APPEAL NO. 02-16424-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETER EVANS and DETREE JORDAN

Plaintiffs-Appellees

vs.

CITY OF ZEBULON, GA. and ROBERT LOOMIS,
Individually and in his Official Capacity as
Police Chief of the City of Zebulon, GA.
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

EN BANC AMICUS CURIAE BRIEF OF JANET HICKS IN SUPPORT OF PLAINTIFFS – APPELLEES EVANS AND JORDAN

AMICUS HEREIN SUPPORTS RETENTION OF A REASONABLE SUSPICION REQUIREMENT FOR STRIP SEARCHES OF PRETRIAL DETAINEES INTRODUCED INTO GENERAL JAIL POPULATIONS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to the United States Court of Appeals for the Eleventh Circuit Rule 26.1, the undersigned counsel for Amicus Curiae Janet Hicks certifies that the following is a full and complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

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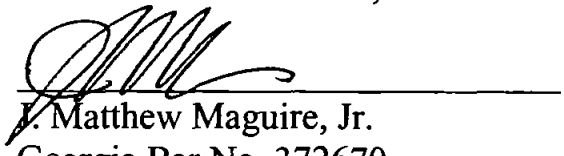

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IDENTIFICATION OF AMICUS CURIAE

Janet Hicks, a citizen of Habersham County, Georgia, is an amicus curiae in this case. Ms. Hicks has an interest in this case because she was strip searched and placed in a general jail population much like the Plaintiffs – Appellees in the present case. Her case is Hicks v. Moore, et al., 11th Circuit Docket No. 03-13686-II, which is presently on interlocutory appeal to this Court from the district court's denial of qualified and official immunity.

Ms. Hicks has an interest in this case because this Court has advised that it intends to hold its decision in her case until after *en banc* disposition of the present appeal. Ms. Hicks was invited by the Court to petition for permission to file this Brief, which she does pursuant to her *Motion to File Amicus Curiae Brief*, filed simultaneously herewith.

STATEMENT OF THE ISSUES

I. Whether arrestees who are to be placed in the general jail population can constitutionally be subjected to a strip search only if the search is supported by reasonable suspicion of the possession of weapons or contraband.

II. Whether the District Court properly denied qualified immunity to officer Stephens.

AMICUS CURIAE WILL ONLY ADDRESS THE FIRST ISSUE.

SUMMARY OF ARGUMENT

Dispensing with the requirement for an individualized and articulable reasonable suspicion that a pretrial detainee is concealing drugs or contraband before subjecting the detainee to a strip search violates the U.S. Supreme Court's holding in Bell v. Wolfish, 441 U.S. 520 (1979). The Bell holding requires courts to consider and weigh "the scope of the particular intrusion, the manner in which it was conducted, the justification for initiating it, and the place in which it was conducted." Id. at 559.

The Bell balancing test is required because, as this Court has acknowledged, "strip searches represent a serious intrusion upon personal rights." Justice v. City of Peachtree City, 961 F.2d 188, 192 (11th Cir. 1992) (Strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, [and] signifying degradation and submission").

Because of the invasiveness of strip searches, the Eleventh Circuit has ruled on four separate occasions that pretrial detainees may not be strip searched absent an articulable and reasonable suspicion that the detainee is concealing weapons or contraband. See Justice, 961 F.2d at 192; Skurstenis v. Jones, 236 F.3d 678, 682 (11th Cir. 2000), Wilson v. Jones, 251 F.3d 1340, 1343 (11th Cir. 2001) and Cuesta v. School Bd. of Miami-Dade County, Fla., 285 F.3d 962, 969 (11th Cir. 2002).

Even if this Court could ignore the U.S. Supreme Court's decision in Bell, there is no good reason to depart from twelve years of well-reasoned Eleventh Circuit holdings that require strip searches to be supported by reasonable suspicion. Incidentally, all nine of the remaining federal circuit courts to address this issue have also ruled that reasonable suspicion is required. See, e.g., Swain v. Spinney, 117 F.3d 1 (1st Cir. 1997); Cottrell v. Kaysville City, Utah, 994 F.2d 730 (10th Cir. 1993); Masters v. Crouch, 872 F.2d 1248 (6th Cir. 1989); Weber v. Dell, 804 F.2d 796 (2d Cir. 1986); Stewart v. Lubbock County, Tex., 767 F.2d 153 (5th Cir. 1985), cert. denied, 475 U.S. 1066 (1986); Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984); Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983); Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982); Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981).

ARGUMENT AND CITATIONS TO AUTHORITY

I. ARRESTEES WHO ARE TO BE PLACED IN GENERAL JAIL POPULATIONS CAN ONLY BE SUBJECTED TO A STRIP SEARCH IF THE SEARCH IS SUPPORTED BY REASONABLE SUSPICION THAT THE ARRESTEE POSSESSES WEAPONS OR CONTRABAND.

This Court has long held that police officers must have "reasonable suspicion" that a pre-trial arrestee possesses weapons or contraband before they may be strip searched. Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992) ("Consequently, we hold that law enforcement officers may conduct a strip

search of a juvenile in custody, even for a minor offense, based upon reasonable suspicion to believe that the juvenile is concealing weapons or contraband"). This Court has restated that rule on several occasions since 1992. See, e.g., Skurstenis v. Jones, 236 F.3d 678, 682 (11th Cir. 2000) ("This [blanket strip search policy], which does not require any reasonable suspicion, does not comport with the requirements of the Fourth Amendment"); Wilson v. Jones, 251 F.3d 1340, 1343 (11th Cir. 2001) ("Because Wilson was strip searched absent reasonable suspicion, we hold that the search of Wilson, as well as the jail's policy authorizing her search, violated the Fourth Amendment prohibition against unreasonable searches and seizures"); and Cuesta v. School Bd. of Miami-Dade County, Fla., 285 F.3d 962, 969 (11th Cir. 2002) ("Both cases [Skurstenis and Wilson] make clear that the Fourth Amendment requires jail officials to have 'reasonable suspicion' that an arrestee is concealing weapons or contraband before they can perform a strip search").

All nine of the other federal circuits to reach this issue subscribe to this Circuit's "reasonable suspicion" requirement for pretrial detainee strip searches. See Swain v. Spinney, 117 F.3d 1 (1st Cir. 1997); Cottrell v. Kaysville City, Utah, 994 F.2d 730 (10th Cir. 1993); Masters v. Crouch, 872 F.2d 1248 (6th Cir. 1989); Weber v. Dell, 804 F.2d 796 (2d Cir. 1986); Stewart v. Lubbock County, Tex., 767 F.2d 153 (5th Cir. 1985), cert. denied, 475 U.S. 1066 (1986); Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984); Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th

Cir. 1983); Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982); Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981).

Each of those decisions has its foundation in the U.S. Supreme Court case of Bell v. Wolfish, 441 U.S. 520 (1979). The issue presented in Bell was whether pretrial detainees, i.e., those charged with a crime but not yet tried on the charge, may be subjected to strip searches and visual cavity searches following contact visits with outsiders. Id. at 558. In addressing that issue, the Court recognized that a "detention facility is a unique place fraught with serious security dangers," see id. at 559, but also that strip searches are invasions of personal privacy. Id. at 558-559. The Court held that searches of pretrial detainees must be reasonable, and reasonableness is to be determined on a case by case basis by balancing "the need for the particular search against the invasion of personal rights that the search entails." Id. at 559.

The Bell holding is consistent with Supreme Court cases dealing with searches and seizures generally. See Terry v. Ohio, 392 U.S. 1, 18 n.15 (1968) (The more intrusive the search, the closer governmental authorities must come to demonstrating probable cause for believing that the search will uncover the objects for which the search is being conducted). As this Court has acknowledged, strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying,

unpleasant, embarrassing, repulsive, [and] signifying degradation and submission." Justice, 961 F.2d at 192 (citing Mary Beth G., 723 F.2d at 1272).

Appellant in this case is asking this Court to ignore the mandate in Bell v. Wolfish by giving jailers carte blanche to strip search all pretrial detainees who might be introduced into the general jail population. See Appellant's En Banc Brief, p. 12 ("In light of the issue posed by the Court, however, Appellant Stephens suggests that the Constitution does not require articulable reasonable suspicion to conduct a strip search of a pretrial detainee who may come in contact with the general jail population").

If the U.S. Supreme Court had wanted that result, it would have said so explicitly having already recognized the inherent security risks in any detention center. See Bell, 441 U.S. at 559 (detention facilities are "fraught with serious security dangers"). Instead, the Court admonished that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." Id. at 559. Thus, the Court created a balancing test which weighs the detention center's security interests and the detainee's privacy interests, with due consideration to "the scope of the particular intrusion, the manner in which it was conducted, *the justification for initiating it*, and the place in which it was conducted." Bell, 441 U.S. at 559 (emphasis added).

In applying the justification for the strip search element of the Bell balancing test, this Court inquires into the factual circumstances of the arrest and the nature of the criminal charges. See, e.g., Justice, 961 F.2d at 194 (Officers had reasonable articulable suspicion based upon their suspicion of drinking and drug activity in area where arrest made and that plaintiff consorted with other suspected drug users, and the officers' observation that plaintiff was nervous and that she had been handed something prior to the arrest); Skurstenis, 236 F.3d at 682 (Reasonable suspicion for strip search of DUI suspect based upon officer's discovery of a .38 special handgun in her possession); and Wilson, 251 F.3d at 1343-1344 (Court found no reasonable suspicion based upon Sheriff's admission that "I don't believe we had a reason to suspect that Wilson had any contraband" and his officer's demonstrated lack of fear that plaintiff would flush any concealed substance down the toilet").

Given the Bell balancing test and explicit disavowal of a "precise definition or mechanical application" of a reasonable – and therefore constitutional – strip search, see id. at 559, this Court cannot create a bright line rule that always permits strip searches of pretrial detainees who may be introduced into the general jail population. Indeed, every federal circuit court that has passed upon the issue has ruled that the justification of "institutional security," without more, is not enough to support a blanket strip search policy of pretrial detainees. See, e.g., Thompson v.

City of Los Angeles, 885 F.2d at 1447 (9th Cir. 1989) ("Although Thompson . . . was placed into contact with the general jail population, such a factor by itself cannot justify a strip search."); Masters, 872 F.2d at 1254 (6th Cir. 1989) ("[T]he fact of intermingling alone has never been found to justify such a search without consideration of the nature of the offense and the question of whether there is any reasonable basis for concern that the particular detainee will attempt to introduce weapons or other contraband into the institution"); Mary Beth G., 723 F.2d at 1273 (7th Cir. 1983) ("[E]nsuring the security needs of the City by strip searching plaintiffs-appellees was unreasonable without a reasonable suspicion by the authorities that either of the twin dangers of concealing weapons or contraband existed").

Strip searches of pretrial detainees, conducted without an articulable, individualized suspicion that they are concealing contraband, violate the Fourth Amendment. Absent a showing of reasonable suspicion, the privacy interests of the innocent-until-proven-guilty detainee must prevail under the U.S. Supreme Court's holding in Bell v. Wolfish, supra.

CONCLUSION

This Court is bound by U.S. Supreme Court authority which does not permit a blanket strip search policy for all pretrial detainees who may be introduced into the general jail population. Instead, this Court should uphold twelve years worth of

prior Eleventh Circuit decisions which require that such strip searches be supported by an articulable and reasonable suspicion that the detainee possesses weapons or contraband.

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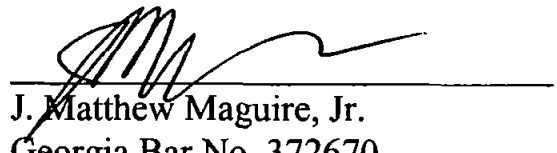

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I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 1,872 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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This is to certify that I have this date served opposing counsel in the foregoing matter with a true and correct copy of the **BRIEF OF AMICUS CURIAE JANET HICKS** by causing a copy of same to be deposited in the United States Mail with adequate postage attached thereon to the following:

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