Case No. 07-1108

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

D.L. MANDELKO

Defendant-Appellant,

vs.

MERCEDES ARCHULETA

Plaintiff-Appellee.

Oral Argument Requested

On Appeal from the United States District Court for the District of Colorado
The Honorable Lewis T. Babcock, Chief District Judge
D.C. Civil Action No. 06-CV-2061-LTB-MJW

BRIEF OF APPELLEE MERCEDES ARCHULETA

Timothy R. Macdonald, No. 29180
Andrew S. Kelley, No. 33161
ARNOLD & PORTER, LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202
Ph: (303) 863-1000
Fax: (303) 832-0428

Attorneys for Plaintiff-Appellee

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Prior or Related Appeals

In compliance with 10th Cir. R. 28.2(C)(1), Appellee states that there are no prior or related appeals.

I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the District Court properly concluded that Mrs. Archuleta stated a claim that Appellant Mandelko violated clearly established law by strip searching Mrs. Archuleta when she did not suspect that Mrs. Archuleta had weapons or contraband concealed on her body; Mrs. Archuleta was not to be placed in the general prison population; the offense with which Mrs. Archuleta was charged was a Lakewood municipal ordinance prohibiting harassment, not a crime of violence, and an offense that is not associated by its nature with the concealment of weapons or contraband in a body cavity; Mrs. Archuleta was wearing light summer clothing, so anything that Mandelko could have found through a strip search would already have been discovered during the three prior pat down searches; and Mandelko believed that a mistake had been made and that Mrs. Archuleta was not the right person charged with the offense.

II. STATEMENT OF THE CASE

In June 2005, while riding in a car with her family, Plaintiff Mercedes Archuleta was arrested, taken to the Jefferson County Detention Facility, and strip searched by Appellant Mandelko, all based on an invalid arrest warrant procured in error by the Lakewood Police Department, charging Mrs. Archuleta with violating a municipal ordinance that prohibits harassment. The mistreatment suffered by Mrs. Archuleta led her to file the Complaint on October 17, 2006.

The Complaint asserts *inter alia* two claims against Appellant Mandelko: a due process claim for failing to release Mrs. Archuleta from custody after Mandelko realized that Mrs. Archuleta was not the correct suspect, and a Fourth Amendment claim for wrongfully strip searching Mrs. Archuleta.

On December 6, 2006, Mandelko filed a motion to dismiss the claims against her. In an Order dated February 27, 2007, the District Court dismissed Mrs. Archuleta's due process claim against Mandelko but denied the motion to dismiss with respect to the strip search claim. Mandelko appeals the District Court's denial of her qualified immunity motion to dismiss the strip search claim.

III. STATEMENT OF THE FACTS

For purposes of this appeal, the allegations in the Complaint must be treated as true and viewed in the light most favorable to Mrs. Archuleta. *E.g., Moya v. Schollenbarger*, 465 F.3d 444, 455 (10th Cir. 2006) (citing *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998)).[1] Appellant's brief ignores this well-established principle. Rather, Appellant does not limit herself to the facts in the Complaint, does not treat those facts as true, and does not view them in the light most favorable to Mrs. Archuleta. Consequently, Mrs. Archuleta offers this brief summary of the pertinent facts, as alleged in the Complaint.

[1] The Complaint is included as pages 1 through 29 of Appellant's appendix.

Plaintiff Mercedes Archuleta is a 46-year old mother of nine with no criminal record. Compl. at ¶ 1 [Aplt. App. at 1]. In June 2005, Mrs. Archuleta was arrested, transported to the Jefferson County Detention Facility, and strip searched by Appellant Mandelko, all based on an invalid arrest warrant procured by the Lakewood police. Compl. at ¶¶ 2, 3, 5 [Aplt. App. at 1-3]. The Lakewood police procured the warrant based on an alleged harassment incident between two women in a Walgreens store on Colfax Avenue in Lakewood. *See* Compl. at ¶¶ 15-31 [Aplt. App. at 4-7]. The victim had given the police the name and approximate age of her alleged harasser, but refused to provide any other identifying information. Compl. at ¶¶ 18, 20-21 [Aplt. App. at 5]. Based solely on the fact that Mrs. Archuleta had the same name and approximate age as those given by the victim, the Lakewood police procured an arrest warrant for her.[2] Compl. at ¶¶ 18, 29-32 [Aplt. App. at 5, 7]. A Lakewood Municipal Court has found that Mrs. Archuleta is factually innocent of the charge in the warrant. Compl. at ¶ 87 [Aplt. App. at 18].

Despite Appellant's repeated references to the charges as a "violent crime," Mrs. Archuleta was in fact charged only with violating a Lakewood municipal

[2] In addition to incorrectly identifying Mrs. Archuleta as the assailant, the warrant also erroneously lists the criminal history of a third woman, Phyllis Rivera. Compl. at ¶ 39 [Aplt. App. at 8]. Notwithstanding Defendant Mandelko's statement of the case, Aplt. Br. at 4, there is no suggestion in the Complaint or otherwise that Rivera was actually the assailant.

ordinance prohibiting harassment. Compl. at ¶ 46 [Aplt. App. at 10]; *see* Lakewood, Colo., Mun. Code § 9.50.040.[3] The harassment ordinance prohibits a broad range of non-violent conduct. Among other things, the Lakewood "harassment" ordinance prohibits directing obscene language or an obscene gesture to another person with the intent to harass, annoy, or alarm them, or making "repeated communication at inconvenient hours that invade the privacy of another and interfere in the use and enjoyment of another's home or other private property." *Id.* § 9.50.040(A)(2), (A)(8). The ordinance even prohibits following a person in a public place. *Id.* § 9.50.040(A)(3). Indeed, the most "violent" violation of the ordinance occurs when a person "strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact" with the intent to harass, annoy, or alarm them.[4] *Id.* § 9.50.040(A)(1).

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[3] Available at http://www.lakewood.org/CC/CityCode/codelist.cfm.

[4] The complete text of the Lakewood ordinance harassment provision is as follows:
9.50.040 Harassment.
A. A person commits harassment if, with intent to harass, annoy, or alarm another person, he:
1. Strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact; or
2. In a public place directs obscene language or makes an obscene gesture to or at another person; or
3. Follows a person in or about a public place; or
4. Initiates communication with a person, anonymously or otherwise in writing, in a manner intended to harass or threaten bodily harm or property damage, or makes any comment, request, suggestion, or proposal in writing which is obscene; or
5. Initiates communication with a person, anonymously or otherwise by telephone, computer, computer network, or computer system in a manner intended to harass or threaten bodily injury or property damage, or makes any comment, request, suggestion, or proposal by telephone, computer, computer network, or computer system that is obscene; or

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Because the suspect in the underlying criminal investigation was allegedly in an intimate relationship with the victim, the warrant for Mrs. Archuleta's arrest includes a "DV" notation (presumably for "domestic violence"). *See* Compl. at ¶ 18 [Aplt. App. at 5]. However, the Lakewood ordinances do not contain any crime of "domestic violence harassment"; rather, Mrs. Archuleta was charged under the general municipal ordinance prohibiting harassment. Consequently, the "domestic violence" notation does not denote that Mrs. Archuleta was charged with a violent offense.

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6. Makes a telephone call or causes a telephone to ring repeatedly, whether or not a conversation ensues, with no purpose of legitimate conversation; or
7. Repeatedly insults, taunts, challenges, or makes communications in offensively coarse language to another in a manner likely to provoke a violent or disorderly response, or
8. Makes repeated communication at inconvenient hours that invade the privacy of another and interfere in the use and enjoyment of another's home or other private property; or
9. Makes a credible threat to another person.

B. As used in this section, unless the context otherwise requires, "obscene" means a patently offensive description of ultimate sexual acts or solicitation to commit ultimate sexual acts, whether or not said ultimate sexual acts are normal or perverted, actual or simulated, including masturbation, cunnilingus fellatio, anilingus, or excretory functions.

C. Any act prohibited by subdivision (4), (5), (6), or (8) of this subsection (A) may be deemed to have occurred or to have been committed at the place at which the writing, telephone call, electronic mail, or other electronic communication was either made or received.

D. "Credible threat" means a threat or physical action that would cause a reasonable person to be in fear for the person's life or safety or the safety of his immediate family.

E. "Immediate family" includes the person's spouse and the person's parent, grandparent, sibling, or child.

Lakewood, Colo., Mun. Code § 9.50.040, *available at* http://www.lakewood.org/CC/CityCode/codelist.cfm.

Appellant booked Mrs. Archuleta into the Jefferson County Jail and then strip searched her. Compl. at ¶¶ 74-83 [Aplt. App. at 15-17]. The strip search was conducted without reason or cause to believe that weapons or contraband were being concealed on or in Mrs. Archuleta's body. Compl. at ¶¶ 79, 143 [Aplt. App. at 16, 27]. Mrs. Archuleta had already been frisked three times, but no contraband was found. Compl. at ¶¶ 64, 73, 142 [Aplt. App. at 13, 15, 27]. Further, she was wearing light summer clothing – shorts and a sleeveless blouse – so that anything that would be detected by a strip search would already have been detected by the frisks. Compl. at ¶ 75 [Aplt. App. at 15]. Mrs. Archuleta had no reason to believe that she would be arrested and searched, and therefore, no reason to hide weapons or contraband. *See* Compl. at ¶¶ 50, 57 [Aplt. App. at 10, 12] (Archuleta arrested while taking her son to work and nursing her baby). Mrs. Archuleta was not charged with a crime involving weapons or drugs. Compl. at ¶ 80 [Aplt. App. at 16]. Further, Appellant Mandelko stripped Mrs. Archuleta even though she knew that Mrs. Archuleta would not be placed in the general prison population and that there was no risk that she would pass contraband to other detainees. Compl. at ¶¶ 80, 84, 141 [Aplt. App. at 16, 17, 27]. Moreover, the facts indicate that Appellant knew and acknowledged that Mrs. Archuleta was not the right suspect. *See* Compl. at ¶¶ 75-76, 83, 127-128 [Aplt. App. at 15, 17, 24-25].[5] Despite knowing

[5] Appellant does not accept these allegations as true. Instead, her brief claims that

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and acknowledging that Mrs. Archuleta was the wrong person, Appellant strip searched Mrs. Archuleta. Compl. at ¶ 78-79 [Aplt. App. at 16].

Not only did Appellant strip search Mrs. Archuleta without justification, she conducted the strip search in a particularly degrading and humiliating manner. As recounted earlier, Mrs. Archuleta was nursing her son at the time she was arrested. Compl. at ¶¶ 57, 59 [Aplt. App. at 12]. As she disrobed during the strip search, her breast milk began to flow. Compl. at ¶ 81 [Aplt. App. at 16]. When Mrs. Archuleta tried to cover herself or stem the flow of milk, Appellant shouted at her to put her hands down. *Id.* Appellant then called to a male jailer to throw her a maxi-pad, and Appellant and the male jailer began laughing and joking about the incident. Compl. at ¶ 82 [Aplt. App. at 16-17]. After directing the male jailer to cut the pad in half, Appellant told Mrs. Archuleta to place the pieces of maxi pad on her breasts, because otherwise she would drip milk. *Id.* Neither Appellant nor the mail jailer was wearing gloves, so the maxi-pad was unsanitary. *Id.* Appellant and the male jailer continued to laugh and mock Mrs. Archuleta throughout the incident. *Id.*

Despite the lack of any support in the record, Appellant's brief suggests that at the time of the strip search, Appellant knew that the underlying charge against

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she merely began to suspect that the wrong person may have been arrested. Aplt. Br. at 4, 10, 21, 25.

Mrs. Archuleta involved a woman pulling her girlfriend's hair and pulling a phone out of her hands, and that Appellant strip searched Mrs. Archuleta because she was "really" charged with an assault. *See* Aplt. Br. at 15.; *see also, e.g.*, *id.* at 4 (police called about an assault in a Walgreens parking lot), 5 (twice describing the crime as "assault."), 17 (describing crime as "assault"). This assertion finds no support in the record, and is inconsistent with the facts that have been elucidated in discovery.[6] *See* Compl. at ¶ 76 [Aplt. App. at 15].

IV. SUMMARY OF ARGUMENT

To prevail in this appeal, Mrs. Archuleta need show only that there is some set of facts that would entitle her to relief. Accepting the well-pled allegations in her Complaint as true, and construing the Complaint in the light most favorable to Mrs. Archuleta, she readily meets this standard. Appellant Mandelko strip searched Mrs. Archuleta at the Jefferson County Jail in a particularly offensive and

[6] Appellant's efforts to go outside the record and view facts in the light most favorable to Appellant are improper, particularly in light of the facts that have come out since the ruling on the Motion to Dismiss. Discovery against Appellant has not gone forward during her interlocutory appeal, but discovery against the remaining defendants has proceeded. Plaintiff has received documents from the Jefferson County Detention Facility and deposed several deputies who worked at the facility. These facts demonstrate that Appellant in fact determined that the harassment charge against Mrs. Archuleta should not subject her to a strip search, but then strip searched her anyway because of an improper policy and practice of the detention facility. Appellant is aware of these facts and her effort to use the current procedural posture to construe "missing" facts in her favor is disingenuous and should be rejected. These facts were not available at the time of the briefing on the Motion to Dismiss and are therefore not in the appellate record on this interlocutory appeal. The current record is more than sufficient to affirm the District Court's denial of qualified immunity on the strip search claim.

humiliating manner, mocking her when her breast milk began to flow during the search. Compl. at ¶¶ 81-82 [Aplt. App. at 16-17]. What is more, when this Court's well-established precedents are applied to the facts, and construing the facts in the light most favorable to Mrs. Archuleta, it is apparent that Appellant had no justification for performing the strip search.

Mrs. Archuleta was "charged" with a minor offense – the violation of a municipal ordinance prohibiting harassment. Compl. at ¶ 46 [Aplt. App. at 10]. This is not a violent offense, nor is it an offense associated with the concealment of weapons or drugs on one's person. In addition, the circumstances of Mrs. Archuleta's arrest – she was arrested while transporting her son to work and while breastfeeding another child – make it unlikely that Mrs. Archuleta would have concealed contraband on her person in preparation for the trip. Compl. at ¶¶ 50, 57 [Aplt. App. at 10, 12]. Given that Mrs. Archuleta was wearing light summer clothing, it is unlikely that the strip search would uncover something that the frisks did not. Finally, at the time of the search, Appellant did not believe that Mrs. Archuleta was properly charged with any crime. Compl. at ¶¶ 75-76, 83, 127-128 [Aplt. App. at 15, 17, 24-25]. In short, Mandelko had no reasonable suspicion that Mrs. Archuleta had weapons or contraband concealed on or in her person. Compl. at ¶¶ 79, 143 [Aplt. App. at 16, 27].

Appellant's brief fails to accept the well-pled facts of the Complaint, and fails to view the facts in the light most favorable to Mrs. Archuleta. Further, it fails to address the many Tenth Circuit opinions that address the critical facts at issue. Instead, contrary to the controlling standard, Appellant argues that Mrs. Archuleta was charged with a "violent crime," that she knew of the facts underlying the charges, that she did not know that Mrs. Archuleta was the wrong person at the time of the search, and therefore that her strip search was permissible as a matter of law. The Court should reject these arguments, both on the facts and the law, and allow discovery against Appellant to proceed. The District Court properly denied Appellant's motion to dismiss.

V. ARGUMENT

A. Standard of Review.

1. Motion to Dismiss

A district court's decision on a motion to dismiss based on qualified immunity is reviewed *de novo*. *Denver Justice & Peace Comm., Inc. v. City of Golden*, 405 F.3d 923, 927 (10th Cir. 2005). In deciding a motion to dismiss, the court must accept all well-pled facts as true, and view those facts in the light most favorable to Mrs. Archuleta, the non-moving party. *E.g., Moya v. Schollenbarger*, 465 F.3d 444, 455 (10th Cir. 2006) (citing *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998)). Indeed, the Court may dismiss only if it appears beyond all doubt that Mrs. Archuleta can prove no set of facts in support

of her claim which would entitle her to relief. *Id.* There is no heightened pleading standard on the plaintiff when the defendant files a motion to dismiss based on qualified immunity; the general Rule 12(b)(6) standard applies. *Id.* (citing *Currier v. Doran*, 242 F.3d 905, 916-17 (10th Cir. 2001)).

2. Claim of Qualified Immunity

Appellant, a deputy sheriff at the Jefferson County Detention Facility, asserts that she is entitled to qualified immunity as a matter of law. When a defendant pleads qualified immunity, the plaintiff must show "(1) that the defendant's actions violated a constitutional or statutory right, and (2) that the rights alleged to be violated were clearly established at the time of the conduct at issue." *Anderson v. Blake*, 469 F.3d 910, 913 (10th Cir. 2006) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

A plaintiff may establish that a right is clearly established by reference to cases from the Supreme Court, the Tenth Circuit, or the weight of authority from other circuits. *Id.* at 914. To show that a right is clearly established, a plaintiff need show only that the right is "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 913 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). There need not be a precise factual correspondence between earlier cases and the facts of the case at hand; general statements of the law are capable of giving a fair and clear warning. *Id.* at 913-14

(quoting *Hope*, 536 U.S. at 741). A general constitutional rule that has already been established can "apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." *Id.* at 914 (brackets in original) (quoting *Hope*, 536 U.S. at 741).

B. Mrs. Archuleta Has Alleged Facts Sufficient to Conclude that Her Strip Search Was Unconstitutional Based on Clearly Established Law.

The Tenth Circuit "has spoken often on the constitutional implications of conducting a strip search," *Cottrell v. Kaysville City*, 994 F.2d 730, 734 (10th Cir. 1993), and has repeatedly emphasized the highly intrusive nature of such searches. In the words of this Court, a strip search is "an invasion of personal rights of the first magnitude" and "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Chapman v. Nichols*, 989 F.2d 393, 395-96 (10th Cir. 1993) (quoting *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983)).

Perhaps because of the highly intrusive nature of a strip search, this Court has not endorsed a *per se* rule permitting such searches. Rather, the Court has balanced the need for the search against the grave invasion of privacy it entails. *Chapman*, 989 F.2d at 395 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). In making this determination, the Court considers the scope of the intrusion, the

manner in which the search was conducted, the justification for initiating the search, and the place where the search took place. *Id.*

Based on the Court's clearly established law, and based on the procedural posture of the case, Appellant's strip search fails the test. With regard to the first factor, it is beyond dispute that a strip search represents a profound intrusion into one's personal rights. *See, e.g.*, *Chapman*, 989 F.2d at 395-96. This intrusion is particularly acute where, as here, the search is performed on a person who was arrested for a minor offense:

> The experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state, in an enclosed room inside a jail, can only be seen as thoroughly degrading and frightening. Moreover, the imposition of such a search upon an individual detained for a lesser offense is quite likely to take that person by surprise, thereby exacerbating the terrifying quality of the event.

Chapman, 989 F.2d at 396 (quoting *John Does 1-100 v. Boyd*, 613 F.Supp. 1514, 1522 (D.Minn. 1985)).

The second factor, the manner in which the search was conducted, also weighs heavily against Appellant. As recounted above, Mrs. Archuleta began lactating during the strip search. Compl. at ¶ 81 [Aplt. App. at 16]. When she attempted to cover her breasts and stem the flow of milk, Appellant shouted at Mrs. Archuleta to put her hands down. *Id.* Making matters worse, Appellant gave Mrs. Archuleta an unsanitary bisected maxi pad to use to stem the flow of milk,

simultaneously laughing and joking with a male jailer about Mrs. Archuleta's predicament. Compl. at ¶ 82 [Aplt. App. at 16-17].

Most importantly, however, construing the facts in the light most favorable to Mrs. Archuleta, Appellant's strip search fails the third factor, the reason for the search. Under the clearly established law of this Circuit, the strip search fails for want of justification for the serious intrusion on Mrs. Archuleta's rights. It is well established that a strip search of a detainee accused of a minor offense, like the Lakewood ordinance prohibiting "harassment," when a detainee will not be placed in the general prison population, has been subject to multiple pat-down searches, and is not likely to possess weapons or contraband, Compl. at ¶¶ 136-138 [Aplt. App. at 26], is not consistent with constitutional requirements or Tenth Circuit law. *See, e.g.*, *Chapman*, 989 F.2d at 394-97 (holding unconstitutional strip searches of detainees where "officials had no reasonable suspicion that these particular detainees were carrying or concealing weapons or contraband"); *Foote v. Spiegel*, 118 F.3d 1416, 1425 (10th Cir. 1997) (holding unconstitutional a strip search under circumstances similar to Mrs. Archuleta's); *Cottrell*, 994 F.2d at 734-35 (same). In addition, Appellant had reason to believe that she had the wrong person. Compl. at ¶¶ 74-75, 140 [Aplt. App. at 15, 27].

This Court has often condemned strip searches of persons, like Mrs. Archuleta, who were charged with minor crimes. For example, in *Foote* the police

arrested a woman for driving under the influence of drugs. 118 F.3d at 1425. At the jail, the police strip searched her, ostensibly to search for drugs. *Id.* at 1421. The Court ruled that the strip search was unreasonable, because the drug crime gave no reason to believe that the plaintiff had concealed drugs inside her person:

> The belief that Foote had drugs hidden in a body cavity because she was suspected of driving while under the influence of drugs . . . was unreasonable. Foote was not suspected of trying to smuggle contraband into a prison or smuggle cocaine or heroin through customs; she was suspected of driving while under the influence of marijuana.

Id. at 1426.

In holding the strip search unconstitutional in *Foote*, the Tenth Circuit considered the fact that (1) there was no reason to suspect the plaintiff had drugs hidden on her person; (2) the plaintiff was not placed in the general prison population; (3) the police already frisked the plaintiff before strip searching her; (4) the plaintiff was wearing "light summer clothing" such that "[a]lmost anything the strip search could have revealed would already have been discovered in the pat-down search"; and (5) before being pulled over, plaintiff had no particular reason to expect that she would be searched and consequently had no reason to conceal contraband in a body cavity. *Foote*, 118 F.3d at 1425-26.

The Tenth Circuit has found similar factors to be relevant in determining that strip searches in other cases were unlawful. In holding the strip search

unconstitutional in *Hill v. Bogans*, the Court considered that (1) the plaintiff was arrested while driving to work, which is not a circumstance indicating that he might possess either a weapon or drugs; (2) the plaintiff only briefly intermingled with the general prison population; (3) the crime charged was not associated with the concealment of weapons or contraband in a body cavity; and (4) almost anything that an officer could discover through a strip search would have been discovered during the pat down search that had been conducted upon the plaintiff's arrival at the jail. 735 F.2d 391, 394 (10th Cir. 1984); *see also Cottrell*, 994 F.2d at 734-35 (relevant factors in finding strip search to be unlawful include the fact that jailer did not believe that plaintiff had weapons or drugs on her person, plaintiff was never placed in the general prison population, and plaintiff was wearing "light summer clothes" and had been frisked, so that a strip search would not have uncovered more than the frisk).

All of these factors demonstrate that Mrs. Archuleta has alleged a set of facts that would allow her to prevail on her claim that the strip search violated clearly established law. Mrs. Archuleta was not intermingled with the general prison population; instead, she was confined in a cell by herself. Compl. at ¶¶ 80, 84, 141 [Aplt. App. at 16, 17, 27]. Mrs. Archuleta was frisked on three separate occasions before she was strip searched. Compl. at ¶¶ 64, 73, 142 [Aplt. App. at 13, 15, 27]. Moreover, like the plaintiffs in *Foote* and *Cottrell*, Mrs. Archuleta was dressed in

"light summer clothing" – shorts and a sleeveless blouse. Compl. at ¶ 75 [Aplt. App. at 15]. Therefore, "[a]lmost anything the strip search could have revealed would already have been discovered in the pat-down search." *Foote*, 118 F.3d at 1425; *see also Cottrell*, 994 F.2d at 735. Also like the plaintiff in *Foote*, Mrs. Archuleta had no reason to believe that she would be arrested and searched, and therefore, no reason to hide weapons or contraband. *See* Compl. at ¶¶ 50, 57 [Aplt. App. at 10, 12]. Just as there was no reason to believe that the plaintiff in *Foote* would "routinely carry a personal stash in a body cavity," *Foote*, 118 F.3d at 1426, the crime that Mrs. Archuleta was "charged" with – the municipal ordinance of harassment – also is not associated with the concealment of weapons or other contraband in a body cavity. *See Hill*, 735 F.2d at 394; *Cottrell*, 994 F.2d at 735 (considering whether the crime charged is associated with such concealment). Finally, Appellant did not suspect that Mrs. Archuleta had weapons or contraband on her person. Compl. at ¶¶ 79, 143 [Aplt. App. at 16, 27]; *Cottrell*, 994 F.2d at 734-35 (noting that the jail official who ordered the strip search did not suspect the plaintiff of having drugs on her person). Based on this case law, it is apparent that Mrs. Archuleta has stated a claim that Appellant's strip search was unreasonable and unconstitutional.

A contrary conclusion – that it is beyond doubt that Mrs. Archuleta can prove no set of facts under which her strip search violated clearly established law –

would drastically change the strip search law of this Circuit. Reversing the District Court and granting the motion to dismiss would allow strip searches with impunity.

C. Mandelko's Attempt to Justify the Strip Search Fails on the Facts and on the Law.

Appellant Mandelko does not confront the weight of well-established Tenth Circuit authority demonstrating that her strip search of Mrs. Archuleta was unjustified and illegal. Instead, Appellant relies on the argument that Mrs. Archuleta was charged with a "crime of violence," and therefore the strip search was *per se* reasonable. Aplt. Br. at 14, 16-17. Appellant Mandelko's argument is a straw man: Mrs. Archuleta was not charged with a crime of violence. Moreover, the cases on which Mandelko relies – all but one of which come from outside the Tenth Circuit – do not support the *per se* rule she advocates.

Appellant repeatedly asserts that Mrs. Archuleta was charged with the crime of "domestic violence." *See, e.g.,* Aplt. Br. at 6 ("crime of domestic violence-harassment"), 15 (same), 16 ("Domestic violence is a crime of violence"). This assertion is not consistent with the facts alleged in the Complaint. Mrs. Archuleta was "charged" with violating a Lakewood municipal ordinance prohibiting "harassment." Compl. at ¶ 46 [Aplt. App. at 10]; s*ee* Lakewood, Colo., Mun. Code § 9.50.040.[7] The Lakewood Municipal Code contains no independent offense of

[7] Available at http://www.lakewood.org/CC/CityCode/codelist.cfm.

"domestic violence." Rather, Lakewood apparently includes a "DV" notation in municipal code warrants where the suspect and the victim were in an intimate relationship.[8]

As one might expect from a municipal ordinance prohibiting harassment, the Lakewood ordinance addresses non-violent conduct, such as the use of obscene language or gestures, harassing e-mail or phone calls, and even following a person in a public place. Lakewood, Colo., Mun. Code § 9.50.040(A)(2), (A)(3), (A)(5). The most "violent" conduct prohibited by the ordinance occurs when a person "strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact" with the intent to harass, annoy, or alarm them. *Id*. § 9.50.040(A)(1).

Because the Lakewood harassment offenses "are not offenses associated with the concealment of weapons or contraband in a body cavity," *Hill*, 735 F.2d at 394, the alleged violation of this municipal ordinance cannot give rise to the *per se* conclusion that a person is likely to be carrying weapons or contraband. Indeed, the harassment offense is not a crime associated with the use of a weapon (or other contraband) at all. In circumstances like these, the Tenth Circuit has rejected a *per*

[8] Under Colorado state law, "domestic violence" is defined to include "any other crime against a person or against property or any municipal ordinance violation against a person or against property, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship." Colo. Rev. Stat. § 18-6-800.3 (2006). Therefore, despite the Defendants' repeated use of the "domestic violence" terminology there is nothing about the definition that would justify a *per se* rule allowing strip searches of every person charged with any offense that could be labeled "domestic violence."

se rule that the mere crime charged, standing alone, will justify the profound intrusion on the privacy of a strip search. *See, e.g.*, *id.*; *Foote*, 118 F.3d at 1425; *see also Cottrell*, 994 F.2d at 734-35. The fact that the individuals involved in the alleged crime may have been in an intimate relationship does not affect the likelihood that the suspect concealed weapons or contraband on her person, and thus has no bearing on the propriety of the search here.

Appellant's cases (all but one of which are from other circuits, and some of which are inconsistent with Tenth Circuit authority) do not justify Appellant's strip search of Mrs. Archuleta. In one case, *Masters v. Crouch*, the court *denied* qualified immunity to county officials on a strip search. 872 F.2d 1248, 1257 (6th Cir. 1989). The court held that it was clearly established in 1986 that a person charged with a nonviolent minor offense may not be subject to a strip search unless there are reasonable grounds for believing that the particular person might be carrying or concealing weapons or other contraband. *Id*. Consequently, the court held that the strip search of the plaintiff (who was charged with minor traffic offenses) was objectively unreasonable, even though the detainee was placed in the general jail population. *Id.* at 1250, 1257. The court does not endorse a *per se* strip search policy for municipal offenses, clearly distinguishing between persons charged with misdemeanors or other minor offenses and persons charged with felonies or other serious crimes "of which violence is an element." *Id.* at 1255.

Mandelko's remaining cases involve detainees charged with much more serious offenses than Mrs. Archuleta's – typically detainees who were about to be placed in the general jail population:

- The plaintiff in *Dufrin v. Spreen* was charged with felonious assault for assaulting her minor stepdaughter with a broom handle. 712 F.2d 1084, 1085, 1087 (6th Cir. 1983). In addition, the plaintiff in *Dufrin* was going to "come into contact with the general jail population." *Id.* at 1087. Further, the court disclaimed any intent to "make any rules of broad application or to lay down any bright line based upon the type of crime charged." *Id.* at 1089.

- Unlike the present case, the defendant in *Thompson v. City of Los Angeles* was charged with a felony and was intermingled with the general prison population. 885 F.2d 1439, 1447 (9th Cir. 1989). The case makes clear that if the detainee were charged with a less serious crime, the strip search would be highly questionable. *Id.* at 1446-47, 1447 n.6.

- The plaintiff in *Hicks v. Moore*, 422 F.3d 1246 (11th Cir. 2005), was charged with "family violence battery," defined as "intentionally causing *substantial physical harm* or *visible bodily harm* to a past or present spouse." *Id.* at 1249 & n.2 (emphasis added) (quotations omitted). This is not analogous to the Lakewood municipal ordinance prohibiting harassment. Moreover, unlike Mrs. Archuleta, the detainee in *Hicks* "was about to be placed in the Jail's general population." *Id.* at 1251. Finally, there is no suggestion that the detainee in *Hicks* was frisked at all (certainly not three times) or that she was wearing light clothing that would reveal any weapon or contraband.

- The plaintiff in *Dobrowolskyj v. Jefferson County*, 823 F.2d 955 (6th Cir. 1987), was charged with menacing, a Class B misdemeanor – "intentionally plac[ing] another person in reasonable apprehension of *imminent physical injury*," *id.* at 958 (emphasis added), and "an offense that is associated with weapons," *id.* at 958-59 – a serious crime that is not akin to the Lakewood municipal offense of harassment. Moreover, the strip search policy in *Dobrowolskyj* was enacted pursuant to a consent decree approved by the district court in a prior case. *Id.* at 959. Finally, the court placed substantial weight on the fact that the plaintiff was not strip searched until he was about to be moved into contact with the general jail population. *Id.* at 958-59.

- Finally, the plaintiff in *George v. City of Wichita*, 348 F. Supp. 2d 1232 (D. Kan. 2004), was charged with felony aggravated battery, *id.* at 1235, had injured the victim so severely that she required corrective surgery, *id.* at 1236, and was accused by the victim of raping her on several occasions, *id.* at 1235, 1239. The court noted that the plaintiff had made no allegation regarding whether or not he was placed in the general prison population. *Id.* at 1241.

These cases do not contradict the Tenth Circuit law that prohibits a *per se* strip search policy for minor offenses, particularly in circumstances like those present in this case, where a nursing mother is arrested in the passenger seat, while her husband is driving her son to work, she is subject to multiple pat-down searches, is wearing light summer clothing, and is not put in the general jail population. Moreover, these cases do not endorse the manner in which Appellant conducted the strip search – mocking Mrs. Archuleta because her breast milk began to flow during the search and suggesting that she use an unsanitary cut-up maxi pad to sop up the milk.

Appellant cannot rely on the facts that the harassment incident allegedly involved one woman pulling another woman's hair and pulling a phone out of her hands. First, at the time of the strip search Appellant had already acknowledged that Mrs. Archuleta was the wrong person and that the warrant contained critical errors. Compl. at ¶¶ 76, 140 [Aplt. App. at 15, 27]. Since there was no basis to believe that Mrs. Archuleta was involved in any crime, let alone a violent one, the "charges" against Mrs. Archuleta would not warrant a reasonable jailer to believe

that Mrs. Archuleta might be concealing weapons or other contraband on or in her person. Second, the warrant that Appellant attached to her brief in the District Court does not contain any statement of the underlying facts. [Aplt. App. at 152].[9] To the extent that the Complaint contains facts about Appellant's knowledge of the underlying harassment, those facts show that Mandelko knew there was a mistake and that Mrs. Archuleta was not property charged with any crime.

Finally, even if Mandelko knew all of the underlying facts, those facts do not justify the strip search. The facts that a person allegedly pulled someone's hair and pulled a phone from her hands do not give rise to a reasonable suspicion that the person was concealing weapons or contraband on her person, particularly in light of all the other countervailing factors discussed above. The District Court properly found that Mrs. Archuleta has stated a claim against Mandelko based on the improper strip search.

[9] Particularly because Plaintiff has not been able to take discovery from Mandelko, Mandelko should not be permitted to go beyond the complaint to assert facts about what she did or did not know. She certainly should not be permitted to do so selectively, pointing only to the extra-Complaint facts that she believes support her motion. If Appellant was going to proceed beyond the pleadings, Appellant should have informed this Court that several Jefferson County witnesses have testified during discovery that the DV harassment charge against Mrs. Archuleta should not have subjected her to a strip search. Moreover, the undisputed facts elucidated in discovery demonstrate that Appellant in fact classified Mrs. Archuleta as "non-strip" based on the charge against her. These facts are not in the appellate record because this is an appeal from a denial of a motion to dismiss, and discovery had not commenced at the time the District Court denied Appellant's motion to dismiss. Nonetheless, they indicate that Appellant's attempt to add additional, selective facts should not be countenanced.

VI. CONCLUSION

Mercedes Archuleta has stated a claim that Appellant strip searched her in violation of the Constitution and this Court's many decisions regarding strip searches. The search in this case was conducted in a particularly offensive and humiliating manner, with Appellant mocking Mrs. Archuleta when her breast milk began to flow during the search. Moreover, Mrs. Archuleta's case is strikingly similar to a number of this Court's precedents finding that a strip search was illegal. When those well-established precedents are applied to the facts, and construing the facts in the light most favorable to Mrs. Archuleta, it is apparent that Appellant had no justification for performing the strip search. This conclusion is reinforced by the fact that at the time of the search, Appellant believed that a mistake had been made and Mrs. Archuleta was the wrong person.

Appellant does not confront the weight of this Court's precedent, nor does she accept the allegations in the Complaint as true and view them in the light most favorable to Mrs. Archuleta. Instead, she argues that she had a *per se* license to strip search Mrs. Archuleta, based solely on the harassment crime "charged." Appellant's *per se* argument is not supported by the facts – Mrs. Archuleta was not charged with a violent crime – and it is contrary to this Court's precedents. The Court should reject Appellant's argument and affirm the District Court's ruling that

Mrs. Archuleta has stated a claim for relief based on Appellant's improper strip search.

VII. STATEMENT REGARDING ORAL ARGUMENT

Appellant Mandelko has sought oral argument in this appeal. Appellee Archuleta agrees that oral argument would be helpful to the Court because of the important issues regarding the constitutionality of strip searches that are raised by this appeal.

DATED: September 4, 2007

Respectfully submitted,

s/ Andrew S. Kelley

Timothy R. Macdonald, No. 29180
Andrew S. Kelley, No. 33161
ARNOLD & PORTER LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-1370
Telephone: (303) 863-1000
Facsimile: (303) 832-0428

In Cooperation with the American Civil Liberties Union Foundation of Colorado

Mark Silverstein, No. 26979
Taylor Pendergrass, No. 36008
American Civil Liberties Union Foundation of Colorado
400 Corona Street
Denver, CO 80218
Telephone: (303) 777-5482
Facsimile: (303) 777-1773

Attorneys for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6680 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I make the foregoing certification in reliance on the word count provided by Microsoft Office Word 2003, the word processing system on which this brief was prepared.

I hereby certify further that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in fourteen (14) point Times New Roman font.

s/ Andrew S. Kelley
Timothy R. Macdonald
Andrew S. Kelley
Attorneys for Plaintiff-Appellee Mercedes Archuleta

DATED this 4th day of September, 2007.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 4, 2007 a true and correct copy of the foregoing **BRIEF OF APPELLEE MERCEDES ARCHULETA** was electronically submitted to the clerk of the court to:

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In addition, a copy of the **BRIEF OF APPELLEE MERCEDES ARCHULETA** was mailed first class, postage prepaid to:

Writer Mott
Patricia W. Gilbert
Jefferson County Attorney's Office
100 Jefferson County parkway, #5500
Golden, CO 80419-5500

Amy Colony
Colorado Attorney General's Office
1525 Sherman Street, 5th Floor
Denver, CO 80203

Thomas J. Lyons
David R. Brougham
Hall & Evans
1125 Seventeenth Street, Suite 600
Denver, CO 80202

Taylor Pendergrass
Mark Silverstein
American Civil Liberties Union Foundation of Colorado
400 Corona Street
Denver, CO 80218

s/ Susan Cole