**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 94-41074**
**Summary Calendar**

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**WILLIAM TAYLOR,**

**Plaintiff-Appellant,**

**versus**

**TDCJ-ID, JAMES COLLINS, Director, ET AL.,**

**Defendants-Appellees.**

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**Appeal from the United States District Court**
**for the Eastern District of Texas**
**(1:94 CV 118 1)**

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March 16, 1995

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

William Taylor and other inmates at the Texas Department of Criminal Justice - Institutional Division's Stiles Unit in Beaumont, Texas, filed, pro se and in forma pauperis, a 42 U.S.C. § 1983 complaint against certain prison officials alleging, inter alia, that after a church service and concert at the prison, they were subjected to a strip search in the presence of "free world

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

church members." The plaintiffs also moved the court for appointment of counsel.

In his report and recommendation, the magistrate judge determined that the inmates' allegations did not state a violation of either the Eighth or the Fourteenth Amendments and recommended dismissal under § 1915(d) because the claims lacked any arguable basis in law or fact. Over the inmates' objections the district court agreed that the claims were frivolous and dismissed the case under § 1915(d) because

> [t]he random or routine strip search of inmates is not unconstitutional. The additional factor of having persons not specifically employed by the prison system, but in the prison for the purpose of ministry, does not create a constitutional issue when they are allegedly present during a strip search.

Id. at 46-47. From the judgment ordering dismissal, only Taylor noticed an appeal. We must reverse and remand.

Taylor argues that the district court erred by dismissing the case as frivolous because a strip search conducted in front of "free world church members" is an unreasonable search and seizure that is violative of the Fourth and Eighth Amendments.

Under § 1915(d) a court may dismiss a complaint filed in forma pauperis "if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d). "A claim is frivolous under § 1915(d) only if it lacks an arguable basis either in law or in fact." Parker v. Fort Worth Police Dep't, 980 F.2d 1023, 1024 (5th Cir. 1993) (internal quotation and citation omitted).

This Court reviews § 1915(d) dismissals for abuse of discretion. Denton v. Hernandez, ___ U.S. ___, 112 S. Ct. 1728, 1734, 118 L. Ed. 2d 340 (1992). To determine whether a district court has abused its discretion, Denton instructs appellate courts to consider

> whether (1) the plaintiff is proceeding pro se, (2) the court inappropriately resolved genuine issues of disputed fact, (3) the court applied erroneous legal conclusions, (4) the court has provided a statement of reasons which facilitates intelligent appellate review, and (5) any factual frivolousness could have been remedied through a more specific pleading.

Moore v. Mabus, 976 F.2d 268, 270 (5th Cir. 1992) (internal quotations and citations omitted). A complaint may be dismissed as factually frivolous

> only if the facts alleged are clearly baseless, a category encompassing allegations that are fanciful, fantastic, and delusional. As those words suggest, a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them. An in forma pauperis complaint may not be dismissed, however, simply because the court finds the plaintiff's allegations unlikely.

Id. (internal quotations and citations omitted).

In Elliott v. Lynn, 38 F.3d 188 (5th Cir. 1994), (holding that although prisoners' privacy was compromised, institution-wide visual body- cavity search was constitutionally reasonable in the context of prisoners' rights under the Fourth Amendment), this Court considered the question whether the manner and place of a strip search "conducted en mass [sic] in a non-private area and in

the [presence of] non-essential personnel" was unreasonable under Fourth Amendment standards. Id. at *2. Although a prisoner's rights are diminished by legitimate penological needs, "[t]he Fourth Amendment [] requires that searches or seizures conducted on prisoners must be reasonable under all the facts and circumstances in which they are performed." Id. (internal quotation and citation omitted). A constitutionally reasonable search strikes a balance "in favor of deference to prison authorities' views of institutional safety requirements against the admittedly legitimate claims of inmates not to be searched in a humiliating and degrading manner." Id. at *191 (internal quotation and citation omitted).

In light of Elliott, the district court's dismissal was founded on an erroneous view of law and was premature. Accordingly, we **REVERSE** and **REMAND** for further proceedings.