Court of Appeals No. 97-55984

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARRYL CARTER,
Plaintiff-Appellant

vs.

SHERMAN BLOCK, individually and as Sheriff for the County of Los Angeles; RAYMOND E. GOTT, individually and as Captain of the Los Angeles County Sheriff's Department; WILLIAM MCSWEENEY, individually and as Lieutenant of the Los Angeles County Sheriff's Department; LAMAR BLEVINS, individually and as Sergeant of the Los Angeles Sheriff's Department; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; COUNTY OF LOS ANGELES, a Municipal Corporation,

Defendants-Appellees

BRIEF OF APPELLEES

Appeal from Final Judgment of the United States District Court,
Central District of California (Hon. David V. Kenyon)
Dist. Ct. No. CV-94-07229-DVK(RGx)

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I. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

Defendants-Appellees agree with Appellant that the District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

B. This Court's Jurisdiction

Defendants-Appellees agree with Appellant that this Court has jurisdiction under 28 U.S.C. § 1291, because the order appealed from was a final determination of all claims by all parties.

C. Timeliness

Defendants-Appellees agree with Appellant that his appeal is timely, pursuant to Federal Rule of Appellate Procedure 4.

II. ISSUES PRESENTED FOR REVIEW

1. Whether a reasonable government official could have concluded that the testimony of two eyewitnesses combined with observation of a peace officer's body bulk and his competition in weight-lifting events provided reasonable suspicion, sufficient to justify testing the subject's urine for steroids?

2. Whether a reasonable government official could have concluded that the subject of an investigation had consented to a urine test, where the subject said that he was "comfortable with" giving a urine sample?

3. Whether a right to be free from direct observation of urination during the collection of a urine sample from a peace officer was clearly established in November 1993?

4. Whether a reasonable government official could have concluded that questioning a peace officer about symptoms associated with steroid use as part of an internal affairs investigation violated his right to privacy?

5. Whether isolated instances of alleged wrongdoing by investigators provided sufficient evidence of a permanent and well settled practice to withstand summary judgment under *Monell v. Department of Social Services*, 436 U.S. 658 (1978)?

III. STATEMENT OF THE CASE

A. Nature of the Case

Deputy Sheriff Darryl Carter has appealed from the District Court's summary judgment dismissing his claims that the Los Angeles Sheriff's Department unlawfully administered a urine test, and then questioned him about possible symptoms associated with steroid use. The Department's Internal Affairs Bureau was investigating Deputy Carter, because two witnesses told investigators that he had used illegal steroids. The District Court ruled that the individual defendants had qualified immunity. It also ruled that the claims against the County failed, because (1) there was no evidence of any constitutional tort, and (2) there was no evidence of a well-established pattern of unlawful activity, as required by *Monell v. Department of Social Services*, 436 U.S. 658 (1978). This Court should affirm.

B. Course of Proceedings

Plaintiff filed his complaint on October 26, 1994. [ER 4] It alleged 14 claims for relief:

Count One alleged a Fourth Amendment violation for requiring Deputy Carter to provide a urine sample, allegedly without reasonable suspicion. [ER 18-19]

Count Two alleged an invasion of Deputy Carter's constitutional right to privacy by (1) subjecting him to a urine test, (2) direct observation of urination when he provided the urine sample, and (3) interrogation about personal matters related to possible steroid use. [19-20]

Count Three alleged a pendent state law privacy claim based on the same conduct that formed the basis for Counts One and Two. [ER 20]

Count Four alleged interference with Deputy Carter's "liberty interest in maintaining his freedom of movement and travel" by (1) requiring him to report to his Captain's office for questioning, and (2) assigning him to his home while awaiting the results of a drug test for steroids. [ER 20-22]

Count Five alleged a pendent state law false imprisonment claim, based on an alleged refusal to allow Deputy Carter to leave the Captain's office. [ER 22]

Count Six alleged a pendent state law claim for violation of California's Public Safety Officers Procedural Bill of Rights, for assigning Deputy Carter to his home while awaiting the results of a drug test for steroids. [ER 22-23]

Count Seven alleged a due process violation, for allegedly depriving Deputy Carter of a property interest in his position as a Deputy Sheriff by assigning him to his home. [ER 24]

Count Eight alleged a violation of Deputy Carter's purported First Amendment right to join and participate in a labor union. [ER 25]

Count Nine alleged a pendent state law claim for an alleged violation of Deputy Carter's right to representation by a union representative of his choice during the investigation into this possible use of steroids. [ER 25-27]

Count Ten alleged a conspiracy to deprive Deputy Carter of his civil rights. [ER 27-28]

Count Eleven purported to allege a 42 U.S.C. § 1983 claim directly against the County, based on *Monell v. Department of Social Services*, 436 U.S. 658 (1978). [ER 28-30]

Count Twelve sought injunctive and equitable relief prohibiting defendants from engaging in the conduct alleged in the complaint. [ER 30-31]

Count Thirteen sought a judgment declaring that defendants' conduct was unlawful. [ER 31-33]

Count Fourteen sought a judgment declaring that defendants' conduct violated state law. [ER 33-34]

Defendants filed their motion for summary judgment on June 7, 1996. [ER 480, No. 27] Deputy Carter filed his opposition on October 7, 1996. [ER 482-83, Nos. 54-56, 58] Defendants replied on October 11, 1996. [ER 483, Nos. 59-61] The District Court granted the motion on May 22, 1997. [ER 440-472] Its ruling dismissed all the federal law claims on the merits. The District Court declined to exercise supplemental jurisdiction over the pendent state law claims, and dismissed them without prejudice under 28 U.S.C. § 1367.

Appellant's Opening Brief does not assert any error with respect to the District Court's dismissal of the pendent state law claims, which were contained in Counts Three, Five, Six, Nine and Fourteen. It also does not contain any argument in support of the federal claims asserted in Counts Four, Seven, Eight and Ten. By failing to argue his position on those nine Counts, Deputy Carter has waived any claim of error. *FDIC v. Garner*, 125 F.3d 1272, 1280 (9th Cir. 1997); *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997).

On the Counts that the Opening Brief does address, the District Court ruled as follows:

Count One: A reasonable officer could have believed that he had reasonable suspicion to require Deputy Carter to submit to a urinalysis. [ER 447-52]

Count Two: To the extent this Count was based on requiring a urine test, the same standards applicable to Count One also defeat any privacy claim. [ER 453-54] The claim with regard to direct observation of urination failed, because there was no clearly established right to be free of such observation. [ER 454-56] The balancing test associated with Fourth Amendment search and seizure cases also applied to the claim arising out of inquiries into Deputy Carter's physical and medical condition. That claim failed for the same reasons that Count One failed. [ER 456-57]

Counts Eleven, Twelve and Thirteen: The evidence did not support a *Monell* claim against the County, because Deputy Carter could not prove a constitutional violation and could not prove any pattern of continued violations of constitutional rights. [ER 465-68] Since there was no valid claim under section 1983, there was no basis for awarding injunctive or declaratory relief. [ER 468-69]

C. The Undisputed Material Facts

In California, use of steroids is illegal without a prescription. Cal. Health & Safety Code §§ 11377(b), 11056(f). On October 31, 1991, Sheriff Sherman Block issued a bulletin to all Sheriff's Department personnel, which declared that use of steroids was "dangerous, illegal, and will subject the user to disciplinary action." The bulletin also pointed out that a recent study in an FBI publication "revealed that anabolic steroid use by police officers is a serious problem that merits greater awareness by departments across the country." [ER 74]

Darryl Carter became a Deputy Sheriff in September 1978. [ER 176] During the events in question he worked in the Transportation Bureau, driving inmates to court. [ER 92] He was also a weightlifter who competed in power lift competitions in law enforcement and other amateur competitions. [ER 79] In an interview after the production of the urine sample that gave rise to this lawsuit, Deputy Carter admitted that he had injected doctor-prescribed steroids to enhance his power-lifting abilities several years earlier. [ER 79]

On March 1, 1993, Martha Ramos, Deputy Carter's former live-in girlfriend complained to the Transportation Bureau that he had threatened

her. When a lieutenant at the Transportation Bureau interviewed her in response to the complaint on March 23, Ramos stated that Deputy Carter had used steroids when she lived with him. She also said that Carter's former wife, Susan Tate, could confirm his use of steroids. [ER 76] Ramos had lived with Carter from 1987 until early December 1992. [ER 419]

The matter was initially referred to the Department's Internal Criminal Investigations Bureau ("ICIB"), which concluded, together with the District Attorney's office, that there was no proof of criminal conduct. [ER 76] The ICIB investigation became inactive on August 31, 1993. [ER 420] The matter was then turned over to the Internal Affairs Bureau to determine whether there was any basis for departmental discipline. The principal Internal Affairs investigator, Sergeant Bleavins, received the case on September 20, 1993. [ER 358]

By November 1, 1993 (the date that Deputy Carter was asked to produce a urine sample), the Internal Affairs investigators had assembled the following information from the work of previous investigators and from their own investigation:

Martha Ramos claimed that she injected Deputy Carter with steroids continuously for an extended period of time, and that he showed symptoms

associated with steroid use. He was frequently tired and sleepy, impotent, moody, and had a rash on his back. [ER 76, 276-81] Susan Tate said that she married Deputy Carter in May 1983. She injected him with steroids from then until they separated in 1987. She had observed the same symptoms that Ramos did. [ER 76, 78, 282-85]

The investigators confirmed with Dr. Don Catlin, director of the UCLA Olympic Laboratory, that individuals using steroids would display the symptoms that Ramos and Tate had observed. [ER 76] They knew that Deputy Carter competed in weightlifting events, and that steroids were "notoriously involved in bodybuilding and weightlifting." They also confirmed that his athletic performance had not deteriorated, and that he was the same size and body weight as he had been over the preceding six months. [ER 124-25]

On November 1, 1997, Lieutenant McSweeney and Sergeants Bleavins and Brazille went to Captain Gott's office at the Transportation Bureau, and asked to see Deputy Carter. The ensuing discussion was tape-recorded. Lieutenant McSweeney began by explaining the purpose of his visit:

> IAB: O.K. Darryl we have received some information that we really have no certainty is accurate that you have been using anabolic steroids and we have that from two sources, two people told us that, you know that is a con-

> cern to the Sheriff's Department for obvious reasons and we have no way of knowing for sure if it is true or not, there are some rare circumstances in which steroids are administered by a physician for some sort of medical need and if that is the case I think it would be wise for you to reveal that now, is there a medical situation where you have taken steroids?
>
> DC: No I haven't taken any at all.
>
> IAB: So there are no medical circumstances? *Alright, the only way we can determine whether there is any truth to that is to request that you give us a urine sample for testing. Are you comfortable with that?*
>
> DC: *Yes sir.*

[ER 83] Lieutenant McSweeney also explained that the Internal Affairs investigators were not out to get him:

> IAB: Okay fine. So what we'll do is get this sample and we'll run it over to the lab and the Captain will as per the policy, relieve you and we'll give you a phone call as soon as this comes back cleared. I want you to know we all hope it does, I mean we are not here to get you off of the job. We have this information and we can't ignore it, we have to proceed. But I think it is all our hope that this information isn't right and the test comes back clear.

[ER 85] At his deposition, Deputy Carter described his agreement to provide the urine sample as follows:

> Q So what happened after you walked to the captain's office?

> A When I walked into the captain's office, McSweeney started talking. And he told me there was some allegations against me, and he stated that somebody had told him that I was using steroids. And in order to find out if I was, they had to take a urine test. *He asked me if I mind or, let me see, if I … if I wanted to take the urine test, and I told him, "Yes, I'll take the test" because I didn't have nothing to hide.*

[ER 93]

Deputy Carter then went into the restroom with Sergeant Brazille. He gave the following account of what transpired at his deposition:

> Q What happened next?
>
> A Then I was escorted out of the room with Sergeant Brazille, I believe it was, and him and I went to the bathroom together. And as I was urinating, he was standing right there in the same room with me urinating. And then when I finished, I handed him the little jar. And then we walked back into the captain's office. And then [Lieutenant McSweeney] said, you know, that I would be relieved of duty. He probably said that prior to that.

[ER 93-94] Thereafter, Deputy Carter was temporarily assigned to his home pending the results of the urinalysis. [ER 76, 95-96]

On November 2, 1997, Sergeants Bleavins and Brazille interviewed Deputy Carter about the allegations of steroid use in the presence of his attorney. A transcript of the taped interview appears in the Excerpts of Record at pages 253-75. The interview included some questions about Deputy Car-

Carter's medical history and physical condition. Those questions related to the symptoms that Ramos and Tate had observed which were associated with steroid use.

The urinalysis came back negative for steroids. Deputy Carter returned to duty on November 9, 1993, having remained at his home for six working days, at full pay. [ER 95-96, 428]

IV. SUMMARY OF ARGUMENT

Government officials are immune from liability unless the plaintiff can (1) point to a clearly established right, and (2) establish that a reasonable official would have concluded in light of the prevailing law that his or her conduct was unlawful. In this case, a reasonable official would have concluded that eyewitness testimony combined with visual confirmation provided reasonable suspicion for requiring a urinalysis. He or she also could have concluded that Deputy Carter had consented to the test. Further, there was no clearly established right to be free from direct observation of urination. A reasonable government official would have concluded that questioning a peace officer about personal matters was reasonable in the context of an investigation into steroid use.

There was also no viable claim against the County. Deputy Carter has not pointed to any underlying constitutional tort. Further, there was no evidence of an established practice sufficient to satisfy the requirements of *Monell*.

V. ARGUMENT

This Court reviews the grant of summary judgment de novo. Its task is to determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact, and whether the District Court correctly applied the substantive law. *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir. 1997).

In reviewing the correctness of the District Court's decision, this Court is not restricted to the reasons given by the District Court. It may affirm on any ground supported by the record. *Abela v. Gustafson*, 888 F.2d 1258, 1265 (9th Cir. 1989); *Golden Nugget, Inc. v. American Stock Exchange, Inc.*, 828 F.2d 586, 590 (9th Cir. 1987).

A. Qualified immunity standards

The Supreme Court has emphasized that qualified immunity is "immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Therefore, it has fashioned the doctrine "in such a way as to 'permit the resolution of many insubstantial claims on summary judgment' and to avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery.'" *Ibid.*, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818 (1982). This Court has explained

that the district courts should determine qualified immunity questions "at the earliest possible point in the litigation. Where the underlying facts are undisputed, a district court must determine the issue on motion for summary judgment." *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (1993).

This Court has explained the standard for deciding whether an official is immune from liability as follows:

> When a law enforcement officer asserts qualified immunity from liability for Fourth Amendment violations, the district court must determine whether, in light of clearly established principles governing the conduct in question, the officer objectively could have believed that his conduct was lawful. [Citation omitted] This standard requires a two-part analysis: (1) Was the law governing the official's conduct clearly established? (2) Under that law, could a reasonable officer have believed the conduct was lawful?

Act Up!, 988 F.2d at 871.

In determining whether the applicable law is clearly established, a court must consider not just generally established principles, but also the particular factual circumstances to which those principles have been applied.

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held

> unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993). Where there is no binding Supreme Court or Ninth Circuit precedent, this Court looks to "all available decisional law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established." *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987).

B. The individual defendants have qualified immunity from the claim that they unlawfully subjected Deputy Carter to a urine test

1. There was a reasonable basis for concluding that Deputy Carter had agreed to the urine test

Government officials may administer a drug test if the subject consents. *See, e.g., United States v. Eide*, 875 F.2d 1429, 1431 (9th Cir. 1989). In this case, a reasonable investigator could have concluded that Deputy Carter consented to giving a urine sample during the discussion in Captain Gott's office. When Lieutenant McSweeney asked whether Deputy Carter

was "comfortable" with giving a urine sample, he said, "Yes sir." At his deposition, Deputy Carter said that he had answered affirmatively, "because I didn't have nothing to hide." An objective observer would have concluded that Deputy Carter had consented.

2. A reasonable investigator would have concluded that there was reasonable suspicion to support requiring a urine test

Deputy Carter argues that his summary judgment papers created a genuine dispute as to the material facts surrounding his production of a urine sample. However, the existence of reasonable suspicion is a legal issue to be determined by the court. *Act Up!*, 988 F.2d at 873. The only questions for a factfinder to resolve are what the officer, and how the parties to the dispute acted. *Ibid.* Deputy Carter has not pointed to any genuine issue regarding such facts in this case.

The facts that the Internal Affairs investigators had developed when they asked Deputy Carter to provide a urine sample were set out in their "Investigative Summary," and in the transcripts of their interviews with Martha Ramos and Susan Tate. [ER 76-81, 276-85] Deputy Carter has not pointed to any evidence that (1) two eyewitnesses stated that Deputy Carter had used steroids, (2) the eyewitness accounts were particularized, (3) Deputy Carter

competed in weightlifting events, and (4) Deputy Carter's athletic performance and body size and weight had not deteriorated in the period since Ramos no longer had day-to-day contact with him.

The only information referred to in the summary that Deputy Carter attempts to dispute here is the reported conversation with Dr. Catlin at the UCLA Olympic Laboratory. However, the declaration from Dr. Catlin that Deputy Carter relies on does not create a genuine issue. In his declaration, Dr. Catlin initially concedes that he has acted as a consultant to the Los Angeles Sheriff's Department, and that he has received phone calls from a member of the crime lab and "other supervisors on the Department to inquire as to the symptoms of or other matters concerning drug use." [ER 172] He then states that he has "no specific recollection of, and no notes documenting my ever speaking to Lt. McSweeney, Sgt. Bleavins or Sgt. Brazille regarding symptoms or signs of steroid use." [ER 174] However, he confirms that steroids can cause "increased physical size, large muscles, and erratic or severe mood swings" and "skin rashes and impotence." [ER 174]

Dr. Catlin's lack of recollection is not evidence that the conversation did not take place. The essence of his statement is that he could not remember one way or the other whether the conversation took place. As this Court

explained in *Shawmut Bank, N.A. v. Kress Assoc.*, 33 F.3d 1477, 1501 (1994), such evidence "does not prove anything. *See also United States v. Lewis*, 406 F.2d 486 (7th Cir.), *cert. denied*, 394 U.S. 1013 (1969) (witness not competent to contradict representations when he could not recall whether any were made).

Even if there were a genuine dispute as to the conversation with Dr. Catlin, the remaining facts as to which there is no dispute were sufficient to establish qualified immunity. The government may conduct a urinalysis of a peace officer employee if it "demonstrate[s] an articulable reasonable basis for suspecting the [officer] of drug use before ordering him to submit to the urinalysis." *Jackson v. Gates*, 975 F.2d 648, 650 (9th Cir. 1992), *cert. denied*, 509 U.S. 1993). Such "reasonable suspicion" may be based on "reliable and credible sources" or on information that is "independently corroborated." *American Fed'n of Gov't Employees v. Roberts*, 9 F.3d 1464, 1468 (9th Cir. 1993).

Here, the investigators relied on the statements of Ramos and Tate as evidence that Deputy Carter had used steroids continuously for several years until at least December 1992, when Ramos ended her relationship with him. The credibility of their statements was enhanced by the facts that they cor-

roborated each other, and that they gave explicit and detailed descriptions of Deputy Carter's steroid use. *See Illinois v. Gates*, 462 U.S. 213, 234 (1983) ("even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case").

On this appeal, Deputy Carter does not question the witnesses' credibility. Rather, Deputy Carter argues that there was not a sufficient basis for concluding the he was *currently* using steroids. He cites no authority whatsoever for his position. Nor does he convincingly refute the District Court's analysis of this issue:

> The Court finds that the information relied upon by the defendants was neither too old nor too unreliable for a reasonable officer to conclude that such information provided sufficient basis for a drug test based upon reasonable suspicion. The Sheriff's Department ICIB section did not turn over their investigation of Carter to the Department's IAB until September 1993. Brazille and Bleavins interviewed Carter's former girlfriend, Ramos, on October 20, 1993. In an attempt to corroborate the information acquired from Ramos, Brazille and Bleavins interviewed Carter's ex-wife, Tate, on October 25, 1993. [Footnote omitted] On November 1, 1993, based on the results of these interviews and Defendants' own observations of Carter's seemingly enlarged muscular condition, [footnote omitted] Carter was asked to submit to a drug test.

[ER 450-51]

Deputy Carter also argues in a footnote that the investigators could not rely on Susan Tate's statement, because it was protected by the marital communications privilege. *See* Opening Brief, p. 20. However, that is a testimonial privilege applicable in judicial proceedings. It does not apply to investigatory interviews, because they are not testimony. *Cf. United States v. Lefkowitz*, 618 F.2d 1313, 1318 (9th Cir.) (explaining that the related spousal testimony privilege does not apply when the spouse does not testify or where a third person testifies about the spousal statements), *cert. denied*, 449 U.S. 824 (1980).[1]

In any event the marital communications privilege only applies to "utterances or expressions intended to be communicative (i.e., to convey a message from one spouse to the other)." *United States v. Lefkowitz*, 618 F.2d

[1] The authorities that Deputy Carter cites in his footnote do not support his argument, because they all involved application of the privilege to testimony by a spouse in a judicial proceeding, *not* statements to an investigator. *See United States v. Marashi*, 913 F.2d 724 (9th Cir. 1990) (application of privilege to spouse's testimony at a criminal trial); *In re Grand Jury Investigation of Hugle*, 754 F.2d 863 (9th Cir. 1985) (application of privilege to spouse's testimony to a grand jury); *Haddad v. Lockheed California Corp.*, 720 F.2d 1454 (9th Cir. 1983) (application of privilege to spouse's testimony at a civil trial); *United States v. Weinberg*, 439 F.2d 743 (9th Cir. 1971) (application of privilege to spouse's testimony to a grand jury).

1313, 1318 (9th Cir. 1980); *see also United States v. Marashi*, 913 F.2d 724, 729 (9th Cir. 1990). It does not bar evidence of personal observations. *Lefkowitz*, 618 F.2d at 1318. In her interview, Tate discussed her administration of steroids to Deputy Carter, and her observations of his physical appearance and actions. That was not evidence of any private communication from Deputy Carter to her.

C. There was no clearly established right to be free from direct observation of urination during collection of the urine sample

In arguing that Sergeant Brazille was not immune from liability for directly observing urination, Deputy Carter cites but two cases that found direct observation unlawful in similar circumstances, both from the District of Columbia Circuit. There is no controlling Ninth Circuit or Supreme Court precedent. However, other courts have disagreed with the District of Columbia Circuit. For example, the California Supreme Court has upheld direct visual observation of student athletes. *Hill v. NCAA*, 7 Cal. 4th 1, 51-52 (1994). The Supreme Judicial Court of Massachusetts has approved the monitoring of a police cadet's act of urinating as part of an unannounced, warrantless and suspicionless drug-testing program. *O'Connor v. Police Comm'r of Boston*, 557 N.E.2d 1146 (Mass. 1990) A district court in Ten-

nessee has noted that "observation of the urine donations does not make the urine texts constitutionally infirm. *Smith v. White*, 666 F. Supp. 1085, 1090 (E.D. Tenn. 1987), *aff'd*, 857 F.2d 1475 (6th Cir. 1988). There is no clearly established rule with respect to direct observation.

A recent decision from the Northern District of California arrived at the same conclusion in a case involving direct observation of a female correctional officer in February 1994:

> If the issue before us was whether the direct observation of Hansen's urination during her drug tests violated her rights under the Fourth Amendment, we probably would hold that it did. Given the doctrinal trends evident in cases as *Yeutter* … and *Piroglu*, it is fairly likely that most federal courts eventually will take the position that the Fourth Amendment generally prohibits direct observation of urination during drug testing without reasonable, individualized, and articulable suspicion of an intent to tamper with the sample. However, the issue before us is not what the law is or where it is likely to go, but whether the law was clearly established at the time of the conduct giving rise to this action.
>
> As we indicated at the beginning of our review of the pertinent authorities, at the time the defendants engaged in the conduct that plaintiff challenges here, there was no reported opinion that squarely addressed the instant issue. There was no clearly controlling authority — and the cases that favor plaintiff's position, while strong in tone, left open the possibility of different outcomes in settings where different interests were at stake. *Yeutter* … and *Piroglu* … the opinions most favorable on these issues to plaintiff are distinguishable because neither pro-

> hibited direct observation of urination when both reasonable suspicion of drug use and "sensitive" employees were involved.

Hansen v. California Dep't of Corrections, 920 F. Supp. 1480, 1495-96 (N.D. Cal. 1996).

As *Hansen* explains, the two cases that Deputy Carter cites — *National Treasury Employees Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990) and *Piroglu v. Coleman*, 25 F.3d 1098 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995) — provide only limited support for his argument. *Yeutter* only invalidated direct observation of employees who did not hold security- or safety-sensitive positions. As a peace officer transporting inmates, Deputy Carter's circumstances were different. *Piroglu* was decided *after* Deputy Carter provided his urine sample. It involved direct observation of a medical technician, *not* a peace officer or someone with a similar position.

Deputy Carter also relies on this Court's decision in *Sepulveda v. Ramirez*, 967 F.2d 1413 (9th Cir. 1992), *cert. denied*, 510 U.S. 931 (1993). However, that case involved a *male* parole officer's direct observation of a *female* parolee. No such degrading circumstances were present here. As the Seventh Circuit has noted:

> Urination is generally a private activity in our culture, though, for most men, not highly private. Men urinate side by side in

> public restrooms without embarrassment even though there is usually little, and often no, attempt to partition the urinals.

Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991).

D. A reasonable investigator would have concluded that it was permissible to ask personal questions about symptoms associated with steroid use

As an armed law enforcement officer, Deputy Carter had a diminished expectation of privacy. Such public employees cannot reasonably expect to keep from their employers "personal information that bears directly on their fitness." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989). For that reason, the two authorities that Deputy Carter cites for his argument that there was no immunity for the questions on personal matters are not controlling. Neither case involved employees in similar safety-sensitive positions. Both cases also upheld compelled disclosure of medical information over a claim of privilege. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3rd Cir. 1980) affirmed an order enforcing an administrative subpoena for the medical records of a private employer's plant workers. *Caesar v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977) upheld a determination that a psychotherapist was required to answer questions about information provided by his patient.

In this case, there was ample justification to overcome any privacy interest that Deputy Carter may have had with regard to personal information. The Sheriff's Department had a firm policy against the use of illegal steroids. The Department's Internal Affairs investigators had information from two eyewitnesses that Deputy Carter had used steroids continuously for an extended period of time. That was sufficient justification for them to question Deputy Carter to determine whether there was a basis for disciplinary action. As the District Court pointed out, "the personal questions posed to Plaintiff about his medical and physical condition are no more intrusive than the search involved with his actual submission to the drug test." [ER 456] Deputy Carter has not cited any authority that clearly establishes a right to be free of such questions in those circumstances.

E. There was no evidence to support a *Monell* claim against the County

1. Deputy Carter did not establish the necessary constitutional tort

The District Court rejected the *Monell* claims contained in the Eleventh, Twelfth and Thirteenth Counts, because Deputy Carter had not proved an underlying constitutional tort. There was no evidence that any employee

of the County had acted unlawfully toward him. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988) *Monell*, 436 U.S. at 691.

On appeal, Deputy Carter argues that qualified immunity does not necessarily bar actions for declaratory or injunctive relief. However, he does not explain what ongoing unconstitutional conduct the District Court could be asked to enjoin. Instead, he requests that this Court remand "for a determination on the merits." He is not entitled to a remand unless he points to a prejudicial error in the District Court's decision. Even if a claim against the County could survive a finding that its officials had qualified immunity, Deputy Carter would still have to come forward with evidence of some underlying constitutional tort. His Opening Brief does not do so.

2. There was no evidence of a permanent and well settled County practice

The District Court also determined that the claims against the County failed because there was no evidence of a County custom or policy. [ER 466-68] Deputy Carter does not even address that point. However, it is fatal to his claims.

In response to the County's motion for summary judgment, Deputy Carter submitted materials from two administrative hearings and a subject

interview. [ER 362-406] He claimed that those documents established improper conduct by Sheriff's Department investigators in those instances. [ER 192] Even if those exhibits establish what Deputy Carter claimed that they did they fall far short of proving the kind of "permanent and well settled practice" required to establish municipal liability. *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1444 (9th Cir. 1989). Three instances of possible misconduct in the course of four years can only be considered random acts or isolated events, which are not sufficient to establish liability. *Thompson*, 885 F.2d at 1443-44.

VI. CONCLUSION

For the reasons stated above, this Court should affirm the summary judgment entered by the District Court.

Dated: November ___, 1997

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VII. CERTIFICATE OF COMPLIANCE

The text in this brief is proportionately spaced. The typeface is Times New Roman, 14-point. The word count generated by Microsoft Word 97 for the portions subject to the restrictions of Circuit Rule 32(e)(1) is 5,452.

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VIII. STATEMENT OF RELATED CASES

Defendants-Appellees are not aware of any cases related to this one that are currently pending before this Court, as defined in Circuit Rule 28-2.6.

Dated: November ___, 1997

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