EN BANC BRIEF FOR APPELLEE

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U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETER EVANS and DETREE JORDAN, Plaintiffs/Appellees

versus

CITY OF ZEBULON, GA,
ROBERT LOOMIS, individually
and in his official capacity as Police
Chief of the City of Zebulon, GA, Defendants,

DENIS STEPHENS, Defendant/Appellant

On Appeal from the United States District Court
for the Northern District of Georgia

CLOSED

EN BANC BRIEF OF APPELLEE

CHRIS JENSEN, ESQ.
State Bar No. 391250
CLARK E. GULLEY, ESQ.
State Bar No. 315191

1447 Peachtree Street, N.E.
Suite 1009
Atlanta, GA 30309
(404) 873-5200 telephone
(404) 873-6560 facsimile
ATTORNEYS FOR APPELLEE

CERTIFICATE OF INTERESTED PERSONS
DISCLOSURE STATEMENT

Trial Judge: Honorable Jack T. Camp, Judge, USDC, NDGA

Attorneys: Dovre Christian (Chris) Jensen, Jr., Esq.
Clark E. Gulley, Esq.
Foster, Jensen & Gulley, LLC

Richard A. Carothers, Esq.
Thomas Mitchell, Esq.
Carothers & Mitchell, LLC

Peter Evans

Detree Jordan

Denis Stephens

Scott W. Gosnell, Esq.
Thomas S. Hale, Esq.
Burgess & Hale, LLC

Randall C. Marshall
Legal Director
ACLU Foundation of Florida, Inc.

Mark R. Brown
Baker & Hostetler Professor of Law

STATEMENT REGARDING ORAL ARGUMENT

This is an excessive force strip search case wherein the police officer seeks dismissal by application of a qualified immunity defense. The facts concerning the strip search as alleged by the plaintiffs and the police officer are widely disparate. The issue to be determined by this Court is whether the express words of the Fourth Amendment itself and/or the cases of Bell v. Wolfish and Justice v. City of Peachtree City, infra, provided "fair warning" to Officer Stephens that an abusive strip search would not be condoned. Although neither the United States Supreme Court nor this Court have defined the term "abusive fashion" this Court may have questions regarding the measures a police officer may take before crossing over the line of abusiveness while conducting a strip search of a motorist and his passenger accused of non-violent and non-drug related criminal activity.

The Bell balancing test and this Court's application of the test in Justice demands that police officers recognize every citizen's right to privacy. In order to encroach upon this privacy right police must have some justification based on a particularized and objective basis in fact giving rise to a reasonable suspicion that the individual is concealing weapons or contraband underneath or within his clothing. Because the Fourth Amendment itself guarantees every citizen the right

to be free from "unreasonable" searches, any search based on anything less than "reasonable suspicion" is by its very definition "unreasonable" and a violation of the Fourth Amendment.

Appellees contend that the facts alleged by Plaintiffs are sufficient to state a cause of action of a violation of the Fourth Amendment because the decision to stripsearch was unreasonable and the manner in which the strip search was conducted was unreasonable.

Finally, Appellees contend that the involvement in this case by the various amici shows the level of interest in the public policy matter and a full hearing including oral argument is in the best interest of justice.

CERTIFICATE OF TYPE SIZE AND STYLE

This is to certify that this brief is composed with 14-point type and Times New Roman font.

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I. STATEMENT OF JURISDICTION

Defendant/Appellant Denis Stephens [Stephens] appeals the District Court's denial of Summary Judgment based on qualified immunity. The issues Stephens raise are whether a constitutional violation occurred and whether the law regarding the specific act of violation was clearly established. These are legal issues immediately appealable. Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S.Ct. 2806 (1985); Cottrell v. Caldwell, 85 F.3d 1480, 1484 (11th Cir. 1996).

II. STATEMENT OF THE ISSUES

In its order granting en banc review of the panel decision this Court requested the parties to focus their briefs on the following two issues:

(1) **WHETHER ARRESTEES WHO ARE TO BE DETAINED IN THE GENERAL JAIL POPULATION CAN CONSTITUTIONALLY BE SUBJECTED TO A STRIP SEARCH ONLY IF THE SEARCH IS SUPPORTED BY REASONABLE SUSPICION THAT SUCH A SEARCH WILL REVEAL WEAPONS OR CONTRABAND.**

(2) **WHETHER THE MANNER IN WHICH THE SEARCHES IN THIS CASE WERE CONDUCTED VIOLATED THE CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS OF PLAINTIFFS SO THAT OFFICER STEPHENS IS NOT ENTITLED TO QUALIFIED IMMUNITY.**

Plaintiff/Appellees respectfully request the Court to consider additional argument presented herein and by Amicus ACLU which touch upon the Court's application of Hope v. Pelzer to the qualified immunity analysis.

III. STATEMENT OF THE CASE

A. Course of Proceedings and Dispositions in the Court Below

Plaintiffs/Appellees Evans and Jordan filed their Complaint pursuant to 42 U.S.C. § 1983 on January 22, 2001. An Amended Complaint was filed with consent of Defendants on March 29, 2002. [R. 19]

All Defendants moved for Summary Judgment.

The District Court granted summary judgment to Stephens on Plaintiffs' false arrest claim. The District Court denied Stephens' summary judgment on Plaintiffs' Fourth Amendment strip search claims.

The District Court granted Summary Judgment to Defendant Robert Lummus in his official capacity and his individual capacity.

The District Court granted the City of Zebulon's motion for summary judgment.

B. Statement of Facts

On January 22, 1999 Plaintiffs Peter Evans and Detree Jordan met with a music producer in a studio in Atlanta, GA to record some music. [R. 43, (Jordan depo 24)] After leaving the music studio, Plaintiffs, who were college students, were attempting to get from Atlanta to Statesboro, GA to Georgia Southern University. [R. 43, (Evans depo 5, 27)] According to Plaintiffs, they got on Interstate 85 enroute to Macon, GA and later realized they were heading in the

wrong direction. [R. 43, (Jordan depo 10, 24)] Stephens stopped Plaintiffs' car for speeding. [R. 45, (Stephens depo 125, 130-31)] A video camera and recorder in Stephens' patrol car recorded the entire stop except for periods of time when Stephens intentionally turned the microphone off. [R. 42, the videotape] and [R. 45 (Stephens depo 130)] Stephens testified that prior to the video camera being activated, he observed no erratic driving or suspicious behavior inside the car. [R. 45, (Stephens depo 132-3)] Stephens asked Evans if he had been drinking. Stephens requested Evans to get out of the car. [R. 42, (JDE 5, 20:02:18)] Stephens thoroughly searched Evans, including going into his pockets, and found no weapons or contraband. [R. 42, (JDE 5, 20:03:53-20:05:25)]

Plaintiff Jordan also denied either he or Evans had consumed any alcoholic beverages. [R. 42, (JDE 5, 20:07:29-20:08:28)] Stephens searched Plaintiffs' car for a period of over five minutes, including Evans' book bag. [R. 42, (JDE 5, 20:08:45-20:14:00)] Stephens switched off the microphone of his video recorder, and walked out of camera range for a period of over four minutes, leaving Plaintiffs sitting on the trunk of their car. [R. 42, (JDE 5, 20:14:10-20:18:18)]

When Stephens returned on camera, he arrested Evans for "DUI refusal," placed him in handcuffs behind his back, and advised him of his Miranda rights. [R. 42, (JDE 5, 20:23:23-20:24:11)]

Stephens then arrested Jordan for "active warrants." [R. 42, (JDE 5, 20:24:47-20:25:00)] Stephens thoroughly searched Jordan and found no weapons or contraband. [R. 42, (JDE 5, 20:25:05-20:25:48)] Stephens thoroughly searched the passenger compartment two more times, searched the trunk of Plaintiffs' car, and searched the area outside of Plaintiffs' car, and found no contraband. [R. 42, JDE 5, 20:36:15-20:46:00)]

Stephens transported Plaintiffs to the Pike County Jail. [R. 45, (Stephens depo 14-15)] Upon arriving at the Pike County Jail, Stephens handcuffed both Evans and Jordan to a bench outside the jail booking office. [R. 45, (Stephens depo 18)] Jordan was protesting he was not the parole violator wanted in the active warrant because he had never been arrested and was not on parole. [R. 43, (Dawson depo 53)] The on-duty jailer, Pike County Deputy Sheriff Andre Dawson said he personally attempted to convince Stephens to release Jordan because the description in the NCIC/GCIC report did not match Jordan's physical description. [R. 43, (Dawson depo 53), and R. 42, (JDE 7 - GCIC printout)] According to the NCIC/GCIC printout, the warrant was outstanding for a man who was 5' 8" tall, 135 pounds, with a scar under his left eye. [R. 42, (JDE 7 - GCIC printout)] Jordan is approximately six feet tall, over 200 pounds, and had no such scar under his left eye. [R. 43, (Dawson depo 51-54)] Stephens told Dawson, you do your job and let

me do mine. [R. 43, (Dawson depo 55)] Stephens ignored the protests of Jordan and Dawson, as well as the information on the printout.

Stephens claims to have formed a reasonable suspicion that Plaintiffs were concealing drugs underneath their clothing simply because these Plaintiffs, who had been caught speeding, and who were lost at night a good distance from home, were nervous. [R. 45, (Stephens depo 89)]

Stephens and Deputy Sheriff Jeff Oliver took Evans and Jordan from the bench where they were handcuffed into another room of the jail, where they were physically assaulted, battered, humiliated, intimidated, threatened, and called niggers. [R. 45, (Stephens depo 78-88); R. 43 (Evans depo 13-17); R. 43, (Jordan depo 12-17)] After physically forcing Plaintiffs to remove their clothing, Stephens used a metal object to probe Plaintiffs' genital and anal areas and lift their testicles, and told them to get used to it, because he was going to see to it that they went to prison, and they were going to get "butt fucked" for twenty years. [R. 43, (Evans depo 13-17); R. 43 (Jordan depo 12-17)] When Evans and Jordan were brought back to the bench after the strip search, they outcried to Jailer Dawson about what Stephens had done to them. [R. 43, (Dawson depo 22-23, 65-67, 70-71)]

Jordan was released from the Pike County Jail the following day. [R. 43, (Jordan depo 33)] Jordan returned to the Pike County Jail to post Evans' bond. [R. 43, (Jordan depo 21-22] Stephens met Jordan coming down the hallway and was

waving a bag of marijuana at him claiming that he had found it in the trustee's cell and he was going to charge Plaintiffs for selling contraband or distributing drugs in the jail. [R. 43, (Jordan depo 21-22); R. 43, (Evans depo 20-21); R. 43, (Dawson depo 25-28, 74-79)] Again, Dawson intervened on Jordan's behalf and told Stephens, "You do not know if it's their drugs. You don't know how it got there. That room was not searched. You searched these guys. They say you strip searched them. I searched them once even before they went into that room." [R. 43, (Dawson depo 27-28)] Plaintiffs were never charged with this marijuana.

Jordan posted Evans' bond on the DUI and speeding charges and the two men left the City of Zebulon. [R. 43, (Evans depo 21-22)]

IV. STATEMENT OF SCOPE OF REVIEW

The Court of Appeals reviews *de novo* a District Court's disposition of a summary judgment motion. Lee v. Ferraro, 284 F.3d 1188, 1190 (11th Cir. 2002). When the Court of Appeals interlocutorily reviews a legal issue involved in a denial of summary judgment on qualified immunity grounds, the Court of Appeals can simply accept the facts upon which the District Court denied summary judgment. Although this Circuit believes it is not required to accept the facts stated in the District Court's order, and this Circuit believes it may engage in interlocutory appellate fact finding, Appellees suggest that such fact finding by the appellate courts is improper.

As argued by Professor Brown in his amicus brief [1] the Supreme Court has made it clear that appellate courts should not review the sufficiency of the plaintiffs' evidence under the guise of qualified immunity on interlocutory appeal. Johnson v. Jones, 515 U.S. 304 (1995) Appellees endorse and adopt the arguments made by Professor Brown including the proper scope of appellate review, and the argument against this Circuit's improper interlocutory fact finding in the context of a qualified immunity analysis.

The Court of Appeals is required to resolve all issues of material fact in favor of the plaintiff, because where the issue is evidentiary sufficiency, the question is "whether or not certain given facts showed a violation of clearly established law." Johnson v. Jones, 515 U.S. 304, 311, 115 S.Ct. 2151, 2155, (1995); Lee v. Ferraro, supra, at 1190.

When reviewing a District Court's disposition of a summary judgment motion, the Court of Appeals must, as the District Court must, consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," in the light most favorable to the party opposing the summary judgment motion. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Skrtich v. Thornton, 280 F.3d 1295, 1299 (11th Cir. 2002).

[1] Professor Brown's Amicus Brief is filed on behalf of the American Civil Liberty Union organizations in Georgia, Florida, and Alabama.

V. SUMMARY OF THE ARGUMENT

This is an excessive force strip search case where City of Zebulon Police Officer Denis Stephens strip searched Plaintiffs without reasonable suspicion, with excessive force and after Chief of Police Lummus had specifically told Stephens not to conduct any strip searches.

Plaintiff/Appellees argue that reasonable suspicion is the minimum standard constitutionally permissible to allow police officers or jailers to require an arrestee to submit to a strip search. The very words of the Fourth Amendment protect citizens from unreasonable searches, and unless a strip search is based on a reasonable suspicion, then it is per se unreasonable.

Plaintiff/Appellees also argue that the manner in which the strip searches in this case were conducted violated clearly established law. No reasonable police officer in the circumstances would believe that the actions as described by Plaintiffs were constitutionally permissible. Plaintiffs analyze the facts of this case in light of this Circuit's analysis in Vineyard v. Wilson, infra, to conclude that Stephens had fair warning that his actions were unconstitutional.

VI. ARGUMENT AND CITATION OF AUTHORITY

A. Officer Stephens is not entitled to Qualified Immunity because he did not have discretionary authority to conduct strip searches.

Police officers are entitled to qualified immunity for their official acts only if they act within the scope of their discretionary authority. In Rich v. Dollar, 841 F.2d 1558 (11th Cir. 1988) this Circuit derived a two-part analysis for applying the objective-reasonableness test to a qualified immunity defense:

> 1. The defendant public official must first prove that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred."
>
> 2. Once the defendant public official satisfies his burden of moving forward with the evidence, the burden shifts to the plaintiff to show lack of good faith on the defendant's part. This burden is met by proof demonstrating that the defendant public official's actions "violated clearly established constitutional law."

Rich, 841 F.2d at 1563-64 (quoting Zeigler v. Jackson, 716 F.2d 847, 849 (11th Cir. 1983). Under the Zeigler/Rich objective reasonableness test, a government official proves that he acted within his discretionary authority by showing "objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties **and within the scope of his authority**." Courson v. McMillian, 939 F.2d 1479, 1487 (11th Cir. 1991) (emphasis added).

Stephens contends in his brief to this en banc court that when he conducted the strip searches of plaintiffs he "was acting consistently with the City of Zebulon policy that states that a strip search may be conducted if reasonable in light of the

circumstances." [Appellant En Banc Brief page 12] The facts construed most favorably to the Plaintiffs show otherwise. As of January 22, 1999 Chief Lummus had established a **no strip search** policy for the City of Zebulon Police Department. Prior to Plaintiffs' arrest and strip search by Stephens on January 22, 1999, Lummus knew that Zebulon Police Officer Joe Henslee had conducted an illegal strip search of a passenger in a car stopped for a minor traffic violation. [R. 45 (Lummus depo 23-24); R.44 (Plaintiffs' Statement of Material Facts in Dispute #141 and footnote 13)] Additionally, Lummus knew that Stephens had conducted an illegal strip search of a motorist on the side of the road, and he had verbally reprimanded Stephens for conducting the illegal search. [R. 45 (Lummus depo 37-42; 77-78)] Lummus testified that before January 22, 1999, he had verbally ordered Stephens "not to be doing any strip searching at all." [R. 45 (Lummus depo 38)] Lummus testified further that any strip search at the jail would have been a violation "of what I said." [R. 45 (Lummus depo 40)] Lummus' testimony of the no strip search policy is corroborated by the sworn testimony of Stephens' supervisor, Sgt. Tom Sheppherd, who testified that strip searches were prohibited, and that Chief Lummus made that change in policy clear to everyone in the department. [R. 39, Affidavit of Tom Sheppherd] The evidence shows that Stephens' discretionary authority to conduct strip searches pursuant to the written

policy and procedure manual had been revoked by Chief Lummus prior to January 22, 1999.

Stephens has not met and cannot possibly meet his threshold burden to be granted qualified immunity, because he had no authority, discretionary or otherwise, to conduct a strip search of Plaintiffs at the Pike County Jail. [Stephens' actions were clear and indisputable violations of Departmental Policy, and a conscious and deliberate violation of a direct order by Chief Lummus personally given to Stephens prior to January 22, 1999. The prohibition on strip searches was well-settled policy, and was promulgated directly to Stephens by Chief Lummus in Sgt. Sheppherd's presence. Therefore, Stephens is not entitled to qualified immunity because he was not acting within the scope of his discretionary authority when he strip searched Plaintiffs at the Pike County Jail.]

B. Stephens is not entitled to qualified immunity under Part One of the *Saucier* analysis.

The Supreme Court, in Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), set forth a two-part test to determine whether a police officer is entitled to the defense of qualified immunity. As a threshold question, this Court must ask "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" If a constitutional right would have been violated under Plaintiffs' version of the facts,

the court must then determine whether the right was clearly established. Saucier, Id. at 201.

The District Court found that Stephens' strip search of Plaintiffs was unconstitutional because Stephens lacked reasonable suspicion to justify strip searching Plaintiffs, and because the facts alleged by Plaintiffs, taken as being true, established that the strip search was conducted in an unreasonable manner. [R. 53, 10-13] The District Court's decision should be affirmed.

The issue this Court requested the parties to focus on was:

WHETHER ARRESTEES WHO ARE TO BE DETAINED IN THE GENERAL JAIL POPULATION CAN CONSTITUTIONALLY BE SUBJECTED TO A STRIP SEARCH ONLY IF THE SEARCH IS SUPPORTED BY REASONABLE SUSPICION THAT SUCH A SEARCH WILL REVEAL WEAPONS OR CONTRABAND.

For the following reasons, the question should be answered in the **affirmative**.

"The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable searches** and seizures, shall not be violated...." United States Constitution, Amendment IV. (emphasis added) Any search not based on at least "reasonable suspicion" is by its very nature and definition "unreasonable." Every police officer knows that an "unreasonable" search of any kind is a violation of the Fourth Amendment based on the express words of the Constitution. Thus, the Constitution itself gives fair warning to all police officers not to conduct strip searches unless he has "reasonable suspicion." Appellant

Stephens concedes in his brief to this en banc Court that he believed the state of the law at the time of the arrest required an officer to have "reasonable suspicion" [Appellant's en banc Brief at page 12] and [R.45 (Stephens deposition page 48:9 through 51:15)]

The Supreme Court has held that it is a violation of a person's constitutional rights when the government conducts an unreasonable search in a place where one has a reasonable expectation of privacy. Terry v. Ohio, 392 U.S.1, 9, 88 S.Ct. 1868 (1968). This Circuit has held as axiomatic the principle that people harbor a reasonable expectation of privacy in their "private parts." Justice v. City of Peachtree City, 961 F.2d 188, 191 (11th Cir. 1992). This Court further recognized that "deeply imbedded in our culture... is the belief that people have a reasonable expectation not to be unclothed involuntarily, to be observed unclothed, or to have their 'private' parts observed or **touched by others."** Justice, at 191 (emphasis added).

Bell v. Wolfish, 441 U.S. 520, 560 (1979), created a balancing test to determine whether the intrusiveness of a strip search meets constitutional muster. The Supreme Court requires the court to balance the interests of the citizen in his privacy against the government's interests. A blanket strip search policy cannot adequately balance the interests of every individual who comes before the government in the context of a custodial arrest and confinement in a general jail

population. The first level of defense of an individual's right to privacy is a well-trained and conscientious police officer. Every officer must understand that an order to remove your clothes can be made only after consideration of particularized facts that give rise to a reasonable suspicion that the individual is hiding weapons or contraband. When police or jail officials are given unbridled authority based on some unspecified general security interest, then the right of every citizen to be free from unreasonable searches is violated.

This Court acknowledged the paramount nature of the right to be free from unreasonable strip searches in Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992), where a panel of this Circuit restated that "convicted prisoners [or pretrial detainees] do not forfeit all constitutional protections by reason of their ...confinement." 961 F.2d at 191. At page 192 the Justice panel interpreted Bell's balancing test as requiring "**at a minimum**, that the facts upon which an intrusion is based be capable of measurement against an objective standard whether this be probable cause or a less stringent test." (emphasis added) It is for the court...ultimately to resolve whether, under the facts available to a law enforcement officer, the legal standard for reasonable suspicion was met." 961 F.2d at 193. In order for a police officer to sustain his reasonable suspicion he must convince the court that he had a particularized and objective basis to suspect the particular person searched of hiding weapons or contraband. The only way to

meet this challenge is to establish a "reasonable suspicion" based on facts known to the officer. Anything less is per se unreasonable. Any blanket strip search policy that allows police officers or jail officials to strip search an arrestee without any consideration of the particular facts surrounding the arrestees situation violates the holding and the rationale of both Bell and Justice.

Until the Supreme Court overrules or modifies the balancing test announced in Bell, and this Court overrules or modifies the Justice balancing test and the standard for justification described as "reasonable suspicion," arrestees can be strip searched **only if** the search is supported by reasonable suspicion that the arrestee is hiding weapons or contraband.

a. Stephens lacked a reasonable suspicion to believe Plaintiffs were concealing drugs under their clothing.

Of the factors asserted by Stephens in his summary judgment motion, the District Court concluded that only three factors related to possible drug use or possession:[2] (1) the plaintiffs were nervous, (2) their story was suspicious, and (3) they were driving a rental car. [R. 53 p 12] The District Court properly determined that Stephens' suspicions based on the Plaintiffs' nervousness and their suspicious story were dispelled by Stephens' thorough search of Plaintiffs, the Plaintiffs' car, and the area around their car. [R. 53, 12] During his searches, Stephens found no

evidence to support any suspicion that the Plaintiffs were using or carrying illegal drugs. Based on his review of the factors asserted by Stephens, and after viewing the videotape of the actual stop, the District Court concluded that Stephens did not have a reasonable suspicion to believe Plaintiffs were concealing drugs because Stephens' suspicions were based on nothing more than a rental car and a "hunch." [R. 53, 12]

This Court should affirm the District Court's holding that Stephens violated Plaintiffs' Fourth Amendment rights because he did not have a reasonable suspicion to believe that Plaintiffs were concealing drugs under their clothing.

b. Stephens did not have arguable reasonable suspicion to believe that Plaintiffs were concealing drugs under their clothing.

On appeal, Stephens presses forward his theory of "arguable reasonable suspicion" to justify granting summary judgment based on qualified immunity.

The purpose for the arguable reasonable suspicion theory is to prevent personal liability for police officers who make a reasonable, but mistaken, conclusion that reasonable suspicion exists. Brent v. Ashley, 247 F.3d 1294, 1303 (11th Cir. 2001) (emphasis added)

In Justice v. City of Peachtree City, supra at 193, this Circuit made it clear that in order to conduct a strip search of an arrestee, a police officer must have a

[2] Stephens admitted that he never suspected either Evans or Jordan of concealing any weapons

"particularized and objective basis for suspecting the particular person searched of criminal activity."[3] In order for Stephens to prevail on the arguable reasonable suspicion theory, he must show that based on the facts available to Stephens at the time, a reasonable police officer could reasonably conclude the facts were legally sufficient to establish reasonable suspicion to justify the strip search, even though reasonable suspicion in fact did not exist.

Stephens argues on appeal that many factors support a determination that he had arguable reasonable suspicion of illegal drugs. All of the factors listed by Stephens are clearly recorded on the videotape of the traffic stop. [R. 42 (JDE 5)] The District Court reviewed the videotape of the traffic stop and concluded that only one of the factors listed by Stephens (a rental car) supported his claim of reasonable suspicion. The videotape shows the Plaintiffs' appearance and demeanor, records the words they used to explain their "suspicious story," shows their willingness to be searched, and shows Stephens' thorough searches of Plaintiffs, their car, and the area surrounding their car.

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under their clothing. [R. 45 (Stephens depo, 90-91)]

[3] Stephens admitted that on January 22, 1999 he knew the law in the 11th Circuit required him to have a "particularized and objective basis" to suspect an arrestee of hiding contraband. Stephens also knew that the 11th Circuit required a "reasonable suspicion" before a strip search could be conducted on less than probable cause. [R. 45, (Stephens depo 50-51]

No reasonable police officer would conclude that the particular facts known to Stephens were sufficient to form a reasonable suspicion. Therefore, Stephens is not entitled to qualified immunity based on arguable reasonable suspicion.

C. Stephens is not entitled to qualified immunity under Part Two of the *Saucier* analysis.

The second issue this en banc court requested the parties to focus their briefs on involves the second part of the Saucier test and was presented as:

WHETHER THE MANNER IN WHICH THE SEARCHES IN THIS CASE WERE CONDUCTED VIOLATED THE CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS OF PLAINTIFFS SO THAT OFFICER STEPHENS IS NOT ENTITLED TO QUALIFIED IMMUNITY

For the reasons and argument that follow, this question should also be answered in the **affirmative.**

a. Stephens' strip search of Plaintiffs was conducted in an abusive fashion in violation of clearly established law.

The second part of the Saucier analysis requires the reviewing Court to determine whether the constitutional right violated was clearly established. Lee v. Ferraro, supra, at 1194, 1197. "The Fourth Amendment's freedom from unreasonable searches and seizures encompasses the plain right to be free from the use of excessive force in the course of an arrest." Lee v. Ferraro, supra, at 1197 citing to Graham v. Connor, 490 U.S. 386, 394-95, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989).

The facts taken in the light most favorable to Plaintiffs clearly show that Stephens used unreasonable and excessive force in conducting the strip search of Plaintiffs. Evans and Jordan testified that on the evening of January 22, 1999, Stephens took both of them to an isolated part of the Pike County Jail. Jordan testified that he was shoved against the wall and told to put his hands against the wall. Stephens began poking Jordan in the back of the head while he made derogatory remarks to the effect that he didn't like niggers in his town. Stephens threatened Jordan that he would send him to prison for a long time. Stephens ordered Jordan to remove his shoes, and then ordered him to take off his shirt. Stephens then ordered Jordan to "exit your clothes." Jordan was required to lower his trousers to his ankles. When Jordan attempted to explain that he was not the person on the warrant, Stephens grabbed Jordan around the throat in a chokehold and then shoved him against the wall. When Evans was brought into the room, Evans was shoved into Jordan and both young men fell to the floor. Stephens then hit Jordan with an object and said, "I told you to keep your hands against the wall." Stephens then grabbed Evans by the neck and made him stand with his hands against the wall. Stephens pulled Jordan's underwear down to his ankles. Then Stephens ordered Evans to lower his underwear to his ankles. While both men were standing with their hands against the wall, Stephens used a long metal object to probe their genital and anal areas. Stephens used the object to lift the men's

testicles and to spread their buttocks. As Stephens was probing them in their anal area, he warned them that they better get used to this type of treatment because "I'm going to send you boys to prison. You are going to get butt-fucked up the ass." After Stephens finished his probing of their genital and anal areas, Plaintiffs were told to hurry up and get dressed. While they were dressing, Plaintiffs were kicked and pushed. [R. 43, (Evans depo 13-17); and R. 43, (Jordan depo 12-17)]

In Bell v. Wolfish, the Supreme Court announced to every law enforcement officer that strip searches performed in an "abusive fashion... cannot be condoned." 441 U.S. 520, 560 (1979), The Supreme Court notified police officers that strip searches "must be conducted in a reasonable manner." Id. at 560. The facts described by Plaintiffs constitute a strip search conducted in an abusive fashion with a specific intent to control, dominate, humiliate and cause specific injury to Plaintiffs as demonstrated by the vile, abusive, and evil manner in which Stephens commanded and intimidated Plaintiffs with threats of going to prison where they would be raped for the next twenty years. This is exactly the kind of abusive strip search that in 1979 the Supreme Court announced "cannot be condoned."

This Circuit recently described the ways in which Plaintiffs can establish that a constitutional right has been clearly established. "Fair and clear notice to government officials is the cornerstone of qualified immunity." Vineyard v.

Wilson, 311 F.3d 1340,1350 (11th Cir. 2002). As discussed in Vineyard, there are multiple ways to show fair and clear warning to police officers that a right is clearly established. Id.

(1) The Words of a Statute or Constitutional provision can give fair and clear warning.

The Vineyard opinion makes it very clear that the specific words of a statute or constitutional provision can establish a citizen's right with obvious clarity, if the officer's conduct is bad enough. In Vineyard, the accused police officer stopped his patrol car on a dark country road, grabbed the arrestee by her hair and arm (bruising her arm and her breast), dragged her out of the backseat of the patrol car while she was handcuffed behind her back, and pepper sprayed her, in order to stop the arrestee from screaming, being obscene, and insulting the officer during the ride to the jail. Although the District Court granted the arresting officer's motion for summary judgment based on qualified immunity, this Court reversed, finding that the officer had fair and clear notice that the conduct he was alleged to have committed was unlawful.

Because this Court thought the officer's conduct was "so bad," the Court also believed the officer's conduct "lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to [him], notwithstanding the lack of fact-specific case law." Vineyard at

1355. This Court held that the arresting officer had fair and clear notice that his conduct was unlawful, even though there was no pre-existing case law involving materially similar facts. Considering the arresting officer used pepper spray on an arrestee who was confined in the back seat of the patrol car, and handcuffed behind her back, the Court found that no fact-specific precedent case law was needed to overcome qualified immunity. Under the Court's analysis, Vineyard is an "obvious clarity case" where the very words of the Fourth Amendment prohibiting "unreasonable searches and seizures" are so clear and the conduct is "so bad," that the violation is obvious.

Like Vineyard, this is an "obvious clarity case." Taking the Plaintiffs' version of the facts, this Court, as it did in Vineyard, can conclude that no pre-existing case is necessary because the peculiar facts of this case are so far beyond the hazy border between excessive force and acceptable force that every objectively reasonable officer in Stephens' situation would have known that he was violating the Constitution even without case law on point.

(2) Broad statements in case law not tied to specific facts can give fair and clear warning.

The Vineyard opinion describes the second way in which fair and clear warning may be given to police officers. "...if the conduct is not so egregious as to violate, for example, the Fourth Amendment on its face, we then turn to case

law. When looking at case law, some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts." Vineyard, supra at 1351. As in the first method of giving fair and clear warning, the Court, in conducting its' analysis, looks at the legal principle in relation to the conduct alleged by the plaintiff. Fair and clear warning can be established if the principle is so clear, and the conduct is "so bad" that every "objectively reasonable official facing the circumstances would know that the official's conduct did violate federal law when the official acted." Vineyard, supra, at 1351.

The Supreme Court in Bell v. Wolfish, supra at 560, announced the general principle that strip searches conducted in an abusive fashion cannot be condoned. The general principal announced gives every citizen the right to be free from abusive strip searches, similar to the right established by the Fourth Amendment to be free from unreasonable searches. Although the Supreme Court in Bell did not specify exactly what acts were prohibited, future reviewing courts are authorized to hold that a "general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has not previously been held unlawful,'...." Hope v. Pelzer, 122 S.Ct. 2508, 2516 (2002); Vineyard v. Wilson, supra at 1352; each quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987). This is another way of saying

that in an "obvious clarity" case, the protected right can be clearly established by judge-made words as well as words set forth in the Constitution or a federal statute. Therefore, if this Court finds the manner in which Stephens conducted the strip search was abusive, the general principle in Bell can be used to satisfy the second part of the Saucier analysis, which requires the right to be clearly established.

The Supreme Court in Hope v. Pelzer explained that this Court's "rigid, overreliance on factual similarity" was dangerous. Id. at 2517. In Hope, the Supreme Court reversed this Court's affirmation of the granting of summary judgment to the prison guards who handcuffed the plaintiff to a hitching post even without factually-particularized, pre-existing case law. The Supreme Court explained that Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) had established the general legal principle that certain forms of corporal punishment would violate the Eight Amendment. Hope at 2516-17. Without specifying the exact type of prohibited punishment, Gates provided fair and clear notice to the prison guards in Hope that their actions were unlawful.

Like Hope, this is a case where a general legal principle, without specific factual examples, can give clear and fair warning. Like the admonition in Gates (that certain forms of corporal punishment violated the Eighth Amendment) relied on in Hope, the admonition in Bell (that abusive strip searches cannot be condoned) demands that this Court now put that principle to work and hold that

Stephens' abusive strip search will not be condoned by this Court. This Court should hold in this case that in light of Bell, the unlawfulness of Stephens' conduct should have been apparent to Stephens.

(3) Fact specific precedent cases can give fair and clear warning.

This is an excessive force strip search case. A plaintiff in a § 1983 civil rights case can overcome the qualified immunity defense if he can show that the right being violated was clearly established by fact specific precedent cases. The Fourth Amendment's freedom from unreasonable searches and seizures encompasses the plain right to be free from the use of excessive force in the course of an arrest. Vineyard v. Wilson, supra at 1347; and Lee v. Ferraro, supra at 1197, each citing to Graham v. Connor, 490 U.S. 386, 394-95, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). In Vineyard, this Court recognized that the right to be free from excessive force in the course of an arrest extends to an arrestee, sitting in a patrol car with her hands behind her back, on her way to the jail. Clearly, Evans and Jordan, who had been arrested and were handcuffed to the bench inside the jail, had that same Fourth Amendment right to be free from excessive force while in Stephens' custody. In order to determine whether Evans and Jordan's right to be free from excessive force has been clearly established by precedent fact specific case law, the Court must compare the facts of this case against precedent case law in excessive force cases.

"Whether a specific use of force is excessive turns on factors such as the severity of the crime, whether the suspect poses an immediate threat, and whether the suspect is resisting or fleeing." Post v. City of Fort Lauderdale, 7 F.3d 1552, 1559 (11th Cir. 1993) (citing Graham, 490 U.S. at 394). The test in excessive force cases, as developed through factually particularized precedent cases, requires the court to examine (1) the need for the application of force, (2) the relationship between the need and the amount of force used, (3) the extent of the injury inflicted, (4) whether the force used by the officer is reasonably proportionate to the need for such force which is measured by (5) the severity of the crime, (6) the danger to the officer, and (7) the risk of flight. Leslie v. Ingram, 786 F.2d 1533, 1536 (11th Cir. 1986) and Graham v. Conner, supra at 396.

In excessive force cases, this Court has consistently denied qualified immunity to police officers whose acts were plainly excessive, wholly unnecessary, and grossly disproportionate under Graham. Additionally, this Court has been consistent in denying qualified immunity when the arrestee had been subdued, handcuffed, or confined, and posed no risk of danger or flight. See generally, Vineyard, supra; Priester v. City of Rivera Beach, 208 F.3d 919 (11th Cir. 2000); Slicker v. Jackson, 215 F.3d 1416 (11th Cir. 2000); Smith v. Mattox, 127 F.3d 1416 (11th Cir. 1997) and Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002).

This Court recognized that a woman sitting in the back seat of a police patrol car, handcuffed behind her back, had a right to be free from excessive force under the Fourth Amendment. This Court should also recognize that two young men sitting handcuffed to a bench in the Pike County Jail also have the right to be free from excessive force under the Fourth Amendment. No 11th Circuit case in which qualified immunity was granted, involved the infliction of severe, and disproportionate force after the arrest had been fully affected, the arrestee fully secure, and all danger vitiated. The facts of this case are well outside the realm of cases in which the 11th Circuit has granted qualified immunity on the ground that the force used and the injury sustained were de minimus. Here the force, threats, intimidation, and racial epithets used by Stephens go so far beyond the hazy border between excessive and acceptable force so that Stephens had to know he was violating the Constitution.

D. <u>Stephens should not be granted qualified immunity based on the Plaintiffs' alleged resistance.</u>

Appellant argues in his brief to this en banc court that Stephens' use of force was justified because Plaintiffs were not "complying with his directions." [Appellant's En Banc Brief page 20] Additionally, the panel reviewing the District Court's ruling gave Stephens the benefit of the doubt and held that Plaintiffs' resistance justified the use of force.

This en banc panel of judges cannot, as a matter of law, give Stephens the benefit of a favorable inference in a summary judgment motion. Plaintiffs are entitled to all favorable inferences pursuant to Fed.R.Civ.P. 56.

Stephens testified under oath that he ordered both plaintiffs to remove their clothing so he could observe them from both the front and back. According to Stephens' sworn testimony, both Plaintiffs complied and offered no resistance whatsoever. [R. 45, (Stephens depo 78-86)] Stephens unequivocally denies he used any force whatsoever to compel obedience. Stephens denies using any racial epithets, hitting or choking either Plaintiff, or intimidating them with the threat of prison rape. Stephens denies using any object to spread Plaintiffs' buttocks or to lift their testicles so he could see if they were concealing drugs or contraband. [R. 45, (Stephens depo 78-88)] Therefore, it is absurd for Stephens to argue to this court that if any force was necessary to compel obedience, such force was justified because of Plaintiffs' resistance. It would be even more absurd for this Court to accept such an argument in the face of Stephens' sworn testimony that is diametrically opposed to the story told by Plaintiffs. Plaintiffs' description of the events of January 22, 1999 is equivalent to a sexual assault and battery in which they were humiliated, dominated and controlled by Stephens with such violence and such malice and oppression to conjure up images of Bull Conner. It is inconceivable that in a summary judgment setting, where Plaintiffs are supposed to

be given the benefit of every reasonable inference, that the story told by Plaintiffs leads any judge on this panel to conclude that Stephens' actions and words were justified. The panel who gave Stephens credit for the reasonable use of force should be ashamed of themselves.

Stephens would have this en banc Court ignore his sworn testimony and give him the benefit of a favorable inference that his use of force was justified. Historically, this Court would scrutinize the facts of each case in order to find a reason to grant immunity to a police officer because no other police officer had previously committed a constitutional violation in exactly the same manner. As Professor Brown's amicus brief discusses, "interlocutory appellate review is not the proper time for drawing conclusions about the reasonableness of a police officer's force." This Court should not, and cannot, as a matter of law, give the moving party the benefit of the doubt. All reasonable inferences must be construed in Plaintiffs' favor, not in Stephens' favor. Whether Stephens used any force, and whether the use of force was reasonable, should be left for the determination of a jury who are charged to judge the credibility of the witnesses. This Court should affirm the trial court's ruling that a genuine issue of material fact prohibits the granting of qualified immunity to Stephens.

E. <u>Stephens should not be granted qualified immunity based on the lack of permanent physical injury to Plaintiffs.</u>

At oral argument, the panel asked Plaintiffs' counsel to address whether a Plaintiff can recover for a constitutional violation if there were no injuries to Plaintiff. This Court can review the record and conclude that there were physical injuries to Plaintiffs although there were no permanent injuries.

Even without physical injury, a plaintiff can recover for personal humiliation, embarrassment, and mental distress as a result of a deprivation of constitutional rights in a §1983 case. Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979).

VII. CONCLUSION

Based on the foregoing argument and authority, this Court should affirm the ruling of the District Court denying summary judgment to Stephens on the basis of qualified immunity.

Defendant/Appellant and Amici supporting him urge this Court to issue a ruling in this case that authorizes blanket strip searches at jail facilities. In opposition, Plaintiffs/Appellees adopt and incorporate by reference Professor Brown's argument and authorities cited in Section II of his brief filed on behalf of Amicus American Civil Liberties Union.

Respectfully submitted this 25 day of June, 2004.

CHRIS JENSEN
Georgia Bar No. 391250

CLARK E. GULLEY
Georgia Bar No. 315191
Attorneys for Plaintiffs/Appellees

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type/volume limitation set forth in F.R.A.P. 32(a)(7)(B). This brief contains 7,145 words, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii).

Chris Jensen /bm

CHRIS JENSEN
GA Bar No. 391250
Attorney for Plaintiffs/Appellees

1447 Peachtree Street, NE
Suite 1009
Atlanta, GA 30309
(404) 873-5200

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing **PLAINTIFFS'/APPELLEES' ANSWER BRIEF** on opposing counsel by placing same in the U.S. Mail with adequate postage affixed thereon and addressed as follows:

RICHARD A. CAROTHERS, ESQ.
THOMAS M. MITCHELL, ESQ.
Carothers & Mitchell, LLC
Suite 200
4350 South Lee Street
Buford, GA 30518

This 25th day of June, 2004.

Chris Jensen /bm

CHRIS JENSEN
State Bar No. 391250

1447 Peachtree Street, NE
Suite 1009
Atlanta, GA 30309
(404) 873-5200