UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Case #16-2174

TREY SIMS,

Appellant,

v.

KENNETH E. LABOWITZ, Administrator Pursuant to *Code of Va.* §64.2-454 of the Estate of David E. Abbott,

Appellee.

***

Claiborne Richardson,

Defendant.

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APPELLANT'S REPLY BRIEF

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On Appeal From The United States District Court
Eastern District of Virginia, Alexandria Division

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In this reply brief, appellant Trey Sims demonstrates the legal insufficiency of all the arguments but one presented by the Administrator of the late David Abbott's Estate in his brief.[1] Det. Abbott's brief affords this court no basis on which to affirm the judgment of the court below, which should be reversed and the case remanded for discovery. Det. Abbott's arguments are addressed in the order in which they appear.

Potemkin Village:
An impressive facade or show designed to hide an undesirable fact or condition.
https://www.merriam-webster.com/dictionary/Potemkin%20village

*

1. Det. Abbott Fails To Contend With The Discrete Circumstances Rendering Genital Photography Constitutional in Other Cases

Conceding that differences exist between the (few) cases approving the genital photography of adult males and the photography here at issue, Det. Abbott argues that these differences "are irrelevant to whether the warrant [to secure

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[1]For ease of reference, in this brief as in his opening one, the appellee is referred to as Detective Abbott. The better to focus his appeal, Trey withdraws his substantive due process claim arising out of the photographs that Det. Abbott took of him (Count IIB), proffered in a footnote in his opening brief as a claim "only in the alternative to his Fourth Amendment claim grounded in the same facts." Opening brief at 27, n.24. Trey's substantive due process claim for the threat of an erection-producing injection is discussed *infra* at 6-8.

photographs of Trey's erect penis] was reasonable." Brief at 10-11. And why? For the following reasons, this court is told:

* "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." Brief at 11. In fact, Trey alleges precisely that. App. 26, ¶19. Beyond this dispositive point, Abbott was charged to take photographs of Trey's erect penis for comparison with the sexted images. He had to know nothing else "in advance." When he observed Trey's (foreseeable) condition, he saw that the warrant's directive could not be met. There was no legitimate evidentiary or other law enforcement purpose to be served by taking useless, patently offensive, photographs. Yet this is precisely what Abbott did.

* "If Sims had any unusual characteristics that were not visible in the pornographic sexts, the photographs could have helped him because they would have been exculpatory."[2] Brief at 11. So, we are to infer, it was to assist in Trey's defense that the pictures were taken. The response to this delightful justification is

[2]No claim was ever advanced by the authorities, including Det. Abbott, that Trey was distinguished by any particular penile characteristics. This fact itself distinguishes the instant case from Det. Abbott's case law addressing genital photography of adults.

that presenting any such defense would have been a matter for Trey and his counsel, without assistance from Det. Abbott, had Trey elected to make such a defense.[3]

* "Sims' claim that being asked to reposition his penis was an effort to stimulate or simulate masturbation ... is a conclusory statement that is not supported by the facts and which may be disregarded by this court." Brief at 11. Trey has alleged that Det. Abbott directed him to hold his penis this way and that, while Det. Abbott took photographs of his manipulations. The net result was to secure a series of photographs demonstrating Trey's various manipulations of his penis.[4] Is it remarkable that Trey has alleged that the result was a depiction of him simulating masturbation? How else might one take such photographs, and how is one to allege this in a non-"conclusory" manner, if not to state the simple fact that it occurred, as Trey did in his complaint? There is no basis for the court to disregard these well-pleaded facts.

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[3]Det. Abbott fails to explain how a search seeking exculpatory evidence could satisfy the requirement of probable cause. To the extent an involuntary search of a suspect for the purpose of procuring exculpatory evidence is even cognizable under the Fourth Amendment's probable cause mandate, such a search is objectively unreasonable *per se* under the Fourth Amendment.

[4]Trey's counsel note that they have not seen the photographs, since the case was dismissed before discovery took place and the photographs constitute child pornography. *See* n.11 at 14, *infra*.

* "[T]here are multiple cases involving custodial strip searches of juveniles. Federal courts have repeatedly found such searches to be reasonable." Brief at 12. Of course they have. Juvenile detention facilities have the right, not to say obligation, to satisfy themselves in an appropriate manner that minors committed to their care will not have potential weapons or drugs on their persons. Reasonable searches for such security-related reasons are routinely upheld.

Det. Abbott did not conduct such a search. Det. Abbott ignores both the logic and binding authority of *Logan v. Shealy,* 660 F.2d 1007, 1013 (4th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982), invalidating and denying qualified immunity for correctional strip search policies unconnected to institutional security needs. Det. Abbott did not take Trey from his home to a juvenile detention center, and force him to expose himself there in service of security needs of the juvenile facility to which Trey was brought and from which he departed the next day. He took pictures of Trey manipulating his penis pursuant to a warrant intended to create evidence duplicating the pornography underlying the charges against Trey.

* "Sims' reliance on certain cases to support his reasonableness argument is misplaced because the cases are readily distinguishable from the instant matter." Brief at 12. Unsurprisingly, and happily, there is no body of case law assessing the constitutional propriety of Det. Abbot's unprecedented actions. As Trey noted in

his opening brief at 36-37:

> There has never been a §1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose the officials would be immune from damages liability because no previous case had found liability in such circumstances.

*K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (Posner, J.).

Some things – one would hope – go without saying.

> [W]hen the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show the law is clearly established.

*Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002). Detective Abbott violated the Fourth Amendment three times in relation to his first warrant: once when he applied for an outrageously inappropriate warrant, once when he proceeded to take photographs of Trey's penis that were not called for by the warrant and could not serve the purpose for which he knew they were intended, and once when he directed Trey to manipulate his penis for photograph. Trey respectfully asks this court so to find.

2. Trey States a Substantive Due Process Violation For Det. Abbott's Threat to Subject Him to an Erection-Producing Injection

Det. Abbott contends that "[e]ven 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." Brief at 15. "*If it had been*" – but it was not, because of a public hue and cry. There never ensued a search for this court to consider under the Fourth Amendment as to the injection threat claim. The substantive due process clause is the proper vehicle for Trey's claim arising out of Det. Abbott's threat, unfulfilled as it was.

Whether Trey states a claim for having been on the receiving end of a threat by Det. Abbott – who had already forcibly photographed him manipulating his penis – to produce an erection or receive an erection-producing injection, is wholly within the discretion of this court. It is this court's conscience that is the judge of the extent to which Det. Abbott's threat sufficiently violated contemporary moral standards so as to expose him to potential constitutional liability as a matter of law.

Det. Abbott deals with the discomfiting allegation at ¶32 of the amended complaint, App. 28, by airbrushing it in his brief, to a helpful suggestion to Trey's lawyer that "a medical professional could facilitate the erection through medications." Brief at 17. Indeed, Det. Abbott notes, as in fairness he should, the resulting "firestorm of public protest." Brief at 18. But he does not note the

unconditional public repudiation of his threat by his own police chief and by the chief county prosecutor, set forth at ¶36 of the complaint, App. 39. This court can take into account that such repudiations are rare indeed in assessing whether the threat was sufficiently outrageous. Nor does Det. Abbott note that Trey fled the state, with court approval, during the two-week period that the threatened warrant remained in force, un-executed but un-quashed and thereby threatening Trey.[5] Why would he have done that if not terrified? Why did the juvenile court let Trey leave the jurisdiction pending expiration of the warrant if the threat were not indeed outrageous?

It is a truism that a great deal of our culture is suffused with direct and indirect reference to sex, and that the ready exposure of young people to all manner of matters sexual presents a challenge to their elders. But Trey respectfully submits that no amount of consensual teen sexual behavior comes close to justifying a policeman – the man with a gun empowered to use formidable discretion to enforce the law and already having engaged in sexually intrusive photography – in making a terrifying invasive threat towards a teenage boy such as

[5]The prosecutor preferred to let the warrant expire un-executed rather than receive an adjudication of its constitutionality pursuant to the motion to quash filed by Trey's criminal defense counsel. He also agreed not to use the photos taken by Det. Abbott, surely for the same reason. App. 39, ¶38.

the one made by Det. Abbott.[6] This court should not give such gross misconduct a pass. What Det. Abbott did was unconscionable, and Trey respectfully submits that this court should say so.

3. Det. Abbott Cannot Distinguish What He Did From The Creation of Child Pornography

Det. Abbott's brief does not overcome the difficulty inherent in the fact that "Congress means business when it comes to enforcing the child pornography laws." *Doe v. Boland*, 630 F.3d 491, 495 (6th Cir 2011), *cert. denied*, 698 F.3d 877 (2013). His various attempts to get out from under the pall of 18 U.S.C. §2255(a)(1) are insufficient to the task. Thus:

* Det. Abbott argues that "[a]bsent 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." Brief at 19. Really? He directed Trey to manipulate himself this way and that, taking pictures all the while. There has never been an allegation that Trey presents any uniquely identifiable penile identifier Det. Abbott was trying to locate. Det. Abbott was directed to take

[6]It is inconsequential that the erection-producing injection was sought by the prosecutor on the case. The "Nuremberg defense" is addressed in Trey's opening brief at 39-40.

photographs of Trey mimicking the depictions of his sexted behavior; he did so by ordering Trey to manipulate his penis while taking pictures. Det. Abbott is not present to explain, but is this a mystery? Trey's "conclusion" that he was photographed as though masturbating, set forth in the complaint at ¶24, App. 27, is regrettably grounded in well-pleaded facts, even without reference to Det. Abbott's apparent personal proclivities acted on by the police and apparently prompting his suicide. Federal child pornography laws specifically prohibit participation in pictures depicting simulated masturbation, 18 U.S.C. §2256(2)(A)(iii). This by itself gives rise to Det. Abbott's liability under §2255, liability not properly subsumed under or conflated with the "lasciviousness" analysis.

* Det. Abbott argues, Brief at 19-20, that "no claim can be made that the photographs at issue in this case were a 'lascivious exhibition,'" based on factors articulated thirty years ago in *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986). But the *Dost* factors are "not controlling of the question whether a display of genitals is lascivious." *United States v. Whorley*, 400 F. Supp. 2d 880, 883–84 (E.D. Va. 2005), *aff'd*, 550 F.3d 326 (4th Cir. 2008). Rather, whether images charged as child pornography are a "lascivious exhibition" requires a "commonsensical" interpretation. *Id.* at 884.[7] The *Dost* opinion itself "cautioned

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[7]No Fourth Circuit case decided after *Whorley* has addressed the

that a visual depiction need not involve all of these factors to be a lascivious exhibition of the genitals or pubic area. The determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor." *Id.* The *Dost* factors do not purport to articulate criteria applicable to every situation, including specifically the compelled reproduction of images being charged as child pornography.

* Det. Abbott's brief proposes to nullify the implications of his own imminent arrest for alleged sexual misconduct with boys and of his suicide upon being served with warrants arising out of such charges. Brief 22. Why is that appropriate? It is true that in the absence of discovery, Trey, mindful of his obligations under Fed.R.Civ.P. 11, went no further than to state established facts and "on information and belief" raised perfectly reasonable inferences relative to Det. Abbott's alleged prurient interest in photographing his genitals. Fairly adhering to the court's pleading rules and reasonably anticipating clarifying

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applicability of the thirty year old *Dost* factors to the "lascivious exhibition" analysis.

discovery on a supportive (not essential) evidentiary point is not a basis for nullifying a common sense inference and dismissing a complaint.

* Det. Abbott again points the finger of blame at the prosecutor who sought the photographs. Brief at 22. The fact that the prosecutor was found to enjoy absolute immunity from Trey's claims against him does not, however, lift from Det. Abbott's shoulders whatever liability he may have from going along with an impermissible program. *See* n.6 at 8, *supra.*

* Det. Abbott deems *Doe v. Boland* to be "completely irrelevant to this case for multiple reasons." Brief at 22. Doubtless the two cases are not identical. But "completely irrelevant to this case" *Boland* surely is not. The case exemplifies the strict interpretation that the federal child protective statute is to be afforded in all contexts.[8] *See* opening brief at 31. In *Boland*, a United States district judge ruled that the law was not intended to extend to an expert witness preparing testimony on aspects of virtual pornography. This was overruled by the Sixth Circuit based on the uncompromising language of the statute. So too should this court reverse the

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[8]Det. Abbott's suggestion that *Boland* merely reflects that the Adam Walsh Child Protection and Safety Act of 2006 "distinguishes between child pornography in the hands of defense counsel and the government," Brief at 23, is baseless. *Boland* cites that statute as confirming that "Congress means business when it comes to enforcing the child pornography laws." *Boland*, 630 F. 3d at 495. There is no occasion to distinguish *Boland* because of the parties to that particular suit. The child-protective principle is what is at issue.

district court below, which offered no analysis whatsoever in support of its unexplained dismissal of Trey's claim against Det. Abbott under 18 U.S.C. §2255.[9]

* Det. Abbott claims the same right to have photographed Trey as sexual assault nurse examiners ("SANE") have when doing their work, warning that "[a] ruling that photographs taken by Detective Abbott constitute child pornography would necessarily infer (*sic*) the criminalization of those by SANE nurses." Brief at 26. This is flatly incorrect. Any genital images created by SANE would have been created by consent of the assault victim or a guardian, as SANE professionals are nurses, and their work is governed by the safeguards imposed by 42 U.S.C. §1320d-6 on clinical interventions, including the need to secure informed consent from or on behalf of the patient. *See,* U. S. Dep't of Justice, Office on Violence Against Women, *A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents, Second Edition* (April 2013) at 43-45.[10]

The Department of Justice protocols also address photography of victims of

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[9]Det. Abbott emphasizes that Mr. Boland admitted to violating the law and apologized, Brief at 24 – as though this availed him (Abbott). Yet Det. Abbott shot and killed himself as he was being served with warrants arising out of the child abuse charges lodged against him. This suicide, inconsequential to Trey's constitutional claims, is probative of his claim under 18 U.S.C. §2255.

[10]Available online at: http://c.ymcdn.com/sites/www.safeta.org/resource/resmgr/Protocol_documents/SAFE_PROTOCOL_2012-508.pdf.

sexual assault. These include the following guidelines, consequential in the instant case for their breach by Det. Abbott of virtually every noted element:

> [C]ommunities appear to take two different approaches. Some routinely take photographs, with patients' permission, of both detected injuries and normal (apparently uninjured) anatomy involved in the assault. *** Other communities limit photographs to detected injuries. *** Involved prosecutors, law enforcement officials, examiners and advocates should further discuss the extent of photography they view as critical, examine any related case law, consider their concerns on this issue and how to be sensitive to victims, and, ultimately, determine what strategy is right for their community. *** Minimize patients' discomfort while they are being photographed and respect their need for modesty and privacy. *** Also, consider how to best provide support to patients during this time. Patients may want an advocate and/or a personal support person to be present.

*Id.* at 91. This excerpt from the Department of Justice protocol serves as an itemization of what Det. Abbott (and his armed colleagues on site) did not do. The district court may proceed to adjudicate Trey's §2255 claim on the merits without any concern that its findings might have any impact whatsoever on SANE programs anywhere.[11]

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[11]A closing commentary, on Det. Abbot's argument that the images he created did not violate §2255, is offered by his counsel's motion below for an order, in aid of facilitating discovery in this case, declaring that production by the City of Manassas Police Department of Det. Abbott's photos of Trey "shall not be deemed creation, production or distribution of child pornography." App. 38-39, 44. It is odd for the self-same party to protest that while what Det. Abbot created was surely not pornography, a federal judge had to confirm that this material could be produced in discovery without fear of being considered such. Considering the fate that befell Mr. Boland, *Doe v. Boland*, *supra*, this was probably a good idea.

4. Det. Abbott is Not Protected by Qualified Immunity

It is for this court to determine whether anything presented in Det. Abbott's brief suffices to provide him with the cover of qualified immunity he seeks for his actions towards Trey. On this subject, Trey rests on his presentation in his original brief at 34-41, but for the following observation:

Det. Abbott claims that "the amount of nuance [Trey] employs to make those distinctions would not have been apparent to a reasonable officer," Brief at 30, appealing to distinguishable case law addressing genital photography. *See* opening brief at 23-26. There is no great "nuance" required to distinguish photographic seizure of unusable material not called for by a warrant from securing usable evidence identified in a warrant; to understand that one does not gratuitously compel a youth to manipulate his genitals for photography by a police officer on his iPhone in the presence of other armed officers, and to understand that one must not produce child pornography.[12] Trey respectfully submits that the "amount of nuance he employs to make those distinctions" should have been as apparent as the fact that the emperor was wearing no clothes.

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[12] *Cf.*, as a matter of "nuance," reasonably granting one police officer qualified immunity but denying it to two others involved in the same event. *White v. Pauley*, 2017 WL 69170, – S.Ct. – (Jan. 9, 2017). Making appropriate distinctions is exactly what police officers are supposed to do.

5. Det. Abbott Has Not Otherwise Justified The Dismissal of Trey's Claims

Det. Abbott justifies the court's dismissal of Trey's suit by viewing its dismissal as a jurisdictional matter. He writes:

> 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.

Brief at 32.

What this is supposed to mean is unclear.[13] Perhaps Det. Abbott means to suggest that Trey's claims were so outrageously without merit that they did not fairly invoke the jurisdiction of the district court in the first place. If this is what

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[13]Det. Abbott's discussion of this issue, at 32-33 of his brief, is in equal measures unclear, bizarre, and legally untenable. Trey sued Det. Abbott for money damages, something unavailable in the juvenile proceedings against him in state court. What does it mean for Det. Abbott to hammer the contention that Trey "should have brought" these claims as part of those proceedings? How could he have done that? What does it mean that the claims Trey sought to litigate in United States district court "were ended" when the Juvenile and Domestic Relations judge dismissed the charges against him without a finding of guilt? Is the fact that Trey's criminal defense counsel *prevailed* – as a practical, if not a formal, matter – on her motions to suppress and to quash to be held *against* Trey when he later seeks redress for constitutional violations in federal court? On Det. Abbott's theory, it would appear that any facts giving rise to a successful motion to suppress evidence cannot function as a predicate for a subsequent claim in federal court. His analysis conflates principles of subject matter jurisdiction with considerations bearing on preclusion, but without making a preclusion argument (which is unavailable in any event). Whatever all this means, it is not a justification of the district court's dismissal of Trey's lawsuit. In the text, Trey addresses an alternative point that Det. Abbott may be making.

he means, there are two problems:

First, Det. Abbott's motion to dismiss, and his memorandum supporting his motion, state not that the court lacks subject matter jurisdiction over the case, but four times – once for Counts I and II(A), once for Counts II(B) and III, once for Count IV, and once for Count V) – that the case should be dismissed because Trey "has failed to state a claim for which relief may be granted." Motion to Dismiss Second Amended Complaint, ECF #22 at 1-2.[14] And the court below, granting Det. Abbott's motion, did so on the grounds that he enjoyed qualified immunity from Trey's claims, even as the prosecutor whom Trey had also sued enjoyed absolute immunity.

Second – and more significantly, perhaps, as lack of subject matter jurisdiction cannot be waived and can be raised at any time – Det. Abbott's substantiality argument lacks merit. Constitutional insubstantiality arises in the face of claims that are "essentially fictitious, wholly insubstantial, obviously frivolous, and obviously without merit." *Salim v. Dahlberg*, 170 F. Supp. 3d 897, 903 (E.D. Va. 2016), *quoting Hagans v. Lavine*, 415 U.S. 528, 537 (1974). The insubstantiality threshold "is a difficult one to meet," and invocation of the

[14]Det. Abbott's motion to dismiss was not added to the appendix because Trey's counsel had no inkling that a jurisdictional argument would be raised here. The motion, available to the court via PACER, will be filed by Trey on direction.

doctrine is inappropriate where "constitutional rights [are] 'directly and sharply' implicated" by the complained-of state action. *Lovern v. Edwards*, 190 F.3d 648, 655-56 (4th Cir. 1999). Trey's suit plausibly claims unreasonable search and seizure, substantive due process violations, and forced production of child pornography in violation of federal law. Federal law provides direct redress for these claims, if proved. Here is no "pretext to allow a state-law issue, the real focus of the claim, to be litigated in the federal system." *Id.* at 655. Trey's claims were properly before the court below.

## Conclusion

For these reasons and the reasons set forth in Trey's opening brief, this court should reverse the district court and remand this case for discovery and trial.

Respectfully submitted,

TREY SIMS,

By counsel

Dated: January 19, 2017

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//s// Victor M. Glasberg

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Certificate of Compliance

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I, Victor M. Glasberg, hereby certify that on this 19th day of January 2017, I electronically filed the foregoing Appellant's Reply Brief with the clerk of the court.

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**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**
**Briefing Orders issued before 12/01/2016**

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Attorney for______________________________

Dated:__________________

04/13/2012
SCC