No. ____

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

JOHN AUGUST PAULINO,
Respondent.

On Petition for Writ of Certiorari To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the police have reason to believe that a suspect is concealing cocaine between his buttocks cheeks, is it reasonable under the Fourth Amendment for the police, at the scene of the arrest, to reach into the suspect's undershorts and seize the cocaine as a search incident to the suspect's arrest?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties below.

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Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Paulino v. State*, 399 Md. 341, 924 A.2d 308 (2007) (filed June 4, 2007), reversing the judgment of the Court of Special Appeals of Maryland, is reproduced in Appendix A. (App. 1a-48a).

The unreported opinion of the Court of Special Appeals of Maryland, *State of Maryland v. John August Paulino*, No. 223, September Term, 2004 (filed July 12, 2006), affirming the judgment of the Circuit Court for Baltimore County, is reproduced in Appendix B. (App. 49a-58a).

The unreported opinion of the Circuit Court for Baltimore County in *State of Maryland v. John August Paulino*, No. 00CR3812 (rendered June 18, 2001), denying Paulino's suppression motion, is reproduced in Appendix C. (App. 59a-61a).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland reversing the judgment of the Court of Special Appeals of Maryland was filed on June 4, 2007. This petition is filed within 90 days of the date of that judgment, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 29, 2000, John August Paulino was arrested by the police and a quantity of cocaine was seized from his person pursuant to a warrantless search incident to his arrest. (App. 2a-6a, 29a). Paulino was charged with possession with intent to distribute cocaine and possession of cocaine. (App. 6a). Paulino filed a motion to suppress the cocaine that was seized from his person, and this

motion was heard in the Circuit Court for Baltimore County, by the Honorable Dana Mark Levitz, on June 18, 2001. (App. 6a, 59a).

At the suppression hearing, Detective Elliott Latchaw of the Baltimore County Community Drug and Violence Interdiction Team testified that, on September 29, 2000, the police were conducting a drug investigation based on information received from a reliable informant. (App. 2a, 29a). Latchaw provided specific examples of how the informant proved reliable in previous narcotics investigations, which resulted in the seizure of contraband and the detention of at least one distributor of cocaine. (Tr. 5-6).[1]

With regard to the investigation of Paulino, who was known to the police based on "past narcotics offenses," the reliable informant told the police that he or she had personal information that, on September 29, 2000, Paulino

> was going to be in the area of Merritt Boulevard and North Point Road, specifically the 1100 block of North Point Road, which would be a car wash, and Mr. Paulino would be traveling in a Jeep Cherokee and that he would be in possession of a quantity of crack cocaine and that he would also have it secreted in his buttocks area between his butt cheeks.

(App. 2a-3a; Tr. 7).

According to Latchaw, the informant's knowledge of Paulino's possession of crack cocaine and his impending presence at the car wash was obtained by the informant

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[1] "Tr." refers to the transcript of the suppression hearing held on June 18, 2001.

through a conversation the informant had with Paulino that same day. (Tr. 8-10). The informant knew that Paulino stashed drugs between his buttocks cheeks based on the informant's prior dealings with Paulino. (Tr. 10-11). The informant did not tell the police the quantity of drugs Paulino would have in his possession. (Tr. 8, 10).

The police set up surveillance at the stated car wash on the evening of September 29. (App. 2a). When asked if this location was "fairly busy at that time of night," Latchaw stated that it was not:

> Not at all. It's actually – the car wash is actually back – you pull into a parking lot, and you've got to go past an entrance to a storage facility, like those little mini storage buildings, and actually go past a – like an auto repair center. And then at the very end of this little parking lot, it's kind of like a zigzaggy entrance. Driveway kind of turns around to the left and comes back to the right, and the very back is the car wash all by itself. It's real secluded back there, actually.

(App. 3a).

At 11:14 p.m., Paulino was observed by the police sitting in the passenger seat of a vehicle that was parked in one of the car wash bays. (App. 2a-5a; Tr. 11-14). The police "blocked in" Paulino's vehicle inside the bay. (App. 3a). The police arrested Paulino, removed him from the vehicle, and searched his person. (App. 29a). Latchaw described the search as follows:

> Well, when we – when Mr. Paulino was removed from the vehicle and laid on the ground, his pants were already pretty much down around his - - below his butt, because I guess that's the fad, these

guys like wearing their pants down real low, so it was just a matter of lifting up his shorts, and - - and between his butt cheeks, the drugs were - - I believe one of the detectives actually put on a pair of gloves and just spread his butt cheeks apart a little bit and it was right there.

[DEFENSE COUNSEL]: So they were not visible before you actually spread his cheeks apart, is that correct?

LATCHAW: I don't think they were.

. . .

[DEFENSE COUNSEL]: And that's where the drugs were found.

LATCHAW: Yes sir.

(App. 5a-6a, 30a; Tr. 12-13).

During the following colloquy, Latchaw explained that, given the time and place of the search, the search was not observable to others:

[DEFENSE COUNSEL]: Were there any other people back there at that time around eleven-fifteen that evening other than yourself and Mr. Paulino?

LATCHAW: No, not that I – not that I can remember.

[DEFENSE COUNSEL]: Yourself - -

LATCHAW: Well, other units of Baltimore County Police. Right.

[DEFENSE COUNSEL]: No civilian personnel?

LATCHAW: No. Nobody was washing their cars, that I can remember.

[DEFENSE COUNSEL]: Is that a lighted area, dark area?

LATCHAW: Well lit.

> [DEFENSE COUNSEL]: Is that viewable by people in the area walking by or not really?
>
> LATCHAW: No. No, it's way back. It's back off the road. It's real secluded.

(App. 4a; Tr. 11-12).

Paulino testified that he was arrested "[i]nside of a car wash, a local car wash." (App. 5a-6a). According to Paulino, at the time he was searched, the persons present were his three friends and "about 12 other officers." (App. 5a-6a). He described the search as follows:

> They had searched me in my pockets, didn't find nothing, and eventually, they came to the subject where - - where in my report, it states that the officer said, Mr. Paulino, why is your butt cheeks squeezed? And in further response, I said nothing. He said it again, and another officer come behind with gloves and pulled my pants down and went in my ass. Well, my cheeks. Sorry about that.

(App. 6a). Paulino stated that he did not tell anyone that he was delivering drugs that day. (Tr. 17-18).

After the close of the evidence, defense counsel argued that the law required that the police conduct a "cavity" search of this kind in a private place. (Tr. 19). According to the defense, the police "should have probably removed him to a more discrete area, knowing that his drugs were allegedly where they were found." (Tr. 19).

The court determined first that the police had probable cause to arrest Paulino and also reason to suspect that Paulino was concealing drugs between the cheeks of his buttocks. (App. 59a-60a). The court denied the motion to suppress and stated the following reasons:

> Now, I'm not convinced that this was a body

> and cavity search, quite frankly, not on the evidence I've heard presented to me, because somebody that has a bag of drugs concealed in their pants and happens to have it between their cheeks of their buttocks doesn't mean that it's in their body cavity. And quite frankly, it seems to me, from the evidence I've heard, I'm not convinced that that's so, so I'm not really concerned about the cases that talk about body cavity searches, going into someone's body cavities to determine or find the drugs.
>
> It seems to me that the police have probable cause to conduct the search they did and recover the cocaine they did. So the motion to suppress evidence is denied.

(App. 60a).

Paulino was tried by the court on an agreed statement of facts and, on July 3, 2001, the court, the Honorable James T. Smith, convicted Paulino of possession of cocaine with the intent to distribute. (App. 6a). Paulino was sentenced to a mandatory ten-year term of incarceration as a subsequent offender. (App. 6a). The Court of Special Appeals of Maryland, applying the factors outlined in *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), affirmed the suppression court's ruling, finding that the search of Paulino was a reasonable intrusion incident to his lawful arrest given the information known to the police at the time of the search. (App. 49a-58a).

The Court of Appeals of Maryland, in a 4-3 decision, reversed this ruling. (App. 9a-26a). Concluding that the police "attempted to manipulate Paulino's clothing in such a manner that his buttocks could be more readily viewed,"

and that "the officers manipulated his buttocks to allow for a better view of his anal cavity," the majority held that the search of Paulino constituted both a strip search and a visual body cavity search. (App. 14a, 16a).

The majority found that the search did not survive the *Bell v. Wolfish* test. Although accepting that the search of Paulino's buttocks was justified given the information provided to the police, the majority found that the search was nevertheless unreasonable because there existed no exigency justifying a search of this manner in the parking lot of a car wash. (App. 17a-26a). The majority's holding was influenced by the fact that, in its view, the police did not take any precautions to ensure the search could not be viewed by others present at the scene. (App. 22a-24a). In declaring the search unreasonable, the majority also noted that viable alternatives to the on-scene search existed; for instance, the police could have conducted a pat-down search for weapons at the scene of the arrest and then conducted the search inside a vehicle or at the police station. (App. 25a-26a).

Three judges joined in dissent, opining that the search of Paulino did not violate the Fourth Amendment. The dissent concluded that, because none of Paulino's clothes was removed, the search was not a strip search as that term had been defined by it and other courts. (App. 29a-30a, 37a-41a). Relying on cases with analogous circumstances, the dissent found that the search of Paulino was instead a reach-in search that was justified incident to his arrest for narcotics offenses. (App. 29a-41a).

The dissent went on to say that, even if the search constituted a strip search, it survived scrutiny under the *Bell v. Wolfish* factors because the search "was no more

intrusive than necessary to determine whether Paulino possessed drugs," and the police took reasonable precautions to protect Paulino's privacy interests. (App. 42a-46a). In this regard, the dissent noted that "there [was] no evidence that anyone saw Paulino's genitalia, nor that anyone other than the searching officer saw Paulino's buttocks." (App. 45a). The dissent pointed out that the majority's *per se* rule that strip searches must be conducted in an enclosed area was inconsistent with the standard of reasonableness set forth in *Bell v. Wolfish*. (App. 42a).

REASONS FOR GRANTING THE WRIT

This case raises important issues concerning searches incident to arrest where the police have reason to believe that a suspect is concealing contraband underneath his or her clothing. Review by this Court is necessary for at least two reasons. First, this Court has not yet defined when and under what circumstances a strip search or other search of intimate areas underneath a suspect's clothing is reasonable incident to arrest. The absence of guidance on this issue has resulted in conflict among lower courts, which unavoidably frustrates street level police action. Second, to the extent that the factors set forth by this Court in *Bell v. Wolfish* apply to determine the reasonableness of a search of intimate areas underneath a suspect's clothing incident to an arrest, the state court misapplied those factors and reached a determination that wrongly outlaws entirely reasonable police conduct.

The Maryland Court of Appeals' decision applied an incorrect standard in holding that the search of Paulino

was unreasonable. Initially, the court improperly assessed the nature of the intrusion, characterizing the search of the fully-clothed Paulino as both a strip search and a body cavity search. Moreover, the court essentially created a *per se* rule that any on-scene search of the intimate areas underneath an arrestee's clothing requires exigent circumstances and must be conducted in an enclosed area. These rulings are in direct conflict with the balancing test set forth in *Bell v. Wolfish*, and with the rulings of other courts that have considered searches of similar kind under similar circumstances. The fractured opinion below reflects the conflict among lower courts regarding how to analyze the reasonableness of searches conducted incident to arrest of a suspect believed to be concealing drugs on his or her person.

With this case, the Court can address the circumstances in which a strip search or other search of the intimate areas underneath the clothing of an arrestee may or may not be appropriate. The Court can also clarify the boundaries for conducting an on-scene search incident to an arrest where the police have reason to believe the arrestee is concealing contraband on his or her person.

I. In the absence of guidance, there is conflict in the lower courts regarding the reasonableness of a strip search, or other search underneath a suspect's clothing, incident to arrest.

This Court has recognized that a person lawfully arrested may, without a warrant, be subjected to a complete search of his or her person incident to arrest. In *United States v. Robinson*, 414 U.S. 218, 235 (1973), this

Court held that, "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." The purpose of the search incident to arrest exception is to safeguard police by allowing them to secure weapons promptly and to prevent the criminal from concealing or destroying evidence of their criminal behavior. *Chimel v. California*, 395 U.S. 752, 763 (1969); *accord United States v. Robinson*, 414 U.S. at 227 (holding that full search incident to arrest can involve "a relatively extensive exploration of the person" aimed at locating weapons or evidence that could be concealed or destroyed).

This Court has not yet addressed, however, whether the authority to conduct a full search incident to an arrest includes the authority to search intimate areas underneath a suspect's clothing, whether by a strip search or a reach-in search.[2] Indeed, this Court has not defined what constitutes a strip search or given guidance regarding the circumstances under which a strip search or reach-in search incident to arrest is reasonable. In *Illinois v. Lafayette*, 462 U.S. 640 (1983), although stating that the "interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street," *id.* at 646, this Court declined to opine on the propriety of conducting a strip search incident to an arrest, stating that

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[2] "A 'reach-in' search involves a manipulation of the arrestee's clothes such that the police are able to reach in and retrieve the contraband without exposing the arrestee's private areas." (App. 24a, *citing United States v. Williams*, 477 F.3d 974, 977 (8th Cir. 2007)).

it was "not addressing in *United States v. Edwards*, 415 U.S. 800 (1974), and do[es] not discuss here, the circumstances in which a strip search of an arrestee may or may not be appropriate." 462 U.S. at 646 n.2.

Although this Court has not addressed this issue, the Maryland Court of Appeals held that a strip search is not permitted as a full search incident to arrest pursuant to *United States v. Robinson* unless an additional showing is made. (App. 11a-13a, 21a) (because strip search involves a more invasive search than routine search incident to arrest, there must be additional proof of exigency and reasonableness). Other lower courts similarly have held that a separate analysis is required for a strip search or other search exposing areas underneath a suspect's clothing. *Williams*, 477 F.3d at 976-78 (applying separate analysis to reach-in search); *Swain v. Spinney*, 117 F.3d 1, 6 (1st Cir. 1997) (noting that strip and visual body cavity search requires independent analysis under Fourth Amendment); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991) (holding that "full search" incident to arrest authorized by *United States v. Robinson* did not contemplate strip search or bodily intrusion); *State v. Jenkins*, 842 A.2d 1148, 1157 (Conn. App. 2004) (same).

In the absence of guidance, most courts assessing the reasonableness of a search beneath a suspect's clothing, whether by strip search or reach-in search, rely on the factors set forth by this Court in *Bell v. Wolfish*. There, in analyzing the reasonableness of an institutional policy of strip searching pretrial detainees after contact visits with persons from outside the institution, the Court explained:

> The test of reasonableness 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.

441 U.S. at 559.

Bell v. Wolfish, though addressing an intimate search performed in a different context, set forth factors that are relevant in assessing the reasonableness of a search underneath a suspect's clothing incident to a lawful arrest. But substantial conflict has arisen in application of this test. Guidance by this Court is needed regarding how to assess the various factors set forth in *Bell v. Wolfish*.

A. The Maryland Court of Appeals' decision deepens an existing conflict over what constitutes a "strip search."

When evaluating the scope and manner of a search underneath a suspect's clothing, lower courts typically start by categorizing the search as either a strip search or a reach-in search. Because a strip search is viewed as demeaning, dehumanizing and terrifying, lower courts subject strip searches to heightened scrutiny, and this factor will be weighed heavily against the state in determining the propriety of the search. *See, e.g., Justice v. City of Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983); *State v. Nieves*, 383 Md. 573, 586, 861 A.2d 62 (2004).

By contrast, a reach-in search of a clothed suspect that

does not display the private areas of a suspect's body to onlookers is less intrusive, which makes it more likely that the search will be upheld as reasonable. For example, in *Williams*, 477 F.3d at 974, the Eighth Circuit found reasonable a reach-in search wherein, on a police precinct parking lot surrounded by a residential neighborhood, an officer opened Williams's pants, reached inside his underwear, and removed a large amount of crack and powder cocaine.[3] Noting that there was no question "that the police were justified in searching inside Williams's pants because "[t]he police possessed a warrant authorizing them to search his person for drugs and firearms, and an initial pat-down produced specific probable cause that Williams was hiding something inside his pants," the court stated that the proper issue was "whether the search was reasonable in its scope, manner, and location." *Id.* at 975. The court found that the search was reasonable, noting that, although Williams was searched on a parking lot, there was no evidence that persons other than the officers involved would have seen the private areas of Williams's body. *Id.* at 977.[4]

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[3]Williams has filed a petition for a writ of certiorari that is pending in this Court at Docket Number 07-5250.

[4] The court further rejected the notion that the search was unreasonably intrusive based on the "intimate contact" that occurred when the police removed the drugs that Williams stashed near his genitals, noting that "some physical contact is permissible, and indeed unavoidable, when police reach into a suspect's pants to remove drugs the suspect has chosen to hide there." *Id.* at 996.

Many other courts, like *Williams* and the dissent here, (App. 41a), have similarly held that a reach-in search with justification is reasonable. *See United States v. Williams*, 209 F.3d 940, 943-44 (7th Cir. 2000) (upholding on-scene search incident to arrest where police officer reached into the back of Williams's undershorts and removed a plastic bag containing cocaine from between Williams's buttocks); *United States v. McKissick*, 204 F.3d 1282, 1296-97 (10th Cir. 2000) (upholding seizure of narcotics from arrestee's crotch area inside pants); *United States v. Ashley,* 37 F.3d 678, 682 (D.C. Cir.1994) (upholding search of drug suspect that involved officer opening individual's pants and seizing a bag of drugs inside his underwear), *cert. denied*, 513 U.S. 1181 (1995); *Jenkins*, 842 A.2d at 1156-58 (upholding search where officer seized contraband after pulling pants and underwear away from arrestee's body); *People v. Butler*, 813 N.Y.S.2d 366, 369 (N.Y. App. Div. 2006) (upholding search where police loosened and lowered arrestee's pants and underwear for a brief time and to a minimal degree in order to retrieve cocaine sitting atop arrestee's buttocks), *lv. dismissed*, 850 N.E.2d 675 (N.Y. 2006); *State v. Smith,* 464 S.E.2d 45, 46 (N.C. 1995) (upholding on-scene search for drugs where officer pulled open arrestee's pants and underwear and reached in to retrieve drugs), *cert. denied*, 517 U.S. 1189 (1996).

Thus, the characterization of a search as a strip search or a reach-in search is important in the assessment of the reasonableness of an on-scene search incident to arrest. There is substantial conflict among lower courts, however, regarding what constitutes a strip search. A significant number of lower courts, like the dissent here, (App. 30a-

41a), embrace the traditional notion that a strip search involves the removal of clothing followed by an inspection of a naked individual. *Wood v. Hancock County Sheriff's Department*, 354 F.3d 57, 63 (1st Cir. 2003); *Williams*, 209 F.3d at 943-44; *Marriott v. County of Montgomery*, 426 F.Supp.2d 1, 7 n.7 (N.D.N.Y. 2006); *Schmidt v. City of Lockport*, 67 F.Supp.2d 938, 944-45 (N.D. Ill. 1999); *Bobbit v. State*, 394 S.E.2d 385, 386 (Ga. App. 1990); *Commonwealth v. Prophete*, 823 N.E.2d 343, 350 (Mass. 2005); *Butler*, 813 N.Y.S.2d at 369; *McCloud v. Commonwealth*, 544 S.E.2d 866, 868-69 (Va. App. 2001).

Other courts, like the majority of the Maryland court, have found searches to be strip searches even if none of the subject's clothes has been removed. (App. 15a) (noting that strip searches occur when the mere rearranging of clothes results in the visualization of a person's "skin surfaces of the genital areas, breasts, and/or buttocks"); *accord Amaechi v. West*, 237 F.3d 356, 365 (4th Cir. 2001) (citing to Virginia statute indicating that strip search includes removal or arranging of "some or all of clothing to permit visual inspection of genitals, buttocks, anus, female breasts, or undergarments of such person"); *Fernandors v. District of Columbia*, 382 F.Supp.2d 63, 73-75 (D.D.C 2005) (assuming that search inside arrestee's pants constituted a strip search); *Jenkins*, 842 A.2d at 1156-58 (holding that pulling arrestee's pants and underwear away from body was akin to a strip search).

Indeed, the assessment of the scope and manner of the intrusion in this case was a critical difference in the majority and the dissenting opinions. The majority opinion found the scope and manner of the search to be highly invasive because the search was both a strip search

and a visual body cavity search, (App. 16a), whereas the dissent concluded that the search of Paulino was neither a strip search nor a body cavity search given that none of Paulino's clothes was removed to effect the search, (App. 29a-41a). That these reasoned jurists can reach such fundamentally different conclusions regarding the scope and manner prong of the *Bell v. Wolfish* test exemplifies the divide on this issue among lower courts and underscores the need for guidance from this Court.

B. The Maryland Court of Appeals' decision deepens an existing conflict over whether searches underneath a suspect's clothes may be conducted at the scene of the arrest.

Another conflict among the lower courts, which is reflected in the majority and dissenting opinions in this case, involves the weight to be given the last of the *Bell v. Wolfish* factors, the place where the search is conducted. Several lower courts, like the Maryland Court of Appeals, have concluded that the test essentially proscribes a search underneath clothing that could possibly be viewed by others, which virtually precludes any such searches at the scene of the arrest. (App. 25a-26a) (holding that strip search at scene was not justified where subject could conceivably be observed by members of the public); *Thompson v. State*, 824 N.E.2d 1265, 1269-71 (Ind. App. 2005) (holding unconstitutional strip search incident to arrest that occurred in front of camerawoman who filmed the search), *transfer denied*, 841 N.E.2d 176 (Ind. 2005); *People v. Mitchell*, 768 N.Y.S.2d 204, 206-07 (N.Y. App. Div. 2003) (holding unconstitutional a strip search that

occurred on a public street and noting that strip searches in public places are never reasonable unless there exist "circumstances that pose potentially serious risks to the arresting officer or others in the vicinity").

Other courts, like the dissenters here, have upheld as reasonable reach-in searches or strip searches that occurred in a public setting, such as the scene of the arrest, as long as the search was justified, and the police took appropriate measures to protect the privacy interests of the subject. (App. 42a-46a) (opining that justified reach-in search conducted at scene was reasonable where circumstances indicated that no one other than searching officers could observe suspect's private area); *United States v. Cofield*, 391 F.3d 334, 337 (1st Cir. 2004) (upholding reasonableness of strip search conducted in the hallway of the police station); *McKissick*, 204 F.3d at 1296-97 (upholding seizure of narcotics from arrestee's crotch area inside pants prior to transporting arrestee to station); *Williams*, 209 F.3d at 943-44 (upholding on-scene reach-in search incident to arrest); *Ashley*, 37 F.3d at 682 (upholding search of drug suspect that occurred around the side of a bus station); *Jenkins*, 842 A.2d at 1156-58 (upholding on-scene reach-in search for contraband incident to arrest for felony narcotics offense); *Butler*, 813 N.Y.S.2d at 369 (upholding on-scene reach-in search); *Smith*, 464 S.E.2d at 46 (upholding on-scene reach-in search).

This was the conclusion reached by the Eighth Circuit in *Williams*, wherein the court upheld a search conducted in a parking lot surrounded by a residential neighborhood. The court reasoned that the officers had a "legitimate need to seize contraband that Williams had chosen to carry in

his underwear," and they took sufficient precautions to protect Williams's privacy. 477 F.3d at 977.

> The police refrained from searching Williams on a public street, and instead took him to the more private precinct parking lot. . . . To the extent any citizen observed the search without notice of the police, there is no evidence that such a person would have seen the private areas of Williams's body or any contact between the gloved hand of the officer and Williams's genitals, which remained obscured from the view of passers-by. Rather, the citizen would have observed from a distance that an officer briefly reached inside Williams's pants and pulled out a bag of cocaine.

Id. The court concluded that such a search did not unreasonably infringe on Williams's privacy interests "when balanced against the legitimate needs of the police to seize contraband that he carried on his person." *Id.* at 977-78.

In the end, although this Court set out in *Bell v. Wolfish* factors to consider in determining whether a strip search or reach-in search is reasonable, there are conflicts among the lower courts regarding how to assess these factors.[5] The

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[5] Although there was no dispute in this case that the police had justification for the search, there is conflict among the lower courts regarding the justification prong of the *Bell v. Wolfish* test, specifically the level of justification required for a strip search incident to arrest. Some courts require reasonable suspicion that the arrestee is concealing weapons or contraband on his or her person. *Edwards v. State*, 759 N.E.2d 626, 629 (Ind. 2001) (need

reality of the inconsistent opinions in the lower courts is that street level police are placed in the eminently precarious position of not knowing the full scope or the limits of their arrest powers. The present case can be used to provide appropriate guidance to the courts and the police on these critically important and currently unresolved issues.

II. The Maryland Court of Appeals' decision is erroneous.

The search conducted in this case struck the appropriate balance between the need for the particular search and the invasion of personal rights. *See Bell v. Wolfish*, 441 U.S. at 559. The officers in this case were told by a reliable source that Paulino would hide the drugs between his buttocks; after lawfully arresting Paulino, the officers simply reached in and retrieved the drugs from

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reasonable suspicion of concealed weapons or contraband to strip search arrestee charged with traffic offense); *Nieves*, 383 Md. at 596-97 (same); *People v. Kelley*, 762 N.Y.S.2d 438, 440 (N.Y. App. Div. 2003) (same), *lv. denied*, 808 N.E.2d 366 (N.Y. 2004). Other courts require probable cause developed independent of the arrest itself. *See Fuller*, 950 F.2d at 1446 (holding that strip and visual body cavity searches with less than probable cause only permitted to protect institutional security and safety; search for evidence must be justified by probable cause); *Commonwealth v. Thomas*, 708 N.E.2d 669, 673 (Mass. 1999) (probable cause necessary to conduct strip or visual body cavity search).

there. Given the limited intrusiveness of such a search, weighed against the need of the police to seize drugs they reasonably believed were secreted on Paulino's body, and the absence of any gratuitous or unnecessary action taken by the police, the search here was reasonable.

In finding that the search of Paulino was unreasonable under the Fourth Amendment, the Maryland Court of Appeals erred in several respects. Initially, the majority opinion stressed a lack of exigency, (App. 12a-13a, 18a-19a, 21a, 25a), which is not a factor in the standard of reasonableness pronounced by this Court in *Bell v. Wolfish*. Moreover, the Court improperly assessed the scope and manner of the intrusion, by characterizing the search as a highly intrusive strip search and visual body cavity search. (App. 16a). Finally, with respect to the last factor under *Bell v. Wolfish*, the majority opinion placed too much weight on the fact that the search occurred in a public place. (App. 17a-26a). As noted by the dissent, the majority opinion established a *per se* rule that on-scene strip searches incident to an arrest must be conducted in an enclosed area, (App. 42a), a rule that is in conflict with the balancing test set forth in *Bell v. Wolfish* and with the lower courts that have upheld searches of similar kind. This Court should grant review of the lower court's decision not only to correct the lower court's error, but to ensure that other courts do not similarly condemn entirely proper police conduct.

A review of each of the *Bell v. Wolfish* factors shows that the search here was reasonable. With respect to the justification for the search, the police had reliable information that Paulino was concealing illegal narcotics between his buttocks cheeks. Both the majority and

dissenting opinions agreed that this reliable information justified a search of that area of his person incident to his arrest. (App. 20a-21a) (noting that the question was not whether a search was justified, but whether such an invasive search at the scene of the arrest was reasonable in the absence of exigency); (App. 42a-46a) (recognizing that all *Bell v. Wolfish* factors, including justification to search, were met in this case).

The majority's addition of an "exigency" requirement, however, (App. 13a, 17a-26a), finds no footing in the *Bell v. Wolfish* test.[6] Moreover, the conclusion that no exigency existed ignores the reality faced by the police effecting an arrest for narcotics offenses. As the cases cited herein prove, it is not uncommon for a narcotics trafficker to conceal contraband or weapons on his or her person. Conducting an immediate seizure at the scene was the most reasonable course of action because it eliminated the possibility that the evidence of criminal behavior would be lost or destroyed. *Williams*, 477 F.3d at 976 (while the potential for destruction of evidence is diminished when a suspect is in custody, it is not completely eliminated, which makes immediate seizure

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[6] The majority's conclusion in this regard likely evolved from its mistaken classification of the search as a visual body cavity search, which the search clearly was not. *See Winston v. Lee*, 470 U.S. 753, 759-60 (1985) (citing *Schmerber v. State of California*, 384 U.S. 757, 769-70 (1966), for the proposition that probable cause of criminal action and exigent circumstances obviated need to obtain warrant for intrusion beneath the skin of the suspect).

reasonable). Because the search conducted on Paulino was no more intrusive than was necessary to accomplish the goal of seizing the contraband, it was lawful. *See, e.g., United States v. Robinson*, 414 U.S. at 236 (recognizing that the justification for conducting search incident to arrest is to disarm suspect and to "preserve evidence on his person for later use at trial. . . .").

With respect to the scope and manner of the search, it was not a highly intrusive search. Rather, it was limited only to that action necessary to retrieve the contraband that Paulino had purposefully concealed on his person. When Paulino arrived at the secluded car wash at 11:15 p.m., the police removed him from his vehicle, placed him on the ground, and, because his pants were worn very low, merely lifted up his boxer shorts. (App. 2a-5a, 29a-30a). When Paulino refused to release the tension on his buttocks cheeks, an officer reached in to secure the drugs, but this was a necessary tactic to secure the contraband. There is absolutely no evidence of any gratuitous or unnecessary action taken by the police, and there was no evidence that anyone other than the searching officer saw Paulino's buttocks. *See Cofield*, 391 F.3d at 337 (upholding reasonableness of strip search conducted in the hallway of the police station where the search was conducted in a professional manner and officers did not require arrestee to assume humiliating poses, expose himself unnecessarily to the public or to members of the opposite sex, remain exposed for an unreasonable duration, or endure any degradation or ridicule); *McGee v. State*, 105 S.W.3d 609, 613-17 (Tex. Crim. App.) (upholding a strip search occurring in a fire station on the basis that the search was justified and was conducted in a

manner that sufficiently protected "the privacy interests of McGee"), *cert. denied*, 540 U.S. 1004 (2003).

With respect to the last *Bell v. Wolfish* factor, the place of the search, that the search occurred in a public place did not, as the majority held, make the search unreasonable. The search occurred in a bay of a deserted car wash, which was itself in a secluded location, away from general traffic. (App. 3a-4a, 45a; 56a-57a). Although there was testimony indicating that other officers and Paulino's cohorts were present at the scene, there was no evidence that any of these persons could see Paulino's genitalia or buttocks. (App. 45a). Paulino's pants were kept in place during the search. (App. 5a; 45a, 54a). Thus, the situs of the search, in this case, did not undermine its reasonableness. *Compare Williams*, 477 F.3d at 977 (upholding justified reach-in search conducted in parking lot of police precinct), *with United States v. Ford*, 232 F. Supp.2d 625, 630 (E.D. Va. 2002) (declaring strip search unreasonable where it involved "revealing [the suspect's] naked body below his buttocks . . . in broad daylight on the side of the George Washington Parkway, a heavily traveled road . . . at the tail end of rush hour"). The *per se* rule adopted by the Maryland Court of Appeals is inconsistent with the balancing approach set forth in *Bell v. Wolfish*. *See Williams*, 477 F.3d at 977 (holding that district court's "bright-line rule," which required that intimate search be conducted at precinct whenever possible, was inconsistent with the *Bell v. Wolfish* balancing test).

The majority's assessment that the search could have been conducted more discretely inside a vehicle or at the police station, (App. 25a-26a), is misguided. Even

assuming that were the case, this Court has made clear that government action does not become *per se* unlawful simply because a less intrusive means exists. *See Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995) ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."); *Illinois v. Lafayette*, 462 U.S. at 646 (holding that the reasonableness of government action does not turn necessarily on the existence of a less intrusive means).

Rather, where, as here, there was ample justification for a search of this scope, the search was conducted in an appropriate manner, and the search was conducted in a place that, given the circumstances, did not unreasonably compromise Paulino's privacy rights, the search was lawful under the Fourth Amendment. *Bell v. Wolfish*, 441 U.S. at 559; *see also Illinois v. Lafayette*, 462 U.S. at 647 (recognizing that, as long as the governmental interest outweighs the intrusion into privacy, there is no need to consider the existence of less intrusive means).

III. This is an important and recurring issue.

The cases cited herein confirm that lower courts continually are confronted with the task of determining the reasonableness of searches incident to arrest of intimate areas underneath a suspect's clothing. The absence of guidance from this Court on this critical Fourth Amendment issue has led to decisions, like that of the Maryland Court of Appeals, that not only prevent the police from taking the prompt, reasonable, and effective crime fighting measures this Court authorized in cases

such as *United States v. Robinson* and *Chimel v. California*, but also provide the reverse incentive for drug dealers to conceal contraband in the most intimate areas of their person in order to prevent detection of the contraband and eventual prosecution. *See Scott v. Harris*, 127 S.Ct. 1769, 1779 (2007) (declining to effect a rule requiring police to curtail pursuit that would have created the "perverse" incentive to flee police at high rates of speed).

The decision of the Court of Appeals of Maryland represents a misapplication of Fourth Amendment jurisprudence to the facts of the case, and its continued vitality will serve only to undermine reasonable and effective methods of law enforcement. This Court should grant review and reverse the judgment of the lower court.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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