No. 20-982

IN THE

Supreme Court of the United States

SHARON LYNN BROWN,

Petitioner,

v.

POLK COUNTY, WISCONSIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Seventh Circuit Court of Appeals correctly conclude that the constitutional standard for conducting a manual cavity search of a pretrial detainee was reasonable suspicion based on prior precedent from the United States Supreme Court and other Courts of Appeals?

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INTRODUCTION

This case involves the application of established case law regarding searches of pretrial detainees. Relying on that established case law, established by this Court and numerous United States Courts of Appeals relying on decisions from this Court, the Seventh Circuit Court of Appeals properly concluded that a cavity search of a pretrial detainee was justified upon a showing of reasonable suspicion.

Throughout the course of this litigation, Petitioner-Appellant-Plaintiff Sharon Lynn Brown ('Petitioner") urged the District Court and Seventh Circuit Court of Appeals to "adopt a higher standard of suspicion and require a warrant based on probable cause" before a pretrial detainee be required to submit to a cavity search. [A-App 10.] She argued that cases involving searches that involved any intrusion into an individual's body required more than reasonable suspicion. However, in so arguing, Petitioner disregarded this Court's holdings in *Bell v. Wolfish* and *Florence v. Board of Chosen Freeholders of County of Burlington.*

In filing this current petition, Petitioner again seeks to minimalize considerations of jail safety and security addressed by this Court in *Bell* and *Florence*, arguing that inapplicable cases involving searches in criminal contexts mandate that a warrant be required for a manual body-cavity search of a pretrial detainee. The District Court, the Seventh Circuit Court of Appeals, and other United States Courts of Appeals – all relying on direction and authority from this Court – have come to the opposite conclusion, holding that cavity searches

of pretrial detainees require only reasonable suspicion. The law is settled on the issue, and Petitioner's position is unsupportable.

This current petition should be denied because the Seventh Circuit Court of Appeals' decision is not in conflict with any relevant decision of another United States Court of Appeal, this Court, or any state court of last resort. To the contrary, the decision issued by the Seventh Circuit Court of Appeals is consistent with controlling and persuasive precedent regarding cavity searches of pretrial detainees. The decisions cited by Petitioner in support of her petition are all distinguishable and there is no basis for overturning the established precedent of this Court and other United States Courts of Appeals.

STATEMENT OF THE CASE

I. Factual Background

1. In May 2017, the Polk County Jail (the "Jail") had a policy in place related to cavity searches. [Dkt. 14 (9:6-13); Dkt. 12, ¶ 10.[1]] The policy defined a "body cavity search" as "an inspection and penetration of the anal or vaginal cavity of a person that is conducted manually, by means of an instrument, apparatus, or object, or in any other manner while the person is detained or confined…" [Dkt. 12-1 (POLK000011).] The policy required that all cavity searches be performed by a physician, physician's assistant, or registered nurse licensed to practice in

1. "Dkt." refers to the docket entry and corresponding document in the District Court record, cited pursuant to Supreme Court Rule 12.7.

Wisconsin. [Dkt. 12-1 (POLK000016).] The policy granted corrections officers the ability to request a cavity search when an inmate is "detained for any lawful reason, and the corrections officer has reasonable grounds to believe that the person is concealing weapons, contraband, or evidence in a body cavity, or otherwise believes that the safety and security of the jail would benefit from a body cavity search" of the inmate. [Dkt. 12-1 (POLK000016).] The policy required the correctional officer to contact the shift supervisor and Jail administrator for approval for the cavity search. [Dkt. 12-1 (POLK000016).] Staff was also required to contact a physician to make arrangement for the search. [Dkt. 12-1 (POLK000016).]

2. Petitioner arrived at the Jail just after midnight on May 3, 2017 after she had been arrested for retail theft. [Dkt. 12, ¶ 6.] When she arrived at the Jail, Petitioner was house in K Pod with other inmates, including Jacqueline Duke ("Duke") and Amy Nelson ("Nelson").[Dkt. 12, ¶¶ 8, 9; Dkt. 15, ¶ 5.]

On May 4, 2017, Duke approached Jail Correctional Officer Steven Hilleshiem (Hilleshiem) during medication pass and told him that Petitioner was concealing a large amount of meth in her body cavity. [Dkt. 14, 17:2-14; Dkt. 19-1 (POLK000002); Dkt. 14 (6:12-20).] After he received the report from Duke, Hilleshiem spoke with Jail Nurse Donna Johnson ("Nurse Johnson"), Sergeant Matt Thayer, and Sheriff Pete Johnson about Duke's report. [Dkt. 14, 19:21-21:7; Dkt. 19-1 (POLK000002).] Nurse Johnson subsequently spoke with Petitioner, Nelson, and another inmate (she did not recall the name of this inmate) in K Pod. [Dkt. 16, ¶¶ 10-13.]

Nelson told Nurse Johnson that she received information from Petitioner, including what drugs Petitioner was concealing, the manner in which Petitioner was concealing the drugs, that Petitioner had asked other girls in the Pod for something in which to conceal the drugs, and that Petitioner was concerned she might absorb the drugs because of how she had them concealed in her body. [Dkt. 15, ¶ 15.] Nelson also told Nurse Johnson that Petitioner told inmates, including Nelson, that she was concealing drugs, specifically meth, inside her body cavity. [Dkt. 15, ¶¶ 9, 13, 15.]

After speaking with Nelson, Petitioner, and the other inmate, Nurse Johnson came to the conclusion that the report about Petitioner was likely credible, that the report warranted further investigation, and that Petitioner should undergo a cavity search. [Dkt. 16, ¶14.] Hilleshiem also came to the conclusion that a cavity search was reasonable based on the report he received as well as his years of interaction with inmates and working with people. [Dkt. 14, 28:21-29:3.] Nurse Johnson and the staff members at the Jail discussed the situation and shared the information that each of them had obtained from speaking with Petitioner and the other inmates. [Dkt. 16, ¶¶ 15, 16.] They also shared their opinions and recommendations, and expressed concerns for Petitioner's safety, as well as the safety and security of the Jail. [Dkt. 16, ¶¶ 16; Dkt. 14 (18:17-19:2; 40:4-9; 40:15-20).]

After the Jail staff discussed their opinions, they collectively came to the conclusion that Petitioner should be sent for a cavity search, and Chief Deputy Wes Revels was contacted for approval in accordance with the policy. [Dkt. 16, ¶ 16; Dkt. 14, (23:10-14); Dkt. 19 (5:14-6:2; 18:1-9);

Dkt. 12-1 (POLK000016); Dkt. 19 (5:14-6:2).] Hilleshiem spoke to Revels and gave him information about the situation. [Dkt. 14, (23:10-14); Dkt. 19 (18:1-15; 19:5-7; 20:1-5).] Hilleshiem also told Revels that the information about the situation that he had obtained met the policy requirements for a cavity search.[2] [Dkt. 19 (22:16-20; 24:2-6).] Revels authorized the cavity search based on the information he received from Hilleshiem.[3] [Dkt. 19 (27:1-6).]

Petitioner was cuffed and escorted to the back of a squad car by Deputy Anthony Lehman. [Dkt. 17 (111:19-24); Dkt. 18 (14:10-13).] Jail staff told Petitioner that she would be going to St. Croix Hospital for a cavity search. [Dkt. 18 (12:2-3; 14:10-13); Dkt. 17 (112:8-10; 114:8-19).] Ultimately, Petitioner met with a nurse and doctor, who explained to Petitioner that the doctor would be performing the cavity search. [Dkt. 17 (115:3-13; 116:1-3).] When the nurse and doctor arrived, Deputy Lehman left the examination room. [Dkt. 18 (14:24-15:2)] The doctor explained to Petitioner that he would be performing an

2. Contrary to Petitioner's assertion, there is no evidence that the request for a body cavity search was limited to only Petitioner's vagina. [Dkt. 14 (16:19-21 (Q: "Okay. So you requested authorization to do a cavity search of Ms. Smith, correct? A: Yes." (emphasis added)); 28:5-7); Dkt. 19 (23:1-5; 28:21-25) (authorizing "cavity search" generally).]

3. Revels testified during his deposition that he assumed the contraband was hidden in Petitioner's vagina, but conceded that it was an assumption and that he was not specifically told where, internally, the contraband was allegedly held. [Dkt. 19 (31:5-32:8).] Indeed, there is no evidence that the sources indicated in which body cavity the contraband was purportedly concealed. [Dkt. 14, 17:2-14; Dkt. 19-1 (POLK000002); Dkt. 16, ¶ 10; Dkt. 15, ¶ 9.]

ultrasound of her abdomen, a vaginal examination, and an anal examination, in that order. [Dkt. 17 (116:4-12).] The examination was very brief and took between one and five minutes. [Dkt. 18 (14:23-15:2); Dkt. 17 (117:7-12).] The doctor used an external probe to conduct the abdominal ultrasound and a speculum for the vaginal and anal examinations. [Dkt. 17 (117:13-20; 119:6-14; 119:25-120:10).] The doctor did not locate any foreign bodies in Petitioner's body cavities during the examination. [Dkt. 14 (30:12-23); Dkt. 18 (15:24-16:3).]

After the examination, Deputy Lehman transported Petitioner back to the Jail. [Dkt. 18 (16:9-11).] Petitioner requested to stay in a holding cell when she returned. [Dkt. 17 (123:13-25); Dkt. 13 (13:2-24; 15:2-6).] She was permitted to stay in the holding cell until she was transported to Barron County, where she had a warrant, early the next morning. [Dkt. 17 (123:13-25); Dkt. 13 (13:2-24; 15:2-6).]

II. Procedural History

1. On May 22, 2018, Petitioner filed suit against Defendants Polk County, Wisconsin, CO Steven Hilleshiem, CO Janet Lee, Chief Deputy Wes Revels, and Polk County Correctional Officers John Doe 1 through 10 (collectively the "County") in the United States District Court for the Western District of Wisconsin (the "District Court"). [Dkt. 1.] Petitioner brought two claims against the County pursuant to 42 U.S.C. § 1983, claiming that the cavity search and the County's failure to train its employees violated her Fourth Amendment rights. [Dkt. 1.] The District Court had original jurisdiction of Petitioner's claims pursuant to 28 U.S.C. § 1331. [*See* Dkt. 1.]

2. The County filed a motion for summary judgment on April 19, 2019 and sought dismissal of Petitioner's claims. [Dkts. 11; 20.] In response to the motion (as it relates to the issue pending before this Court), Petitioner argued that probable cause or a warrant was required prior to the cavity search. [Dkt. 22, pp. 10-17.]

On August 16, 2019, the District Court granted the County's motion for summary judgment. [Dkt. 39.] The District Court rejected Petitioner's argument regarding the necessity of probable cause and, relying on established precedent, applied the reasonable suspicion standard to the case. [Dkt. 39, pp. 9-13.] The District Court concluded that the Defendants had the requisite reasonable suspicion required to request Petitioner's body cavity search, thus satisfying Petitioner's Fourth Amendment protections. [Dkt. 39, (pp. 10; 13; 18).] The Court dismissed all claims. [Dkt. 39 (p. 18).]

3. On September 4, 2019, Petitioner appealed the District Court decision to the Seventh Circuit Court of Appeals. [Dkt. 43.] On appeal, Petitioner challenged the dismissal of her Fourth Amendment search claim against Chief Deputy Revels, CO Hilleshiem, and Polk County, Wisconsin. [See Doc. 6.[4]] Petitioner's appeal argued that the scope and justification for initiating the search were unconstitutional. [See Doc. 6.] Specifically, Petitioner again argued that probable cause or a warrant was required prior to the cavity search. [Doc. 6, pp. 17-22.]

4. "Doc." refers to the docket entry and corresponding document in the Seventh Circuit Court of Appeals record, cited pursuant to Supreme Court Rule 12.7.

On July 13, 2020, the Seventh Circuit Court of Appeals affirmed the District Court's rulings, again concluding that the proper constitutional standard governing the cavity search was reasonable suspicion and not probable cause. [App. 9, 11.] The Seventh Circuit Court of Appeals specifically rejected Petitioner's request to "adopt a higher standard of suspicion and require a warrant based on probable cause." [App. 10.]

On July 27, 2020, Petitioner filed a petition for "Combined En Banc and Panel Rehearing." [Doc. 28.] On August 18, 2020, the Seventh Circuit Court of Appeals denied both petitions. [Doc. 31.]

REASONS FOR DENYING THE WRIT

Under the Supreme Court Rules, a petition for a writ of certiorari will be granted only for compelling reasons. [Rule 10.] Rule 10 sets forth criteria indicating "the character of the reasons the Court considers . . ." in determining whether to grant a petition. Petitioners have not established meritorious grounds satisfying these conditions and, as such, this Court should deny the Petition.

I. The Decision from the Seventh Circuit Court of Appeals is Not in Conflict with Any Other Relevant Decisions of Any United States Court of Appeals, State Court of Last Resort, or This Court.

Petitioner is incorrect when she asserts that "[f]ederal and state courts are divided" regarding the constitutional standard governing cavity searches of pretrial detainees. Her contention that the decision from the Seventh Circuit

Court of Appeals (the "Decision") is the sole decision that has ever concluded that manual cavity searches are governed by reasonable suspicion, rather than probable cause or a warrant, is simply not accurate. There are, indeed, other decisions from Courts of Appeals across the country that support the Decision. Additionally, the cases she cites to suggest the existence of a circuit split are distinguishable or inapplicable.

1. It is well-settled law that pretrial detainees retain Fourth Amendment protection against unreasonable searches and seizures. *Bell v. Wolfish*, 441 U.S. 520, 545, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). More than forty years ago, this Court established that pretrial detainees' Fourth Amendment rights were limited by needs of a penal institution with custody of that pretrial detainee; namely, the safety and security of the institution. *Id.* at 545-47. The Court held that jail and prison staff "must be free to take appropriate action to ensure the safety of inmates and corrections personnel…." *Id.* at 547. Therefore, *Bell* established that institutional practices that may infringe on a constitutional right are "evaluated in the light of the central objective of prison administration, safeguarding institutional security." *Id.* (citations omitted). This is the case because a pretrial detainee "simply does not possess the full range of freedoms of an unincarcerated individual." *Id.* at 546.

Pursuant to the holding in *Bell,* prison administrators are afforded "wide-ranging deference in the adoption and execution of policies and practices" that they deem appropriate to "preserve internal order and discipline and to maintain institutional security." *Id.* at 547 (citations omitted). This Court noted that "in the absence of

substantial evidence in the record to indicate that [prison and jail] officials have exaggerated their response to these conditions, courts should ordinarily *defer to their expert judgment in such matters*." *Id.* at 548 (emphasis added; quoting *Pell v. Procunier*, 417 U.S. 817, 827, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974)).

With that understanding, this Court has held that warrantless strip and cavity searches of pretrial detainees may be conducted subject to a reasonableness test under the Fourth Amendment. *Bell*, 441 U.S. at 558-59. The test of reasonableness under the Fourth Amendment is "not capable of precise definition or mechanical application" and each case calls for an analysis of the balance between "the need for the particular search against the invasion of personal rights that the search entails." *Id.,* at 559. To assess reasonableness, courts have been instructed to "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." *Id.* (citations omitted).

More than thirty years after this Court decided *Bell*, the Court was asked to address a related issue: namely, "whether undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt from the more invasive procedures at issue *absent reasonable suspicion* of a concealed weapon or other contraband." *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318, 330, 132 S. Ct. 1510, 182 L. Ed. 2d 566 (2012) (emphasis added). *Florence* addressed the legality of a jail policy requiring a strip search of all pretrial detainees prior to entering the general jail population, regardless of the offense each

individual was arrested for and without any reasonable suspicion that the detainee was concealing contraband. *Id*. at 324-25. This Court began its analysis with its prior opinion in *Bell*, noting that "correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities." *Id*. at 328. Ultimately, this Court concluded that the policy at issue comported with the Fourth Amendment and this Court's prior holding in *Bell* because the policy "struck a reasonable balance between inmate privacy and the needs of the institutions." *Id*. at 339.

Both *Bell* and *Florence* established exceptions to the Fourth Amendment's warrant requirement in penal institutions. Relying on the holdings in both cases, Courts of Appeals have previously addressed the issue of manual body cavity searches in jail settings and have concluded that such searches are permissive upon a showing of reasonable suspicion:

First Circuit: *Sanchez v. Pereira-Castillo*,[5] 590 F.3d 31 (1st Cir. 2009)

The First Circuit concluded that the manual rectal search of an inmate was reasonable when the search was based on suspicion that the inmate was concealing contraband and "carried out for the legitimate penological objective of locating and removing contraband from the prison system." *Sanchez*, 590 F.3d at 43-44. The First Circuit drew on this Court's decision in *Bell* in its decision, noting that although the searches in *Bell* were visual cavity searches and the search at issue was a manual cavity

5. Curiously, Petitioner cites this decision for the proposition that probable cause was required for the manual cavity search. [Petition, 22-23.] The case clearly holds to the contrary.

search, the *Bell* "framework … still guide[d] the inquiry." *Id*. at 43 (citation omitted).

Seventh Circuit: *Isby v. Duckworth*, 175 F.3d 1020 (7th Cir. 1999)

The Seventh Circuit previously held that a digital rectal exam of an inmate comported with the Fourth Amendment when the prison staff had reason to believe the plaintiff was concealing contraband internally. *Isby*, 175 F.3d at *1-2.

Ninth Circuit: *Hill v. Koon*, 977 F.2d 589 (9th Cir. 1992)

In *Hill v. Koon*, the Ninth Circuit confirmed that a digital body cavity search of an inmate was justified under Fourth Amendment jurisprudence when there was reasonable suspicion that the person to be searched was concealing contraband. *Hill*, 997 F.2d 589, at *1. The Court in *Hill* cited another decision from the Ninth Circuit, *Vaughan v. Ricketts*, which stated that *Bell* "clearly established that the Fourth Amendment requires that rectal searches in prisons be conducted with reasonable cause and in a reasonable manner." *Id.* (*citing Vaughan v. Ricketts*, 950 F.2d 1464, 1469 (9th Cir.1991)); *Vaughan*, 950 F.2d at 1968-69 (citing *Bell*, 441 U.S. at 559).

Though Petitioner suggests that other Courts of Appeals have issued decisions contrary to the Seventh Circuit's decision herein and held that such searches are permitted only after the issuance of a warrant, the cited cases[6] are all factually and legally distinguishable

6. Petitioner also cites state appellate court decisions to support her position. [Petition, 24-26.] However, her citations

from this Petition. As such, her assertion regarding the existence of a circuit split is inaccurate.

First Circuit: *Spencer v. Roche*, 659 F.3d 142 (1st Cir. 2011); *Sanchez*, 590 F.3d 31; *Rodriques v. Furtado*, 950 F.2d 805 (1st Cir. 1991).

The First Circuit decision in *Spencer* is inapposite because it addressed the legality of a search incident to arrest[7] – not the legality of cavity search of a pretrial detainee in a penal institution.[8] *Spencer v. Roche*, 755 F. Supp. 2d 250, 255-56, 259 (D. Mass. 2010); *Spencer v. Roche*, 659 F.3d at 144. The legal considerations

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to mid-level appellate courts are inapposite, as the rules of this Court note that considerations for granting a writ of certiorari can include whether a United States Court of Appeals "has decided an important federal question in a way that conflicts with a decision by a state court **of last resort**." [Rule 10.a.] Only one of the state court cases cited by Petitioner was issued by a state court of last resort: *People v. Hall*, 886 N.E.2d 162 (N.Y. 2008). All other cases cited by Petitioner were issued by mid-level appellate courts. [*See* Petition, pp. 24-26.] *Hall* is distinguishable from the present case in that it dealt with a search incident to arrest, rather than a search of a detainee in the general jail population. *Hall*, 886 N.E.2d at 164-65. The considerations of *Bell* and *Florence*, which controlled the case subject to this Petition, were not at issue in *Hall*, making the case irrelevant.

7. "The search incident to arrest need not occur at the scene of the arrest, but 'may legally be conducted later when the accused arrives at the place of detention.'" *Spencer*, 755 F. Supp. 2d at 259 (*quoting United States v. Edwards*, 415 U.S. 800, 803, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974)).

8. The plaintiff in *Spencer* also did not challenge the legality of the visual or digital cavity search on appeal; he challenged the legality of an x-ray, which he contended went beyond the scope of the warrant that had been obtained. *Spencer*, 659 F.3d at 145-46.

surrounding searches incident to arrest differ from those related to searches within a penal institution. The search incident to arrest exception to the Fourth Amendment's warrant requirement is founded on the interests of officer safety and preservation of evidence, whereas the warrant exception for searches within a penal institution is founded on penal safety and security of officers and other inmates. *Arizona v. Gant*, 556 U.S. 332, 338, 129 S. Ct. 1710, 1716, 173 L. Ed. 2d 485 (2009) (*citing United States v. Robinson,* 414 U.S. 218, 230–234, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973); *Chimel v. California,* 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)); *Bell*, 441 U.S. at 546-47. Courts have tended to favor an individual's interest in privacy over the government's interest in collecting evidence in criminal cases, but an individual's privacy interests are generally secondary when weighed against penitentiary safety and security. Because "the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests" courts tend to "strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment" in "most criminal cases." *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L.Ed.2d 639 (1989) (internal quotation marks omitted; citations omitted).

These differing considerations explain the different holdings in cases involving cavity searches of pretrial detainees in the care and custody of a jail, and cavity searches of individuals immediately upon their arrest.

Next, with regards to the *Sanchez* case, Respondents have already explained Petitioner's inaccurate citation;

Sanchez upheld the warrantless manual rectal search of an inmate based on suspicion that the inmate was concealing contraband. *Sanchez*, 590 F.3d at 43-44. As such, it supports the Decision and refutes the suggestion of a circuit split.

Finally, the decision in *Rodriques* is also inapposite because it addressed the legality of a manual search authorized by a warrant. *Rodriques*, 950 F.2d at 811. There was no discussion of whether the search would have been justified under a reasonable suspicion standard because the warrant had been obtained in advance of contact with the plaintiff. *Id.* Further, the case involved an individual who had not yet been arrested. *Rodriques v. Furtado*, 771 F. Supp. 1245, 1249 (D. Mass. 1991). In sum, *Rodriques* has no bearing on the issue presented by this Petition because the factual and legal issues are completely unrelated.

In sum, none of the First Circuit cases cited by Petitioner are instructive on the issue presented by this Petition and none of the cases suggest the existence of a split between the First and Seventh Circuit.

Sixth Circuit: *United States v. Booker*, 728 F.3d 535 (6th Cir. 2013)

The Sixth Circuit's decision in *Booker* is distinguishable from the present matter and, therefore, not relevant to the determining the constitutional standard applied to cavity searches of pretrial detainees in a general population area of a jail. The purpose of the search in *Booker* was "investigative" – it was meant to retrieve evidence to support charges against the plaintiff. *Booker*, 728 F.3d a

546-47. Indeed, the court in *Booker* relied heavily upon this Court's decision in *Winston v. Lee*[9] when coming to its conclusion about the reasonableness of the search. *Id.* (citing *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985)). Further still, there is no indication that the reasonable suspicion standard was inapplicable or improper. The analysis was of the "substantive reasonableness"[10] of the search under the standards set forth in *Winston*, not the constitutional standard justifying the search. *Booker*, 728 F.3d at 546-47.

In addition, the institutional safety and security concerns which justify warrantless searches in jails and prisons were not present in *Booker*. Notably, when providing the factual background of the case, the Sixth Circuit specifically indicated that the decision to strip search the plaintiff at the jail[11] was *not* done pursuant to a policy strip-searching all new inmates and there had been *no* decision regarding whether Booker would ultimately be placed into the general population of the facility. *Booker*, 728 F.3d at 538. These two facts distinguish the *Booker*

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9. *Winston* addressed the reasonableness of a subcutaneous search for the retrieval of evidence in a criminal matter. *Winston*, 470 U.S. at 759.

10. "(1) '[T]he extent to which the procedure may threaten the safety or health of the individual,' (2) 'the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity,' and (3) 'the community's interest in fairly and accurately determining guilt or innocence.'" *Booker*, 728 F.3d at 546 (*quoting Winston*, 470 U.S. at 761-62).

11. This visual search was done prior to bringing the plaintiff to the hospital for the search that was ultimately at issue in the case. *Booker*, 728 F.3d at 538.

case from *Florence*, which upheld strip searches, absent reasonable suspicion, done pursuant to policy when an individual was in the general prison population because of safety and security concerns. *Florence*, 566 U.S. at 338-39. These facts also distinguish the case from the present matter, as those considerations from *Florence* were rightly considered in the Decision by the Seventh Circuit. [*See e.g.,* App. 8, 10.]

Because the underlying facts and legal analysis at issue in *Booker* are distinguishable from the facts and legal issue presented by this Petition, it does not support the finding of a circuit split.

Ninth Circuit: *United States v. Fowlkes*, 804 F.3d 954 (9th Cir. 2015)

The *Fowlkes* decision likewise is not incongruent with the Decision herein because it is premised on distinguishable facts and differing legal principles. First and foremost, the Court in *Fowlkes* never addressed whether the seizure at issue required a warrant. *See Fowlkes*, 804 F.3d 962 ("…*we need not and do not determine whether a warrant is required* to seize evidence discovered during a visual strip search from an inmate's body because the officers' conduct here was unreasonable for other reasons." (emphasis added)). Rather, the Court addressed the reasonableness of the seizure based on the manner in which it was conducted. The Court held that an officer's removal of a plastic bag from the defendant's anus during the booking process constituted an unreasonable seizure because the seizure was not conducted by medical personnel to ensure the removal was safe and sanitary, was aided by use of a taser, was conducted in the absence

of exigent circumstances, *and* was in violation of the institutional policy. *Fowlkes*, 804 F.3d at 962, 967 ("No single factor" was dispositive of the unreasonableness of the seizure).

Second, the search in *Fowlkes* was conducted after an arrest, during the booking process, and therefore was a search incident to a lawful arrest. *Id.* at 959; *see U.S. v. Edwards*, 415 U.S. 800, 804-05, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974) (discussing search incident to arrest during booking process). As noted previously, searches incident to arrest implicate different individual and governmental interests and are rightly evaluated under different standards. *See Gant*, 556 U.S. at 338 (citations omitted); *Bell*, 441 U.S. at 546-47.

Because the underlying facts and legal analysis in *Fowlkes* are distinguishable from the facts and legal issue presented by this Petition, it does not support the finding of a circuit split.

Tenth Circuit: *Hinkle v. Beckham County Board of County Commissioners*, 962 F.3d 1204 (10th Cir. 2020)

The Tenth Circuit's decision in *Hinkle* is factually and legally distinguishable from the present matter and does not support the finding of a circuit split. The plaintiff in *Hinkle*, who had been arrested without probable cause or a warrant, was strip-searched upon his arrival at the jail *before* the staff made a determination of whether he would be placed into the general population of inmates. *Hinkle*, 962 F.3d at 1214, 1236. As noted previously, this Court's decision in *Florence* upheld strip searches, absent reasonable suspicion, which were conducted pursuant

to policy when an individual was in the general prison population because of safety and security concerns. *Florence*, 566 U.S. at 338-39. However, when an inmate is *not* placed in the general prison population (or, as with *Hinkle*, no determination had yet been made about placing the plaintiff into the general prison population), the warrant exception established by *Florence* was not applicable because those security and safety concerns which justify a warrantless search are simply not present. *Id.*; *Hinkle*, 962 F.3d at 1237-38. Because the warrant exception from *Florence* was not applicable in *Hinkle* (but is applicable in the present matter), *Hinkle* is distinguished and is not indicative of a circuit split on the specific issue presented by this Petition.

II. This Petition Does Not Present an Issue of National or Immediate Urgency.

In addition to arguing the existence of a (non-existent) circuit split, Petitioner has argued that this Court should grant the Petition because the question presented is exceptionally important. While Respondents do not dispute that a cavity search is a serious matter, the question presented by this Petition is not novel or unsettled, nor will its impact be as far reaching as suggested, and it does not warrant review by this Court.

1. Petitioner urges that the searches are more egregious, and therefore the issue presented by this Petition is exceptionally important, because "[m]ost of these detainees 'are not dangerous' and will be 'released from custody' before or at the time their arrest is reviewed by a judge." [Petition, 28.] The suggestion that the severity of a detainee's charged crime should justify or limit the

types of allowable searches has already been rejected by this Court. In *Florence*, the Court considered, and summarily rejected, the idea that pretrial detainees detained for "minor offenses" should be exempt from certain searches based on the proffered justification that those pretrial detainees "pose the least risk" of smuggling contraband. *Florence*, 566 U.S. at 333-34. As discussed in detail in *Florence*, "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminal" and "the seriousness of an offense is a poor indicator of who has contraband…." *Id.* at 334. As such, the type of crime that an individual has been charged with has no bearing on allowable searches, and does not elevate the question presented to national importance.

2. There is no evidence in the record or presented in the Petition that suggests manual cavity searches of pretrial detainees are happening *en masse* such that the issue is of national importance. Though Petitioner cites to the number of pretrial detainees generally incarcerated at any given time, there is no suggestion that manual or visual cavity searches on particular individuals with reported contraband occur with any given frequency. Therefore, there is no indication in the record or Petition to suggest that a decision by this Court on the Petition will have widespread national impact.

3. The question presented by this Petition already has received guidance from this Court and numerous Courts of Appeals across the country and therefore is not an unsettled issue. This Court has already concluded that pretrial detainees in the general population of a penal institution may be subjected to strip searches and cavity searches in response to the penal institution's need for

safety and security without any semblance of a suspicion that they may be carrying contraband. *Florence*, 566 U.S. at 338-39; *Bell* 441 U.S. at 558-59. Drawing on that decision and the Court's prior decision in *Bell*, Courts of Appeals across the country extended the rulings to add the reasonable suspicion requirement for individual searches in an institutional context. *See, e.g.*, *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983); *Swain v. Spinney*, 117 F.3d 1, 7 (1st Cir.1997); *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir.1993). A decision from this Court on the issue presented would simply affirm what other Courts of Appeals have already concluded.

III. None of the Reasons Proffered by Petitioner Make this Case the "Proper Vehicle" for the Issue Presented.

Petitioner's stated justifications for accepting this Petition to address the issue presented are, in some instances, overstated or irrelevant considerations.

1. As noted above, *Florence* rejected the notion that those incarcerated for minor offenses should be exempt from certain types of searches. *Florence*, 566 U.S. at 333-34. As such, the fact that Petitioner contends she was arrested for a "minor offense" is of no bearing.

2. Second, the record does not suggest that Petitioner was subjected to an unreasonable search after Respondents concluded there was reasonable suspicion to request a cavity search by a licensed physician. Though Petitioner seems to suggest otherwise when she claims that the physician's headlight failure "concretizes the risks of manual body-cavity searches…" the search was performed

in a reasonable manner, in a hygienic situation, by a licensed physician, and Petitioner suffered no physical ailments as a result. [App. 12-13.]

3. The fact that drugs or other contraband were not located during the search likewise has no bearing on the reasonableness or justification of the search.

4. The lower courts never had occasion to address whether the information obtained by Respondents constituted probable cause, because the lower courts correctly concluded that the search did not require probable cause before commencement. [App. 1-35.] As such, the issue of whether the information presented constituted probable cause would still need to be resolved before the case could be concluded.

5. Petitioner's argument that her Petition "bears out the virtues of the question she advances" is essentially a challenge to the District Court and Seventh Circuit's conclusions that there was reasonable suspicion to justify the search. [Petition, 32.] Arguing misapplication of established law is not a valid basis for accepting a petition for writ of certiorari. [Rule 10.]

IV. The Seventh Circuit Decision was Correct.

The Petition should also be denied because the Decision issued by the Seventh Circuit was correct; the appropriate constitutional standard for the manual cavity search is reasonable suspicion. The Seventh Circuit appropriately analyzed the case through the lens of *Bell* and *Florence*, given that this case involved weighing individual privacy and liberty interests against governmental interests of

penal safety and security, rather than through the lens of *Schmerber v. California* which involved governmental interests of obtaining evidence in a criminal matter. The justifications for the searches, as well as the legal analysis, underlying *Schmerber* and cases that have followed are distinguishable from cases involving pretrial detainees housed in the general inmate population. Where there is no intention to obtain evidence in criminal matters, a court's analysis should not be guided by *Schmerber.*[12]

1. *Schmerber v. California* evaluated the legality of a warrantless blood draw after an OWI arrest. *Schmerber*, 384 U.S. 757, 758, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). The legality of the search was evaluated under the search incident to arrest exception to the Fourth Amendment's warrant requirement. *Id*. at 769. The purpose of the search was to preserve evidence supporting the crime of which the petitioner had been charged. *Id*. at 770-71. This Court evaluated the need for a warrant prior to the search with the understanding that the sole justification for the search was to obtain evidence, which may be destroyed as

12. Petitioner also cites to *Birchfield v. North Dakota* and *Mitchell v. Wisconsin* to argue for a warrant requirement. [Petition, 33.] As with her prior citations, her reliance on *Birchfield* and *Mitchell* to impose a warrant requirement in a penological institution are misplaced. *Birchfield* analyzed searches incident to arrest with the intention of obtaining evidence to support the arrest. *Birchfield*, 136 S. Ct. 2160, 2174, 195 L. Ed. 2d 560 (2016). *Mitchell* addressed the exigent circumstances exception to the Fourth Amendment, similar to the issue presented by *Schmerber*. *Mitchell*, 139 S. Ct. 2525, 2530, 204 L. Ed. 2d 1040 (2019). Neither case justifies the imposition of a warrant requirement to conduct a search of an inmate or pretrial detainee because neither case addresses the specific issues and governmental interests at stake.

time progressed and thus present exigent circumstances justifying a warrantless search, in order to support a criminal charge against the petitioner. *See id.* at 766-772.

As this Court summarized in *Winston v. Lee*, nearly twenty years after *Schmerber* was decided, *Schmerber* provides the framework for analyzing "[t]he reasonableness of surgical intrusions beneath the skin … in which the individual's interests in privacy and security are weighed against … the community's need for evidence …." *Winston*, 470 U.S. at 760.

2. *Bell*, as discussed in detail *supra*, established a framework for analyzing governmental actions in a penal institution under the Fourth Amendment. *See Bell*, 441 U.S. at 547. Specifically, *Bell* established that actions which may infringe on an individual's constitutional rights are "evaluated in the light of the central objective of prison administration, safeguarding institutional security." *Id.* (citations omitted). When those considerations were evaluated against the individual inmate's interests, this Court upheld a policy requiring visual cavity searches and strip searches of pretrial detainees without **any** particularized suspicion or indication that the inmate may be concealing contraband. *Id.* at 558-59.

3. As noted in the Seventh Circuit's Decision, *Bell* (and, subsequently, *Florence*) addresses "circumstances under which the special context of a jail—with the unique challenges it presents—allows for suspicionless searches of pretrial detainees' body cavities." [App. 7.] However, the Seventh Circuit appropriately noted that this case did not involve a suspicionless search pursuant to a general policy; it involved a particular individual singled out for a search.

[App. 9.] The Seventh Circuit, therefore, concluded that reasonable suspicion was required to justify the search. [App. 9 (citing *Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985)).] Rejecting Petitioner's request to "adopt a higher standard of suspicion and require a warrant based on probable cause" for the cavity search in jail, the Seventh Circuit noted "*Bell* and *Florence* underscore the necessity of a jail's ability to search those under its care for contraband, for the protection of all within its walls." [App. 10.] The Seventh Circuit correctly concluded that *Schmerber* (and *Winston*, which Petitioner had also argued as justification for a warrant requirement) were not applicable because a "search conducted for the safety of the jail is one that furthers special needs beyond the normal need for law enforcement, and 'the public interest is such that neither a warrant nor probable cause is required.'" [App. 10 (quoting *Maryland v. King*, 569 U.S. 435, 447, 133 S. Ct. 435, 133 S. Ct. 1958 (2013); *Maryland v. Buie*, 494 U.S. 325, 331, 110 S. Ct. 1093, 108 L. Ed. 2d. 276 (1990)).]

The analysis employed by the Seventh Circuit is the correct framework for analyzing individual searches of pretrial detainees, including strip and body cavity searches (whether manual or visual). The analysis correctly relies on applicable jurisprudence from this Court, including *Bell* and *Florence*, to conclude that reasonable suspicion, rather than a warrant, is required before a search may be conducted. It is well-established that the penal safety and security presents significant governmental interests, distinguishable from those presented in a criminal investigation context, which "make the warrant and probable-cause requirement impractical." *Skinner*, 489 U.S. at 619 (quoting *Griffin v. Wisconsin*,

483 U.S. 868, 873, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987)). In the face of these governmental interests, this Court "has not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements" and, in the case of body cavity searches of inmates, have concluded that such searches are permissible upon less than probable cause *Id*. at 619-620. Accordingly, the Seventh Circuit's Decision was in congruence with this Court's Fourth Amendment jurisprudence and should not be disturbed.

CONCLUSION

The Respondents respectfully request the Petition for Writ of Certiorari be denied.

Respectfully submitted this 24th day of February, 2021.

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