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, ROBERT LOOMIS,
Individually and in his Official Capacity as
Police Chief of the City of Zebulon, GA,

Defendants-Appellants.

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

EN BANC AMICUS CURIAE BRIEF OF RICK MOORE, BRIAN AUSBURN, RUSSELL GOSNELL, JEANNIE CLOUATRE AND JOSHUA HIGHFILL, IN SUPPORT OF DEFENDANT-APPELLANT STEPHENS

AMICI HEREIN SUPPORT REJECTION OF A 'REASONABLE SUSPICION' REQUIREMENT FOR STRIP SEARCHES OF PRETRIAL DETAINEES INTRODUCED INTO A GENERAL JAIL POPULATION

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Rules of the United States Court of Appeals for the Eleventh Circuit, the undersigned counsel for the Defendants-Appellants 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 and 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 indefinable legal entities related to a party:

- Association County Commissioners of Georgia-Interlocal Risk Management Agency

  Insurer for Amici, Defendants-Appellees in Hicks v. Moore, et al., Eleventh Circuit Appeal No. 03-13686-II

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- Hon. William C. O'Kelley

  Judge, United States District Court for the Northern District of Georgia, presiding district court judge in Hicks v. Moore, et al., Northern District of Georgia Civil Action No. 2:02-CV-36-WCO (case presently on interlocutory appeal to the Eleventh Circuit Court of Appeals, Appeal No. 03-13686-II)

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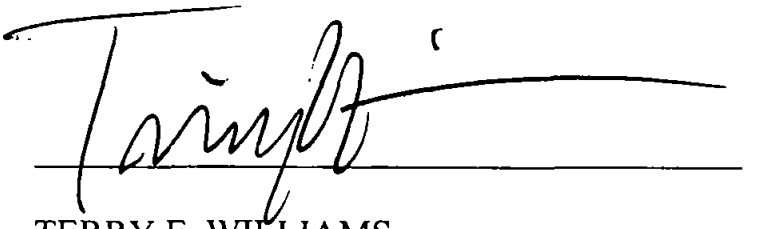

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IDENTIFICATION OF AMICI CURIAE

Amici are Rick Moore, Sheriff of Habersham County, Georgia; Habersham County Jail Captain Brian Ausburn and Habersham County Jail Sergeant Russell Gosnell, jail administrators at the Habersham County, Georgia Sheriff's Office; Jeannie Clouatre, a former Habersham County Sheriff's Office Dispatch Officer; and Joshua Highfill, a former Habersham County Detention Officer.

Amici are interested in this case for two primary reasons. First, amici are named Defendants-Appellants in Hicks v. Moore, et al., a lawsuit filed in the Northern District of Georgia under 42 U.S.C. § 1983, based on a strip search and other alleged conduct associated with the detention of Plaintiff-Appellee Janet Hicks. Hicks was a pretrial detainee arrested in April 2001 for family violence battery, and placed in the Habersham County Detention Center's general jail population overnight. Hicks v. Moore, et al. is presently on interlocutory appeal to this Court from the district court's denial of qualified immunity to amici, and denial of official immunity to amicus Highfill. Hicks v. Moore, et al., 11th Circuit Docket No. 03-136861-II. Amici understand that the panel that heard oral argument in Hicks intends to hold its decision until after *en banc* disposition of the present appeal.

Second, Sheriff Moore, Captain Ausburn and Sergeant Gosnell have

the ongoing responsibility to administer the Habersham County Detention Center so as to protect the safety of their employees, the prisoners in their custody (both pretrial detainees and convicts) and the security of the facility in general. Therefore, they have an interest in the issues presented.

Amici seek leave of Court to file this Brief, pursuant to their *Motion to File Amicus Curiae Brief*, filed simultaneously herewith. By letter dated April 27, 2004 from En Banc Case Manager Matt Davidson, these parties were invited by the Court to petition for leave to file this Brief.

STATEMENT OF THE ISSUES

The issues posed by this Court for *en banc* review are:

I. **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**; (emphasis in original)

II. 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.

AMICI HEREIN ADDRESS ONLY THE FIRST ISSUE.

SUMMARY OF ARGUMENT

This Court should permit arrestees who are to be detained in the general jail population to be strip searched in the manner described in Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861 (1979) and Justice v. City of Peachtree City, 961 F.2d 188, 193 (11th Cir. 1992), regardless whether the search is supported by reasonable suspicion that such a search will reveal weapons or contraband. Jail officers of the same sex should be able to perform a visual, nonintrusive unclothed search, in a private area, to ensure that arrestees who are to be detained in a general jail population do not carry concealed weapons, drugs or contraband into the jail population.

In Bell the Supreme Court struck the proper balance between institutional security and the extremely attenuated Fourth Amendment privacy rights of general jail population pretrial detainees, and declined to impose a "reasonable suspicion" requirement. This case presents a more compelling ground for a strip search than Bell. Whereas Bell considered incarcerated pretrial detainees who were strip searched after contact visits, jailers, like the officer in this case, face detainees fresh off the street. The detainees were "unknown quantities," who (unlike the Bell prisoners) had not been subject to the security measures of a jail facility. While it may be tempting to speculate that charges or circumstances of arrest bear some

relationship to the probability that a pretrial detainee may have weapons or contraband, there is no necessary logical connection, and the Supreme Court has rejected such speculative Fourth Amendment jurisprudence. United States v. Robinson, 414 U.S. 218, 234-35, 94 S.Ct. 467, 476 (1973); Bell, 441 U.S. at 546 n. 28 ("There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order.").

Additionally, the Supreme Court recognizes that law enforcement officers, the public and pretrial detainees alike are best guided by clear, consistent rules, rather than vague standards—particularly in highly recurrent yet diverse factual scenarios where the Fourth Amendment is implicated. In the general jail population context, jail officers must make critical security decisions regarding searches of pretrial detainees, keeping in mind the duties to safeguard officers, duties to general population inmates, and the security of the facility. Presently, they must also consider whether there is "reasonable suspicion" to search the detainee. Given the lack of clarity regarding what "reasonable suspicion" means in this context, jail officers and policymakers have a strong disincentive to permit even

constitutional strip searches, thus compromising officer and prisoner safety and jail security.

In short, Bell v. Wolfish, which permits limited visual strip searches of general population pretrial detainees without reasonable suspicion, provides the bright line rule that is needed in this circumstance. For the limited context of general population strip searches, there is no compelling reason to deviate from Bell by imposing a "reasonable suspicion" requirement.

ARGUMENT AND CITATIONS TO AUTHORITY

INTRODUCTION

This Brief addresses only the first issue for *en banc* review, specifically:

> 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.

These amici answer in the negative. Specifically, amici submit that the Court should adopt the rule that jail officials may perform the nonintrusive visual searches described in Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) and Justice v. City of Peachtree City, 961 F.2d 188, 193 (11th Cir. 1992), on pretrial detainees before their entry into a general jail population—without a requirement of particularized reasonable suspicion—for purposes of safety and security.

I. THE "REASONABLE SUSPICION" STANDARD FOR GENERAL POPULATION PRETRIAL DETAINEES SUBSTANTIALLY COMPROMISES JAIL SECURITY AND UNDULY RESTRICTS A REASONABLE LAW ENFORCEMENT PROCEDURE

The Supreme Court's controlling opinion regarding strip searches of pretrial detainees is Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861 (1979). In Bell, the Supreme Court upheld a jail policy that required visual unclothed body cavity searches of general population pretrial detainees after contact

visits from outside parties. Id. at 560. On first glance, Bell provides only guidelines for general population strip searches:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell, 441 U.S. at 559.[1] Close analysis, however, reveals that Bell's holding controls the first *en banc* issue.

The Supreme Court's holding in Bell v. Wolfish, under factually concrete circumstances, provides the clear, controlling rule that strikes the proper balance between a general population pretrial detainee's individual rights and jail security. Bell permitted the following type of strip search of general population pretrial detainees, without imposing a "reasonable suspicion" standard:

> If the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates also are visually inspected. The inmate

[1] Importantly, Bell cites a number of cases for this proposition, including United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074 (1976), United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574 (1975) and Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968)—all of which recognize a Fourth Amendment "reasonable suspicion" standard. Yet the Bell Court implicitly rejected Justice Powell's call for imposition of a "reasonable suspicion" requirement on visual body cavity searches. Bell, 441 U.S. at 563 (Powell, J., dissenting in part).

> is not touched by security personal at any time during the *visual* search procedure.

Id. at 558 n. 39 (emphasis in original).[2] This Court has no compelling cause to depart from Bell by requiring a "reasonable suspicion" showing.

The Supreme Court acknowledged that the Fourth Amendment rights of general population pretrial detainees are no different from those of convicted prisoners.[3]

> Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. The fact of confinement as well as the legitimate goals and policies of the

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[2] See also Justice v. City of Peachtree City, 961 F.2d 188, 193 (11th Cir. 1992):

> The officers limited the search in the following manner: (1) having members of the same sex perform the search, (2) using a room where only the participants were present to conduct the search, and (3) limited the search to exclude body cavities. Without doubt, the officers conducted the strip search in the least intrusive manner.

[3] The Seventh Circuit has concluded that convicted prisoners have no substantial Fourth Amendment right to be free from strip searches. Peckham v. Wisconsin Dept. of Corrections, 141 F.3d 694, 697 (7th Cir. 1998) ("[G]iven the considerable deference prison officials enjoy to run their institutions it is difficult to conjure up too many real-life scenarios where prison strip searches of inmates could be said to be unreasonable under the Fourth Amendment."); see also Cornwell v. Dahlberg, 963 F.2d 912, 916-17 (6th Cir. 1992) (finding that convict's Fourth Amendment strip search claim should be measured by the deferential standard of Turner v. Safely, 482 U.S. 78, 89, 107 S.Ct. 2254, 2261 (1987): "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

> penal institution limits these retained constitutional rights. There must be a mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application. **This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individual.**

Bell, 441 U.S at 545-46 (citations and internal quotations omitted). Moreover, "given the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope[.]" Id. at 557. Finally, "[a pretrial detainee's presumption of innocence] has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." Id. at 533.

The Supreme Court also recognized that a general population pretrial detainee's limited range of freedoms are retracted in light of the governmental interests at stake in prison administration.

> **[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees.** Central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves. Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.

Bell, 441 U.S at 546-47 (citations, internal quotations and footnote omitted);

see also id. at 540 ("[T]he Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees."); Hudson v. Palmer, 468 U.S. 517, 527-28, 104 S.Ct. 3194, 3201 (1984) ("A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.").

It is no secret that jail officers cannot see razor blades, LSD 'hits', crack rocks, hacksaw blades, and other contraband that is easily concealed beneath clothing and evades a standard patdown search.[4] Whereas Bell dealt with strip searches of inmates administered after contact visits, the officer in the present case (and jailers in the Eleventh Circuit generally) had to deal with pretrial detainees fresh from the street. Accordingly, this case poses even stronger security and contraband concerns than Bell, where strip searches were upheld without a "reasonable suspicion" requirement.

This Court may be encouraged by the appellees to indulge a view that persons arrested for traffic offenses or other minor violations—charges that

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[4] "Where an arrestee is wearing blue jeans or another heavy material, even the most thorough pat-down search will not necessarily turn up small items such as several hits of LSD on postage stamps, a small rock of crack cocaine, or a razor blade." Kraushaar v. Flanigan, 45 F.3d 1040, 1046 (7th Cir. 1995).

do not suggest weapons or contraband—have little or no probability of secreting weapons or other problematic materials into a general jail population. But charges or circumstances of arrest bear no necessary relationship to the level of danger posed by a pretrial detainee. For example, "Al Capone ... was nailed for income-tax evasion, not for the bootlegging, loan-sharking, extortion, and prostitution that generated the income," United States v. Ytem, 255 F.3d 394, 397 (7th Cir. 2001), nor for the bloody mob activities for which he is infamous.

Moreover, the Supreme Court long ago rejected a Fourth Amendment jurisprudence of speculation regarding the probability that a detainee may possess weapons.

> Nor are inclined [*sic*], on the basis of what seems to us to be a rather speculative judgment, to qualify the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes. **It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station** than in the case of the relatively fleeting contact resulting from the typical Terry-type stop.

United States v. Robinson, 414 U.S. 218, 234-35, 94 S.Ct. 467, 476 (1973) (emphasis supplied).

Similarly, "it is scarcely open to doubt" that pretrial detainees who are

dangerous in the back of an officer's patrol vehicle, remain dangerous when set loose in a general jail population. In fact, they are more dangerous when unrestrained and surrounded by potential accomplices (or victims, whichever the case may be) in a general jail population. See also Bell, 441 U.S. at 546 n. 28 ("There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order.").

II. THE PUBLIC, PRETRIAL DETAINEES, AND JAIL OFFICIALS ARE BEST SERVED BY A BRIGHT LINE RULE THAT PERMITS THE GENERAL POPULATION INMATE SEARCHES DESCRIBED IN BELL v. WOLFISH

The Supreme Court recognizes that clear rules are highly desirable in the Fourth Amendment context. "[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." Atwater v. City of Lago Vista, 532 U.S. 318, 347, 121 S.Ct. 1536, 1553 (2001).

Elsewhere, the Supreme Court has stated that " '[a] highly sophisticated set of [Fourth Amendment] rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline

distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.' " New York v. Belton, 453 U.S. 454, 458, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (quoting LaFave, "*Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S.Ct.Rev. 127, 141).

Indeed, "the protection of the Fourth and Fourteenth Amendments 'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.' " Id. (quoting LaFave, 1974 S.Ct.Rev. at 142). See also United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 477 (1973) (adopting a clear, uniform Fourth Amendment search rule, and stating "how and where to search the person of a suspect whom [an officer] has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance.").

It is also pertinent to observe that most jail officers are not legal scholars, and cannot readily understand and apply arcane legal distinctions and vague standards. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance

the social and individual interests involved in the specific circumstances they confront." Dunaway v. New York, 442 U.S. 200, 213-214, 99 S.Ct. 2248, 2256-57 (1979). "[D]efendant [officers] are not usually lawyers and ... they do not have 'familiarity with the contents of the Federal Reporter.' " Lintz v. Skipski, 25 F.3d 304, 305-06 (6th Cir. 1994) (quoting Davis v. Holly, 835 F.2d 1175 (6th Cir.1987)).

Accordingly, a bright line rule that permits limited, reasonable strip searches of general population pretrial detainees is the best way to protect jail workers and general population inmates, particularly in light of the serious safety and inmate control concerns that mark prison administration. Jail officials must make difficult security decisions under uncertain circumstances, and therefore need to be able to perform limited strip searches of general population inmates without the fear that they will be second-guessed in a subsequent legal proceeding. A few of the many concerns that face jailers are as follows.

"The administration of a prison ... is 'at best an extraordinarily difficult undertaking.' " Hudson v. Palmer, 468 U.S. 517, 527, 104 S.Ct. 3194, 3200 (1984) (quoting Wolff v. McDonnell, 418 U.S. 539, 566, 94 S.Ct. 2963, 2979 (1974)).

> A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other

> contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record, App. 71-76, and in other cases.

Bell, 441 U.S. at 559.

Jail officials must manage general population inmates while outnumbered and facing a variety of competing constitutional and institutional mandates, including protecting society, themselves, and the inmates. Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) ("Primary responsibility of jails is to protect society from those considered dangerous. Likewise inmates must be protected from each other. Sufficient security is therefore a necessity for any jail.").

In addition to multiple levels and types of physical protection, jailers must provide inmates with, *inter alia*, basic necessities, medical care, First Amendment protections and due process—or face personal liability.[5] See, e.g., Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 1982-83 (1994) (requirement to protect from other inmates); Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 290 (1976) (requirement to provide necessary medical care);

[5] The cases that follow are not cited for the proposition that inmates enjoy frequent success in civil rights lawsuits. Rather, the cases stand for the proposition that inmates—pretrial detainees and convicts alike—have a panoply of actionable civil rights, which jailers are obligated to understand and respect, and which can breed substantial and costly litigation—even if ultimately meritless or barred by immunity.

Cagle v. S 334 F.3d 980 (11th Cir. 2003) (jail suicide claim); Bass v. Perrin, 170 F.3d 1312, 1318 (11th Cir. 1999) (due process claim); Wilson v. Blankenship,163 F.3d 1284 (11th Cir. 1998) (claims based on failure to provide access to law library, inadequate exercise space and administrative isolation); Mitchell v. Farcass, 112 F.3d 1483, 1490 (11th Cir. 1997) (claim based on alleged retaliation for exercise of First Amendment rights); Hamm v. DeKalb County, 774 F.2d 1567 (11th Cir.1985) (jail conditions claim); Miller v. Carson, 563 F.2d 741 (5th Cir. 1977) (jail conditions class action); Hunt v. Reynolds, 974 F.2d 734 (6th Cir. 1992) (claim of harm due to exposure to secondhand tobacco smoke).

Jail officials must maintain order while keeping themselves and inmates from bodily harm, from inmates who frequently have little or nothing to lose by assaulting them or otherwise creating chaos. See, e.g., United States v. Bradford, 237 F.3d 1306 (11th Cir. 2001) (prosecution of inmate after she jabbed one officer with mop handle and threw cup of urine on another; officer was doused with urine just after inmate requested AIDS (Acquired Immune Deficiency Syndrome) and herpes test); White v. Lemacks, 183 F.3d 1253, 1254 (11th Cir. 1999) (female jail nurses savagely beaten by pretrial detainee; nurses then sued sheriff and deputy); Hardin v. Stynchcomb, 691 F.2d 1364, 1375 (11th Cir. 1982) (Clark, J., dissenting)

("Deputies in the male division of the jail are subjected to daily verbal and, in some instances, physical abuse by inmates. Inmates have been known to throw urine on the deputies as they pass the cells, and physically confront and attack deputies on occasion.").

Jailers must deal with all these concerns in a stressful environment, all too frequently with limited or inadequate funding and staff. This Court should be mindful of all these factors when determining what limits to place on their ability to protect their safety, the safety of general population inmates and the safety of other jail personnel who must deal with such inmates.

This Court's 2001 panel ruling requiring "reasonable suspicion" for a strip search, apparently even when the detainee is placed in a general jail population,[6] opened a new front of liability for jail officers in the Eleventh Circuit and unreasonably restricted jailers' ability to protect the safety and security of a detention facility. As the Supreme Court recognized in Bell v. Wolfish, a visual strip search is an effective tool for ensuring jail safety, security and order, and deterring smuggling of contraband into general jail populations. Jailers' ability to conduct such searches should not be dissolved in the opaque pool of "reasonable suspicion."

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6 Wilson v. Jones, 251 F.3d 1340 (11th Cir. 2001).

The Supreme Court has recognized that the threat of litigation for alleged failure to comply with an uncertain standard creates a disincentive to adequate law enforcement and a consequent threat to officer safety, even where qualified immunity may ultimately protect the officer from liability.

> The doctrine of qualified immunity is not the panacea the dissent believes it to be. See *post,* at 1564-1565. As the dissent itself rightly acknowledges, even where personal liability does not ultimately materialize, the mere "specter of liability" may inhibit public officials in the discharge of their duties, *ibid.* for even those officers with airtight qualified immunity defenses are forced to incur "the expenses of litigation" and to endure the "diversion of [their] official energy from pressing public issues," Harlow v. Fitzgerald, 457 U.S. 800, 814, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Further, and somewhat perversely, the disincentive to arrest produced by [the plaintiff's] opaque standard would be most pronounced in the very situations in which police officers can least afford to hesitate: when acting "on the spur (and in the heat) of the moment," *supra,* at 1553. We could not seriously expect that when events were unfolding fast, an officer would be able to tell with much confidence whether a suspect's conduct qualified, or even "reasonably" qualified, under one of the exceptions to [the plaintiff's] general no-arrests rule.

Atwater v. City of Lago Vista, 532 U.S. 318, 351 n. 22, 121 S.Ct. 1536, 1556 n. 22 (2001) (rejecting litigant's proposed tests for when warrantless arrests for minor offenses should or should not be permissible).

Similar to the arrest scenario considered in Atwater, jail officials are frequently required to make hurried security decisions with little initial information regarding the persons with whom they must deal. Jailers most

frequently receive pretrial detainees directly from the streets and they do not know the detainees or their history. Most often the jail officers do not participate in the arrest, and do not know the circumstances under which the arrest was made.

Except for the three factual scenarios where strip searches were upheld by this Court,[7] there is no guidance as to what "reasonable suspicion" for a strip search means in any given circumstance.[8] And, given the legal consequences, it is unlikely that informed officers will be willing to risk liability to find out. It is easier and less expensive to discontinue strip searches than to defend lawsuits. This litigation threat ultimately raises the danger and contraband levels in general jail populations.

Even where qualified immunity protects individual officers, the agency or supervisor for whom the officer works can still be liable. See generally Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978) (entity liability); Gold v. City of Miami, 151 F.3d 1346 (11th Cir. 1998) (entity liability for failure to train); Belcher v. City of

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[7] Cuesta v. School Bd. of Miami-Dade County, Fla., 285 F.3d 962 (11th Cir. 2002); Skurstenis v. Jones, 236 F.3d 678 (11th Cir. Dec. 28, 2000); Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992).

Foley, Ala., 30 F.3d 1390 (11th Cir. 1994) (supervisor personal liability). In sum, the "reasonable suspicion" standard provides policymakers with a strong disincentive to permit any detainee to be strip searched—no matter how reasonable the circumstances.

Similar uncertainty applies to pretrial detainees and the general public. "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." New York v. Belton, 453 U.S. 454, 459-60, 101 S.Ct. 2860, 2864 (1981).

Accordingly, the public, pretrial detainees and jail officials will benefit from a rule that is clear and easily applied, and which accounts for the substantial pressures, dangers and competing interests to which jail officials and general population inmates are exposed. Allowing a visual strip search of any detainee to be housed in a general population area will provide such a clear rule, while protecting all concerned.

In fact, Bell v. Wolfish and this Court's decision in Justice v. City of

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[8] Lest this Court be led to believe that the familiar "reasonable suspicion" language is in any sense self-defining, the volumes written after 20 plus years of litigation over the meaning of that phrase—in federal and state courts—tell a different story.

Peachtree City, 961 F.2d 188, 193 (11th Cir. 1992), provide the ground for such a simple rule for general population pretrial detainees. This Court should permit nonintrusive, visual strip searches of pretrial detainees who are introduced into a general jail population—regardless of reasonable suspicion—where the search is conducted by a jailer(s) of the same sex as the detainee, using a room where only the participants are present to conduct the search.

Importantly, the Supreme Court ended its opinion in Bell with a pertinent admonition:

> [T]he inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

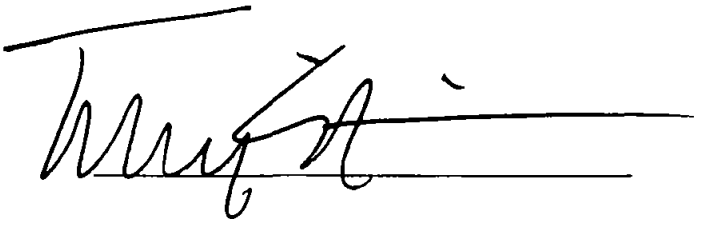
Bell, 441 U.S. at 562. Amici respectfully urge the Court to follow Bell.

CONCLUSION

For the within and foregoing reasons, this Court should permit arrestees who are to be detained in the general jail population to be strip searched in the manner described in Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861 (1979) and Justice v. City of Peachtree City, 961 F.2d 188, 193 (11th Cir. 1992), regardless whether the search is supported by reasonable suspicion that such a search will reveal weapons or contraband.

Respectfully submitted,

TERRY E. WILLIAMS AND ASSOCIATES, P.C.



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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 4,734 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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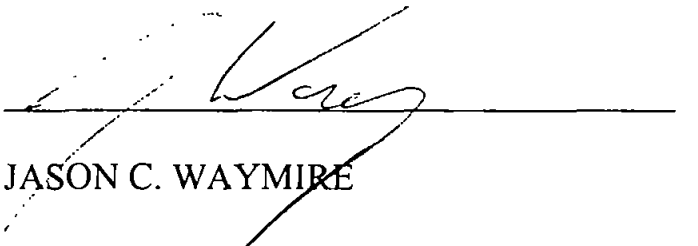

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **AMICUS CURIAE BRIEF OF RICK MOORE, BRIAN AUSBURN, RUSSELL GOSNELL, JEANNIE CLOUATRE AND JOSHUA HIGHFILL** upon all parties by depositing a true a correct copy of the same in the United States Mail, proper postage prepaid, addressed as follows:

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