CHAPTER 24: YOUR RIGHT TO BE FREE FROM ILLEGAL BODY SEARCHES*

A. INTRODUCTION

This Chapter explains your right to be free from involuntary (not your choice) exposure of your body and illegal searches of your body. Part B explains your rights about the involuntary exposure of your naked body to members of the opposite sex and your right to the privacy of your body in general. Part C explains your right to be free from unreasonable searches of your body under the Fourth Amendment of the Federal Constitution, including what a court will think about to decide if a search of your body was reasonable and how the court will apply those factors to strip searches, body cavity searches, and cross–gender body searches. Part D explains your right to be free from cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution. Part E is about the legal "remedies" (solutions) you have if your body has been searched illegally, including filing an "administrative grievance" (complaint) and claims under 42 U.S.C. § 1983 and 28 U.S.C. § 1331.

This Chapter explains what your rights are under both federal (i.e. 5th Circuit) law and Louisiana State law. With searches of prisoners, including strip searches and body cavity searches, courts generally use the Fourth Amendment, which protects you against unreasonable searches.[1] Rules from the U.S. Supreme Court apply to all other U.S. courts, which include all state and federal courts. If you are in a prison outside of Louisiana, you should research the laws in your state. You should try to use the laws and court decisions of the federal circuit you are in. Louisiana is in the 5th Circuit of the federal court system, so if you are in prison in Louisiana, you should first look at cases from the 5th Circuit to figure out if a search was reasonable.

If you think your rights were violated, you should first try to protect your rights through your prison's administrative remedy procedures. Administrative remedy procedures (ARP) are the prison's rules for how prisoners should file a complaint. The Prison Litigation Reform Act ("PLRA") requires you to first go through the prison grievance process before you can sue in federal court. This means that you will not be able to sue in federal court, until you have followed all of the steps of your institution's administrative remedy procedures.

If the administrative remedy procedures aren't able to help you, or if it does not help you enough, you then can file a lawsuit. Prisoners who challenge illegal body searches and involuntary exposure usually file claims under 42 U.S.C. § 1983 ("Section 1983")[2] in either federal or state courts.

If you bring a civil suit, you can usually sue only because of physical abuse, not emotional damage. According to Section 803(d) of the PLRA, "no Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."[3] So if you want to sue beause of emotional damage, you first need to show that you were physically injured.

Prison officials can use the defense of "qualified immunity"[4] to defend against a Section 1983 lawsuit. This means that even if you can prove you were illegally searched, the officials may not be responsible under the law for their actions because of their qualified immunity defense. For more information about "qualified immunity," *see* Chapter 8 of the *Louisiana State Supplement* and Chapter 16 of the main *JLM*.

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[1] The Fourth Amendment states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

[2] Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321 (1996) (codified as 18 U.S.C. § 3626 and 28 U.S.C. § 1932).

[3] Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, § 803(d), 110 Stat. 1321 (1996) (codified as 18 U.S.C. § 3626 and 28 U.S.C. § 1932).

[4] "Immunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or stator rights." *Qualified Immunity,* Black's Law Dictionary, 868 (10th ed., 2014).

If you want to sue because of an illegal body search, you must be specific about what happened to you during the search you are suing over. Pay attention to the cases listed in the footnotes of this chapter when deciding whether to try to use any laws and constitutional amendments in your lawsuit. Part E discusses these laws and constitutional amendments.

B. EXPOSURE AND THE RIGHT TO PRIVACY

This Part discusses your privacy rights about your naked body. As a prisoner, you do not have many rights to privacy for your naked body.[5] Louisiana courts and the 5th Circuit of the U.S. Court of Appeals have said that prisoners have a reduced expectation of privacy: "Any right to privacy, including the right to bodily privacy, retained by prisoners is minimal, at best."[6] Prisoners have less of a right to privacy in prison because prison officials have "legitimate governmental interests," or important reasons that courts have recognized, that reduce prisoners' privacy.[7] The right to privacy is explained in Section 5 of the Louisiana Constitution.[8]

1. Legitimate Penological Interest

Courts will support prison officials whose actions are in line with properly running the prison. So, if the prison official can show a legitimate penological,[9] or prison-related, reason for the action, it is probably ok to make a prisoner show their naked body.[10] Rules about making prisoners show their naked bodies must be "reasonably related to legitimate penological interests".[11] Courts think about four things to decide if the regulation is "reasonably related":

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[5] *See* State v. Patrick, 381 So. 2d 501, 503 (La. 1980) (expressly stating that an inmate's expectation of privacy is considerably less than that of free members of society) (citing State v. Dauzat, 364 So. 2d 1000 (La. 1978)); *see also* Oliver v. Scott, 276 F.3d 736, 745 (5th Cir. 2002) (recognizing that a prisoner possesses a constitutional right to bodily privacy that "is minimal, at best").

[6] *See* State v. Patrick, 381 So. 2d 501, 503 (La. 1980) (expressly stating that an inmate's expectation of privacy is considerably less than that of free members of society) (citing State v. Dauzat, 364 So. 2d 1000 (La. 1978)); *see also* Oliver v. Scott, 276 F.3d 736, 745 (5th Cir. 2002) (recognizing that a prisoner possesses a constitutional right to bodily privacy that "is minimal, at best").

[7] Letcher v. Turner, 968 F.2d 508, 510 (5th Cir. 1992) (cited in Martin v. Seal, 510 Fed. App'x. 309, 309 (5th Cir. 2013)) (dismissing prisoner's claim of violation of right of privacy when female guards were present while prisoner was strip searched because there was a legitimate government interest in maintaining security of the facility); *see also* Oliver v. Scott, 276 F.3d 736, 744–745 (5th Cir. 2002) (stating that the strong security concerns in prison justify the surveillance of male prisoners in the showers and bathrooms by male or female guards, and stating that the Fifth Circuit is unlikely to uphold a Fourth Amendment claim for a right to bodily privacy).

[8] La. CONST. art. I, § 5 ("Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.").

[9] "The study of penal institutions, crime prevention, and the punishment and rehabilitation of criminals, including that are to fitting the right treatment to an offender." *Penology,* Black's Law Dictionary, 1315 (10th ed., 2014).

[10] *See* Oliver v. Scott, 276 F.3d 736, 744 (5th Cir. 2002) (stating that the strong security concerns justify the surveillance of male prisoners in the showers and bathrooms by male or female guards, and stating that the Fifth Circuit is unlikely to uphold a Fourth Amendment claim for a right to bodily privacy); Elliott v. Lynn, 38 F.3d 188, 190–191 (5th Cir. 1994) (holding that visual cavity searches conducted on all prisoners were justified in response to an emergency situation of increasing violence in the prison and by the need for swift action).

[11] *See* State v. Perry, 610 So. 2d 746, 775 (La. 1992) (stating that "the proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is reasonably related to legitimate penological interests") (quoting Washington v. Harper, 494 U.S. 210, 223, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 199 (U.S. 1990)); *see also* Oliver v. Scott, 276 F.3d 736, 745 (5th Cir. 2002) (stating that the strong security concerns justify the surveillance of male prisoners in the showers and bathrooms by male or female guards, and stating that the Fifth Circuit is unlikely to uphold a Fourth Amendment claim for a right to bodily privacy) (quoting Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987), *superseded on other grounds* by § 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA) (42 U.S.C.. § 2000cc-1 (2012) (discussing the relationship between an inmate's constitutional rights and prison regulations).

1) The connection between the invasion of privacy at issue and the stated government interest;
2) Whether the inmate has alternative (other) methods for exercising his or her right to privacy;
3) What impact honoring the privacy at issue would have on other inmates, guards, and prison resources; and
4) What other methods, if any, the prison officials could have used to achieve their stated goal.[12]

An example of a prison-related interest is keeping order between prisoners. Another example is finding contraband. Contraband can include drugs or weapons.[13]

It is hard to claim that your right to privacy against involuntary exposure was violated just because the guard is of the opposite sex. This is because of rules about job discrimination.[14] These rules apply to the prison as an employer. Prohibiting guards of the opposite sex from viewing nude prisoners may violate laws requiring equal employment opportunities, because the sex of the guard would then become a factor in employment decisions. In these cases, courts will balance your right to privacy against the prison's compliance with anti-employment discrimination laws and legitimate penological objectives (prison-related goals);[15] however, Louisiana state courts and the 5th Circuit have held that allowing cross-sex viewing of nude prisoners does not violate the prisoners' rights.[16] For example, courts have rejected privacy claims

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[12] Turner v. Safley, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987), *superseded on other grounds* by § 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1 (2012) (discussing the relationship between an inmate's constitutional rights and prison regulations).

[13] *See, e.g.*, Patin v. Leblanc, 2012 U.S. Dist. LEXIS 106300, at *72–74 (E.D. La. May 18, 2012) (holding that searches conducted after visitation implicate no constitutional right because they are conducted in an effort to control the entry of contraband after visits with guests, and thus are reasonably necessary to achieve legitimate penological needs); *see also* Oliver v. Scott, 276 F.3d 736, 744 (5th Cir. 2002) (stating that the strong security concerns justify the surveillance of male prisoners in the showers and bathrooms by male or female guards, and stating that the Fifth Circuit is unlikely to uphold a Fourth Amendment claim for a right to bodily privacy); Elliott v. Lynn, 38 F.3d 188, 190–191 (5th Cir. 1994) (holding that visual cavity searches conducted on all prisoners were justified in response to an emergency situation of increasing violence in the prison and by the need for swift action). For a definition of "contraband," *see* LA. REV. STAT. ANN. § 14:402 (2017).

[14] *See, e.g.,* Sinclair v. Stalder, 78 Fed. App'x. 987, 989 (5th Cir. 2003) (affirming grant of summary judgment in favor of defendant holding that assignment of female prison guards to tier duty in prison residential areas is reasonably related to legitimate penological objectives, including flexibility in security personnel staffing and equal employment opportunity); Foster v. Coody, 2010 U.S. Dist. LEXIS 42675, at *8–9 (M.D. La. Mar. 29, 2010) (holding that the prison's routine staffing on female guards observing male prisoners' bathroom and shower areas is not a violation of the right to privacy where the prisoner failed to establish facts showing that searches conducted by female guards on male prisoners violates the right to privacy in the face of the prison's interest in equal employment opportunities and controlling contraband).

[15] *See, e.g.*, Sinclair v. Stalder, 78 Fed. App'x. 987, 989 (5th Cir. 2003) (affirming grant of summary judgment in favor of defendant holding that assignment of female prison guards to tier duty in prison residential areas is reasonably related to legitimate penological objections, including flexibility in security personnel staffing and equal employment opportunity); Guy v. Tanner, 2012 U.S. Dist. LEXIS 61322, at *5–7 (E.D. La. Mar. 20, 2012) (holding that viewing of plaintiff undressing, using the bathroom, and taking showers by prison guards, both male and female, implicates no protected constitutional right, but that plaintiff's claim is nonfrivolous only to the extent that he is alleging that the monitors used to view the plaintiff can be viewed by visitors and guests of the prison); *see also* Oliver v. Scott, 276 F.3d 736, 744 (5th Cir. 2002) (stating that the strong security concerns justify the surveillance of male prisoners in the showers and bathrooms by male or female guards, and stating that the Fifth Circuit is unlikely to uphold a Fourth Amendment claim for a right to bodily privacy); West v. Parker, No. 95-30489, 1995 U.S. App. LEXIS 42346, at *3 (5th Cir. Aug. 23, 1995) (requiring prisoner to argue that giving a female officer "unrestricted access" to male inmate's dormitory was unnecessary to maintain security).

[16] *See, e.g.,* Foster v. Coody, 2010 U.S. Dist. LEXIS 42675, at *8–9 (M.D. La. Mar. 29, 2010) (holding that the prison's routine staffing on female guards observing male prisoners' bathroom and shower areas is not a violation of the right to privacy where the prisoner failed to establish facts showing that searches conducted by female guards on male prisoners violates the right to privacy in the face of the prison's interest in equal employment opportunities and controlling contraband); *see also* Sinclair v. Stalder, 78 Fed. App'x. 987, 989 (5th Cir. La. 2003) (affirming grant of summary judgment in favor of defendant; holding that assignment of female prison guards to tier duty in prison residential areas is reasonably related to legitimate penological objectives, including flexibility in security personnel staffing and equal employment opportunity).

about female guards watching male prisoners using the bathroom or showers.[17] Courts have also allowed female officers to go into a male prisoner's dormitory when the guards have shown a legitimate penological interest.[18] However, if you can show that the prison official responsible for the invasion of your privacy *did not* have a legitimate penological interest, your claim may be heard.[19] For example, the 5th Circuit held in *Moore* that a male prisoner's claim that he was repeatedly subject to strip and cavity searches by female staff members under non-emergency settings and while male guards were available may entitle him to relief under the Fourth Amendment.[20]

For information on how to make an invasion of privacy claim, *see* Part E of this Chapter.

C. BODY SEARCHES UNDER THE FOURTH AMENDMENT

This Part talks about when and how a prison official may search your body. The Louisiana Constitution and the U.S. Constitution do not allow unreasonable searches and seizures.[21] These searches and seizures include strip searches and body searches of prisoners by prison guards.[22]

The lawfulness of a search depends on whether a prison guard acts reasonably when doing the search. In *Bell v. Wolfish*, the Supreme Court stated that body searches are constitutional, but only if performed in a "reasonable manner."[23] Guards must act reasonably when searching prisoners because

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[17] *See, e.g.,* Foster v. Coody, 2010 U.S. Dist. LEXIS 42675, at *8–9 (M.D. La. Mar. 29, 2010) (holding that the prison's routine staffing on female guards observing male prisoners' bathroom and shower areas is not a violation of the right to privacy where the prisoner failed to establish facts showing that searches conducted by female guards on male prisoners violates the right to privacy in the face of the prison's interest in equal employment opportunities and controlling contraband); Guy v. Tanner, 2012 U.S. Dist. LEXIS 61322, at *5–7 (E.D. La. Mar. 20, 2012) (holding that viewing of plaintiff undressing, using the bathroom, and taking showers by prison guards, both male and female, implicates no protected constitutional right, but that plaintiff's claim is nonfrivolous only to the extent that he is alleging that the monitors used to view the plaintiff can be viewed by visitors and guests of the prison); *see also* Oliver v. Scott, 276 F.3d 736, 744 (5th Cir. 2002) (stating that the strong security concerns justify the surveillance of male prisoners in the showers and bathrooms by male or female guards, and stating that the Fifth Circuit is unlikely to uphold a Fourth Amendment claim for a right to bodily privacy); Petty v. Johnson, No. 98-40941, 1999 U.S. LEXIS 39736, at *1 (5th Cir. Aug. 25,1999) (rejecting challenge to prison policy that allowed female guards to monitor male inmates while showering or otherwise naked).

[18] *See, e.g.,* Sinclair v. Stalder, 78 Fed. App'x. 987, 989 (5th Cir. 2003) (affirming grant of summary judgment in favor of defendant; holding that assignment of female prison guards to tier duty in prison residential areas is reasonably related to legitimate penological objectives, including flexibility in security personnel staffing and equal employment opportunity); Lechter v. Turner, 968 F.2d 508, 510 (5th Cir. 1992) (affirming dismissal of plaintiff inmate's civil rights action because a strip search in the presence of female guards does not violate plaintiff's constitutional right to privacy); West v. Parker, No. 95-30489, 1995 U.S. App. LEXIS 29536, at *3 (5th Cir. Aug. 23, 1995) (requiring prisoner to argue that giving a female officer "unrestricted access" to male inmate's dormitory was unnecessary to maintain security).

[19] *See* Moore v. Carwell, 168 F.3d 234, 236–237 (5th Cir. 1994) (holding that plaintiff prisoner's § 1983 claim was not frivolous because his allegations entitled him to relief under the Fourth Amendment if true; plaintiff prisoner alleged that he was subjected to repeat strip and cavity searches by female prison guards, under non-emergency circumstances and when male officers were available); *see also* Tuft v. Texas, 410 Fed. App'x. 770, 777 (5th Cir. 2011) (remanding in part as to prisoner's claim that the sole purpose of a female officer's presence during a strip search was to sexually coerce and humiliate him).

[20] Moore v. Carwell, 168 F.3d 234, 236–237 (5th Cir. 1994) (holding that plaintiff prisoner's § 1983 claim was not frivolous because his allegations entitled him to relief under the Fourth Amendment if true; plaintiff prisoner alleged that he was subjected to repeat strip and cavity searches by female prison guards, under non-emergency circumstances and when male officers were available).

[21] LA. CONST. Art. I, § 5 (Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy."); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated").

[22] *See, e.g.,* Parker v. State, 282 So. 2d 483, 487 (La. 1973) (finding that periodic searches of both inmates and dormitory areas for weapons may be reasonable).

[23] Bell v. Wolfish, 441 U.S. 520, 560, 99 S. Ct. 1861, 1885, 60 L. Ed. 2d 447, 482 (1979).

searches invade prisoners' privacy and can easily become abusive.[24] In other words, courts balance the state's need for conducting the search against how much the prisoner's privacy is invaded.[25]

Courts do not have a strict rule as to what constitutes an unreasonable search. Rather, they have decided that some practices are unreasonable. To determine whether a search is "unreasonable," *Bell v. Wolfish* requires federal and state courts to examine three factors:

1) Why the prison official searched you;
2) Where they searched you; and
3) How they searched you.[26]

Whether a strip or body cavity search was reasonable depends on what happened, how it happened, and why it happened.[27] Courts balance your right to privacy with the prison officer's duty to run a safe and effective prison.[28]

Prison rules can block some of your constitutional rights if they are related to "legitimate penological interests."[29] For a definition of "legitimate penological interests," *see* Part B of this Chapter. The government has to justify a search when they search you.[30] The government usually justifies searches by saying that they are related to "security, order, and rehabilitation."[31] For example, a court might say that visual cavity searches of all prisoners were reasonable in an emergency when there was a threat of

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[24] Bell v. Wolfish, 441 U.S. 520, 559–560, 99 S. Ct. 1861, 1884–1886, 60 L. Ed. 2d 447, 481–483 (1979).
[25] *See* United States v. Lilly, 576 F.2d 1240, 1246 (5th Cir. 1978), *abrogated on other grounds by* Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) (stating "few searches are more intrusive than a body cavity search" and applying the *Bell* factors to determine if legitimate penological interests outweigh the "intrusive scope of the search").
[26] Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 481 (1979) (finding that a search of the prisoner's cell was reasonable and stating the determining whether a search is reasonable "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.").
[27] *See, e.g.*, Moore v. Carwell, 168 F.3d 234, 237 (5th Cir. 1999) (stating that "searches and seizures conducted of prisoners must be reasonable under all the facts and circumstances in which they are performed.") (internal citations omitted).
[28] *See, e.g.*, Moore v. Carwell, 168 F.3d 234, 237 (5th Cir. 1999) (finding that while a prisoner's rights may be diminished due to the needs or exigencies of the prison in which he is incarcerated, "searches and seizures conducted of prisoners must be reasonable under all the facts and circumstances in which they are performed" in order to avoid violating the Fourth Amendment) (internal citations omitted).
[29] Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987), *superseded on other grounds by* § 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1 (2012) (discussing the relationship between an inmate's constitutional rights and prison regulations); State v. Perry,610 So. 2d 746, 775 (La. 1992) (stating that "when a prison regulation impinges on an inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests") (quoting Washington v. Harper, 494 U.S. 210, 223, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 199 (U.S. 1990)); *see also* Hutchins v. McDaniel, 512 F.3d 193, 196 (5th Cir. 2007) (stating that although an inmate's "rights are diminished by the needs and exigencies of the institution in which he is incarcerated . . . [and] [h]e thus loses those rights that are necessarily sacrificed to legitimate penological needs," the "Fourth Amendment protects [him] from searches and seizures that go beyond legitimate penological interests.") (internal citations and quotations omitted).
[30] *See* U.S. v. Lilly, 576 F.2d 1240, 1244–1245 (5th Cir. 1978), *abrogated on other grounds by* Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, L. Ed. 2d 393 (1984) (holding that the government bears the burden of justifying a search or seizure in prison, and stating "*whenever* the government has invaded an individual's privacy, the government has been required to justify its invasion by proving that it was reasonable under all the facts and circumstances.") (emphasis added).
[31] *See* White v. Sanders, 1995 U.S. App. LEXIS 43501, at *7 (5th Cir. Mar. 2, 1995) (stating that legitimate penological interests include security, order, and rehabilitation). *See, e.g.,* Elliott v. Lynn, 38 F.3d 188, 190–191 (5th Cir. 1994) (holding that visual cavity searches conducted on all prisoners was justified in response to an emergency situation of increasing violence in the prison and by the need for swift action); Hay v. Waldron, 834 F.2d 481, 485–486 (5th Cir. 1987) (holding that the policy requiring a strip search of prisoners on administrative segregation is constitutional based on the interest in the security of the prison and the safety of the prisoners on segregation).

violence.[32] A search is more likely to be reasonable if it happens in private.[33] A Louisiana court said that a visual cavity search was private enough when no one else was able to see the prisoners except the officers and the prisoners being searched.[34] Courts also look at whether the prison officials were trying to harass or punish you.[35] It is harder for the government to justify some kinds of searches, like cavity searches.[36] The next Section of this Chapter talks about what searches courts think are unreasonable. It is organized by different kinds of searches.

The prison only has to prove that the search was reasonable.[37] The search might be reasonable even if there was a better way to keep prisoners safe.[38] It is important to remember that courts usually listen to what prison officials say about why they searched you.[39] If you can, you should try to prove that the prison officials are lying about why they searched you.[40]

1. Types of Searches

This Section is about your right to be free from an unreasonable (which, here, means illegal) search and seizure, and explains the types of searches that might happen to you. This includes strip searches, visual body cavity searches, and manual body cavity searches. Search and seizure means someone searches your body or your property and maybe takes (seizes) one or some of your things. DNA testing is also

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[32] Elliott v. Lynn, 38 F.3d 188, 190–191 (5th Cir. 1994) (holding that visual cavity searches conducted on all prisoners was justified in response to an emergency situation of increasing violence in the prison and by the need for swift action).

[33] *See, e.g.,* Fulford v. Regel, 582 So. 2d 981, 984 (La. App. 1 Cir. 1991) (finding that a strip search conducted by officers inside a building where no one was present other than prison employees and the inmates was reasonable, even though the strip search was conducted in the presence of the inmates involved).

[34] Fulford v. Regel, 582 So. 2d 981, 984 (La. App. 1 Cir. 1991) (finding that a strip search conducted by officers inside a building where no one was present other than prison employees and the inmates was reasonable, even though the strip search was conducted in the presence of the inmates involved).

[35] *See, e.g.,* Fulford v. Regel, 582 So. 2d 981, 984 (La. App. 1 Cir. 1991) (finding that because a strip search by prison officers on an inmate was not performed to harass or punish an inmate, the search was reasonable).

[36] *See* United States v. York, 578 F.2d 1036, 1041 (5th Cir. 1978) (stating that "[t]he more intrusive the search, the heavier is the government's burden of proving its reasonableness," but holding the strip and body cavity searches at issue were justified by the fact that a bag containing marijuana had fallen from the pant leg of the prisoner's visitor moments before the search was conducted); *see also* State v. Kleinpeter, 449 So. 2d 1043, 1046 (La. App. 1 Cir. 1984) (stating that body cavity searches are intrusive and humiliating, and must be surrounded by protection which does not conflict with legitimate penological needs).

[37] *See* Hay v. Waldron, 834 F.2d 481, 486 (5th Cir. 1987) (stating that "'[p]robable cause' is not the definitive litmus for constitutionality of prison search policies."); Fulford v. Regel, 582 So. 2d 981, 984 (La. App. 1 Cir. 1991) (finding that strip searches conducted on prisoners without reasonable suspicion or probable cause do not violate the U.S. constitution or Louisiana constitution so long as the searches are conducted in a reasonable manner); State v. Guirlando, 509 So. 2d 172, 174 (La. App. 1 Cir. 1987) (finding that even though the state demonstrated particular justification for a search, such a justification was constitutionally unnecessary, as inmates have no expectation of privacy of their items).

[38] *See* Hay v. Waldron, 834 F.2d 481, 485 (5th Cir. 1987) (denying the inmate's claim that the strip search procedure was in violation of the Fourth Amendment, stating that a court does not have to apply a least restrictive means standard when reviewing the security policies adopted by prison officials) (citing Block v. Rutherford, 468 U.S. 576, n.11, 104 S. Ct. 3227, n.11, 82 L. Ed. 2d 438 (1984)) (stating that "administrative officials are not obliged to adopt the least restrictive means to meet their legitimate objectives").

[39] *See, e.g.*, Hay v. Waldron, 834 F.2d 481, 486 (5th Cir. 1987) (stating that the policy requiring a strip search of prisoners on administrative segregation is constitutional based on the interest in the security of the prison and the safety of the prisoners on segregation; stating that prison officials deserve deference "regarding the reasonableness of the scope, the manner, the place and the justification for a particular policy" based on the interest of internal security) (internal citations omitted); Elliot v. Lynn, 38 F.3d 188, 191 (5th Cir. 1994) (stating that in the Fourth Amendment Context, "a prison administrator's decisions and actions in the prison context are entitled to great deference from the courts, the burden of proving reasonableness is a light burden").

[40] *See* Hay v. Waldron, 834 F.2d 481, 486 (5th Cir. 1987) (holding that "[i]f a policy is reasonably related to legitimate security objectives *and there is no substantial evidence to indicate that prison officials have exaggerated their response to security considerations*, courts ordinarily should defer to prison administrators' expertise") (emphasis added).

discussed. A strip search is when your naked body is searched, but your body cavities are not.[41] A body cavity search can be visual or manual. A visual body cavity search means the searcher looks into your anal or genital areas without touching you. A manual body search is when the searcher uses some touching, with his hands or an instrument, to search your anal or genital areas.

Before you make a Fourth Amendment unreasonable search and seizure claim, you should check your jail or prison's rules about the types of searches and the reasons that a search is used. But know that such a policy is just a suggestion for the court in deciding if the search was okay. This means the court can disagree with it.[42]

a. Strip Search

In a strip search, you take your clothes off. Then, a prison official searches the clothes and checks your naked body to see if you are hiding anything. In a strip search, the prison official does not touch you or search your body. The courts usually allow a strip search if it was done in a reasonable manner.[43] Courts usually allow strip searches if prison officials have a real security reason to explain the search. This might be because there has been a lot of violence at the prison or when prisoners have had contact with visitors from outside of prison.[44] However, if a strip search is just done to bother prisoners, and there are no real security concerns, it may violate the Fourth or Eighth Amendment.[45]

A court will balance the need for a search with how much it violated your rights.[46] It is the state's job to show that the search was reasonable and done because of a real prison need. A strip search does not need to be based on probable cause, which means the prison actually thought you were breaking the rules or doing something illegal.[47] Courts usually let prison officials pick how they do a search and what types of

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[41] "A search of a suspect whose clothes have been removed, the purpose usually being to find any contraband the person might be hiding." *Strip Search,* Black's Law Dictionary, 1553 (10th ed., 2014).

[42] *See* Florence v. Bd. Of Chosen Freeholders, 566 U.S. 318, 527, 132 S. Ct. 1510, 1517, 182 L. Ed. 2d 566, 576 (2012) (stating that the task of determining whether a policy is reasonably related to legitimate security interests is peculiarly within the province and professional expertise of corrections officials, but that in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment); Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64 (1987), *superseded on other grounds* by § 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1 (2012) (discussing the relationship between an inmate's constitutional rights and prison regulations).

[43] *See, e.g.,* Fulford v. Regel, 582 So. 2d 981, 984 (La. App. 1 Cir. 1991) (finding that strip searches conducted on prisoners without reasonable suspicion or probable cause do not violate the U.S. constitution or Louisiana constitution so long as the searches are conducted in a reasonable manner).

[44] *See, e.g.*, Elliott v. Lynn, 38 F.3d 188, 190–191 (5th Cir. 1994) (holding that visual cavity searches conducted on all prisoners was justified in response to an emergency situation of increasing violence in the prison and by the need for swift action); United States v. York, 578 F.2d 1036, 1041 (5th Cir. 1978) (upholding strip searches of prisoner after a visit with a person from outside the prison as reasonable upon finding balloons containing marijuana on his visitor's person).

[45] *See* Moore v. Carwell, 168 F.3d 234, 236–237 (5th Cir. 1999) (holding that plaintiff prisoner's § 1983 claim was not frivolous because his allegations entitled him to relief under the Fourth Amendment if true; plaintiff prisoner alleged that he was subjected to repeat strip and cavity searches by female prison guards under non-emergency circumstances and when male officers were available); *see also* Tuft v. Texas, 410 Fed. App'x. 770, 777 (5th Cir. 2011) (remanding in part as to prisoner's claim that the sole purpose of a female officer's presence during a strip search was to sexually coerce and humiliate him).

[46] *See* Hutchins v. McDaniels, 512 F.3d 193, 196 (5th Cir. 2007) (holding that a claim that strip searches and cavity searches conducted within view of other prisoners and female body guards without the justification that the prisoner was suspected of possessing contraband *may be unreasonable*, stating "[t]he test for a Fourth Amendment violation requires the balancing of the need for the particular search and the invasion of rights that are a result of the search").

[47] *See* Hay v. Waldron, 834 F.2d 481, 485 (5th Cir. 1987) (rejecting a least restrictive means and probable clause standard for searches and noting that the United States Supreme Court has rejected the argument that a strip search must be based on probable cause) (citing Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 481 (1979)); *see also* Fulford v. Regel, 582 So. 2d 981, 984 (La. App. 1 Cir. 1991) (finding that strip searches conducted on prisoners without reasonable suspicion or probable cause do not violate the U.S. constitution or Louisiana constitution so long as the searches are conducted in a reasonable manner).

searches are needed to reach their goal.[48] This means prison policies requiring a regular strip search of a group of prisoners are often upheld.[49]

b. Body Cavity Search

A body cavity search is an actual physical examination of the prisoner's anal and/or genital cavities conducted by a professional member of the health services staff.[50] Body cavity searches can either be visual or manual. In a visual body cavity search, sometimes referred to as a "strip frisk," a prison official performs a visual search of a prisoner's clothes and body. This may include looking at body cavities. This may involve one or more of the following procedures:

1) Opening the mouth and moving the tongue up and down and from side to side;
2) Removing any dentures;
3) Running the prisoner's hands through the prisoner's hair;
4) Visually examining the prisoner's ears;
5) Lifting the prisoner's arms to expose the armpits;
6) Bending over and/or spreading the buttocks to expose the anus to the frisking officer;
7) For male prisoners, spreading the testicles to expose the area behind the testicles; or
8) For female prisoners, squatting to show the vagina.

While a visual body cavity search does not involve the touching of a prisoner by a prison official, in a manual body cavity search a prison official places his or her fingers or other instruments into a prisoner's nose, mouth, anus, and/or vagina. A body cavity search of prisoners by prison officials is subject to the federal and state constitutional protections against unreasonable searches, but a court will determine the search reasonable unless the law enforcement interests of the officials is sufficiently outweighed by the violation of the prisoner's privacy rights.[51] Because manual body cavity searches involve a higher level of intrusiveness than visual body cavity searches, courts may want a greater reason to justify a manual body cavity search in order to find the search reasonable.

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[48] *See* Hay v. Waldron, 834 F.2d 481, 486 (5th Cir. 1987) (stating that the policy requiring a strip search of prisoners on administrative segregation is constitutional based on the interest in the security of the prison and the safety of the prisoners in segregation; stating that prison officials deserve deference "regarding the reasonableness of the scope, the manner, the place and the justification for a particular policy" based on the interest of internal security) (internal citations omitted); Elliot v. Lynn, 38 F.3d 188, 191 (5th Cir. 1994) (stating that in the Fourth Amendment context, "a prison administrator's decisions and actions in the prison context are entitled to great deference from the courts, and the burden of proving reasonableness is a light burden.").

[49] *See, e.g.,* Hay v. Waldron, 834 F.2d 481, 486 (5th Cir. 1987) (denying the inmate's § 1983 claim that the strip search procedure was in violation of the 4th Amendment because the procedure was applied to inmates in segregation for security detention, pre–hearing detention, protective custody or emergency detention with the purpose of "prevent[ing] the transfer or concealment of prison contraband"); Fulford v. Regel, 582 So. 2d 981, 984 (La. App. 1 Cir. 1991) (finding that strip searches conducted on prisoners without reasonable suspicion or probable cause do not violate the U.S. constitution or Louisiana constitution so long as the searches are conducted in a reasonable manner).

[50] *See, e.g.*, 28 C.F.R. § 552.11(d) (2017) (defining "digital or simple instrument search" as an "inspection for contraband or any other foreign item in a body cavity of an inmate by use of fingers or simple instruments, such as an otoscope, tongue blade, short nasal speculum, and simple forceps," but declaring that the search "may be conducted only by designated qualified health personnel").

[51] *See* State v. Bullock, 95-KA-0324, p. 6 (La. App. 4. Cir. 9/15/95); 661 So. 2d 1074, 1077 (stating that a body cavity search performed at the time of arrest at a correctional facility was reasonable under the *Bell* factors in order to prevent contraband from entering the correctional facility); Hutchins v. McDaniel, 512 F.3d 193, 196 (5th Cir. 2007) (stating that although an inmate's "rights are diminished by the needs and exigencies of the institution in which he is incarcerated . . . [and] [h]e thus loses those rights that are necessarily sacrificed to legitimate penological needs," the "Fourth Amendment protects [him] from searches and seizures that go beyond legitimate penological interests.") (internal citations and quotations omitted); United States v. York, 578 F.2d 1036, 1041 (5th Cir. 1978) (stating that the more intrusive the search, the heavier the government's burden of showing its reasonableness); State v Kleinpeter, 449 So. 2d 1043, 1046 (La. App. 1 Cir. 1984) (stating that body cavity searches are intrusive and humiliating, and must be surrounded by protection which does not conflict with legitimate penological needs).

It is not necessary that the court find that each of the *Bell* factors to be reasonable, but instead courts decide whether a search was reasonable based on the "totality of the circumstances" (meaning all the facts).[52] Although courts know that visual and manual body cavity searches are "among the most intrusive of searches,"[53] the search will likely be considered reasonable if the other *Bell* factors outweigh the intrusiveness of the search.[54] That is, if the intrusion of a body cavity search is outweighed by the law enforcement reason for needing to do the search.[55] To determine this, courts consider whether the officer that did the search had done this type of search before or whether the officer was supervised or assisted by medical personnel.[56] To decide if the location of the search was reasonable, the court will consider, for example, whether the search was conducted in a hygienic environment and whether it was conducted in a public place.[57] A search in prison requires less justification because prisoners have a lower expectation of privacy under the Fourth Amendment.[58]

c. Body Search by Someone of the Opposite Gender

There is no constitutional violation when a naked male prisoner is viewed by a female guard if the presence of female guards is necessary to protect a legitimate government interest, such as maintaining prison security.[59] Female prison guards also may do physical searches of male prisoners when there is a

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[52] *See, e.g.*, United States v. Lilly, 576 F.2d 1240, 1246 (5th Cir. 1978) (stating "few searches are more intrusive than a body cavity search" and applying the *Bell* factors to determine if legitimate penological interests outweigh the "intrusive scope of the search").

[53] *See* United States v. York, 578 F.2d 1036, 1041 (5th Cir. 1978) (stating that the more intrusive the search, the heavier the government's burden of showing its reasonableness); *see also* United States v. Lilly, 576 F.2d 1240, 1246 (5th Cir. 1978) (stating "few searches are more intrusive than a body cavity search" and applying the *Bell* factors to determine if legitimate penological interests outweigh the "intrusive scope of the search").

[54] United States v. Caldwell, 750 F.2d 341, 343 (5th Cir. 1984) (Permitting visual and manual body cavity search, stating that "the usual standards that apply to such searches outside the prison may be severely weakened inside the prison. Indeed, prisoners' rights often may be diminished by the needs and exigencies of the prison environment."). *But see* State v. Kleinpeter, 449 So. 2d 1043, 1046 (La. App. 1 Cir. 1984) (stating that body cavity searches are intrusive and humiliating, and must be surrounded by protection which does not conflict with legitimate penological needs).

[55] *See* Hutchins v. McDaniel, 512 F.3d 193, 196 (5th Cir. 2007) (stating that although an inmate's "rights are diminished by the needs and exigencies of the institution in which he is incarcerated . . . [and h]e thus loses those rights that are necessarily sacrificed to legitimate penological needs," the "Fourth Amendment protects [him] from searches and seizures that go beyond legitimate penological interests") (internal citations and quotations omitted).

[56] *See* United States v. Lilly, 576 F.2d 1240, 1247 (5th Cir. 1978) (noting that body cavity search of female was conducted by a female medical officer in the prison clinic in the presence of only the medical officer and a female correctional officer).

[57] McGee v. State, 105 S.W.3d 609, 617 (Tex. Crim. App. 2003), *reh'g on petition for discretionary review denied*, (June 11, 2003) (holding that because the search was done with rubber gloves and did not involve penetration of the anus, the location of the search at the fire station was permissible even though it was not as sanitary as a hospital; also stating that visual body cavity inspections should not be conducted in a public place, and even if search is not in a separate room, an officer should conduct himself so as to protect the privacy interests of the party being searched).

[58] *See, e.g.,* United States v. York, 578 F.2d 1036, 1041 (5th Cir. 1978) (holding that a body cavity search of an inmate after a visit was reasonable where moments before the search a balloon containing marijuana had fallen from the inmate's pants); Elliott v. Lynn, 38 F.3d 188, 190–191 (5th Cir. 1994) (holding that the group, institution–wide visual cavity search conducted in view of others did not violate the Fourth Amendment, because there were sufficient exigent circumstances, namely to regain control, discipline, and security in an emergency circumstance).

[59] *See, e.g.,* Letcher v. Turner, 968 F.2d 508, 510 (5th Cir. 1992) (holding that the presence of female guards during the strip search of a male prisoner following a disturbance does not violate his constitutional right to privacy); Oliver v. Scott, 276 F.3d 736, 744 (5th Cir. 2002) (stating that the strong security concerns justify the surveillance of male prisoners in the showers and bathrooms by male or female guards, and stating that the Fifth Circuit is unlikely to uphold a Fourth Amendment claim for a right to bodily privacy); Sinclair v. Stalder, 78 Fed. App'x. 987, 989 (5th Cir. 2003) (affirming grant of summary judgment in favor of defendant holding that assignment of female prison guards to tier duty in prison residential areas is reasonably related to legitimate penological objections, including flexibility in security personnel staffing and equal employment opportunity); Petty v. Johnson, No. 98-40941, 1999 U.S. LEXIS 22626, at *1 (5th Cir. Aug. 25, 1999) (rejecting challenge to prison policy that allowed female guards to monitor male inmates while showering or otherwise naked); Foster v. Coody, 2010 U.S. Dist. LEXIS 42675, at *8–9 (M.D. La. Mar. 29, 2010) (holding that the prison's routine staffing on female guards observing male prisoners' bathroom and shower areas is not a violation of the right to privacy where the prisoner failed to establish facts showing that searches conducted by female guards on male prisoners violates the right to privacy in the face of the prison's interest in equal employment opportunities and controlling contraband).

legitimate government interest.[60] The Fifth Circuit has indicated that a strip or body cavity search of a male prisoner by a female guard requires both a legitimate government interest and a showing of necessity for the female guard to do the search.[61]

Although most searches of male inmates by female prison officials have been found reasonable, in *Moore v. Carwell*, the court stated that a non-emergency strip search of a male prisoner by a female prison official, when male prison officials were available, may state a potential Fourth Amendment violation.[62]

Courts may be more sympathetic to female prisoners. Some courts recognize that women have a greater privacy interest in certain situations. This is because female prisoners can be at a greater risk of sexual abuse by prison officials. As a result, some courts have found some searches of women prisoners by male prison officials to be unconstitutional, even if the same searches of male prisoners by female prison officials would be allowed under the same circumstances.

Courts will balance a prisoner's limited right to be free from invasions of privacy by members of the opposite sex with the state's interest in the security of the prison and in avoiding sex discrimination in prison employment.[63] Most cases about gender issues in prison focus on this right to privacy and try to balance these interests.

d. DNA Testing

Prison officials may require you to provide blood samples or other specimens to create a DNA record and this likely does not violate your state and federal rights to be free from unreasonable search and seizure.[64] Under Louisiana state law, you have to give a DNA sample either by court order or if you have been arrested for any felony or other specified offense, including: an attempt, conspiracy, criminal solicitation, or accessory.[65]

Forced DNA testing of prisoners usually does not violate the Fourth Amendment.[66]

D. EIGHTH AMENDMENT PROTECTIONS

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[60] *See* Letcher v. Turner, 968 F.2d 508, 510 (5th Cir. 1992) (Stating "that female guards may, in addition to monitoring male prisoners during showers, conduct 'pat' searches of male inmates").

[61] *See, e.g.,* Foster v. Coody, 2010 U.S. Dist. LEXIS 42675, at *8–9 (M.D. La. Mar. 29, 2010) (holding that the prison's routine staffing on female guards observing male prisoners' bathroom and shower areas is not a violation of the right to privacy where the prisoner failed to establish facts showing that searches conducted by female guards on male prisoners violates the right to privacy in the face of the prison's interest in equal employment opportunities and controlling contraband). *But see* Moore v. Carwell, 168 F.3d 234, 236 (5th Cir. 1999) (holding that a strip search of a male prisoner by a female officer without emergency circumstances, when male officers were available to conduct the search, could state a potential Fourth Amendment claim).

[62] Moore v. Carwell, 168 F.3d 234, 236 (5th Cir. 1999) (holding that a strip search of a male prisoner by a female officer without emergency circumstances, when male officers were available to conduct the search, could state a potential Fourth Amendment claim).

[63] *See, e.g.*, Sinclair v. Stalder, 78 Fed. App'x. 987, 989 (5th Cir. 2003) (affirming grant of summary judgment in favor of defendant holding that assignment of female prison guards to tier duty in prison residential areas is reasonably related to legitimate penological objections, including flexibility in security personnel staffing and equal employment opportunity).

[64] *See* LA. REV. STAT. ANN. § 15:609 (2017); *see also* Velasquez v. Woods, 329 F.3d 420, 421 (5th Cir. 2003) (rejecting a § 1983 claim that requiring convicted felons to provide blood samples under TEX. GOV. CODE § 411.148 is a violation of the Fourth Amendment, and finding that "[e]very circuit court to consider this issue has held that the collection of DNA samples from felons pursuant to similar statutes does not violate the Fourth Amendment").

[65] LA. REV. STAT. ANN. § 15:609 (2017).

[66] Groceman v. United States Dep't. of Justice, 354 F.3d 411, 413–414 (5th Cir. 2004) (per curiam) ("[A]lthough collection of DNA samples from prisoners implicates Fourth Amendment concerns, such collections are reasonable in light of an inmates' diminished privacy rights, the minimal intrusion involved, and the legitimate government interest in using DNA to investigate crime . . . persons incarcerated after conviction retain no constitutional privacy interest against their correct identification.").

The Eight Amendment of the Constitution and Article 1, Section 20 of the Louisiana Constitution prohibit cruel and unusual punishment.[67] For issues about poor prison conditions, federal courts find for state prisoners only when it is shown that the prisoners are subjected to cruel and unusual punishment, as prohibited by the Eight Amendment.[68]

Courts usually use the Fourth Amendment to determine if a body search is constitutional,[69] but may use the Eighth Amendment if the search is so unreasonable that it rises to the level of cruel and unusual punishment.

There is no clear standard about how much pain and suffering is required to show an Eighth Amendment violation. To bring an Eighth Amendment claim for cruel and unusual punishment from a body search, you must prove that the body search showed a "wanton or deliberate indifference" to your rights.[70] Prison officials' conduct must meet this standard before a court will find a constitutional violation under the Eighth Amendment. To decide if prison officials showed wanton or deliberate indifference, courts may consider:

1) Whether, and to what extent, prison officials knew of the condition at issue;
2) Whether prison officials made any effort to change the condition or remove the prisoner from being subject to the condition; and
3) What, if anything, prison officials could have done to prevent the condition at issue.[71]

An Eighth Amendment claim requires action by a prison official or a condition of your confinement that was applied for a penal or disciplinary purpose and authorized or consented to by prison officials.[72] A court will consider all of the facts of your incarceration to decide if the prison's action is enough to violate the Eighth Amendment.[73] Courts haven't found a lot of Eight Amendment violations because of a search or assault, but successful cases have been brought.[74]

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[67] *See* LA CONST. art. I § 20 (Prohibiting euthanasia, torture, cruel, excessive, or unusual punishment); U.S. CONST. amend. VIII.

[68] *See* Farmer v. Brennan, 511 U.S. 825, 832 (1994) ("The treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment."); Ruiz v. Estelle, 650 F.2d 555, 559 (5th Cir. 1981) ("The federal courts may interfere only to protect prisoners against cruel and unusual treatment, because that is prohibited by the Eighth and Fourteenth Amendments of the United States Constitution."); Gates v. Cook, 376 F.3d 323, 332 (5th Cir. 2004) ("The treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.").

[69] *See* Waddleton v. Jackson, 445 Fed. App'x. 808, 808 (5th Cir. 2011) (stating that inmates may bring claims alleging searches that violated the 8th Amendment, but in the 5th Circuit, these claims are properly considered under the 4th Amendment); *see also* Hutchins v. McDaniels, 512 F.3d 193, 198 (5th Cir. 2007) (holding that a claim that strip searches and cavity searches conducted within view of other prisoners and female body guards without the justification that the prisoner was suspected of possessing contraband is a potential unreasonable search in violation of the Fourth Amendment); Moore v. Carwell, 168 F.3d 234, 237 (5th Cir. 1999) (refusing to extend the Eighth Amendment to strip searches, noting that a complaint about a strip search is properly analyzed under the Fourth Amendment).

[70] *See* Rhodes v. Chapman, 452 U.S. 337, 346 (1981) ("Among 'unnecessary and wanton' inflictions of pain are those that are totally without penological justification.") (citation omitted); Wilson v. Seiter, 501 U.S. 294, 302 111 S. Ct. 2321, 2326 115 L. Ed. 2d 271, 281 (1991) (holding that prisoner claiming that conditions of confinement constituted cruel and unusual punishment must show deliberate indifference on the part of prison officials).

[71] *See* McCord v. Maggio, 927 F.2d 844, 847–849 (5th Cir. 1991) ("The wantonness of the action depends on factors such as (1) the extent to which the official knew of the unsanitary conditions and that the prisoner was being exposed to them; (2) what steps the official took to correct the conditions or remove the prisoner from them; and (3) what the official could have done to protect the prisoner from the conditions.").

[72] *See* George v. Evans, 633 F.2d 413, 415 (5th Cir. 1980) (holding the isolated act of a beating by a prison guard did not qualify as "punishment," stating an 8th Amendment violation requires either state action or apparent authorization of conduct applied for disciplinary purposes to qualify as "punishment").

[73] *See, e.g.*, Stewart v. Winter, 669 F.2d 328, 335–336 (5th Cir. 1982) (holding that courts must "make a detailed inquiry" in to all the conditions of confinement to determine if they violate "contemporary standards of decency") (citing Rhodes v. Chapman, 452 U.S. 337, 362–363, 101 S. Ct. 2392, 2407 69 L. Ed. 2d 59, 79 (1981)).

[74] *See, e.g., See* George v. Evans, 633 F.2d 413, 415 (5th Cir. 1980) (holding the isolated act of a beating by a prison guard did not qualify as "punishment," stating an 8th Amendment violation requires either state action or apparent

To decide if excessive force was used, a court will look into whether prison officials used force in "good faith" or "maliciously and sadistically to cause harm."[75] To decide if excessive force was used, the Fifth Circuit has considered:

1) The stated need for the use of force;
2) The relationship between the need and amount of force used;
3) The reasonable perceived threat to the prison official; and
4) What efforts, if any, were made by the prison official to reduce or limit the amount of force used.[76]

The court will compare the amount of your injuries[77] to the reason for the use of force.[78] Generally, courts allow strip and cavity searches when a prison official acts to further a penal interest and the pain suffered by the inmate is incidental to (and not the purpose of) the procedure.[79] For example, in *Hamer v. Jones*,[80] a male prisoner refused to be strip searched by a female officer. The prison had a policy of not allowing cross-sex strip searches. While officers tried to hold down the prisoner, the prisoner was injured and then needed medical help. The court ruled that because the prisoner was unable to show that the prison officials used excessive force and because the prison officials gave a legitimate interest, there was no constitutional violation.

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authorization of conduct applied for disciplinary purposes to qualify as "punishment."); Hamer v. Jones, 364 Fed. App'x. 119, 123 (5th Cir. 2010) (holding that an inmate who refused a strip search by a female officer, which was a violation of prison policy, and was subsequently restrained, resulting in injury requiring hospitalization, did not achieve a valid Eighth Amendment claim because the plaintiff was unable to show excessive force because he could not disprove that such force was implemented in good faith to maintain or restore discipline, or maliciously and sadistically to cause harm) (citing Eason v. Holt, 73 F.3d 600, 602–603 (5th Cir. 1996)).

[75] Hudson v. McMillian, 503 U.S. 1, 6–7, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992); *see also* David v. Hill, 401 F. Supp. 2d 749, 759 (S.D. Tex. 2005) ("Excessive or unprovoked violence and brutality inflicted by prison guards upon inmates violates the Eighth Amendment.").

[76] Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999 117 L. Ed. 2d 156, 166 (1992). *See* McCreary v. Massey, 366 Fed. App'x. 516, 517–518 (5th Cir. 2010) (applying the *Hudson* test to dismiss a claim of excessive force during a handcuffed exchange resulting in a dislocated shoulder); Valencia v. Wiggins, 981 F.2d 1440, 1447 (5th Cir. 1993) (stating the appropriate inquiry is "whether the measure taken inflicted unnecessary and wanton pain and suffering" and "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm"); Rankin v. Klevenhagen, 5 F.3d 103, 108 (5th Cir. 1993) (where the order to remove prisoner from control of officer exerting force tempered severity of response, but tended to indicate that first officer was exercising unnecessary force).

[77] *See* Hudson v. McMillian, 503 U.S. 1, 7,112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (absence of serious injury does not end constitutional inquiry); Luciano v. Galindo, 944 F.2d 261, 264 (5th Cir. 1991) (permitting claim that guard pushed handcuffed prisoner down stairs, even though resulting injuries were transient).

[78] *See, e.g.,* Hamer v. Jones, 364 Fed. App'x. 119, 123 (5th Cir. 2010) (holding that an inmate who refused a strip search by a female officer, which was a violation of prison policy, and was subsequently restrained, resulting in injury requiring hospitalization, did not achieve a valid eighth amendment claim because the plaintiff was unable to show excessive force because he could not disprove that such force was implemented in good faith to maintain or restore discipline, or maliciously and sadistically to cause harm) (citing Eason v. Holt, 73 F.3d 600, 602–603 (5th Cir. 1996)).

[79] *See, e.g.,* Hamer v. Jones, 364 Fed. Appx. 119, 123 (5th Cir. 2010) (holding that an inmate who refused a strip search by a female officer, which was a violation of prison policy, and was subsequently restrained, resulting in injury requiring hospitalization, did not achieve a valid Eighth Amendment claim because the plaintiff was unable to show excessive force because he could not disprove that such force was implemented in good faith to maintain or restore discipline, or maliciously and sadistically to cause harm) (citing Eason v. Holt, 73 F.3d 600, 602–603 (5th Cir. 1996)); Elliott v. Lynn, 38 F.3d 188, 191 n.3 (5th Cir. 1994) (holding that visual cavity searches conducted on all prisoners was justified in response to an emergency situation of increasing violence in the prison and by the need for swift action).

[80] *See, e.g.,* Hamer v. Jones, 364 Fed. App'x. 119, 123 (5th Cir. 2010) (holding that an inmate who refused a strip search by a female officer, which was a violation of prison policy, and was subsequently restrained, resulting in injury requiring hospitalization, did not achieve a valid Eighth Amendment claim because the plaintiff was unable to show excessive force; plaintiff could not disprove that such force was implemented in good faith to maintain or restore discipline, or maliciously and sadistically to cause harm) (citing Eason v. Holt, 73 F.3d 600, 602–603 (5th Cir. 1996)).

Although other circuits have permitted Eight Amendment claims from excessive use of force in conducting a strip or body cavity search, no Louisiana or 5th Circuit cases have been successfully brought.[81]

E. LEGAL REMEDIES

This Part talks about the legal remedies you can use for constitutional violations from illegal body searches. Section 1 describes the administrative grievance you must first file before seeking court relief. Section 2 describes the federal laws you may use in your suit. As a prisoner, you may file your claim under Title 15 of the Louisiana Revised Statutes *in forma pauperis*.[82] Your claim may be dismissed if the allegation of poverty is untrue or the action or appeal:

1) Is frivolous;
2) Is malicious;
3) Fails to state a cause of action;
4) Seeks monetary relief against a defendant who is immune from such relief (you sue someone you can't sue); or
5) Fails to state a claim upon which relief can be granted.[83]

It is hard to win a suit on a privacy, Fourth Amendment, or Eighth Amendment claim about a body search of a prisoner. Because your claim will be dismissed if the court decides that you probably won't win because of any of the reasons above, you should only make a state or federal claim if other cases support your suit and if you can prove the facts of your claim.

Different laws apply in state and federal prisons. If you are in a federal prison, it does not matter what state the prison is in. Federal prisons only use federal law. If you are in a state prison, you can use both state and federal laws. But remember that each state creates its own laws. You must research the laws of your particular state and how prisoners in your state file suits in that state's courts. Federal Constitutional rights are protected both in state and federal prison, but the way you present your case—what legal claims you make and how you make them—will be different.

1. Administrative Grievances

You must file an administrative grievance before seeking any further remedies, like suing in court.[84] Before making an administrative grievance, you should review your prison's rules and regulations about body searches. Your prison facility is required to provide you with the rules and regulations governing your conduct.[85] If you are not satisfied with the outcome of your administrative grievance or if you believe there has been a violation of your constitutional rights, you may bring a constitutional suit, which is detailed in Section 2 of this Part.

2. The Prison Litigation Reform Act, § 1983 Claims, and *Bivens* Actions

If you think that prison officials have violated your Eighth or Fourth Amendment rights, you may sue the officials or guards using 42 U.S.C. § 1983. Section 1983 is a federal law that allows you to sue state

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[81] *See, e.g.,* Waddleton v. Jackson, 455 Fed. App'x. 808, 808 (5th Cir. 2011) (stating that inmates may bring claims alleging searches violated the 8th Amendment, but in the 5th Circuit these claims are properly considered under the 4th Amendment).
[82] *See* LA. REV. STAT. ANN. § 15:1186 (2017).
[83] *See* LA. REV. STAT. ANN. § 15:1186(C) (2017) ("[T]he court shall dismiss the case at any time if the court determines that the allegation of poverty is untrue, or the action or appeal is frivolous, is malicious, fails to state a cause of action, seeks monetary relief against a defendant who is immune from such relief, or fails to state a claim upon which relief can be granted.").
[84] *See* LA. REV. STAT. ANN. § 15:1184(A)(2) (2017).
[85] *See* LA. REV. STAT. ANN. § 15:829 (2017).

officials who have violated your constitutional rights while acting "under color of state law."[86] You can also use Section 1983 to sue local officials as long as you can show that they too acted under "color of state law." You can only sue municipalities (towns, cities, or counties) under 42 U.S.C. § 1983 if your injury was the result of an official municipal policy or custom.[87]

You can sue federal officials in a similar suit, called a *Bivens* action.[88] *Bivens* actions are used to sue federal officials for violating your constitutional rights.

To make a constitutional challenge to the conditions of your confinement, you must first meet the qualifications of the Prison Litigation Reform Act (PLRA).[89] Under the PLRA, before you may challenge a condition of your confinement in court, you must first exhaust all available administrative remedies by using up whatever inmate grievance or appeals procedures you have in your prison.[90]

If you already brought three federal civil action claims or appeals to judgment on civil action claims that were dismissed as frivolous, malicious, or for failure to state a claim for which relief may be granted, any more civil action claims or appeals to judgments on civil action claims that you make *in forma pauperis*[91] will be dismissed unless you show "imminent danger or serious physical injury."[92] Because of this provision, you want to make *in forma pauperis* claims cautiously. Second, if you are filing a writ of habeas corpus, you may have to exhaust all available administrative remedies before making your claim in a federal court.[93]

You may use 42 U.S.C. § 1983 to sue state or local officials for violating your constitutional rights.[94] Section 1983 is a way to address Fourth and Eighth Amendment claims. These claims involve your right to be free from illegal body searches.[95] The local or state government can only be held liable (responsible) under § 1983 if you show that your injury from the illegal body search was a direct result of the local or state government's official policy or directive.[96]

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[86] 42 U.S.C. § 1983 (2012).

[87] *See*, *e.g.*, Williams v. Kaufman County, 352 F.3d 994, 1013–1014 (5th Cir. 2003) (holding that the municipality could be held liable for unlawful searches of detainees because the policy was authorized by the sheriff, the relevant policymaker).

[88] Prisoners can make constitutional claims against federal officials in federal court under 28 U.S.C. § 1331 (2012) by using *Bivens* actions.

[89] 42 U.S.C. § 1997e (2012).

[90] 42 U.S.C. § 1997e(a) (2012).

[91] *In forma pauperis*, meaning "as a poor person," means that you may file your claims without having to pay many normal court costs and fees or pay on an installment plan.

[92] 28 U.S.C. § 1915(g) (2012). *See also*, Banos v. O'Guin, 144 F.3d 883, 885 (5th Cir. 1998) (rejecting § 1983 complaint regarding the use of a body cavity searches to sexually harass the plaintiff and excessive force in conducting body cavity searches because the plaintiff failed to claim imminent danger of serious physical harm in accordance with § 1915(g)); King v. Steven, 382 Fed. App'x. 396 (5th Cir. 2010) (finding "imminent danger of serious physical injury").

[93] 42 U.S.C. § 1997e(a) (2012); Hardwick v. Ault, 517 F.2d 295, 297 (5th Cir. 1975) ("If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release the traditional purpose of habeas corpus. In the case of a damage claim, habeas corpus is not an appropriate or available federal remedy.") (quoting Preiser v. Rodriguez, 411 U.S. 475, 477, 93 S. Ct. 1827, 1830, 36 L. Ed. 2d 439, 443 (1973)) (holding that if "habeas corpus is the exclusive federal remedy in these circumstances, then a plaintiff cannot seek the intervention of a federal court until he has first sought and been denied relief in the state courts, if a state remedy is available and adequate").

[94] *See, e.g.,* Florence v. Bd. Of Chosen Freeholders, 566, U.S. 318, 339–340 132 S. Ct. 1510, 1523, 182 L. Ed. 2d 566, 583 (2012) (dismissing plaintiff's § 1983 claim against corrections officers alleging that strip searching non-indictable defendants is a violation of the Fourth and Eighth Amendments).

[95] *See* Geiger v. Jowers, 404 F.3d 371, 375 (5th Cir. 2005) (stating § 1997(e) "applies to all federal civil actions in which a prisoner alleges a constitutional violation"); Hutchins v. McDaniels, 512 F.3d 193, 196 (5th Cir. 2007) (holding that a claim that strip searches and cavity searches conducted within view of other prisoners and female body guards without the justification that the prisoner was suspected of possessing contraband is a potential unreasonable search in violation of the Fourth Amendment under § 1983).

[96] *See* Grabowski v. Jackson County Pub. Defenders Office, 47 F.3d 1386, 1392 (5th Cir. 1995) (stating that to obtain relief under § 1983, a prisoner must prove two elements: (1) a deprivation of a right secured by the Constitution and laws of the United States, and (2) a deprivation of that right by the defendant acting under color of state law).

When deciding a § 1983 claim, a court may find that the official's discretionary conduct (actions that involve judgement or choice) is immune from liability.[97] If an official is immune from liability, that means that he is protected from being sued by you even if he may have done something wrong. As long as the court determines that a reasonable officer would have thought the actions at issue to be lawful, the court will likely find the government officer immune from liability.[98] When making your § 1983 claim, you must show facts negating (disprove) this immunity in addition to facts establishing the violation.[99] For more information about immunity, *see* Chapter 8 of the *Louisiana State Supplement* and Chapter 16 of the main *JLM*.

You *must* show a physical injury in order get compensatory damages (money intended to pay you for your injury) for mental or emotional injures.[100] However, such a showing of physical injury is not required to receive punitive (money intended to punish a person for wrongdoing) and nominal damages (damages that acknowledge a legal wrong but find no loss of money) or declaratory (determining the rights of the parties) or injunctive (preventing certain actions) relief.[101]

F. CONCLUSION

You have limited constitutional rights when it comes to the privacy of your body from involuntary exposure and body searches. However, prison officials can still violate your rights under the Fourth Amendment, Eighth Amendment, and the Louisiana Constitution. Whether your rights have been violated will depend on how reasonable the explanation for the search was, the type of search or exposure, and its intrusion on your privacy. When making your claim for an illegal body search, look for cases with as many facts similar to your own claim as possible. Be as specific and detailed as you can when explaining the illegal body search. The more cases you can find with facts similar to your own situation, the better your chances are of showing that your rights were violated.

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[97] *See* Mouille v. City of Live Oak, 918 F.2d 548, 551 (5th Cir. 1990) ("When a defendant raises the defense of qualified immunity, however, we must determine whether the defendant's conduct was qualifiedly immune before reaching the merits of the section 1983 claim."); Green v. McKaskle, 788 F.2d 1116, 1124 (5th Cir. 1986) (finding that a prison official is entitled to qualified immunity); Richardson v. McKnight, 521 U.S. 399, 412 (1997) (holding that qualified immunity does not extend to privately employed prison guards hired by for-profit entities in § 1983 suits).

[98] *See* Anderson v. Creighton, 483 U.S. 635, 638–639, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523, 529–530 (1987) (holding that whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action); Johnson v. Johnson, 385 F.3d 503, 524 (5th Cir. 2004) (applying *Anderson*, stating "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

[99] *See* Brown v. Texas A & M University, 804 F.2d 327, 333 (5th Cir.1986) (holding that once the defendant (the prison official) claims qualified immunity, the burden shifts to the prisoner to establish that the defendant's conduct "violated clearly established statutory or constitutional rights of which a reasonable person would have known").

[100] 42 U.S.C. § 1997e(e) (2012) ("No federal civil action may be brought by a prisoner . . . for mental or emotional injury . . . without a prior showing of physical injury."). *See, e.g.*, Hutchins v. McDaniels, 512 F.3d 193, 198 (5th Cir. 2007) (stating that while the plaintiff may seek relief for searches and cavity searches conducted within view of other prisoners and female body guards without the justification that the prisoner was suspected of possessing contraband in violation of the Fourth Amendment, the prisoner cannot claim compensatory damages because he did not suffer physical injury); Samford v. Staples, 249 Fed. App'x. 1001, 1004–1005 (5th Cir. 2007) (denying the plaintiff's claim of a violation of his constitutional rights arising from a retaliatory order to strip in a public hallway, among other claims, because he failed to show facts establishing the retaliation and stating the plaintiff would not have been able to recover compensatory damages under § 1997e because he did not claim any physical injury).

[101] *See, e.g.*, Geiger v. Jowers, 404 F.3d 371, 375 (5th Cir. 2005) ("[The] physical injury requirement does not bar declaratory or injunctive relief for violations of a prisoner's Constitutional rights."); Hutchins v. McDaniels, 512 F.3d 193, 197 (5th Cir. 2007) (stating that although the plaintiff cannot seek compensatory damages for searches and cavity searches conducted within view of other prisoners and female body guards without the justification that the prisoner was suspected of possessing contraband in violation of the Fourth Amendment because he did not suffer physical injury, he may seek punitive or nominal damages under § 1983); Whitman v. Washington, 113 F. App'x. 605, 606 (5th Cir. 2004) (noting that, although prisoner could not recover actual damages, he might still be able to recover nominal damages for an Eighth Amendment claim).