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02-16424DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NO. 02-16424-DD

DENIS STEPHENS,

Defendant/Appellant,

vs.

PETER EVANS and DETREE JORDAN,

Plaintiffs/Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

PREFERENCE: CIVIL APPEAL

PLAINTIFFS'/APPELLEES' ANSWER BRIEF

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DISCLOSURE STATEMENT

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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. Oral argument in this case might be appropriate to allow the Court to address any questions concerning the evidence of this police officer's discretionary authority. 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 will be whether qualified immunity is appropriate to a police officer who conducts a body cavity strip search in an abusive fashion after his Chief of Police had told him not to conduct any strip searches. 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 arrested for a minor traffic violation.

CERTIFICATE OF TYPE SIZE AND STYLE

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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

Whether Stephens' discretionary authority to conduct strip searches had been revoked by Chief Lummus' verbal standing order.

Whether Stephens had a reasonable suspicion or an arguable reasonable suspicion to believe that Plaintiffs/Appellees Peter Evans and Detree Jordan [Evans and Jordan] were concealing drugs.

Whether, assuming Plaintiffs' version of the facts, the strip search, or the manner in which Stephens conducted the strip search of Evans and Jordan violated Evans and Jordan's constitutional rights.

Whether Evans and Jordan had a clearly established right to be free from an unreasonable strip search and free from the use of excessive force while in the custody of Stephens.

Whether Stephens is entitled to qualified immunity.

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. Discovery proceeded, and near the end of discovery, Evans and Jordan requested leave of Court to file an Amended Complaint by consent of the parties. The Amended Complaint was filed on March 29, 2002. [R. 19]

All Defendants moved for Summary Judgment.

The District Court granted summary judgment to Stephens on Plaintiff's false arrest claim. The District Court denied Stephens' summary judgment on Plaintiffs' Fourth Amendment strip search claims because Stephens did not have a reasonable suspicion to conduct a strip search and, assuming the version of the facts as alleged by Plaintiffs, the strip search was conducted in an unreasonable manner.

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 based on its finding of insufficient evidence to demonstrate a fact question as to Lummus' deliberate indifference to constitutional rights.

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)] Stephens' patrol car was equipped with a video camera and recorder. [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 testified he had a "reasonable hunch" that the driver could be DUI. [R. 45, (Stephens depo 133)] Stephens asked Evans if he had been drinking. Evans said he had not been drinking. [R. 42, (Joint Defense Exhibits (JDE) 5, 20:02:15-16)] 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 testified that it was his normal practice to display any open alcohol containers for the video camera for use at trial later and to confiscate the containers as evidence of a crime. [R. 45, (Stephens depo 149-50)] During the searches of Plaintiffs' car Stephens did not mention or produce for the videotape any contraband or open alcoholic beverage containers. [R. 45, (Stephens depo 149-50)]

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 gave Evans a copy of a Uniform Traffic Citation for speeding. [R. 42, (JDE 5, 20:20:15-20:21:20)] After Evans refused to submit to a state administered breath test, Stephens 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 placed Jordan under arrest 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 testified that he did not conduct a search of Jordan or Evans around the groin area and below the waist even though nothing prevented him from doing so other than his lack of

experience, and not being trained how to do a search around the groin area of a male arrestee. [R. 45, (Stephens depo 91-92)]

Stephens admitted he had no reasonable suspicion that Jordan was armed, or had any contraband concealed on his person. [R. 45, (Stephens depo 14, 90)] Stephens admitted that he never had a reasonable suspicion that either Evans or Jordan was concealing weapons or concealing drugs in any body cavity. [R. 45, (Stephens depo 90-91)]

Stephens told Jordan that he did not know what the active warrant was for, and stated, "If it comes back that its not you on that warrant I will release you." [R. 42, (JDE 5, 20:25:00-20:26:04)]

After Evans and Jordan were secured in the back seat of his patrol car, Stephens thoroughly searched the passenger compartment two more times, searched the trunk of Plaintiff's 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 both men to the Pike County Jail. [R. 45, (Stephens depo 14-15)] Stephens did not learn any additional information after Jordan's arrest that Jordan had committed any crimes or that Jordan might reasonably be concealing dangerous contraband underneath or within his clothing. [R. 45, (Stephens depo 17, 60)]

Upon arriving at the Pike County Jail, Stephens handcuffed both Evans and Jordan to a bench outside the jail booking officer's 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, testified that he reviewed the NCIC/GCIC printout showing an active warrant for man named Jordan with a similar first name. [R. 43, (Dawson depo 53)] Dawson said he personally attempted to talk to Stephens about it because the description in the 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)] Dawson encouraged Stephens to release Jordan because Jordan was not the person who was wanted on the warrant. [R. 43, (Dawson depo 54-55)] 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 testified that he conducted a strip search of Plaintiffs because they were nervous and lost. [R. 45, (Stephens depo 89)] Stephens acknowledged that

Plaintiffs told him they were lost, and that fact alone would not cause him to be suspicious that a driver or passenger were concealing drugs. [R. 45, (Stephens depo 71-2)] 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 another officer removed Evans and Jordan from the bench where they were handcuffed and took them 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)] Stephens testified that Deputy Jeff Oliver of the Pike County Sheriff's Department was present during the strip searches of Plaintiffs. [R. 45 (Stephens depo 53)] Plaintiffs testified that another officer was present and participated in the strip search but Plaintiffs could not identify Oliver by name. [R. 43, (Evans depo 13-17); R. 43 (Jordan depo 12-17)]

Oliver testified that he could not remember Plaintiffs and denied ever participating in any strip search with Denis Stephens. [R. 45, (Oliver depo 37-40)]

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 Plaintiffs' 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 has discretion to accept the facts upon which the District Court denied summary judgment. However, the Court of Appeals is not required to accept the facts stated in the District Court's order. The Court of Appeals may accept the District Court's factual findings, and additionally, may supplement those facts with evidentiary sufficiency findings of its own from the record. Cottrell v. Caldwell, 85 F.3d 1480, 1486 (11th Cir. 1996).

The Court of Appeals also reviews *de novo* the issue of evidentiary sufficiency of the facts that are part and parcel of the core qualified immunity analysis. However, 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).

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.

After considering the District Court's Order, and reviewing *de novo* the testimony of Chief Lummus and Stephens' supervisor Sgt. Tom Sheppherd, this Court should conclude that Stephens did not have discretionary authority to strip search Plaintiffs because his discretionary authority had been revoked by Chief Lummus' verbal standing order. Once this Court so finds, then the consideration of the qualified immunity issue is over, and the Court should affirm the denial of summary judgment based on qualified immunity.

In the event the Court determines that Stephens met his burden of showing he was acting within the scope of his discretionary authority, this Court should affirm the District Court's ruling that Stephens violated Plaintiffs' constitutional right to be free from unreasonable searches and the use of excessive force.

Assuming Plaintiffs' version of the facts, Stephens clearly violated Plaintiff's Fourth Amendment right by strip searching them without reasonable suspicion or even arguable reasonable suspicion to support his "hunch" that they were concealing illegal drugs. Additionally, Stephens violated Plaintiffs' constitutional right to be free from the use of excessive force by assaulting, battering, shoving, choking, and kicking them, and probing their genital and anal areas with a metal object.

As of the date of this strip search, Stephens had fair notice that Plaintiffs' rights herein were clearly established. The Fourth Amendment itself, when analyzed in light of Stephens' egregious conduct, gave fair and clear notice to Stephens that his search and use of force was unlawful. Additionally, Stephens had fair notice from the principle established in Bell v. Wolfish, infra, that abusive strip searches would not be condoned. Finally, Stephens had fair notice from prior excessive force cases, that his use of force was excessive in light of the fact that both men were already under arrest, handcuffed, confined in the Pike County Jail and posed no danger to Stephens and posed no threat of escape.

VI. ARGUMENT AND CITATION OF AUTHORITY

A. Officer Stephens is not entitled to Qualified Immunity

Police officers are entitled to qualified immunity for their official acts only if they act within the scope of their discretionary authority. "The Supreme Court

developed an objective-reasonableness test for evaluating actions of a government official claiming qualified immunity: the official's action must be evaluated against "clearly established law," consisting of statutory or constitutional rights that a reasonable person should have known." Courson v. McMillian, 939 F.2d 1479, 1487 (11th Cir. 1991) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), and Rich v. Dollar, 841 F.2d 1558 (11th Cir. 1988). In Rich, 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).

The District Court held that Stephens met his Zeigler/Rich burden because "the Zebulon police department policy manual allows officers to conduct strip searches in certain situations." [R.53, p.14-15]

The clear evidence in this case, construed in Plaintiffs' favor, compels a finding that **before** Stephens strip searched these Plaintiffs, Chief Lummus superceded the strip search policy stated in the policy manual by personally instructing Zebulon police officers, including Stephens, that strip searches were prohibited.[1] [R. 39, Affidavit of Tom Sheppherd]

The District Court took for granted that the language stated in the written policy satisfied Stephens' burden, without any apparent consideration of the verbal standing order issued by Lummus instructing Stephens not to perform any strip searches. [R. 53, 14-15] This Court must review *de novo* Chief Lummus' and Sgt. Sheppherd's testimony that establishes Stephens knew before he strip searched Plaintiffs that his authority to conduct strip searches in connection with the performance of his duties as a Zebulon police officer had been **revoked.**

1. Stephens did not have discretionary authority to conduct a strip search of Plaintiffs.

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 (Plaintiff's 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 Stephen's 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.

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[1] Stephens denied that Chief Lummus told him not to strip search traffic arrestees. [R. 45 (Stephens' depo, p 101)]

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.

2. Stephens is not entitled to qualified immunity under 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 plaintiff's 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 a 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] For the following reasons, the District Court's decision should be affirmed.

a) The Strip Search violated the Fourth Amendment.

"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.

Fourth Amendment jurisprudence 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).

Under the first part of the Saucier test, Plaintiffs must show that the facts alleged by them constitute a violation of the Fourth Amendment because the strip search was "unreasonable." Plaintiffs submit that the strip search was "unreasonable" under Fourth Amendment jurisprudence because (1) Stephens lacked reasonable suspicion to believe that Plaintiffs were concealing drugs under their clothing, (2) Stephens lacked arguable reasonable suspicion to believe Plaintiffs were concealing drugs under their clothing, and (3) as discussed in context of the second part of the Saucier analysis below, Stephens used excessive force in conducting the search.

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

The District Court considered the facts proposed by Stephens to support his belief that Plaintiffs were concealing drugs beneath their clothing.[2] 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: (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.

(2) 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. Stephens advances the theory that if no Court has ruled on a particular set of facts as establishing that no reasonable suspicion for a strip search exists, then the police officer should be granted qualified immunity if he had arguable reasonable suspicion.

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[2] Stephens admitted that he never suspected either Evans or Jordan of concealing any weapons under their clothing. [R. 45 (Stephens depo, 90-91)]

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 "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 the factors listed by Stephens [rental car] supported his claim of

[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

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. This Court, reviewing *de novo* the legal sufficiency of the arguable reasonable suspicion claim, is invited to order the record sent up and review the videotape for itself.

After reviewing the videotape, this Court, as the District Court did, should conclude that no reasonable police officer could mistakenly conclude that a rental car would be legally sufficient to form a particularized and objective basis to believe Plaintiffs were concealing drugs.

Therefore, Stephens is not entitled to qualified immunity based on arguable reasonable suspicion.

b) 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

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suspicion" before a strip search could be conducted on less than probable cause.

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 when he was escorted to the room where the strip search was conducted, 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 choke hold 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

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[R. 45, (Stephens depo 50-51]

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 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). 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 words of the general principle, when analyzed in light of conduct that is "so bad" that every reasonable government official would know that the conduct was obviously unlawful, makes the right clearly established by the general principle. 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.

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 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). To determine whether the amount of force used by a police officer was proper, a court must ask whether a reasonable officer would believe that this level of force is necessary in the situation at hand. 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 (arrestee handcuffed and secured in back seat of car); Priester v. City of Rivera Beach, 208 F.3d 919 (11th Cir. 2000) (arrestee subdued on the ground guarded by a police dog, not a threat, not attempting to resist or flee); Slicker v. Jackson, 215 F.3d 1416 (11th Cir. 2000) (arrestee handcuffed, not struggling, resisting or fleeing); Smith v. Mattox, 127 F.3d 1416 (11th Cir. 1997) (officer on arrestee's back handcuffing him, arrestee not resisting) and Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002) (arrestee handcuffed and not resisting).

This Court recognized that a woman sitting, handcuffed behind her back, in the back seat of a police patrol car 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 effected, 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 that [Stephens] had to know he was violating the Constitution.

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.

Respectfully submitted this 4th day of February, 2003.

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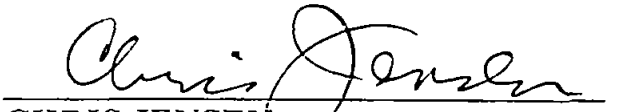

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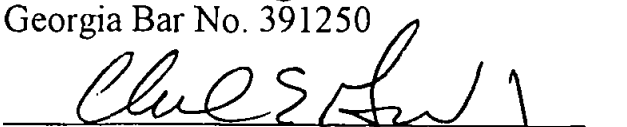

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CERTIFICATE OF SERVICE

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:

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