No. _____ - 07 1568 JUN 13 2008

IN THE

Supreme Court of the United States

NEW YORK,

Petitioner,

- versus -

AZIM HALL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fourth Amendment permit the police to conduct warrantless strip and visual body cavity searches incident to arrest, for the purpose of finding and preserving concealed evidence of the crime?

2. In *Schmerber v. California*, 384 U.S. 757 (1966), this Court ruled that the Fourth Amendment prohibited warrantless "intrusions into the human body" absent a "clear indication" that evidence would be recovered and exigent circumstances justifying the warrantless search. Here, after arresting respondent for the felony sale of narcotics, police ordered him to remove his clothes and bend over for a visual inspection of his anus. When he did so, the officers noticed a string protruding from his rectum. The police pulled this string, which was attached to a bag of crack cocaine secreted inside that cavity. However, the police never touched, probed, or entered into respondent's rectum in any way. Did this search and seizure constitute an intrusion into the body requiring a warrant under *Schmerber*?

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PETITION FOR A WRIT OF CERTIORARI

The State of New York respectfully petitions for a writ of *certiorari* to the New York Court of Appeals in *People v. Azim Hall*, 10 N.Y.3d 303, 886 N.E.2d 162 (N.Y. 2008).

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 10 N.Y.3d 303, 886 N.E.2d 162 (N.Y. 2008), and is reproduced in the appendix at pages 1a-37a. The opinion of the New York Appellate Division, First Department, is reported at 39 A.D.3d 100, 829 N.Y.S.2d 85 (N.Y. App. Div. 2007), and is reproduced in the appendix at pages 38a-47a. The written order of the trial court (New York Supreme Court, County of New York) granting respondent's motion to suppress is unreported and is reproduced in the appendix at pages 48a-53a.

STATEMENT OF JURISDICTION

On March 25, 2008, the New York Court of Appeals reversed the order of the Appellate Division, First Department, granted respondent's Fourth Amendment motion to suppress physical evidence, and dismissed the indictment (App. 1a).[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part, that "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 Warrant shall issue, but upon probable cause ..."

STATEMENT OF THE CASE

This case presents two important issues of Fourth Amendment jurisprudence, both concerning the power to conduct a search incident to arrest, that have sharply divided the courts of this nation.

First, although this Court determined in *United States* v. *Robinson*, 414 U.S. 218, 234 (1973), and *United States v. Edwards*, 415 U.S. 800, 802-03 (1974), that a full warrantless search of a person is permitted incident to any lawful arrest, this Court

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[1] Page references preceded by "App." are to petitioner's separately-bound appendix.

has expressly reserved the question of whether a strip search or visual body cavity search of an arrestee is also permissible. *See Illinois v. Lafayette*, 462 U.S. 640, 646 n.2 (1983). This case presents that issue, thereby giving this Court an opportunity to resolve a federal constitutional question that has resulted in a deep split amongst both the federal courts of appeals and the states.

Second, in the context of a 1966 case involving the drawing of blood from an arrestee by means of a needle inserted into the arrestee's arm, this Court determined that the Fourth Amendment forbids warrantless "intrusions into the human body" absent a clear indication that evidence would be found and exigent circumstances that justify dispensing with the warrant requirement. *Schmerber v. California*, 384 U.S. 757, 769-70 (1966). In the more than forty years since *Schmerber*, courts nationwide have struggled to define what constitutes an "intrusion" into the body. In particular, courts have sharply split over whether the removal of an object partially protruding from a body orifice constitutes an intrusion into the body requiring a warrant. In this case, the New York Court of Appeals ruled that by pulling a string protruding from respondent's rectum the police conducted an unlawful intrusion into his body. This case will allow this Court to clarify what constitutes an intrusion into the body under *Schmerber*, thereby resolving a second issue that has split both federal and state courts.

A. Material Facts

On the evening of February 10, 2005, two Manhattan police officers, who were stationed on a rooftop in a neighborhood plagued with drug dealing, clandestinely watched respondent and Ross Meyers sell drugs outside a neighborhood bodega (App. 2a, 39a, 48a). Specifically, two men approached Meyers and handed him money (App. 2a, 39a, 49a). Meyers accepted the money and talked briefly with respondent (App. 2a, 39a, 49a). Then, he and respondent went inside the bodega (App. 2a, 39a, 49a). Respondent retreated to the back of the bodega, while Meyers remained by the entrance (App. 2a, 39a, 49a). Minutes later, respondent emerged from the back and handed something to Meyers (App. 2a, 39a, 49a). Meyers, in turn, went outside and gave "small white objects" to the waiting men (App. 2a-3a, 39a, 49a).

Upon seeing the apparent drug sale, the police left their rooftop perch to arrest the participants; the buyers escaped, but the police arrested respondent and Meyers (App. 3a, 39a, 49a). In a "pat-down" search at the crime scene, no contraband was recovered (App. 3a). Respondent and Meyers were brought to the precinct station house, where the arrest was processed (App. 3a, 49a). There, respondent was given a more thorough pat-down search; still, no contraband was recovered (App. 49a). However, the police knew that drug dealers, particularly in the area in which respondent had been arrested, often secreted narcotics between their buttocks or down their pants (App. 14a, 39a). In fact, in "at least one out of two drug arrests, the

suspects had hidden drugs in such a manner" (App. 14a, 39a-40a).

For this reason, respondent was led into a holding cell and ordered to disrobe (App. 3a, 40a, 49a). Now standing naked inside the cell, respondent was asked to bend over for a visual inspection (App. 3a, 40a, 49a). When he did so, the police noticed a three-inch long white string protruding from his rectum (App. 40a, 49a). The police believed that this string was attached to narcotics (App. 3a, 49a). The police ordered respondent to remove the string, but he refused (App. 3a, 32a, 40a, 49a). One police officer then secured respondent while another pulled the string (App. 3a, 32a, 40a, 49a-50a). The string, which was tied to a plastic bag containing crack cocaine, came out easily; no police officer "put a hand or implement" into respondent or "even touched him below the waist," and respondent was in no way injured (App. 3a, 32a, 49a-50a). Respondent was subsequently charged with two New York narcotics felonies (App. 3a).

B. Proceedings Below.

Prior to trial, respondent moved to suppress the bag of crack cocaine that had been recovered by the police, arguing that the police conducted an unlawful body cavity search by pulling the string protruding from his rectum (App. 50a). The suppression court agreed with respondent, granted his suppression motion, and dismissed the indictment (App. 53a). Characterizing the search as a "body cavity search," the suppression court

determined that under *Schmerber v. California*, 384 U.S. 757 (1966), and *People v. More*, 97 N.Y.2d 209 (N.Y. 2002), which applied *Schmerber* to a body cavity search conducted at the suspect's apartment, the Fourth Amendment required a warrant to conduct a visual inspection of respondent's anus and likewise to pull the protruding string, unless "exigent circumstances" justified dispensing with the warrant (App. 50a-51a). The suppression court concluded that the lack of exigent circumstances here "dictate[d]" that the "body cavity search" was "unreasonable" (App. 51a).

A unanimous five-judge panel of the New York Appellate Division, First Department reversed the suppression order and reinstated the indictment, ruling that the search at the precinct was not "unreasonable" under the Fourth Amendment (App. 38a). The intermediate appellate court noted that *Schmerber* required a search warrant for police "intrusions *within* the suspect's body" (App. 40a-41a) (emphasis in original). The Appellate Division ruled that "pull[ing] the string out of [his] rectum" did not constitute an intrusion into respondent's body (App. 41a-42a).

Instead, the police conduct at the precinct amounted to a "strip search" and "visual body cavity" search governed by the "reasonableness" principles pronounced by this Court in *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), which considered the constitutionality of warrantless visual body cavity searches of pretrial detainees housed in a correctional facility (App. 41a-42a). The reasonableness balancing test promulgated in *Bell*

considered "(1) the scope of the intrusion, (2) the manner in which the search is conducted, (3) the justification for initiating the search, and (4) the place in which the search is conducted" (App. 42a) (*citing Bell*, 441 U.S. at 559). And as the Appellate Division explained, in balancing those factors and taking into account the legitimate security interests of correctional facilities, this Court ruled that warrantless visual body cavity searches of prison detainees were permissible "even absent probable cause, particularized suspicion or clear indication" that evidence would be found (App. 42a-43a) (*citing Bell*, 441 U.S. at 560).

The Appellate Division recognized that the *Bell* rule pertained to pretrial detainees, and that this Court had "not yet specifically considered the circumstances under which a strip search incident to arrest [was] justified" (App. 42a) (*citing Illinois v. Lafayette*, 462 U.S. 640, 646 n.2 [1983]). However, citing a number of cases from the Second Circuit Court of Appeals, the court determined that such warrantless visual searches were lawful where there exists a "reasonable suspicion that the arrestee is concealing" contraband (App. 43a) (*citing Weber v. Dell*, 804 F.2d 796, 802 [2d Cir. 1986]).

Applying the four-factor *Bell* test to the facts at hand, the Appellate Division held that the "visual body cavity search initially conducted here was justified and reasonable" (App. 46a). Even though the "scope" and "nature" of the procedure was "degrading," the "manner and place" of the search were "reasonable" and the "visual body cavity search" was justified by "the facts known to the

police, including their experiences with the common practices of drug sellers in the neighborhood," and their "observation of defendant selling drugs, packaged in small packets, during which the seller had to temporarily retreat to an unseen spot prior to completing the transaction in order to retrieve the goods he sold" (App. 46a). Indeed, those factors gave the police "reasonable suspicion" to believe that respondent was "concealing ... contraband" (App. 46a). Lastly, the "observation of the protruding string during the course of the procedure justified the immediate actions taken to physically retrieve the secreted narcotics" (App. 47a).

On federal constitutional grounds, the New York Court of Appeals reversed the Appellate Division's decision (App. 11a, 15a). Initially, five of the seven judges held that the "relevant constitutional precedent" required the "reasonable suspicion standard" for investigatory strip searches and visual body cavity inspections incident to arrest (App. 11a). Under this standard, the police could conduct a strip search if they had reasonable suspicion that an arrestee was "concealing evidence underneath clothing," and they could conduct a "visual body [cavity] inspection" if they had a "reasonable suspicion that the arrestee has evidence concealed inside a body cavity" (App. 1a, 7a-8a, 11a).[2] Under that legal standard, the majority

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[2] The Court of Appeals pronounced that there were "three distinct and increasingly intrusive types of bodily examinations undertaken" incident to arrest (App. 4a). A strip search is one in which the arrestee disrobes, a visual body cavity search is one in which the police visually inspect the (Continued...)

concluded that the police here had the requisite "reasonable suspicion" to conduct the initial strip and visual body cavity search (App. 13a).

The two judges in the minority on that score agreed that the "reasonable suspicion" standard should apply to strip searches incident to arrest, but opined that a higher standard of cause should be adopted for "visual body cavity searches" (App. 16a). They concluded that like manual body cavity searches, a visual body cavity search was an intrusion into the body that either required a warrant "based upon probable cause" or "satisfaction" of the *Schmerber* clear indication and exigent circumstances test (App. 16a, 21a) (*citing Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1449 [9th Cir. 1991]; *Hughes v. Commonwealth*, 31 Va. App. 447, 460 [Va. Ct. App. 2000]).

However, the Court of Appeals decided, by a vote of four to three, that *Schmerber* "dictate[d] that a more stringent standard be applied to a physical search of an arrestee's body cavity" (App. 10a). In that regard, the Court of Appeals believed that *Schmerber* obliged the police to obtain a warrant "before conducting a body cavity search" like the one here, even though no "insertion into the body cavity [was] necessary" (App. 12a). The four judges

(...Continued)
arrestee's "anal or genital cavities," and a "manual body cavity search" includes some "degree of touching or probing of a body cavity that causes a physical intrusion beyond the body's surface" (App. 4a) (*citing Blackburn v. Snow*, 771 F.2d 556, n.3 [1st Cir. 1985]).

concluded that, "when the police physically removed the object that was attached to the string without first obtaining a warrant, they conducted an unreasonable manual body cavity search in violation of the Fourth Amendment" (App. 15a).

The dissent wrote that the general rule allowed the police to search an arrestee without a warrant. The exception to that rule established in *Schmerber v. California* required a warrant only for "searches that intrude into the human body" (App. 32a-33a). Here, the dissent noted, *Schmerber* was "inapplicable" because "no one intruded into" respondent's body or caused him pain; the "removal of the contraband in this case seem[ed] ... a lesser violation of privacy than the lawful search that led to its discovery" (App. 33a). Hence, the dissent concluded, it made "little sense ... to require officers to obtain a warrant in cases such as this, where contraband is visible between the cheeks of the buttocks and may be retrieved easily, without harm to the individual" (App. 36a) (*quoting State v. Barnes*, 215 Ariz. 279, 285 [2007] [Espinosa, J. dissenting]).

REASONS FOR GRANTING THE WRIT

1. AS THE SPLINTERED DECISION OF THE NEW YORK COURT OF APPEALS QUITE FAIRLY INDICATES, WHETHER THE FOURTH AMENDMENT PERMITS WARRANTLESS STRIP AND VISUAL BODY CAVITY SEARCHES OF ARRESTEES TO

RECOVER EVIDENCE OF A CRIME IS A DIFFICULT AND IMPORTANT QUESTION THAT REQUIRES RESOLUTION BY THIS COURT.

A. Twenty-Five Years Ago, This Court Left Unresolved The Question Of Whether The Fourth Amendment Permits Warrantless Strip And Visual Body Cavity Searches Incident To Arrest.

"Reasonableness" is the "ultimate touchstone of the Fourth Amendment," *Brigham City, Utah* v. *Stuart*, 547 U.S. 398, 403 (2006), and it is well-settled that a warrantless search of a person incident to any lawful arrest is reasonable. *United States v. Robinson*, 414 U.S. 218, 234-35 (1973); *see also United States v. Edwards*, 415 U.S. 800, 802-03 (1974). Such a search is justified both by the need to detect weapons and other dangerous items, and by the need to "search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Chimel v. California*, 395 U.S. 752, 755 (1969); *see also Knowles v. Iowa*, 525 U.S. 113, 116 (1997); *Robinson*, 414 U.S. at 234.

Immediately after this Court decided *Robinson* and *Edwards*, some courts ruled that strip and visual body cavity searches incident to arrest could be conducted without a warrant and without any particularized individual suspicion at all. *See, e.g., United States v. Klein*, 522 F.2d 296, 300 (1st Cir. 1975); *State v. Magness*, 115 Ariz. 317 (Ariz. Ct. App. 1977). And here, the contested evidence was not lawfully recovered unless the strip and visual body cavity search which followed the arrest was

legal. However, this Court later explicitly reserved the question of whether such searches were authorized by *Robinson* and its progeny (App. 7a, 21a, 42a). *See Illinois v. Lafayette*, 462 U.S. 640, 646 n.2 (1983) (Court had not yet addressed the "circumstances in which a strip search of an arrestee may or may not be reasonable").

Thus, whether the search incident to arrest contemplated in *Robinson* and *Edwards* includes strip and visual body cavity searches of arrestees remains an open question. *See, e.g., Amaechi v. West*, 237 F.3d 356, 361 (4th Cir. 2001) (in deciding reasonableness of body cavity search, wrote that *Robinson* did not permit all searches incident to arrest, "no matter how invasive"); *Swain v. Spinney*, 117 F.3d 1, 6 (1st Cir. 1997) (under *Robinson* not all "searches of an arrestee's body are automatically permissible as a search incident to arrest"); *Giles v. Ackerman*, 746 F.2d 614, 616 (9th Cir. 1984) (*Robinson* inapplicable to visual body cavity searches); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1271 (7th Cir. 1983) (*Robinson* "did not contemplate the significantly greater intrusions that occur[ ]" in a visual body cavity inspection).

While *Illinois v. Lafayette* reserved the question, this does not mean that this Court has provided no guidance on this subject. In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court considered the constitutionality of a blanket policy requiring visual body cavity searches of all pre-trial detainees subsequent to visitations with persons from outside the prison. Acknowledging that the Fourth Amendment prohibited "unreasonable" searches,

this Court wrote that "reasonableness" required a "balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.* at 559. The Court ruled that the detention center's security interests outweighed the intrusion of a visual body cavity search, and therefore, such searches could be conducted "even absent probable cause, particularized suspicion or clear indication" that evidence would be found. *Id.* In doing so, this Court promulgated a four-factor "reasonableness" test, balancing the 1) scope of the intrusion, 2) the manner in which the search is conducted, 3) the justification for initiating the search, and 4) the place in which the search is conducted. *Id.* at 559-60.[3]

B. State and Federal Courts Are Divided Over Whether the Fourth Amendment Permits Warrantless Investigatory Strip and Visual Body Cavity Searches Incident to Arrest.

As noted, the two primary justifications for a post-arrest warrantless search at the stationhouse are to maintain institutional security and to discover concealed evidence of the crime. *Knowles*, 525 U.S. at 116; *Robinson*, 414 U.S. at 234-35. *Bell*, which permitted warrantless visual body cavity searches of pretrial detainees, was decided in the context of

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[3] In his partial dissent, Justice Powell recommended that visual body cavity searches of detainees be subject to a "reasonable suspicion" standard (*Bell*, 441 U.S. at 563), thereby foreshowing, if not actually precipitating, the New York Court of Appeals' application of such a rule in this case.

institutional security concerns, as its subjects were not in the category of the newly arrested who will often be in possession of fruits or evidence of the recently committed crimes.

While *Bell* permitted warrantless visual body cavity searches of pretrial detainees, a "ruling applicable to incarcerated jail inmates is not automatically applicable to those newly arrested" (App. 42a). *See, e.g., Turner v. Safley*, 482 U.S. 78, 89 (1987) (constitutional standards in prisons different because even prison regulations that "impinge[ ] on inmates' constitutional rights" are valid if they are "reasonably related to legitimate penological interests"). And since *Bell*, federal and state courts throughout the nation have struggled to determine whether, and in what circumstances, the Fourth Amendment permits warrantless strip and visual body cavity searches incident to arrest. *See, e.g.*, Gabriel Helmer, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U.L. Rev. 239, 242 (2001) ("*Bell* test has provided minimal guidance to lower courts, and these courts continuously struggle to extrapolate" what is demanded for strip and visual body cavity searches of arrestees and detainees) [hereinafter Helmer, *Strip Search and the Felony Detainee*].

In considering situations analogous to *Bell,* where institutional security was the paramount reason for the strip or visual body cavity search of the detainee, many courts have resolved *Illinois v. Lafayette*'s undecided question in line with Justice Powell's partial dissent, *see* footnote 3, *supra*, and have concluded that strip and visual body cavity

searches of lawfully arrested suspects, when done to maintain institutional or jail security, are lawful when the police have a "reasonable suspicion" that the arrestee is concealing contraband or weapons inside his body. *See, e.g., Archuleta v. Wagner,* 523 F.3d 1278, 1284-85 (10th Cir. 2008); *United States v. Barnes*, 506 F.3d 58, 62 (1st Cir. 2007); *Campbell v. Miller*, 499 F.3d 711, 718 (7th Cir. 2007); *Evans v. Stephens*, 407 F.3d 1272, 1279 (11th Cir. 2005); *Masters v. Crouch,* 872 F.2d 1248, 1255 (6th Cir. 1989); *Watt v. Richardson Police Dep't*, 849 F.2d 195, 198 (5th Cir. 1988); *Jones v. Edwards*, 770 F.2d 739, 740-41 (8th Cir. 1985); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984). A number of states have likewise adopted the "reasonable suspicion" standard in this context. *See, e.g., Paulino v. Maryland*, 399 Md. 341, 356-57 (Md. 2007); *State v. Jenkins*, 82 Conn. App. 111, 123 (Conn. 2004); *Taylor v. State*, 239 Ga. App. 858 (Ga. Ct. App. 1999); *Delaware v. Doleman*, 1995 Del Super. LEXIS 235, *22 n.2 (Del. Super. Ct. 1995) (unpublished decision).

But in considering situations like the one presented here, where the arrestee was subjected to a strip and visual body cavity search just to prevent the concealment and potential destruction of evidence, the federal and state courts have sharply splintered. Broadly speaking, and as will be explained, *infra*, the courts have largely devolved into two opposing camps -- those that permit warrantless visual body cavity searches of arrestees to discover evidence and those that do not. Yet strikingly, even within the federal circuits and states that have permitted warrantless investigatory strip

and visual body cavity searches, the legal standards and given rationale for conducting such searches vary considerably.

In that regard, some courts, in permitting warrantless strip and visual body cavity searches of arrestees to search for evidence, have simply analyzed the propriety of such searches under *Bell*'s four-part reasonableness test, looking at the scope of the intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *See, e.g., United States v. Williams*, 477 F.3d 974, 977 (8th Cir. 2007) (investigatory strip search incident to arrest in precinct parking lot reasonable); *United States v. Cofield*, 391 F.3d 334, 336-38 (1st Cir. 2004) (stationhouse strip search of defendant, who was arrested for possession of heroin, reasonable); *Justice v. Peachtree City*, 961 F.2d 188, 192-93 (11th Cir. 1992) (strip search of arrestee at stationhouse proper under *Bell*); *McGee v. State*, 105 S.W.3d 609, 616 (Tex. Crim. App. 2003) (visual cavity search of defendant at fire station, after arrest for selling drugs, reasonable under *Bell*).

Similarly, courts have employed the *Bell* test and determined that the scope or manner of a given search rendered it inherently unreasonable. *See, e.g., Amaechi*, 237 F.3d at 361-63 (strip search in public, which involved penetration of arrestee's vagina, unreasonable under *Bell* "scope of intrusion" and "location" factors); *United States v. Ford*, 232 F. Supp. 2d 625, 630 (E.D. Va. 2002) (search of defendant's buttocks on side of highway unreasonable under *Bell* location factor); *Paulino v.*

Maryland, 399 Md. 341, 355 (Md. 2007) (visual cavity search of arrestee at carwash unreasonable under *Bell* "location" factor).[4]

Yet to avoid the inherent difficulties and lack of uniformity that come with applying a multi-prong test, many of the state and federal circuit courts that have permitted warrantless strip and visual body cavity searches of arrestees to recover evidence, have eschewed the *Bell* test and endeavored to provide a more objective standard as to the reasonableness of conducting such searches. *See, e.g., Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1273 (7th Cir. 1983) ("reasonableness" standard requires "that the facts upon which an intrusion is based be capable of measurement against an objective standard"); Nadine Strossen, *The Fourth Amendment in the Balance*, 63 N.Y.U.L. Rev. 1173, 1184 (1988) (Fourth Amendment balancing tests problematic because they are "inherently subjective," and "no objective methodology exists for their implementation").

In doing so, the highest court of Massachusetts, while not requiring a warrant, has adopted the "probable cause" standard for visual body cavity searches of arrestees, regardless of whether the search is conducted for security purposes as in *Bell* or, like here, to recover secreted evidence of the crime. *See Commonwealth v.*

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[4] The intermediate appellate court here applied the four-factor *Bell* test and found that under the circumstances, the "visual body cavity search" was "justified and reasonable" (App. 45a-46a).

Thomas, 429 Mass. 403, 408-09 (1999). However, the majority of jurisdictions, including the First, Seventh, Eighth, Tenth and Eleventh Circuits and the state courts of Maryland, Delaware, Connecticut, and now New York, have embraced the lesser "reasonable suspicion" standard. *See, e.g., Archuleta*, 523 F.3d at 1284-85; *Campbell*, 499 F.3d at 717-18; *Richmond v. City of Brooklyn,* 490 F.3d 1002, 1008-10 (8th Cir. 2007); *Evans*, 407 F.3d at 1279;[5] *Swain*, 117 F.3d at 7; *Hall*, 10 N.Y.3d at 303; *Jenkins*, 82 Conn. App. at 125; *Nieves*, 383 Md. at 573; *Doleman,* 1995 Del Super. LEXIS 235 at *22 n.2; *see also Sarnicola v. County of Westchester*, 229 F. Supp. 2d 259, 268-70 (S.D.N.Y. 2002) (investigatory visual body cavity search justified by "reasonable suspicion"); *Harden v. Flowers*, 2003 U.S. Dist. Lexis 7213 (N.D. Ill. 2003) (unpublished decision) (same); *Liston v. Steffes*, 300 F. Supp. 2d 742, 757 (D. Wis. 2002) (same).

And even though the aforementioned courts have agreed on the "reasonable suspicion" standard, they have split as to why this standard is required. The Tenth and Eleventh Circuits, along with the state courts of Maryland and Delaware, have simply held that the Fourth Amendment "reasonableness" mandate requires the police to have "reasonable suspicion" before conducting a strip and visual body

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[5] In *Evans*, the Eleventh Circuit ruled that while the police must have "at least" reasonable suspicion to conduct investigatory visual body cavity searches incident to arrest, it cautioned that perhaps the "actual standard" was "higher." 407 F.3d at 1279

cavity search of an arrestee to find evidence of a crime. *Archuleta*, 523 F.3d at 1284-85 (*citing Foote v. Spiegel*, 118 F.3d 1416, 1425-26 [10th Cir. 1997]); *Evans*, 407 F.3d at 1279; *Nieves*, 383 Md. at 573; *Doleman*, 1995 Del Super. LEXIS 235 at *22 n.2. Conversely, the First, Seventh, and Eighth Circuits, and the state courts of Connecticut and now New York, have analyzed the propriety of such searches under *Bell*, and from *Bell*, have concluded that "reasonable suspicion" is required.[6] *Campbell*, 499 F.3d at 717-18; *Richmond*, 490 F.3d at 1008-10; *Swain*, 117 F.3d at 7; *Hall*, 10 N.Y.3d at 303; *Jenkins*, 82 Conn. App. at 125.

Hence, among the jurisdictions that permit warrantless visual body cavity searches of arrestees to recover evidence, there is significant confusion as to which legal standard applies. In fact, even within individual circuits, different legal standards have been employed. For example, in recent decisions, the First, Eighth, and Eleventh Circuits, like the intermediate appellate court here (App. 45a-46a), have analyzed strip and visual body cavity searches of arrestees under both the "reasonable suspicion" standard (*Swain*, 117 F.3d at 7, *Richmond*, 490 F.3d at 1008-10, *Evans*, 407 F.3d at 1279), and the four-factor *Bell* test (*Cofield*, 391 F.3d at 336-38, *Williams*, 477 F.3d at 977, *Peachtree City*, 961 F.2d

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[6] The five judges writing for the majority here (App. 2a), as well as every justice on the intermediate appellate court (App. 47a), found that the police had "reasonable suspicion" to conduct the strip and visual body cavity search of respondent (App. 14a, 46a).

at 192-93). Similarly, in Texas, that state's highest court for criminal appeals, while agreeing that the visual body cavity search of the arrestee was lawful, split four to three as to whether the search was governed by *Bell* or whether it was governed by a "reasonable suspicion" standard. *See McGee*, 105 S.W.3d at 616-19.

Standing opposite to the jurisdictions that permit warrantless searches, the Ninth Circuit Court of Appeals and the courts of Virginia have concluded that the Fourth Amendment requires a warrant to conduct visual body cavity searches of arrestees when those searches are not justified by threats to institutional security (App. 21a). *See Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1449 (9th Cir. 1991); *Burton v. Spokane*, 2007 US Dist LEXIS 42101, *10 (E. D. Wash. 2007) (unpublished decision); *King v. Commonwealth*, 49 Va. App. 717, 724-27 (Va. Ct. App. 2007); *Hughes v. Commonwealth*, 31 Va. App. 447, 460 (Va. Ct. App. 2000); *Commonwealth v. Gilmore*, 27 Va. App. 320, 331 n. 5 (Va. Ct. App. 1998); *see also McGee*, 105 S.W.3d at 619-20 (Price, J., dissenting) (warrant required to conduct visual body cavity searches of arrestees).[7] Put differently, these courts have concluded that investigatory visual body cavity searches of arrestees fall completely outside the "reasonableness" ambit of *Bell*.

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[7] Other states have passed statutes requiring a warrant for investigatory visual body cavity searches of arrestees. *See, e.g.*, N. J. Stat. Ann. § 2d:161a-3 (West 1998); Tenn. Code. Ann. § 40-7-121(a) (1998).

These courts have required warrants because they liken visual body cavity searches to intrusions into the body which, under *Schmerber v. California, supra,* are permitted without a warrant only under exigent circumstances (App. 16a-17a). *See Fuller*, 950 F.2d at 1449; *Hughes*, 31 Va. App. at 460; *McGee*, 105 S.W.3d at 619-20 (Price, J., dissenting). And, these same courts have found *Bell*, which permitted warrantless visual body cavity searches of pretrial detainees, inapplicable to investigatory visual body cavity searches because the searches conducted in *Bell* were performed for the paramount governmental interest of maintaining institutional security in residential detention centers and prisons, a justification that is absent for investigatory searches of arrestees (App. 20a). *See Gilmore*, 27 Va. App. at 331 n. 5.

Further, while this Court created the *Bell* reasonableness test for "convicted prisoners" and "pre-trial detainees" -- *i.e.*, people who had lost "some" of their Fourth Amendment rights upon their commitment (App. 24a) -- the aforementioned courts have ruled that arrestees, who have not yet even been arraigned and entered into the prison system, enjoy greater constitutional protections. *See, e.g., Fuller*, 950 F.2d at 1448; *King*, 49 Va. App. at 725; *Gilmore*, 27 Va. App. at 331 n. 5; *see also Salinas v. Breier*, 695 F.2d 1073, 1083 (7th Cir. 1982) ("there is considerably greater constitutional power in the police to search the bodies of persons in custody than the bodies of persons not in custody"). Thus, for the courts that require warrants, not only is *Bell* inapplicable for the two aforementioned reasons, but

the visual body cavity searches constitute intrusions into the body under *Schmerber*.[8]

This issue has split not only the courts, but also legal scholars. Some argue for the Ninth Circuit's standard, concluding that the Fourth Amendment requires that investigatory searches be subject to a determination by a neutral and detached magistrate. *See, e.g.*, Eugene Shapiro, *Strip Searches Incident to Arrest: Cabining the Authority to Humiliate*, 83 N. Dak. L. Rev. 67, 108 (2007) [hereinafter Shapiro, *Strip Searches Incident to Arrest*]; William Simonitsch, *Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment*, 54 U. Miami L. Rev. 665 (2000) [hereinafter Simonitsch, *Visual Body Cavity Searches*]; Michael G. Rogers, *Bodily Intrusions in Search of Evidence: Fourth Amendment Decisionmaking*, 62 Ind. L.J. 1181, 1191 (1987). Others suggest that such strip and visual body cavity searches incident to arrest fall outside the warrant requirement and that the reasonable suspicion standard should apply. *See, e.g.,* Helmer, *Strip Search and the Felony Detainee*, *supra.*

In sum, a deep divide has developed among the federal and state courts with regards to the propriety of conducting visual body cavity searches of arrestees to recover evidence. While the majority of jurisdictions have held that the Fourth

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[8] The two concurring judges here, in writing that a warrant should be required for investigatory visual body cavity searches of arrestees, expressly relied on this reasoning (App. 18a-23a).

Amendment permits such warrantless searches, the Ninth Circuit Court of Appeals and the courts of Virginia require a warrant absent exigent circumstances. And even among the states and circuits that allow warrantless visual body cavity searches incident to arrest, the courts are split as to what constitutes the appropriate legal standard for evaluating the propriety of such searches. Some courts follow the four-factor *Bell* test, while others have held that *Bell* demands "reasonable suspicion." Still others have applied the "reasonable suspicion" standard, but have done so from outside the *Bell* paradigm. Lastly, courts, while approving of warrantless searches, have even required the higher standard of probable cause.[9]

What these differing opinions among the courts and scholars highlight, and what the division in the New York Court of Appeals suggests, is that the guidance of this Court is urgently needed. *See, e.g.,* Deborah MacGregor, *Stripped of All Reason? The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees*, 36 Colum. J.L. & Soc. Probs. 163, 206-07 (2003) (the "varied

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[9] This confusion is hardly surprising given that this Court's decisions in other areas are cited in support of the opposite conclusions reached by courts nationwide on the issue now presented. *Compare Maryland v. Buie*, 494 U.S. 325 (1990) (post-arrest searches of property must be justified by specific facts establishing that search was necessary), *Schmerber*, 384 U.S. at 757 (intrusions into body require warrant), *with Bell*, 441 U.S. at 520 (warrantless visual body cavity searches of detainees reasonable); *Robinson*, 414 U.S. at 234 (full warrantless search incident to arrest permissible).

approaches lower courts have taken to analyzing the question of arrestees' ... rights to be free from unreasonable strip searches demonstrate the level of confusion that exists in this area of the law. Such confusion in a major area of civil rights can lead to an increase in lawsuits and frustration on the part of correctional officials and detainees."); *see also* Shapiro, *Strip Searches Incident To Arrest*, *supra* at 67 ("[o]ne of the more puzzling characteristics of current Fourth Amendment jurisprudence has been the inadequacy of judicial evaluation of [arrestees'] strip searches").

The need to resolve this conflict among the lower courts is especially pressing because in Virginia there is a direct conflict between the state courts and the Fourth Circuit Court of Appeals, which has jurisdiction over that state. *Compare Amaechi*, 237 F.3d at 361-63 (strip and visual cavity searches analyzed under *Bell* reasonableness factors), *with King*, 49 Va. App. at 724-27 (warrant needed for investigatory visual body cavity search of arrestee).

C. This Case is the Perfect Vehicle for Deciding This Extremely Important and Frequently Arising Issue of Law.

Without question, a strip and visual body cavity search subjects an arrestee to a "gross interference" in his personal privacy. *See Swain*, 117 F.3d at 6 (*citing Arruda v. Fair*, 710 F.2d 886, 887 [1st Cir. 1983]). Such a search, regardless of the manner in which it is conducted, is an "embarrassing and humiliating experience." *Boren v. Deland*, 958 F.2d 987, 988 n. 1 (10th Cir. 1992);

see also Kennedy v. Los Angeles, 901 F.2d 702, 711 (9th Cir. 1990); *Mary Beth G.*, 723 F.2d at 1272. The intrusive nature of these searches alone evinces that the constitutional limits on such searches should be dictated by this Court. Notwithstanding the obvious importance of this issue, litigation concerning the propriety of such searches arises very frequently because the question has not been addressed in this Court. The result, as noted, has been a deep split.

And this case presents an ideal opportunity for this Court to resolve this split and decide whether the Fourth Amendment permits warrantless strip and visual body cavity searches of arrestees. The New York Court of Appeals squarely confronted the issue of whether it was "constitutionally permissible for police to subject a person arrested for a drug sale to a [warrantless] visual body inspection" (App. 1a). In deciding that issue, the majority opinion directly concluded "that the Fourth Amendment does not prohibit a visual cavity inspection if the police have at least a reasonable suspicion to believe that contraband, evidence or a weapon is hidden inside the arrestee's body" (App. 8a). The majority based this rule on the *Bell* "balancing test" (App. 7a-8a). Thus, this case presents no procedural hurdles that could prevent this Court from reaching this central issue.

2. IN HOLDING THAT THE POLICE INTRUDED INTO RESPONDENT'S BODY BY PULLING ON THE STRING PROTRUDING FROM HIS RECTUM -- AND THEREFORE THAT A WARRANT WAS REQUIRED UNDER *SCHMERBER* -- THE MAJORITY OPINION OF THE NEW YORK COURT OF APPEALS CONFLICTS WITH THAT OF OTHER COURTS NATIONWIDE. MOREOVER, THAT OPINION CREATES A DANGEROUS LEGAL STANDARD THAT CONTRAVENES THIS COURT'S CONTROLLING PRECEDENT.

In *Schmerber,* this Court reaffirmed the well-settled principle that there is an "unrestricted" right to search the accused incident to a lawful arrest "to discover and seize the fruits or evidences of crime." 384 U.S. at 769. However, this Court determined, the rules governing typical searches incident to arrest have "little applicability with respect to searches involving intrusions beyond the body's surface." *Id.* Rather, where "intrusions into the human body are concerned," police must have a "clear indication" that evidence will be found inside the body, and the police must first obtain a warrant unless there are exigent circumstances that justify dispensing with the warrant. *Id.* at 770.

The *Schmerber* case involved the warrantless extraction of blood via a needle inserted into the defendant's arm. The extraction was incident to *Schmerber*'s lawful arrest for driving under the influence of alcohol. This Court opined that a warrant was ordinarily required for such an

intrusion inside the body. *Id.* However, because an arrestee's blood-alcohol level "begins to diminish shortly after drinking stops," time was critical. Therefore, the police were presented with exigent circumstances that justified dispensing with the warrant. *Id.*

At issue here is what constitutes an "intrusion[ ] beyond the body's surface" requiring a warrant under *Schmerber*. The four judges writing for the majority held that by pulling the string that was protruding three inches beyond the surface of respondent's rectum, the police intruded into respondent's body, and therefore, under *Schmerber*, they should have first obtained a warrant (App. 15a). As a result, the majority suppressed the recovered drugs and dismissed the felony indictment. The three judges in dissent argued that because no "officer put a hand or implement in [respondent's] body," *"Schmerber* [was] inapplicable ... for the simple reason that no one intruded into [respondent's] body" (App. 33a).

Like the majority and dissent here, courts nationwide have split over whether the removal of an item partially protruding from a suspect's body cavity constitutes an intrusion into the body requiring a warrant. By granting *certiorari*, this Court will obtain an opportunity to settle this split in jurisprudence, clarify what constitutes an intrusion into the body under *Schmerber,* and reverse this erroneous decision of the New York Court of Appeals.

A. Courts Nationwide Have Split On The Question Of Whether the Removal Of An Object Protruding From An Arrestee's Body Cavity Is An Intrusion Into The Body Within The Meaning Of *Schmerber*.

As explained, in *Schmerber*, which involved the insertion of a needle into the arrestee's arm, puncturing his skin in order to withdraw blood, this Court forbade warrantless "intrusions into the body" absent exigent circumstances.

From this, in the forty years since *Schmerber*, courts have unanimously held that the insertion into the body of a foreign object, such as an endoscope, surgical instrument, or speculum, constitutes an "intrusion into the body" under *Schmerber*. *See, e.g., Winston v. Lee*, 470 U.S. 753, 755 (1983) (*Schmerber* applied to warrantless surgery to remove bullet embedded in skin); *United States v. Nelson*, 36 F.3d 758, 761 (8th Cir. 1994) (warrantless endoscopic examination unlawful under *Schmerber*); *United States v. Cameron*, 538 F.2d 254, 258 (9th Cir. 1976) (enema and forced consumption of laxatives ruled unlawful under *Schmerber*); *State v. Clark*, 654 P.2d 355, 361 (Haw. 1982) (penetration of vagina with speculum to retrieve money, unlawful under *Schmerber*).

The same is true for the digital penetration of an arrestee's body cavities. *United States v. Oyekan*, 786 F.2d 832 (8th Cir. 1986) (digital "rectal probe and pelvic examination" of arrestee unreasonable under *Schmerber*); *Amaechi*, 237 F.3d at 361-63 (digital penetration of arrestee's vagina unlawful); *Gilmore*, 27 Va. App. at 320 (insertion of

hand inside vagina to recover money, unlawful under *Schmerber*); *State v. Fontenot*, 383 So. 2d 365 (La. 1980) (manual retrieval of bottle from inside vagina during "pelvic examination" unreasonable under *Schmerber*). This is because those types of searches involve the actual police intrusion beneath the body's surface, like in *Schmerber*. Thus, for the aforementioned searches, absent exigent circumstances, the police must obtain a warrant.

However, where the search of an arrestee does not involve the physical penetration of the human body, the courts have been unable to agree upon a rule. For example, as explained in Point I, *supra*, the Ninth Circuit Court of Appeals and the courts of Virginia hold that a mere visual inspection of an arrestee's body cavities constitutes an intrusion into the body under *Schmerber*. *See Fuller*, 950 F.2d at 1449 (warrant required for visual body cavity search of arrestee because *Schmerber* governs all invasive searches "whether by a needle ... or a visual intrusion into a body cavity"); *King*, 49 Va. App. at 724-27 (warrantless visual body cavity search falls under *Schmerber*); *Commonwealth v. Moss*, 30 Va. App. 219, 224-26 (Va. Ct. App. 1999) (applying *Schmerber* to strip search). Similarly, courts have held that an x-ray incident to arrest constitutes an intrusion into the body requiring a warrant. *See United States v. Allen*, 337 F. Supp. 1041 (E.D. Pa. 1972) (x-ray of arrestee falls under *Schmerber*); *State v. Palmer*, 803 P.2d 1249 (Utah. Ct. App. 1990) (same); *People v. Williams*, 157 Ill. App. 3d 496 (Ill. App. Ct. 1987) (same); *State v. Mabon,* 648 S.W.2d 271 (Tenn. Crim. App. 1982) (same); *see also United States v. Elk*, 676 F.2d 379 (9th Cir. 1982) (in

context of border search, held that *Schmerber* applied to x-ray search). But, as noted in Point I(B), *supra*, the majority of federal and state courts have held that visual searches and inspections, which involve no instrumental or digital penetration of the body, do not constitute an intrusion into the body under *Schmerber*.

Likewise, the federal and state courts have failed to come to agreement as to whether the swabbing of the inside of an arrestee's mouth to obtain saliva for a DNA sample constitutes an intrusion into the body under *Schmerber*. *See United States v. Nicolosi*, 885 F. Supp. 50, 53 (E.D.N.Y. 1995) (because critical element of *Schmerber* was the collection of "physical evidence below the skin" versus evidence "outside the skin," warrant required to swab arrestee's mouth for saliva); *see also In re: Shaddie Clark Shabazz*, 200 F. Supp. 2d 578 (D.S.C. 2002) (same); *Henry v. Ryan*, 775 F. Supp. 247 (N.D. Ill. 1991) (same); *but see In re Nontestimonial Identification Order Directed To R.H.*, 171 Vt. 227, 233-34 (Vt. 2001) (critical element in *Schmerber* was "piercing" the skin, thus, no warrant required to swab arrestee's mouth).

Most pertinent here, the courts have split as to whether the removal of an object which is embedded within the body, but which protrudes outside the body and can be removed without any actual physical penetration, constitutes an "intrusion into the body" falling under *Schmerber*. On one side, and as the four judges in the majority ruled here, are holdings that "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" (App. 12a). *See, e.g., State v. Barnes*, 159 P.3d 589 (Ariz. Ct. App. 2007) (2-1 decision) (removal of bag of narcotics partially secreted in the defendant's rectum was intrusion into body under *Schmerber*), *review dismissed*, 2008 Ariz. LEXIS 38 (Ariz. 2008); *People v. More,* 97 N.Y.2d 209 (N.Y. 2002) (seizure of bag "partially protruding" from rectum fell under *Schmerber*); *Hughes*, 31 Va. App. at 447 (removal of a plastic bag protruding halfway out of rectum constituted an "intrusive physical body cavity search" under *Schmerber*); *State v. Kangas*, 1998 Ohio. App. LEXIS 5417 (Ohio Ct. App. 1998) (unpublished decision) (implying that if cocaine had been partially secreted in rectum, warrant would have been needed to remove it); *State v. Bullock*, 661 So. 2d 1074 (La. App. 4th Cir. 1995) (removal of cocaine partially protruding from vagina unlawful under *Schmerber*).

Other jurists, like the three judges writing in dissent here, have taken the opposite approach, ruling that as long as the police do not penetrate the surface of an arrestee's skin, *Schmerber* does not apply. *See, e.g., State v. Himmelwright*, 551 F.2d 991 (5th Cir. 1977) (during visual body cavity search, police saw cocaine-filled condom protruding from arrestee's vagina; removal of condom did not elevate search to unlawful manual body cavity search); *United States v. Holtz*, 479 F.2d 89 (9th Cir. 1973) (cocaine-filled condom, which protruded out of arrestee's vagina, properly removed without warrant and did not fall under *Schmerber*); *Barnes*, 159 P.3d at 594-95 (Espinosa, J., dissenting) (removal of bag

protruding from rectum not intrusion into body under *Schmerber*); *State v. Nieves*, 383 Md. 573 (Md. 2004) (search held unlawful for lack of reasonable suspicion, but court concluded that removal of protruding bag was not "a physical body cavity search" requiring warrant); *State v. Jones*, 887 P.2d 461 (Was. Ct. App. 1995) (removal of tube protruding from anus during strip search was not unlawful body cavity search); *State v. Kelly*, 1993 Ohio App. LEXIS 3292 (Ohio Ct. App. 1993) (unpublished decision) (removal of condom partially protruding from rectum not body cavity search); *see also State v. Voichahoske*, 271 Neb. 64 (Neb. 2006) (while not directly confronting issue, removal of drugs "protruding" from rectum was part of strip search); *Taylor v. Commonwealth*, 28 Va. App. 638 (Va. Ct. App. 1998) (same). These courts have determined that as long as the police were in a lawful position to see the object protruding from the body cavity, i.e. they conducted a lawful visual body cavity search of the arrestee, it was then proper for them to seize what they saw in plain view (App. 36a).

In short, review of this case is needed to clarify what constitutes an intrusion into the body under *Schmerber*. *See* Simonitsch, *Visual Body Cavity Searches Incident to Arrest*, at 671 (highlighting that this Court, in *Schmerber*, did "not take the opportunity to speak more on intrusions beyond the body's surface," and specifically, "on what an intrusion entails"). While the courts of this nation have unanimously concluded that the insertion of an instrument or digit into an arrestee's body requires a warrant under *Schmerber*, the courts have split on whether other types of searches,

i.e., the visual inspection of an arrestee's body cavities, the x-ray of an arrestee, and the collection of DNA from a suspect's mouth, constitute such an intrusion. And specifically in this situation, forty-two years after *Schmerber*, the courts are sharply split on whether the removal of an object protruding from a suspect, but still partially concealed within his body, requires a warrant.

B. The Majority Opinion of the New York Court Of Appeals Is Fundamentally Flawed, And It Creates A New and Dangerous Legal Standard That Benefits Neither Arrestees Nor The Police.

As explained, the police in *Schmerber* inserted a needle into the suspect's arm in order to gather evidence of the crime. Simply put, the search in *Schmerber* pierced the skin of the suspect. In examining this search, this Court held that such an "intrusion[ ] into the body" required a warrant absent exigent circumstances.

The decision of the New York Court of Appeals directly conflicts with the principles and rule enunciated by *Schmerber.* In that regard, in holding that the "*Schmerber* rule" applied here, the majority ruled that the "removal of an object protruding from a body cavity, *regardless of whether any insertion into the body cavity is necessary,*" required a warrant absent exigent circumstances (App. 12a). Thus, while *Schmerber* applied expressly to insertions into the body, the majority here turned *Schmerber* on its head, ruling that *Schmerber* applied "regardless of whether any insertion into the body cavity" was performed.

Put differently, as Justice Espinosa wrote in his dissent in *Barnes*, 215 Ariz. at 284 fn. 8, which analyzed an almost identical search:

> the record establishes that no intrusion, gentle or otherwise, occurred, notwithstanding the majority's novel theory that removal of the plastic baggie [partially embedded in defendant's rectum] 'had the effect' of exerting some type of 'force' within the body. *Schmerber*, however, does not rely on such delicate quantum mechanics, nor should the reasonableness of an otherwise lawful search.

Similarly here, there was no intrusion into the body, and the majority's expansion of *Schmerber* should be struck down by this Court.

Perhaps more importantly, the Court of Appeals decision here, as the dissent aptly recognized (App. 36a), creates a cumbersome legal requirement -- obtaining a search warrant -- that provides no benefit even to arrestees. In that regard, under the majority's rule, when the police have lawfully conducted a strip and visual body cavity search of a suspect, and have lawfully observed contraband protruding from a cavity, they must then halt the search and secure the arrestee while the police obtain a search warrant from a judge. In the meantime, for the hours during which the police await the issuance of the search warrant -- which will inevitably be issued because its basis is the

direct observation of contraband -- the arrestee must be held under constant observation that will be more degrading than the quick, non-invasive removal of that which the warrant will necessarily order removed. And of course, during that lengthy time period, there will be some danger of the unintended ingestion of the drug being concealed. In other words, the rule benefits no one, causing state expense and inconvenience as well as humiliation and danger to the arrestee.

Of course, penetration of the body with either a hand or instrument to retrieve contraband raises grave considerations for a person's privacy, dignity, and health, and public policy dictates that a warrant should be required. *See Schmerber,* 384 U.S. at 769-70. But here, it "makes little sense ... to require officers to obtain a warrant ... where contraband is visible between the cheeks of the buttocks and may be retrieved easily, without harm to the individual, but may be partially secreted in the rectum" (App. 36a) (*citing Barnes*, 215 Ariz. at 285). Indeed, as the dissent explained here, "it is [not] unreasonable for the officers to take, with minimal force, what they have already lawfully seen" (App. 36a). *See, e.g., Horton* v. *California*, 496 U.S. 128 (1990) (police need not obtain a warrant to seize evidence that is in plain view and that they are lawfully situated to observe). The majority's warrant requirement is even more perplexing given that, in New York as well as other jurisdictions, the police can lawfully seize contraband found between the cheeks of the buttocks, *see People v. Walker*, 27 A.D.3d 899 (N.Y. App. Div. 2006); *Thomas*, 429 Mass. at 407-08; *McGee*, 105 S.W.3d at 613; *People v. Wade*, 208 Cal.

App. 3d 304 (1989), but must now obtain a warrant when that same contraband is partially concealed in a cavity.

Lastly, the rule espoused by the dissent here, which would permit the warrantless recovery of discovered contraband as long as the officer does not have to insert an implement or hand into the suspect's body, is a bright-line rule that makes sense. *See, e.g., New York v. Belton*, 453 U.S. 454 (1981) (Fourth Amendment doctrine should be expressed in "readily applicable" terms, and should not require the "drawing of subtle nuances and hairline distinctions"). It permits the police promptly and efficiently to complete necessary searches that have little chance of injuring the suspect, *United States v. Ross*, 456 U.S. 798 (1982) ("When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions ... must give way to the interest in the prompt and efficient completion of the task at hand"), while it requires the police to obtain judicial sanction before undertaking the highly intrusive step of penetrating the suspect's body.

C. There Is No Doubt That This Issue Presents a Federal Question.

Finally, this issue undoubtedly presents a question of federal constitutional law. In ordering that the drugs recovered from respondent's rectum be suppressed, the majority held that "when the police physically removed the object that was attached to the string without first obtaining a warrant, they conducted an unreasonable manual

body cavity search in violation of the Fourth Amendment" (App. 15a).[10] In fact, the majority specifically noted that the "preeminent decision examining the constitutional dimensions of searches that involve police intrusion into a person's body is *Schmerber*," and from this "stressed that *Schmerber* requires the police to obtain a warrant authorizing the removal of the plastic bag in the absence of the exigent circumstances justifying an immediate seizure of the item" (App. 4a, 15a).

The single New York state case relied upon by the majority, *More*, 97 N.Y.2d at 209, also involved a direct application of *Schmerber* and the principles of the Fourth Amendment. In *More*, during a body cavity search conducted at the defendant's apartment, the police forcibly removed a plastic bag protruding from his rectum. In suppressing the recovered narcotics, the Court of Appeals explained that the "dispositive issue" was "the validity of that seizure under the Fourth Amendment of the United States Constitution." *More*, 97 N.Y.2d at 211. And in analyzing whether the Fourth Amendment required a warrant, the Court of Appeals held that the search was "at least as" intrusive as the search conducted in *Schmerber*, and therefore was governed by the clear indication and exigent circumstances requirements of *Schmerber*. *Id.* at 213. Notably, the majority opinion here described *More* as holding that

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[10] Here, the Court of Appeals was clearly referring to the Fourth Amendment of the United States Constitution, as the Search and Seizure Clause of the New York Constitution is found in Article 1 § 12.

"the removal of the object from the defendant's rectum without prior judicial authorization violated the Fourth Amendment" (App. 11a).

In short, there is no doubt that the New York Court of Appeals' decision turned directly on federal constitutional law.

* * *

In sum, in the forty-two years since *Schmerber*, courts nationwide have struggled to interpret what constitutes an intrusion into the body requiring a warrant. And in this particular context, where the police pulled a string protruding from respondent's rectum, the courts are split. By granting *certiorari* here, this Court can clarify what constitutes an intrusion into the body, and further, resolve the split among this nation's courts.

CONCLUSION

This Court should issue a writ of *certiorari* here to review the decision of the New York Court of Appeals.

Respectfully submitted,

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