*, the Ninth Circuit

affirmed a six factor analysis created in *U.S. v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986). The *Dost* court had listed six factors that should be considered when determining if there is a lascivious exhibition:

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
> 4) whether the child is fully or partially clothed, or nude;
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. at 832. In *Whorley*, the District Court noted that six other Circuits have already adopted or applied these factors, and further stated that the factors were "certainly relevant, though not controlling, to the question of whether a display of a minor's genitals or pubic area amounts to lasciviousness." 400 F. Supp. 2d at 883.

When one considers the *Dost* factors, it becomes immediately apparent that the photographs at issue here are not a lascivious exhibition. First, the search warrant allowed photographs of Sims' entire body, and not exclusively his genital region, in spite of its relevance to the investigation. Second, it should be beyond dispute that there is nothing sexually suggestive about a juvenile detention center. Third, nothing in the Complaint suggests that Sims was posed unnaturally or wearing inappropriate clothing. Fourth, the Complaint states that Sims was

instructed to pull down his pants – the reasonable inference from that being that he was otherwise clothed. Fifth, Sims has made it very clear both in his Complaint and brief on appeal that his penis was not erect, and that he was not voluntarily participating in the photographs. It is therefore reasonable to conclude that the photographs do not depict "sexual coyness" or a willingness to engage in sexual activity.

Finally – and given the circumstances of this case, perhaps the most important factor – it is wholly obvious from the Complaint that the photographs were not intended or designed to elicit a sexual response in the viewer. The photographs were taken for the sole purpose of being used as evidence in a criminal investigation and trial. Sims may counter that the photographs were never actually used at trial, but it is clear from the Complaint that the decision not to use them was made *after* the photographs were taken, and therefore has no bearing on the intended use. Additionally, Richardson's later decision about what evidence to introduce was a question of trial strategy. See *Wilson v. Greene*, 155 F.3d 396, 404 (4th Cir. 1998) (quoting *Pruett v. Thompson*, 996 F.2d 1560, 1571 n. 9 (4th Cir. 1993)) ("Decisions about what types of evidence to introduce are ones of trial strategy, and attorneys have great latitude on where they can focus the jury's attention and what evidence they can choose not to introduce." (internal quotations omitted)). This Court should not infer from that decision that the photographs

were not valuable to the investigation or prosecution of the charge. The photographs constituted evidence that would potentially be used at trial, and were not intended to sexually excite anyone.

Sims repeatedly argues in his brief on appeal that the sexual abuse allegations against Detective Abbott and his subsequent death support the inference that the photographs constituted child pornography. However, Sims' allegations in the Second Amended Complaint contradict that inference. Throughout his Complaint, Sims maintained that Detective Abbott obtained the warrant and photographed Sims at the behest of Richardson. (JA 25-29, 32). In fact, only once did Sims state, in the most general of terms that, "on information and belief, [Detective Abbott's] conduct in this case, apart from being directed by Richardson, was also driven by his perverse sexual interest in boys." (JA 22). When the Complaint is considered in its entirety, as is required when deciding a motion to dismiss, *Tellabs, Inc.*, 551 U.S. at 323, it is clear that the allegations establish that Richardson was the impetus for the search warrant and photographs, and that Detective Abbott's subsequent alleged misconduct is completely irrelevant to this suit.

Sims' argument regarding *Doe v. Boland*, 630 F.3d 491 (6th Cir. 2011), is completely irrelevant to this case for multiple reasons. First, that case is persuasive authority and not controlling in this Circuit. Second, in that case, the question was

whether the federal child pornography laws "exempt those who violate the law in the course of *providing expert testimony*?" *Id*. at 494 (emphasis added). Detective Abbott was not acting as an expert witness at the time he executed the search warrant. He was acting as a police officer, an agent of the Commonwealth. This distinction is particularly significant because the Sixth Circuit's ruling was partially based on the fact that federal law – specifically The Adam Walsh Child Protection and Safety Act of 2006 – distinguishes between child pornography in the hands of defense counsel and the government. *Id*. at 495.

Third, while the *Doe* defendant, Boland, was an expert testifying pursuant to a court order, the court later "admonished him to purge the images from his hard drive," but he did not do so. *Id*. at 494. The Sixth Circuit also noted that Boland only had permission to present expert testimony and images, not to violate pornography laws, and that he could have combined two innocent images to create a different innocent image while fulfilling the same goals. *Id*. at 496. By contrast, in the instant case, Detective Abbott never violated any court order – quite the opposite, in fact, as a Virginia magistrate authorized and ordered the photographs to be taken. A sanitized, less explicit image that did not show Sims' penis would have no value in the investigation or prosecution of Sims' criminal case. Sims may argue that the photographs were wholly unnecessary as evidenced by the fact that

they were not used in the prosecution. However, a later decision not to utilize evidence does not mean that the evidence was unnecessary or obtained unlawfully.

Finally, in *Doe*, there was no dispute that the images Boland created constituted child pornography. Boland used a computer to morph innocent photographs of real children into obscene images: one altered image showed a five year old girl with an adult male's penis in her mouth, and another one showed a six year old girl performing sex acts on two males. *Id*. at 493. Boland admitted to violating 18 U.S.C. § 2252A(a)(5)(B) and even stated in a published apology that he recognized that he had violated federal law. *Id*. at 494. By contrast, the images at issue in this case, as discussed above, are of a completely different nature than the pornographic images in *Doe*, in spite of the fact that they show a minor's genitals.

It is manifestly absurd to conclude that a law enforcement officer engaged in the performance of his law enforcement duties, at the direction of the Commonwealth's Attorney's Office, pursuant to a valid warrant, created child pornography in violation of law when, during the course of the police investigation into the sexting admittedly done by Sims, he obtained photographs of Sims' penis. Accepting Sims' argument defies common sense and would lead to a slippery slope. For example, under his theory, a sexual assault nurse examiner (SANE) could never photograph the genitals of a child sexual assault victim for use at trial,

as doing so would constitute the production of child pornography. Federal law provides no more of an exception for medical personnel than it does for police officers, so Sims' argument is equally applicable to SANE nurses as it is to police.

On page 22, fn. 18 of his brief, Sims concedes that child sexual assault victims may also be subjected to genital photography and attempts to distinguish that situation from the instant one. However, his points are distinctions without a difference for the purposes of child pornography law, which does not differentiate between medical professionals and police personnel. Sims provides no support to explain how photographs taken in a medical setting are any different from those taken in a detention center. He states that, with assault cases, either the victim or their guardian would have previously consented, but in this case, a magistrate consented, and even ordered the photographs (and Sims' guardian would have no lawful right to stop the warrant from being executed). Finally, he notes that, with SANE nurses, safeguards would be imposed by 42 U.S.C. § 1320d-6. He fails to note that Virginia Code § 16.1-309 makes it a crime for someone who investigates an offense committed by a juvenile to release information not otherwise available to the public.

For the purposes of child pornography, there is no functional difference between these two situations. Clearly, the law was not intended to criminalize the work of SANE nurses, any more than it was intended to criminalize a police

officer's execution of an admittedly valid search warrant. A ruling that the photographs taken by Detective Abbot constitute child pornography would necessarily infer the criminalization of those by SANE nurses.

The authority cited herein above shows that the photographs at issue here do not constitute child pornography. Common sense supports that conclusion. For this reason, Sims failed to state a claim for production of child pornography and the District Court's dismissal of that claim was proper and should be upheld.

VIII. The District Court properly held that the Abbott Estate is entitled to qualified immunity.

Qualified immunity protects government officials who perform discretionary functions, shielding them from civil liability to the extent that their conduct does not ". . . violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991), citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006) (internal quotation marks omitted) (holding that qualified immunity shields government officials from personal-capacity liability claims for civil damages under § 1983 when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.) "Qualified immunity balances two important interests - the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment,

distraction, and liability when they perform their duties reasonably." *Saucier v. Katz*, 533 U.S. 194, 231 (2001). The courts have extended the protection of qualified immunity to law enforcement officers because "it is inevitable that law enforcement officers will in some cases reasonably but mistakenly conclude that probable cause is present," and they should not be personally liable under such circumstances. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

The defense provides for "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). "The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." *Pearson v. Callahan*, 555 U.S. 223, 244 (2009). Government officials are entitled to the defense of qualified immunity when sued in their individual capacities unless "(1) the allegations underlying the claim, if true, substantiate the violation of a federal statutory or constitutional right; and (2) this violation was of a clearly established right of which a reasonable person would have known." *Ridpath*, 447 F.3d at 306. If there is no violation of a constitutional right, the defense of qualified immunity is not necessary or even implicated, *Saucier*, 533 U.S. at 201, and, conversely, the defense is still available to a defendant whose actions are found to be unconstitutional. *Id*. at 206. Even an

allegation of malice cannot defeat the defense of qualified immunity. *Malley*, 475 U.S. at 341.

In analyzing an officer's entitlement to qualified immunity, the court utilizes the test of objective reasonableness to determine whether or not an officer is entitled to the defense in a particular set of circumstances. *Bailey v. Kennedy*, 349 F.3d 731, 739 (4th Cir. 2003); *Gordon v. Kidd*, 971 F.2d 1087, 1093 (4th Cir. 1992); *Rish v. Johnson*, 131 F.3d 1092, 1095 (4th Cir. 1997); *Goodwin v. Metts*, 885 F.2d 157, 163-64 (4th Cir. 1989); *Slattery*, 939 F.2d at 216; *Malley*, 475 U.S. at 341; *Henry v. Pumell*, 501 F.3d 374, 383-84 (4th Cir. 2007); *Mitchell v. Forsyth*, 471 U.S. 511, 533-34 (1985); *Milstead v. Kibler*, 243 F.3d 157, 162-63 (4th Cir. 2001). In the case of police officers, the question is whether the officer acted as an objectively reasonable police officer would have acted under similar circumstances. *Malley*, 475 U.S. at 341. One must ask whether a reasonable police officer could believe that his conduct was lawful. *Anderson*, 483 U.S. at 641. "If officers of reasonable competence could disagree on [the] issue, immunity should be recognized." *Malley*, 475 U.S. at 341.

The analysis also involves "a more particularized inquiry, focusing on whether a reasonable" police officer, at the time of the acts or actions complained of, "could have believed" his conduct was lawful, "in light of clearly established law and the information" he possessed at the time. *Cruey v. Huff*, 2010 U.S. Dist.

LEXIS 118374 *20 (W.D. Va. Nov. 8, 2010); *Collinson v. Gott*, 895 F.2d 994, 998 (4th Cir. 1990) ("assessment whether a 'reasonable person' in the official's position would have known that his conduct would violate 'clearly established' rights must be made on the basis of information actually possessed at the time by the official"); *Filarsky v. Delia*, 132 S. Ct. 1657, 1665-66 (2012) (court analyzed the public policy reasons for affording government workers, whether permanently or temporarily employed by the government, qualified immunity including "avoiding 'unwarranted timidity' on the part of those engaged in the public's business . . . and [e]nsuring that those who serve the government do so 'with the decisiveness and the judgment required by the public good' . . . ."). *Collinson*, 895 F.2d at 998 ("question of qualified immunity is not the question of whether a constitutional right has been violated . . ." but "whether a 'reasonable person' in the official's position could have failed to appreciate that his conduct would violate [someone's constitutional rights]").

As discussed at length, *supra*, Detective Abbott did not violate Sims' Fourth or Fourteenth Amendment rights. Further, the law was not clearly established at the time, sufficient enough that a reasonable officer would have believed his conduct was unlawful, given the information available to him. In this case, the facts alleged by Sims show that Detective Abbott was directed by the Assistant Commonwealth's Attorney to seek a search warrant, which a magistrate then

issued. A reasonable officer would have believed that he could rely on the warrant, especially given the fact that an attorney directed him to seek it. Additionally, as shown above, multiple courts have upheld the reasonableness of search warrants authorizing photographs of genitalia. While Sims has attempted to distinguish those cases from the instant one, the amount of nuance he employs to make those distinctions would not have been apparent to a reasonable officer.

Sims further alleges that Detective Abbott took the photographs, as authorized by the warrant, in the presence of other officers (who did not object), at a juvenile detention center. As discussed previously, several courts have considered warrantless strip searches at juvenile detention centers. Given that, a reasonable officer would not have found anything unreasonable about a similar type of search at a detention center, especially one authorized by a warrant.

Sims claims that "[t]he dispositive law discussed at 16-20 of this brief has long been clearly established." Appellant's Brief, p. 38. While those cases may be clearly established, they are far from dispositive in *this* case, as many of those cases – *King v. Rubenstein*, *Schmerber v. California*, *Winston v. Lee*, and *Amaechi v. West* – are readily distinguished from the facts of this case, as discussed on pages 11-12, *supra*, of *this* brief. No reasonable police officer would have believed that his actions were unconstitutional, based on those cases.

Finally, Sims argues that the photographs constitute child pornography, and that fact alone should suffice to deny the Abbott Estate qualified immunity. However, as shown above, the law regarding that is far from clearly established, and no reasonable officer would have believed he was producing child pornography when acting as authorized by a search warrant. It is clear that Abbott, and therefore the Abbott Estate, is entitled to qualified immunity because, as discussed previously, there was no violation of Sims' constitutional rights, and the rights at issue were not clearly established at the time. For these reasons, the Abbott Estate is entitled to qualified immunity and Counts II-V were properly dismissed by the District Court.

IX. The District Court's dismissal was proper because Sims failed to assert substantial federal claims.

Finally, District Court's dismissal was proper because Sims failed to assert substantial federal claims sufficient to invoke federal jurisdiction. The burden is on Sims to demonstrate that federal jurisdiction exists in this case. *Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999) (citing *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) and *Goldsmith v. Mayor & City Council of Baltimore*, 845 F.2d 61, 64 (4th Cir. 1988)). "The mere assertion of a federal claim is not sufficient to obtain jurisdiction. . . ." *Id*. (citing *Davis v. Pak*, 856 F2d 648, 650 (4th Cir. 1988) (dismissal of "§ 1983 claims for lack of subject matter jurisdiction because the federal claims were insubstantial and were pretextual state claims.")). "Federal

jurisdiction requires that a party assert a substantial claim." *Id*. (citing *Hagans v. Lavine*, 415 U.S. 528, 536 (1974)).

Sims brought "wholly frivolous federal claims . . . as a pretext to" litigate what were actually state law issues that were already litigated or should and could have been litigated in the state court criminal proceedings. *Id*. at 655; Supp. JA 1-77. The court record of the JDR proceedings supports the Abbott Estate's argument that matters complained of in Counts II through V were defenses and/or the subject of motions to quash related to the criminal proceedings in which Sims ultimately entered into a plea bargain.

In *Lovern*, the court cited to a Virginia statute as the appropriate recourse for the plaintiff in that case to litigate his claims in state court, i.e., a ban from his child's school because of "continued pattern of verbal abuse and threatening behavior toward school officials." 190 F.3d at 655 n. 11. The parent had not resorted to state court, but should have, rather than attempt to litigate state court issues in the federal courts. *Id*. at 655.

This is exactly what Sims sought to do by bringing his claims, which were either already litigated or should have been litigated in the JDR proceedings and/or appeals in state court, but were ended by Sims' voluntary agreement to a suspended imposition of sentence with a probationary period of one year, including conditions. The court pleadings show that his counsel filed a Motion to Quash and

Motion to Suppress based on the search warrants and authorized photographs, and the parties came to an agreed disposition on those matters, which was affirmed by the court at hearing on July 15, 2014. (Supp. JA 17-46). The fact that Sims ultimately entered into an agreed disposition to the entire matter, which included imposition of a probationary period with conditions, confirms that he did sext pictures of himself to his girlfriend, as admitted in the Second Amended Complaint, thus negating any argument that there was no probable cause for the actions taken by Detective Abbott at Richardson's behest.

These state issues were or could have been litigated in the state courts. For those reasons, the District Court properly dismissed the case.

Conclusion

The District Court properly dismissed the claims against the Abbott Estate, and the ruling should be upheld.

Respectfully Submitted,

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Fed. R. App. P. 32 CERTIFICATE

Pursuant to Rules 32(a)(7)(B)-(C) of the Federal Rules of Appellate Procedure, the undersigned counsel for the Appellees certifies that this brief is printed in 14-point type with serifs and, including footnotes, contains **7,995** words including footnotes and headings, but excluding the title page, table of authorities, table of contents, and certificates, according to Microsoft Word.

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I hereby certify that I have this January 9, 2017, filed the foregoing Brief of Appellee using the Court's CM/ECF system which will send notification of such filing to the following counsel:

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