QUESTIONS PRESENTED

1. Should this Court grant certiorari where the State won on the primary issue which it asks this Court to review. Further, should this Court grant certiorari where the parties do not dispute the constitutionality of warrantless strip searches, and there is virtually no conflict among the lower courts regarding the constitutionality of visual body cavity searches conducted incident to arrest, or the appropriate standard that applies to such searches?

2. Should this Court should grant certiorari where the holding of the New York Court of Appeals, that the Fourth Amendment and Schmerber v. California require the police to obtain a warrant before removing an item protruding from but concealed within a defendant's rectum, does not conflict with any direct holding of a state court of last resort or of a United States court of appeals?

3. Should this Court grant certiorari where the parties agree that the Fourth Amendment requires the police to obtain a warrant before conducting a body cavity search, and the New York Court of Appeals correctly decided that removing a concealed but protruding item from an arrestee's body cavity constitutes a body cavity search in light of heightened privacy, safety, and health concerns?

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IN THE
SUPREME COURT OF THE UNITED STATES

NEW YORK,

Petitioner,

-against-

AZIM HALL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Azim Hall, by counsel Robert S. Dean and Barbara Zolot, respectfully requests the Court to deny the Petition for Writ of Certiorari filed by the State of New York as there has been no showing that the issues presented merit consideration by the Court.

OPINIONS BELOW

The relevant state court opinions are reproduced in Petitioner's Appendix in Support of Petition for a Writ of Certiorari, cited herein as "State App."

INTRODUCTION/COUNTER STATEMENT

Following his arrest for participating in an alleged drug sale, respondent was taken to a precinct cell, where he was ordered to remove his clothes, then bend over

for a visual body cavity inspection (State App. at 3a). Two police officers, Burnes and Spiegel, observed a string hanging from respondent's rectum, that they believed was attached to a package of drugs secreted inside respondent's body (State App. at 3a). After respondent refused to remove the object, Spiegel held respondent around the waist while Burnes pulled on the string, removing a plastic bag containing crack cocaine from within respondent's rectum (State App. at 3a, 46a).

Respondent was indicted on two felony drug possession counts. He moved to suppress the drugs, which the court granted following an evidentiary hearing. The hearing court held that "by visually inspecting the defendant's anus and then removing the bag of cocaine from his rectum, the officers were in fact conducting a body cavity search." (State App. at 47a). Accordingly, applying the test in Schmerber v. California, 384 U.S. 757 (1966), which the New York Court of Appeals had previously applied in considering a similar search, the hearing court held that a warrant was required to conduct the search because the police lacked exigent circumstances (State App. at 47a-50a). Appeals to the intermediate appellate court (by the State) and to the New York Court of Appeals (by respondent) followed.

At each stage of the appeal, the State argued that the Fourth Amendment permits warrantless visual body cavity searches for the purpose of obtaining concealed evidence. Specifically, the State argued at length in the New York Court of Appeals that institutional security was not the only justification for warrantless visual body cavity searches, and that such searches were allowed to find and

preserve concealed evidence. The State maintained that respondent's arrest alone should justify the search, but also argued that application of the four-prong reasonableness test this Court formulated in Bell v. Wolfish, 441 U.S. 520 (1979), as well as reasonable suspicion, justified the search. In its efforts to persuade the New York Court of Appeals that the Fourth Amendment permitted warrantless visual body cavity searches incident to arrest, the State represented that "the vast majority of courts have declined to draw a distinction between strip and visual body cavity searches of arrestees conducted for the purpose of institutional security and those same searches conducted for the express purpose of discovering and preserving evidence of a crime," and that "courts nationwide have ruled that warrantless strip and visual body cavity searches incident to arrest, conducted for the purpose of discovering and preserving evidence of the crime, are lawful as long as they are reasonable."[1]

A five-judge majority of the New York Court of Appeals agreed with the State that a standard "less stringent than Schmerber" applied to "visual cavity inspections of arrestees" (State App. at 7a), and further agreed with the State that warrantless visual body cavity searches were permissible not only to maintain institutional security, but also "for the purpose of preserving evidence" (State App. at 8a). The court thus held that a visual body cavity search may proceed "when the police have a specific, articulable factual basis supporting a reasonable suspicion to

[1] Brief for the State in the New York Court of Appeals, at 35. Respondent can provide this Court with a copy of the State's brief upon request.

believe the arrestee secreted evidence inside a body cavity," and the search is reasonably conducted (State App. at 9a).

A four-judge majority of the court, however, agreed with respondent that the removal of the bag of drugs by pulling the string was a more invasive manual body cavity search that gave rise to "heightened privacy and health concerns," thus requiring the police to obtain a warrant absent exigent circumstances (State App. at 8a, 10a). As the court held, "Under our decision in More, the removal of an object protruding from a body cavity, regardless of whether any insertion into the body cavity is necessary, is subject to the Schmerber rule and cannot be accomplished without a warrant unless exigent circumstances reasonably prevent the police from seeking prior judicial authorization." (State App. at 11a). In People v. More, 97 N.Y.2d 209 (2002), the police had also forcibly removed a plastic bag protruding from the defendant's rectum, and the New York Court of Appeals held that "a search of this nature was 'at least as intrusive as [the] blood test procedures' in Schmerber (id. at 213)." (State App. at 9a-10a)

The State fails to present any compelling reason why its request for a writ of certiorari should be granted. See Supreme Court Rule 10 ("Review on a writ of certiorari is not a matter of right but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.") The State primarily claims that the Court should grant certiorari to resolve whether the Fourth Amendment permits warrantless strip and visual body cavity searches incident to arrest. But, as discussed further below, the State won on that issue, making this case an

inappropriate candidate for certiorari. The New York Court of Appeals agreed with the State that warrantless visual body cavity searches incident to arrest may be reasonable. The Court should not exercise its discretion to grant certiorari on an issue where the party seeking review has no incentive to upset the state court's holding in its favor — even assuming there was a conflict for the Court to resolve. Moreover, while the State complains about a nationwide split concerning the appropriate standard for such searches, the reasonable suspicion standard adopted by the New York Court of Appeals is the same standard applied by the majority of state and federal courts, and there is no practical difference between reasonable suspicion and Bell v. Wolfish's reasonableness test.

The State's secondary basis for seeking certiorari is its claim that Schmerber's warrant requirement should not apply unless the police penetrate a person's rectum. That does not present a compelling reason for granting certiorari either. There is no conflict in the law for this Court to resolve. The "conflict" imagined by the State involves a handful of cases, which either do not directly address the issue or are from intermediate appellate state courts. In any event, the New York Court of Appeals correctly decided the issue.

REASONS FOR DENYING THE WRIT

I. THE STATE WON ON THE ISSUE WHICH IT ASKS THIS COURT TO REVIEW. FURTHER, THERE IS NO CONFLICT THIS COURT NEEDS TO RESOLVE REGARDING THE CONSTITUTIONALITY OF WARRANTLESS STRIP AND VISUAL BODY CAVITY SEARCHES CONDUCTED INCIDENT TO ARREST, OR THE APPROPRIATE STANDARD THAT APPLIES TO SUCH SEARCHES.

At the outset of its petition, the State asserts that because the Court has reserved the question of whether a strip search or visual body cavity search is permissible incident to a lawful arrest, the Court should grant certiorari to resolve this constitutional question. (Petition for a Writ of Certiorari ["State Pet."] at 3). However, initially, there is no dispute between the parties as to the propriety of warrantless strip searches incident to arrest. Respondent has never argued that the police must obtain a warrant before requiring the arrestee to disrobe to permit a visual inspection of the person's body.[2] As for the constitutionality of visual body cavity searches conducted incident to arrest, the State won on that issue below by a clear majority. Five of the seven judges sitting on the New York Court of Appeals agreed with the State that the authority to conduct a full search incident to arrest also includes the authority to conduct a visual body cavity search. Accordingly, this case is not the proper vehicle for this Court to determine the question of whether a search incident to arrest includes strip or visual body cavity searches of arrestees.

[2] All seven judges agreed that a warrantless strip search may be conducted on reasonable suspicion to believe that the arrestee is concealing evidence underneath clothing (State App. at 11a, 15a).

The State nonetheless claims that "federal and state courts have sharply splintered" over whether arrestees can be subjected to "a strip and visual body cavity search just to prevent the concealment and potential destruction of evidence." (State Pet. at 15). This claimed divide, the State asserts, "highlight[s]. . . that the guidance of this Court is urgently needed." (State Pet. at 23). However, there is virtually no conflict among the state and federal courts regarding the propriety of such searches.

Notwithstanding respondent's belief that a warrant should be required for visual body cavity searches, the overwhelming majority of the state and federal courts — the "vast" majority in the State's prior words — including now the New York Court of Appeals, have held that strip and visual body cavity searches may be conducted incident to arrest without the necessity of a warrant.[3] The New York Court of Appeals found "considerable judicial consensus" on this issue (State App. at 5a). Indeed, as the State acknowledges, only a single Ninth Circuit case and a few intermediate state appellate court decisions from Virginia have reached the opposite conclusion (State Pet. at 20). Of course, the state supreme court of Virginia may eventually decide the issue consistently with the majority of

[3] See, e.g., Archuleta v. Wagner, 525 F.3d 1278 (10th Cir. 2008); Richmond v. City of Brooklyn, 490 F.3d 1002 (8th Cir. 2007); United States v. Williams, 477 F.3d 974 (8th Cir. 2007); Campbell v. Miller, 499 F.3d 711 (7th Cir. 2007); United States v. Cofield, 391 F.3d 334 (1st Cir. 2004); United States v. Dorlouis, 107 F.3d 248 (4th Cir. 1997); Justice v. Peachtree City, 961 F.2d 188 (11 Cir. 1992); Harden v. Flowers, 2003 U.S. Dist. Lexis 7213 (N.D. Ill. 2003)(unpublished decision); State v. Hall, 10 N.Y.3d 303 (N.Y. 2008); Paulino v. Maryland, 399 Md. 341, cert. denied 128 S.Ct. 709 (2007); State v. Jenkins, 82 Conn. App. 111 (Conn. Ct. App. 2004); McGee v. State, 105 S.W.3d 609 (Tex Crim. App.), cert. denied 540 U.S. 1004 (2003), rehearing denied, 540 U.S. 1143 (2004)); Delaware v. Doleman, 1995 Del. Super. LEXIS 235 (Del. Super. Ct. 1995)(unpublished opinion).

jurisdictions, eliminating even that jurisdiction from the tiny opposing camp.

Accordingly, there is no conflict among the lower courts for this Court to resolve. To the contrary, New York has followed the clear majority of the courts that have addressed this issue in finding that warrantless visual body cavity searches may be conducted.[4]

Another reason that the State advances for granting certiorari is the perceived need for the Court to settle "which legal standard" applies to assessing the constitutionality of warrantless visual body cavity searches incident to arrest (State Pet. at 19). According to the State, while the "the majority of jurisdictions" have "embraced the . . . reasonable suspicion standard," "some courts" have applied the four-part reasonableness test set forth in Bell v. Wolfish, and one court has applied a probable cause standard (State Pet. at 16-19). The State also finds it troubling that those courts adopting a reasonable suspicion standard have arrived at the standard via different reasoning (State Pet. at 18-19).

Initially, this case is the wrong vehicle for resolving any issue concerning the correct standard. The New York Court of Appeals adopted the reasonable suspicion standard. The State never claimed that the reasonable suspicion standard was

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[4] The State cites a "split" among legal scholars as further evidencing the need for review by this Court (State Pet. at 22). However, a range of opinion in the academic community does not require resolution by this Court when the lower courts themselves are not divided. Notably, one of the more recent law review articles cited by the State is premised on the recognition that the federal circuits, with the exception only of the Ninth Circuit, have been unanimous in permitting warrantless visual body cavity searches incident to arrest upon a showing of particularized facts. See Eugene Shapiro, Strip Searches Incident to Arrest: Cabining the Authority to Humiliate, 83 N.Dak. L. Rev. 67, 67 (2007).

improper or incorrect. In fact, the State acknowledged widespread acceptance of this standard among federal and state courts, and argued that the circumstances of respondent's case satisfied its demands. It may well be that the State would prefer some other standard to apply to such searches. However, the State is not aggrieved by New York's adoption of a standard that the State itself endorsed, and the State should not be afforded another bite at the apple to advocate for a different standard nationwide.

In any event, the "significant confusion" that the State claims exists is illusory. As the State acknowledges, the First, Seventh, Eighth, Tenth and Eleventh Circuits and the state courts of Maryland, Delaware, Connecticut and New York have embraced the reasonable suspicion standard. Although the State endeavors to portray a conflict-riven nation by casting Bell's "reasonableness" test as qualitatively different (State Pet. at 16-17), the practical reality is that courts applying Bell to visual body cavity searches of arrestees have also incorporated a requirement of particularized suspicion, either expressly or through application of the Bell factor that considers the "justification for initiating the search." See, e.g., Cofield, 391 F.3d at 336-38; Campbell, 499 F.3d at 718; Swain v. Spinney, 117 F.3d 1, 5 (1st Cir. 1997); Weber v. Dell, 804 F.2d 796, 802 (2d Cir. 1986), cert. denied sub nom. County of Monroe v. Weber, 483 U.S. 1020 (1987); Stewart v. Lubbock County, Texas, 767 F.2d 153, 156-57 (5th Cir. 1985), cert denied 475 U.S. 1066 (1986); Mary Beth G. V. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983); State v. Jenkins, 842 A.2d 1148, 1157-58 (Conn. App. Ct. 2004); McGee, 105 S.W.3d at 616-17;

Commonwealth v. Thomas, 708 N.E.2d 669, 672-74 (Mass. 1999).

Indeed, each of the four cases the State offers as examples where courts "simply analyzed the propriety of such searches under Bell's four-part reasonableness test" (State Pet. at 16), also assessed the particular suspicion the police possessed to believe that the defendant was concealing weapons or contraband. See United States v. Williams, 477 F.3d 974, 975 (8th Cir. 8th Cir. 2007)("There is no question that the police were justified in searching inside Williams's pants. The 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."); Cofield, 391 F.3d at 336-37 (citing circumstances giving police "good reason" to believe that weapons and narcotics might be hidden in defendant's underwear); Justice v. Peachtree City, 961 F.2d 188, 193 (11th Cir. 1992)(holding that strip searches require "reasonable suspicion to believe that the [defendant] is concealing weapons or contraband"); McGee, 105 S.W.3d at 617 (where, inter alia, citizen-informant advised police officer that defendant was hiding crack cocaine between his buttocks, court finds "from the totality of the circumstances that [the officer] had sufficient justification to believe that a search was necessary").

Thus, courts applying the Bell test would not have reached a different conclusion upon applying a reasonable suspicion test. Certainly, that is true in respondent's case, where the intermediate appellate court, in applying the Bell factors, relied on the same facts in finding both that the search was justified under

Bell and that the police had reasonable suspicion (State App. 42a-43a). Certiorari, therefore, is not merited because a decision regarding the "correct" standard would lack any practical significance.

In summary, there is no compelling reason to grant certiorari to the State, the prevailing party on the primary issue on which it now seeks certiorari. Further, there is no conflict that needs to be resolved by this Court. The lower courts agree with virtual unanimity that warrantless visual body cavity searches may be conducted incident to arrest. Further, this Court does not need to resolve which standard should be applied. The majority of courts have consistently applied the standard adopted by the New York Court of Appeals, reasonable suspicion to believe that the arrestee is concealing a weapon or contraband. To the extent that some courts rely more directly on Bell v. Wolfish's factors, those courts still require particularized facts in assessing the justification for the search, so that choosing one standard over the other would not change the outcome.

II. THE NEW YORK COURT OF APPEALS IS THUS FAR THE ONLY COURT OF LAST RESORT TO DIRECTLY HOLD THAT THE POLICE MUST OBTAIN A WARRANT BEFORE REMOVING AN ITEM PROTRUDING FROM BUT CONCEALED WITHIN A DEFENDANT"S RECTUM.

Pursuant to Schmerber and its own prior decision in People v. More, the New York Court of Appeals held in respondent's case that, absent exigent circumstances, the police must obtain a warrant before removing a protruding but concealed item from the body cavity of an arrestee. The State maintains that this holding must be reviewed because "[c]ourts nationwide" have "split" on the question of whether the

removal of a concealed but protruding item requires a warrant under Schmerber (State Pet. at 28).

The State exaggerates the state of the law on this narrow issue. At present, the New York Court of Appeals is the only state high court to have squarely addressed the issue. There is no nationwide split, or anything close. The State cites a handful of cases supposedly standing in opposition to the New York Court of Appeals' holding (State Pet. at 31-32), but those cases present no conflict.

The State cites State v. Himmelwright, 551 F.2d 991 (5th Cir. 1977) and United States v. Holtz, 479 F.2d 89 (9th Cir. 1973) — both border search cases — as supporting the proposition that "as long as the police do not penetrate the surface of the skin, Schmerber does not apply." (State Pet. at 31). However, initially, neither case decided what standard applies to the removal of a protruding object; instead, both cases concerned the constitutionality of the visual inspection of the suspect's vagina that led to the discovery of the protruding item. Himmelwright, 551 F.2d at 995-96; Holtz, 479 F.2d at 93. Further, both cases involved border searches, and therefore, to the extent Holtz also inferentially approved the seizure of the condom protruding from the suspect's vagina, the case is not apposite because of the diminished expectation of privacy that defendants have at a border. See United States v. Montoya de Hernandez, 473 U.S. 531, 539 (1985).

The State also cites State v. Nieves, 383 Md. 573 (Md. 2004). But that case, while finding that a strip search took place when the search produced two baggies that were protruding from the defendant's rectum, did not directly address the

issue, perhaps because of the undeveloped state of the record. The intermediate state appellate court decision explained that there was "no evidence" in the record, "[a]side from the obvious removal of the appellant's clothing . . . as to how the strip search was conducted," State v. Nieves, 160 Md. App. 647, 662, fn.2 (Md. App. 2004), and specifically noted as an open question whether "any touching [was] involved in this procedure." Id. at 662. Even assuming the drugs were actually concealed inside a body cavity, rather than protruding from the buttock cheeks, the record fails to reveal how the drugs were recovered, and, specifically, whether the police, or the defendant himself, removed them. It is therefore unsurprising that the Court of Appeals found on the basis of this undeveloped record, that "it appears that a strip search was conducted rather than a physical body cavity search." Nieves, 383 Md. at 586.[5]

The State also cites intermediate state appellate court decisions from Washington, Ohio and Virginia (State Pet. at 32), but those provide no basis for finding a conflict as the state high courts have not passed on the issue, and may ultimately decide it differently.

Accordingly, there is no conflict in the law for this Court to resolve regarding the need for the police to obtain a warrant before removing a protruding object

[5] State v. Voichahoske, 271 Neb. 64 (Neb. 2006), cited by the State, also fails to advance the State's claim of conflict, as the question of whether the police conducted a body cavity search was never before the court. While the court recounted that the police saw a bag of powder protruding from the defendant's rectum after he was made to bend over, the defendant did not claim that he was subjected to a body cavity search, and complained only that the evidence stemming from his "strip search" should have been suppressed. The State itself is forced to acknowledge that Voichahoske does not "directly confront[]" the issue (State Pet. at 32).

concealed within a body cavity. Only a handful of cases have any bearing on the issue. Virtually no state high court aside from the New York Court of Appeals has directly addressed the issue, and the two federal Court of Appeals decisions cited by the State are inapt and distinguishable.

III. THERE IS NO DISPUTE BETWEEN THE PARTIES CONCERNING SCHMERBER'S APPLICABILITY TO BODY CAVITY SEARCHES, AND THE NEW YORK COURT OF APPEALS CORRECTLY DECIDED THE NARROW QUESTION OF WHETHER REMOVING AN ITEM CONCEALED WITHIN A BODY CAVITY BUT PROTRUDING FROM IT CONSTITUTES SUCH A SEARCH.

The State does not dispute that, absent exigent circumstances, a warrant is necessary before the police may conduct a body cavity search. The State, however, takes issue with the New York Court of Appeals' holding that removal of a partially protruding item constitutes a body cavity search. The State contends that only penetrations "into the body" implicate Schmerber, and that the Court of Appeals decision "creates a cumbersome legal requirement" of no practical benefit (State Pet. at 34).

The State is wrong. The Court of Appeals' application of Schmerber to the removal of items protruding from body cavities is the correct rule of law. It is consistent with Schmerber's concern for "human dignity and privacy," and, importantly, protects an individual's safety under a wide range of factual possibilities.

The main flaw in the State's reasoning is its casual assumption that whenever the police remove a protruding item, it will be "quick" and "non-invasive,"

presumably because it will involve no "penetration of the body with either a hand or instrument." (State Pet. at 35). But, as the Court of Appeals implicitly recognized, the removal of a protruding item can be every bit as invasive as a search effected by direct penetration. As the underlying facts in People v. More, set forth by the dissent, show, the removal of a protruding item is not necessarily a simple task, and may occasion significant pain (State App. at 31a-32a). Regardless of whether an implement or hand is inserted into the defendant, the "manipulation and removal" of a protruding portion of a bag "necessarily exert[s] force on the portion of the bag extending into [the defendant's] rectum." State v. Barnes, 159 P.3d 589, 591 (Ct. App. Ariz. 2007). Just how much force may depend on a number of variables, but certainly no categorical assumption can be made that the police will accomplish every such extraction "quickly" and "non-invasively." Only a bright-line rule tethering the warrant requirement to the location of the item within a body cavity will ensure that the police do not forcibly and painfully invade another individual's body, without a neutral magistrate first assessing the need for such an invasion and the manner and scope of the search.

Nor is the State correct in its complaint that a warrant creates "a cumbersome legal requirement . . . that creates no benefit even to arrestees," for the warrant will "inevitably be issued," but the arrestee, may, in the meantime, ingest, to his or her detriment, the concealed drug (State Pet. at 34-35).

Requiring a warrant before the police can remove a concealed but protruding item is not a technicality and serves important purposes. This Court has repeatedly

reaffirmed the centrality of the warrant requirement's goals of judicial objectivity and deliberative decision-making. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 622 (1989)("A warrant . . . provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case."); Johnson v. United States, 333 U.S. 10, 14 (1948)("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."); Groh v. Ramirez, 540 U.S. 551, 558-59 (2004)("we are not dealing with formalities")(quoting McDonald v. United States, 335 U.S. 451, 455 (1948)).

Putting the matter before the magistrate not only ensures that there is a basis for the search, but also ensures that the search is conducted reasonably — before any damage is done — an equally important consideration under Schmerber, see 384 U.S. at 771-72, and reinforced by the New York Court of Appeals. See State App. at 12a; see also Eugene Shapiro, Strip Searches Incident to Arrest: Cabining the Authority to Humiliate, 83 N.D. L. Rev. 67, 106-107 (2007)("The magistrate's traditional role in determining the reasonable scope and manner of a search would have a tremendous impact in this area. . . . In addition to the need for an objective determination of the authorized scope of a strip search, the value of a judicial determination of the manner in which a search may be executed cannot be overstated"). Where, how, and by whom the search is to be conducted are

matters appropriate to judicial inquiry, and, if found wanting, can be corrected, thus averting potential injury to the defendant, claims of malfeasance or brutality against the police, and suppression of the evidence if the search were ruled unreasonable after a hearing or on appeal. The "importance of informed detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." Schmerber, 384 U.S. at 770. Accordingly, contrary to the State's claim, the warrant requirement in this context serves important purposes, and benefits law enforcement as much as the arrestee.

Finally, as in many states, search warrants can be obtained in New York by telephone application, see Criminal Procedure Law §§ 690.35, 690.36. There is no basis for believing that undue delay will accompany seeking a warrant as to pose a health danger to the arrestee. And nothing in the Court of Appeals' decision bars the police from obtaining the warrant before they undertake the initial strip and visual body cavity search, thus allowing them to proceed without interruption once the search is underway.

In sum, the New York Court of Appeals correctly decided that Schmerber governs removal of an item protruding from a body cavity. The State's Petition utterly fails to raise any issue on this narrow question requiring review by this Court.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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July 16, 2008