

No.

IN THE

Supreme Court of the United States

Glenn Ray Maxwell,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE CALIFORNIA COURT OF APPEAL
FOR THE SIXTH JUDICIAL DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fourth Amendment to the United States Constitution require that police obtain a search warrant before conducting a visual body cavity search incident to arrest, when that search is not otherwise justified by exigent circumstances or the necessities of jail administration?

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- U.S. Dept. of Justice, Bureau of Justice Statistics,
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[https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-
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- U.S. Dept. of Justice, Civil Rights Division,
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INTRODUCTION

The “humiliating and deeply offensive” nature of a visual body cavity search is clear from even a clinical description of the procedure. *See, Florence v. Board of Chosen Freeholders of County of Burlington (Florence)* 566 U.S. 318, 338-340; 132 S.Ct. 1510, 1518, 1522 (2012) (ALITO, J., concurring.) Typically, the subject is compelled to disrobe in front of one or more law enforcement officers, then to display his or her naked body to their satisfaction, including lifting the scrotum, bending over and spreading open the anus if the subject is male, or displaying the breasts and spreading open the vagina and anus if the subject is female. *Florence*, 566 U.S. at 343, 132 S.Ct. at 1525 (BREYER, J., concurring), *citing, Dodge v. County of Orange*, 282 F.Supp.2d 41 (S.D.N.Y. 2003).

This Court has grappled on more than one occasion with the limits imposed by the Fourth Amendment on visual body cavity searches of detainees in jails and prisons, and concluded that the “undoubted security imperatives” involved in the administration of these locked facilities support a general rule that routine, warrantless strip searches of inmates, including pretrial detainees, do not violate the Fourth Amendment, at least where the subject is being admitted to the general population of the jail or prison, *Florence*, 566 U.S. at 330; 132 S.Ct. at 1518, or is re-entering that population after a contact visit with someone from outside the facility. *Bell v. Wolfish (Wolfish)* 441 U.S.

520, 560; 99 S.Ct. 1861, 1885 (1979). This Court has never considered, however, the fundamentally different question of whether police may conduct a warrantless visual body cavity search *incident to arrest* that is otherwise unjustified by exigent circumstances or the necessities of jail or prison administration.

The decisions of lower federal courts and state appellate courts concerning the constitutionality of visual body cavity searches incident to arrest are, to quote the California Court of Appeal in this case, “all over the map.” Pet. App. 30a. The cacophony of rules and legal reasoning adopted by these courts creates uncertainty for law enforcement officers in the field, for courts tasked with deciding the constitutionality of these searches in both criminal and civil cases, and for individuals forced to undergo these humiliating and degrading procedures.

This uncertainty is particularly burdensome given the recurring nature of the scenario presented by this case, where police make an arrest for an offense that is unlikely to lead to pretrial detention but, during the course of that encounter, develop a suspicion that the arrestee has something hidden inside a body cavity, usually drugs. The benefits of crafting a categorical rule for police and courts to follow in this situation is particularly strong, in light of the core privacy interests at stake and the emotionally and politically fraught nature of the police practices considered here.

Finally, this case presents a question that is inexorably raised by this Court's recent jurisprudence concerning the search incident to arrest exception. In two recent cases, this Court has clarified that the search incident to arrest exception does not ordinarily permit the warrantless seizure of a blood sample from a suspect arrested for driving under the influence, *Birchfield v. North Dakota*, 579 U.S. ___, 136 S.Ct. 2160 (2016), or the warrantless examination of digital data stored on an arrestee's smart phone, *Riley v. California*, 573 U.S. ___, 134 S.Ct. 2473 (2014), even where these intrusions are supported by probable cause. In *Birchfield* and *Riley*, this Court analyzed whether to "exempt [an intrusion] from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Birchfield*, 136 S.Ct. at 2176, *quoting Riley*, 134 S.Ct. at 2484. The instant case presents an important, unresolved application of the balancing test employed by the Court in *Birchfield* and *Riley*.

OPINIONS AND ORDERS BELOW

The opinion of the California Court of Appeal for the Sixth Appellate District is unpublished, and is set forth at Pet. App. 1a–75a. The order of the California Supreme Court summarily denying review in this matter is set forth at Pet. App. 1b.

JURISDICTION

The California Supreme Court denied review on January 10, 2018. Pet. App. 1b. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

The Arrest and Initial Search

The prosecution introduced testimony at the suppression hearing from San Jose Police Officers Blackerby, Jorgensen and Miller regarding the arrest and search in this case. At the time of the hearing, Officer Blackerby had been a police officer for nine years, the last six with the San Jose Police Department. RT 11/16/13, at 14, 37-38.¹ Officer Blackerby testified that, on August 17, 2012,

¹ The suppression hearing in this case spanned three dates: November 16, December 3, and December 6, 2013. The transcripts from these sessions will be referred to in this petition as RT 11/16/13, RT 12/3/13, and RT 12/6/13.

around 10:00 p.m., he and Officer Jorgensen were conducting surveillance from a building on the south side of Santa Clara Street in San Jose, California, across the street from a bus stop. RT 11/16/13, at 14; RT 12/3/13, at 6; Pet. App. 15a. Officer Blackerby testified that there had been complaints from businesses and citizens in that area about drug activity, and that both he and Officer Blackerby had made drug arrests at that location before. RT 11/16/13, at 14-15; RT 12/3/13, at 6-7; Pet. App. 15a.

At the time of the surveillance, it was dark out, but the area was illuminated by streetlights and the headlights of passing cars. RT 11/16/13, at 43. Both officers were using binoculars. RT 11/16/13, at 22. According to Officer Blackerby, after about thirty minutes of watching the area, RT 11/16/13, at 40-41, his attention was drawn to petitioner, Glen Maxwell, who was leaning against a horizontal railing next to the bus stop, facing the street. RT 11/16/13, at 18. After about ten minutes of watching him, Blackerby saw a male and female walk to within ten feet of Maxwell. RT 11/16/13, at 20-21, 48-49. The female stopped, and the male walked up to Maxwell and handed him what appeared to be paper money. RT 11/16/13, at 20-22, 46-48; Pet. App. 15a.

Blackerby testified that Maxwell placed the suspected currency into his right pants pocket, then reached into the back of his shorts in the area of his buttocks and retrieved an object that was about the size of a golf ball and covered in clear plastic. RT 11/16/13 at 22-23, 26. He placed the object into the front pocket of his sweatshirt, put his other hand into the pocket and appeared

to move both hands around as if he was manipulating something. RT 11/16/13 at 23-24. Maxwell then withdrew a smaller object about the size of a pencil eraser from the pocket and handed it to the man, who appeared to place the object into his mouth as he walked away from the scene. RT 11/16/13, at 18, 21, 25-26, 29-30. At the same time, Maxwell removed the golf ball-sized object from his sweatshirt and returned it to the back of his shorts. RT 11/16/13, at 30; Pet. App. 15a-16a. Officer Blackerby testified that, in his experience, this interaction resembled a street level drug transaction, specifically a sale of “crack cocaine.” RT 11/16/13, at 24-25, 27-30, 53-54. Pet. App. 16a-17a. On cross-examination, he acknowledged that he could not actually see the smaller object that Maxwell handed to the man. RT 11/16/13, at 52.

After the man and woman walked away from the scene, without being detained by police, a second man later identified as Thomas White approached Maxwell, sat next to him and handed him paper currency. RT 11/16/13, at 31-32, 51. At that point, Officers Blackerby and Jorgensen elected to terminate the surveillance operation and radioed the arrest team -- Officers Akery and Miller -- to take Maxwell and White into custody. RT 11/16/13, at 33; Pet. App. 16a.

Officer Miller approached Maxwell and saw that he had a zip-lock bag of marijuana in his left hand, and “wadded paper money” falling out of his right pants pocket. RT 11/16/13, at 62-63, 69. Both suspects were arrested and taken around the corner to an alley where they were searched incident to arrest. RT

11/16/13, at 63-64. Officer Miller searched Maxwell and found \$28 in his right pants pocket, and additional money in his sock, in a pouch hanging around his neck, and in his backpack.² RT 12/3/13, at 11. He did not find a golf ball-sized object wrapped in plastic or any controlled substances other than the marijuana. RT 12/3/13, at 12; Pet. App. 21a.

The First “Strip Search”

Officers Jorgensen and Blackerby transported Maxwell to the San Jose Police Department Pre-Processing Center (the PPC) in an unmarked police van, with Maxwell handcuffed and seat belted into the right front passenger seat. RT 12/3/13, at 15. On the way to the PPC, Officer Jorgensen noticed that Maxwell was moving his handcuffed hands behind his back, which made the officer think he was trying to hide something. RT 12/3/13, at 15-16; Pet. App. 21a.

The drive from the scene to the PPC took no more than five minutes. RT 12/3/13, at 32. At the PPC, Officer Jorgensen explained to Maxwell that he was going to be “strip searched” and placed him in a holding cell for about ten minutes with his arms handcuffed out to his sides in a position that prevented him from reaching into his pants. He was also kept under video surveillance. RT 12/3/13, at 37, 39-40; Pet. App. 21a-22a.

² The total amount of money recovered from Maxwell was \$513, although this fact was not adduced at the suppression hearing. See, RT 1/28/14 (trial), at 512-515.

When it came time for the “strip search,” Officers Blackerby and Jorgensen escorted Maxwell to another holding cell which had a single window covered by blinds for privacy. RT 12/3/13, at 15-16, 34, 37. Officer Jorgensen conducted the search, instructing Maxwell to take off his clothing, “lift up his scrotum, spread his buttocks and bend over at the waist.” RT 12/3/13, at 35. Maxwell cooperated fully to the point of bending over, but he squatted instead of bending over and did not comply with officer’s request that he bend over further. RT 12/3/13, at 35-36. At this point, Officer Jorgensen elected to discontinue the search and transport Maxwell to the jail for a second strip search. RT 12/3/13, at 36; Pet. App. 22a.

The Second “Strip Search”

It took about two minutes for Officers Jorgensen and Blackerby to drive Maxwell from the PPC to the jail. RT 12/3/13, at 37-38. At the jail, Jorgensen told Maxwell that he was going to be strip searched again, and Maxwell requested that a sergeant be present. RT 12/3/13, at 38-40. Maxwell was taken to another room at the jail, which had a window and door that were left open during the search. There were “at least five” officers present in the room, including Jorgensen, Blackerby and a sergeant assigned to the jail named Roggia. RT 12/3/13, at 38-40. Pet. App. 22a-23a. Maxwell’s handcuffs were removed, and Officer Jorgensen instructed him as before to remove his clothing and bend over and spread his buttocks. RT 12/3/13, at 20. Maxwell complied, and using a flashlight, Jorgensen was able to see a “white ball” inside his anus.

RT 12/3/13, at 20. Jorgensen told the other officers what he saw, and grabbed Maxwell's wrists to keep him from interfering. RT 12/3/13, at 20, 45. The sergeant then asked Maxwell "if he would remove it," and eventually Maxwell reached back and grabbed the object and threw it on the floor. RT 12/3/13, at 20-21, 45. The object was a golf ball sized chunk of cocaine, in two pieces, wrapped in plastic. RT 12/3/13, at 21. Pet. App. 25a.

The Suppression Ruling

Maxwell was charged in California state court with three felonies: possession for sale of cocaine base, selling cocaine base, and bringing a controlled substance into a jail facility, as well as various prior conviction allegations. Pet. App. 3a. Prior to trial, Maxwell moved to suppress the cocaine found during the second visual body cavity search on the grounds that his arrest was not supported by probable cause, and the warrantless strip searches violated the Fourth Amendment. Pet. App. 2a, 13a-14a.

A hearing was held before Judge Griffin Bonini, who took testimony over two court sessions and denied the motion on December 6, 2013. Pet. App. 14a. On that date, Judge Bonini ruled that there was probable cause to arrest Maxwell for loitering with intent to commit a drug offense, a misdemeanor under California Health and Safety Code §11532. RT 12/6/13, at 73-74. He further ruled that the strip search was done "reasonably and professionally and somewhat routinely," and did not violate the Fourth Amendment. RT 12/6/13, at 74-75; Pet. App. 14a, 25a.

Maxwell proceeded to trial, and was found guilty of two felonies: possession of cocaine base for sale and bringing a controlled substance into a jail facility. The jury could not reach a verdict on the sales count, which was thereafter dismissed. Pet. App. 3a. He was sentenced to eight years in prison, and is currently released on parole. Pet. App. 3a.

Maxwell timely appealed his convictions on October 14, 2014 to the California Court of Appeal for the Sixth Appellate District. Pet. App. 4a.

The Court of Appeal Ruling

The Court of Appeal affirmed the trial court's denial of the motion to suppress. First, the Court analyzed whether Maxwell's arrest was supported by probable cause, a close question under California law, and affirmed Judge Bonini's ruling that there was probable cause to arrest Maxwell for the misdemeanor offense of loitering with intent to commit a drug offense. Pet. App. 17a-21a.

Next, the Court of Appeal considered whether the warrantless visual body cavity searches in this case violated the Fourth Amendment, including whether the searches fell within the search incident to arrest exception. Pet. App. 21a-37a. The Court noted the lack of any U.S. Supreme Court precedent answering this question, and that the decisions of lower federal and state appellate courts were "all over the map." Pet. App. 30a. The Court of Appeal then traced the evolution of the search incident to arrest exception in this Court's cases and proceeded to balance "law enforcement's strong interest in

the preservation of evidence of the offense” against the “invasion of defendant’s dignity and privacy” occasioned by the strip searches in this case. Pet. App. 30a-35a. Ultimately, without really explaining why a *warrantless* search was necessary to “preserve evidence of the offense” in this case, the Court of Appeal ruled that the visual body cavity searches were “reasonable searches incident to a custodial arrest” and did not require a warrant. Pet. App. 36a-37a.

Maxwell timely petitioned the California Supreme Court for review of the Court of Appeal’s decision affirming his conviction and sentence on November 7, 2017, including the question presented in this petition. His petition for review was summarily denied on January 10, 2018. Pet. App. 1b.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Raises an Important and Unsettled Question of Fourth Amendment Law.

A. Background

The question presented by this case -- whether police may conduct a warrantless visual body cavity search incident to a lawful custodial arrest when that search is not otherwise justified by exigent circumstances or the necessities of jail administration -- implicates at least two distinct lines of authority in this Court’s Fourth Amendment jurisprudence.

The first line of authority concerns the limits imposed by the Fourth Amendment on visual body cavity searches of inmates and pretrial detainees in locked detention facilities. The most recent of these cases, *Florence v. Board of Chosen Freeholders*, held that it does not violate the Fourth Amendment for authorities to conduct a visual body cavity search of all persons being admitted to the general population of a detention facility, without first undertaking a case-by-case consideration of the seriousness of the offense or background of the detainee. *Florence, supra*, 566 U.S. at 322-325, 336-339; 132 S.Ct. at 1513-1515, 1521-1522.

The Court in *Florence* affirmed long-standing precedent that deference should be given to jail authorities to “devise reasonable search policies to detect and deter the possession of contraband in their facilities,” *id.*, 566 U.S. at 327-328, 132 S.Ct. at 1516-1517, citing *Wolfish, supra*, 441 U.S. at 546, 99 S.Ct. 1861, and concluded that the “undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt from the more invasive search procedures ... absent reasonable suspicion of a concealed weapon or other contraband.” *Id.*, 566 U.S. at 330, 132 S.Ct. at 1518.

Florence followed this Court’s decision in *Bell v. Wolfish*, which held that it does not violate the Fourth Amendment for jail authorities to conduct suspicionless visual body cavity searches of inmates and pretrial detainees returning from a contact visit with someone from outside the facility. Recognizing the special security concerns unique to detention facilities, and

the “wide-ranging deference” that should be afforded to jail administrators to maintain institutional security, the Court in *Wolfish* concluded that the searches were constitutional. *Wolfish, supra*, 441 U.S. at 546-547, 99 S.Ct. at 1878-1879. In doing so, the majority reminded courts that, in balancing “the need for a particular search against the invasion of personal rights that the search entails,” they “must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.” *Id.*, 441 U.S. at 559-560, 99 S.Ct. at 1884-1885.

Importantly, for understanding the relevance of this line of authority to the case at bar, neither *Florence* nor *Wolfish* decided whether a visual cavity search would violate the Fourth Amendment “in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees.” *Florence*, 566 U.S. at 338, 132 S.Ct. at 1518; *see also*, 566 U.S. at 342; 132 S.Ct. at 1523 (ROBERTS, C.J., concurring); and 566 U.S. at 343; 132 S.Ct. at 1523 (ALITO, J., concurring) [emphasizing that it may not “always [be] reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population.”] *Florence* and *Wolfish* are thus limited by their terms to searches within a detention facility, where the “security imperatives” of preventing the smuggling of weapons and contraband justify the extraordinary intrusions at issue in those cases.

The second, and more pertinent, line of authority implicated by the question presented in this case deals with the scope of the search incident to arrest exception to the warrant requirement. The point of embarkation here is *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034 (1969), which limited the scope of this exception by reference to its rationale:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. [...] In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. *Id.*, 395 U.S. at 762-763, 89 S.Ct at 2040.

Given this rationale, *Chimel* limited the scope of a search incident to arrest to a “... search of the arrestee's person and the area ‘within his immediate control’ -- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” *Ibid.*

Four years after *Chimel*, this Court upheld, as a valid search incident to arrest, the warrantless search of a crumpled cigarette pack taken from the pocket of a man who had been arrested for driving without a license. *United States v. Robinson*, 414 U.S. 218, at 223, 234-236, 94 S.Ct. 467, at 471, 476-477 (1973). The majority opinion, by then Justice Rehnquist, acknowledged that the scope of a search incident to arrest permitted by *Chimel* was tailored to its rationale, which was to “remove weapons and other things which might be used to assault an officer or effect an escape” and “to prevent the destruction of

evidence,” but also held that such searches need not be justified on a case-by-case basis:

[T]he authority to search the person incident to a lawful custodial arrest ... does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. *Id.*, 414 U.S. at 228-229, 94 S.Ct. at 474.

Subsequent decisions of this Court regarding the scope of the search incident to arrest exception have adhered to the preference expressed in *Robinson* for categorical rules which provide clarity for police, courts and the general public as to the scope of a permissible warrantless search incident to arrest. See e.g., *New York v. Belton*, 453 U.S. 454, 460-461, 101 S.Ct. 2860, 2864-2865 (1981) [holding that police may conduct a warrantless search of the entire passenger compartment of a car incident to the custodial arrest of an occupant], *Riley, supra*, 573 U.S. at ___, 134 S.Ct. at 2484-2485, 2493-2494; *Birchfield, supra*, 579 U.S. at ___, 136 S.Ct. at 2184-2185. Each of these cases recognized the importance of establishing categorical rules defining the scope of a warrantless search incident to arrest, rather than defaulting to a case-by-case determination made by officers in the field. *Belton*, 453 U.S. at 458-460, 101 S.Ct. at 2863-2864; *Riley*, 573 U.S. at ___, 134 S.Ct. at 2491-2493; *Birchfield*, 579 U.S. at ___, 136 S.Ct. at 2176, 2179-2180, 2183.

A third group of cases decided by this Court that have a bearing on the question presented are those decisions weighing the Fourth Amendment implications of warrantless “bodily intrusions” by police, including a series of cases dealing with the constitutionality of requiring persons arrested for driving under the influence to submit to a warrantless blood test for evidence of intoxication. The seminal case, *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826 (1966), held that police were entitled to take a blood sample from a driver injured in an accident without a warrant, where there was probable cause to arrest for driving under the influence *and* exigent circumstances justifying taking the blood sample without first securing a warrant. *Schmerber*, 384 U.S. at 767-771, 86 S.Ct. 1834-1836.

The holding in *Schmerber* was revisited in *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552 (2013), which considered whether the “natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases.” *McNeely*, 569 U.S. at 145, 133 S.Ct. at 1556. In contrast to the search incident to arrest cases, which articulate categorical rules defining the scope of that exception, the lead opinion in *McNeely* observed that the exigent circumstances exception necessarily depends on the “totality of the circumstances” in effect when the decision about whether to seek a warrant is made, and therefore is not susceptible to categorical rules. *Id.*, 569 U.S. at 150-156, 133 S.Ct. at 1559-

1563. Thus, *McNeely* declined to establish a *per se* rule that exigent circumstances will always justify a warrantless blood draw following a lawful DUI arrest. *Id.*, 569 U.S. at 145, 160-165, 133 S.Ct. at 1556, 1565-1568.

Following *McNeely*, this Court in *Birchfield* held that the search incident to arrest exception likewise does not support a *per se* rule allowing the state to compel every person arrested for driving under the influence to submit to a warrantless blood test. *Birchfield, supra*, 579 U.S. at ___, 136 S.Ct. at 2184-2185. The majority opinion in *Birchfield*, authored by Justice Alito, reached the opposite conclusion, however, with respect to laws penalizing a driver's refusal to submit to a *breath* test following a DUI arrest, basing the distinction on the relative intrusiveness of the two procedures. *Id.*, 579 U.S. at ___, 136 S.Ct. at 2176-2178, 2184-2185. The opinion stressed that "the legality of a search incident to arrest must be judged on the basis of categorical rules," leading to the Court's articulation of bright-line rules for both post-arrest breath tests and blood tests. *Id.*, 579 U.S. at ___, 136 S.Ct. at 2179-2185.

A crucial distinction emerges, therefore, between this Court's jail and prison search cases, which seek to articulate categorical rules circumscribing the conduct of suspicionless strip searches in detention facilities, and which are for the most part unconcerned with the warrant requirement, and this Court's search incident to arrest cases, which seek to articulate categorical rules circumscribing the conduct of warrantless searches following a custodial arrest, and which are for the most part unconcerned with the individualized

suspicion that supports those searches. With this distinction in mind, we shall now examine the decisions of federal and state appellate courts weighing the constitutionality of warrantless visual body cavity searches incident to arrest.

B. *There is a Deeply Entrenched Split of Authority among the Federal Circuit Courts and State Appellate Courts on this Issue.*

1. Federal Circuit Court Decisions

There is a deeply entrenched split of authority among the federal circuit courts concerning the limits imposed by the Fourth Amendment on visual body cavity searches incident to arrest.

Nine federal circuits (the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh) either hold, *or simply assume*, that these searches may be conducted without a warrant, but must in some circumstances be supported by a reasonable suspicion that the arrestee has weapons or contraband concealed inside his or her body.³ Two federal circuits have not yet ruled on the constitutionality of warrantless visual cavity searches incident to arrest, the Third Circuit and D.C. Circuit. The remaining federal circuit, the Ninth, has held that a search warrant *is required* before police may conduct a visual body cavity search incident to arrest, when that search is not otherwise

³ *Swain v. Spinney*, 117 F.3d 1, 7 (1st Cir. 1997); *United States v. Barnes*, 506 F.3d 58, 62-64 (1st Cir. 2008); *Hartline v. Gallo*, 546 F.3d 95, 100 (2d Cir. 2008); *Gonzalez v. City of Schenectady*, 728 F.3d 149, 159-160 (2d Cir. 2013); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981); *Watt v. City of Richardson Police Dept.*, 849 F.2d 195 (5th Cir. 1988); *Masters v. Crouch*, 872 F.2d 1248, 1253-1255 (6th Cir. 1989); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1268-1273 (7th Cir. 1983); *Campbell v. Miller*, 499 F.3d 711, 716-718 (7th Cir. 2007); *United States v. Hambrick*, 630 F.3d 742 (8th Cir. 2011); *Foote v. Spiegel*, 118 F.3d 1416, 1425-1426 (10th Cir. 1997); *Evans v. Stephens*, 407 F.3d 1272, 1278-1281 (11th Cir. 2005) (*en banc*).

justified by exigent circumstances or the necessities of jail administration. *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1449-1451 (9th Cir. 1991).

In *Fuller*, Los Angeles Police (LAPD) officers responded to the scene of a reported theft of an \$800 ring from a jewelry store, and learned from the store owner that Annise Fuller and her daughter were the last people to handle the ring and might have stolen it. *Id.*, 950 F.2d at 1439-1440. The police conducted an investigation at the scene, including searching the two women, their belongings and the places they went after leaving the jewelry store, but did not find the ring. *Ibid.* Still, the women were arrested for grand theft, a felony, and taken to the police station where they were both subjected to visual body cavity searches, which likewise did not turn up any evidence. At the time of these events, LAPD had a policy that required visual body cavity searches of all felony arrestees. *Id.*, 950 F.2d at 1440.

The case came before the Ninth Circuit on appeal from summary judgment orders dismissing federal civil rights claims by the Fullers. After agreeing that the police defendants were entitled to qualified immunity on the unlawful arrest claims, 950 F.2d at 1443-1445, the Court analyzed whether the visual body cavity searches were constitutional. Initially, the Court concluded that the searches could not be justified by the LAPD policy of strip searching all felony arrestees, in part because it was unclear the Fullers would be admitted to the general jail population. *Id.*, 950 F.2d at 1445-1448, citing *Wolfish, supra*, 441 U.S. at 559-561, 99 S.Ct. at 1884-1885. The Court then

held that the search incident to arrest exception as defined in *Chimel* and *Robinson* “did not extend to a strip search or bodily intrusion,” so a search warrant or probable cause and exigent circumstances was required for the searches of the Fullers at the station. *Fuller*, 950 F.2d at 1446, 1449-1450.

What is most striking about the decisions of the other nine federal circuits that have considered the constitutionality of warrantless visual body cavity searches incident to arrest is how little attention they pay to the threshold question of whether a warrant is required. See, Eugene Shapiro, *Strip Searches Incident to Arrest: Cabining the Authority to Humiliate*, 83 North Dakota L. Rev. 67, 104-108 (2007). These decisions either assert, in conclusory fashion, that this Court’s search incident to arrest cases authorize a warrantless visual body cavity search incident to arrest, at least where there is a reasonable suspicion the arrestee is hiding something inside his or her body, or they say nothing at all about the warrant requirement.

The former category, which includes the First, Seventh, Eighth and Eleventh Circuits, all rely on this Court’s decisions defining the scope of the search incident to arrest exception, especially *Robinson*, as authority for the proposition that police may conduct a warrantless visual body cavity search incident to a lawful, custodial arrest -- as if these cases settled the question. For example, in *Swain v. Spinney*, the First Circuit was called upon to decide whether police violated the Fourth Amendment when they conducted a visual body cavity search of a woman who was arrested for misdemeanor possession

of marijuana and who was not going to be held in the general jail population. *Swain, supra*, 117 F.3d at 3-4. The Court disposed of any issue that a warrant was required with the following brief observation: “Thus, under *Robinson*, if the arrest was lawful, a searching officer does not need to have any justification for performing a full body search of an arrestee.” *Id.*, 117 F.3d at 5-6.

Similarly, in *Campbell v. Miller*, the Seventh Circuit decided the constitutionality of a visual body cavity search following an arrest for selling marijuana. After the arresting officer searched Campbell’s pockets and found nothing incriminating, he conducted a visual body cavity search of him in the backyard where he was arrested. *Campbell, supra*, 499 F.3d at 713-715. On appeal from a jury verdict for the police defendants on federal civil rights claims, the Court held that the search itself was justified, but the manner in which it was conducted (i.e., in a public place) violated the Fourth Amendment. *Id.*, 499 F.3d at 716-718. Of particular relevance here, the Court concluded that no warrant was required for the strip search because *Robinson* “condoned a relatively extensive exploration of the person.” *Id.*, 499 F.3d at 717, *quoting, Robinson*, 414 U.S. at 234, 94 S.Ct. at 467.

Similarly, in *United States v. Hambrick*, the Eighth Circuit upheld the constitutionality of the warrantless strip search of a man arrested for driving with a suspended license and suspicion of drug trafficking. *Hambrick*, 630 F.3d at 744-745. After the traffic stop and arrest, police searched Hambrick’s car and found a digital scale with cocaine residue. They transported him to the

station where they conducted a visual body cavity search and found a bag of cocaine between his buttocks. *Ibid.* The Court quickly disposed of the issue of whether a warrant was required:

It is ... plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention. *United States v. Edwards*, 415 U.S. 800, 803, 94 S.Ct. 1234. Hambrick's stop, arrest, and subsequent search incident to arrest squarely fit within *Edwards* and its progeny, and therefore ... the district court was correct in concluding the search incident to arrest was valid. *Id.*, 630 F.3d at 748.

Finally, in *Evans v. Stephens*, the Eleventh Circuit decided the constitutionality of a particularly brutal and abusive strip search, as alleged by the plaintiffs -- an African American man who was arrested for driving under the influence and his passenger, who was arrested on a “possible” warrant. *Evans, supra*, 407 F.3d at 1275-1278. The Court first considered whether the search was valid under this Court’s jail and prison search cases:

[O]n reflection, this case provides no opportunity to decide the question of when jailers -- for security and safety purposes -- may lawfully conduct strip searches of persons about to become inmates in the general jail population. This case raises no questions about the necessities of jail administration. This case involves a different kind of search altogether: a post-arrest investigatory strip search by the police looking for evidence. *Id.*, 407 F.3d at 1279 (internal citations omitted.)

The opinion then cites *Robinson* as authority for the proposition that a search incident to custodial arrest may include a warrantless visual body

cavity inspection, and proceeded to analyze the reasonableness of the search according to the framework laid out in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990), which upheld the constitutionality of a protective sweep of a residence incident to an arrest in the home if there is a “reasonable suspicion the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Buie*, 494 U.S. at 332-335, 110 S.Ct. at 1097-1099. From this, the Court derived a rule that a warrantless visual body cavity search incident to arrest requires at least a reasonable suspicion that an arrestee has weapons or evidence concealed in a bodily cavity. *Evans*, 407 F.3d at 1279-1280.

If the decisions of the First, Seventh, Eighth and Eleventh Circuits fail to articulate a cogent argument that the search incident to arrest exception includes the authority to conduct a warrantless visual body cavity search, then the decisions of the remaining federal circuits are even less helpful.

In *Logan v. Shealy*, for example, the Fourth Circuit weighed the constitutionality of a visual body cavity search of a woman arrested for driving under the influence, who, after appearing before a magistrate, was ordered released after a four hour period, during which time she was subjected to a visual body cavity search in a holding cell at the station. *Logan, supra*, 660 F.2d at 1009-1010. Relying on *Wolfish*, the Court concluded that the search violated the Fourth Amendment, because police did not have a reasonable suspicion that Logan was hiding anything inside her body. *Id.*, 660 F.2d at 1013. Whether a search warrant was required was not even discussed.

Likewise, in *Watt v. City of Richardson Police Dept.*, the Fifth Circuit reviewed the constitutionality of a visual body cavity search of a woman who was arrested on a warrant for a dog leash violation and who was held briefly at the station while she arranged to make bail. The search was conducted pursuant to a city policy that required a “strip search” of all arrestees who had a prior history of drug violations. *Watt, supra*, 849 F.2d at 196.

Although it was clear that Watt would be held in custody for only a short time and that the search could not be “justified by the demands of institutional security,” the Court still concluded that an “[a]nalysis of the [search] begins, and practically ends, with the Supreme Court's decision in [*Wolfish*].” *Ibid.* Declaring that the city’s strip search policy “lies analytically between the prisoner and arrestee search cases,” the Court in *Watt* concluded that the “solution to unconstitutional application of the policy lies in a case-by-case approach.” *Id.*, 849 F.2d at 197-199. Applying *Wolfish*, the Court found that the search was unreasonable, because there was no reason to suspect Watt was concealing anything inside her body. *Ibid.* The Court did not consider whether a warrant was required for the search. *Id.*, 849 F.2d at 198-199.

This pattern is followed closely in the other federal circuits surveyed here. The Second Circuit, for example, has reviewed the constitutionality of visual body cavity searches in a variety of post-arrest, pre-incarceration contexts. In each of these cases, the Court analyzed the reasonableness of the search according to the criteria set forth in *Wolfish* and concluded that the

searches would be justified if police had a reasonable suspicion that the arrestee was hiding something inside a body cavity. *See, Weber v. Dell*, 804 F.2d 796, 800-802 (2nd Cir. 1986) [visual cavity search at police station following misdemeanor arrest for false report of a crime violated Fourth Amendment because police lacked a reasonable suspicion that anything was hidden inside body cavity]; *Hartline v. Gallo*, *supra*, 546 F.3d at 100-101 [same ruling following arrest for misdemeanor possession of marijuana]; *Gonzalez v. City of Schenectady*, *supra*, 728 F.3d at 158-160 [same ruling following felony arrest for offering to sell drugs.])

The Sixth and Tenth Circuits have taken a similar approach, relying on *Wolfish* as authority for a rule permitting warrantless visual cavity inspections incident to arrest if police have a reasonable suspicion that an arrestee is concealing weapons or contraband inside a body cavity. *Masters v. Crouch*, *supra*, 872 F.2d at 1253-1255, 1257 [holding that visual body cavity search at the station incident to arrest on traffic warrants violated Fourth Amendment where police did not have a reasonable suspicion the arrestee was hiding anything]; *Foote v. Spiegel*, *supra*, 118 F.3d at 1420, 1425-1426 [same ruling, where police conducted visual body cavity search at the station of a woman arrested for driving under the influence of marijuana, but did not have a reasonable suspicion that she was hiding anything inside her body].

Thus, although only one out of ten federal circuits to consider the issue has held that a search warrant is required before police may conduct a visual

body cavity search incident to arrest, none of the other nine circuits has fully considered the question. Four circuits (the First, Seventh, Eighth, and Eleventh) dispose of the issue with little more than a perfunctory citation to this Court's decision in *Robinson* or other search incident to arrest cases, as if this settled the question. The other five circuits (the Second, Fourth, Fifth, Sixth and Tenth) decide the constitutionality of visual body cavity searches incident to arrest while barely mentioning the warrant requirement, relying instead on the application of criteria articulated in *Wolfish* for assessing the reasonableness of visual body cavity searches of detainees in a jail or prison.

2. State Appellate Court Decisions

State court cases considering the constitutionality of warrantless visual body cavity searches incident to arrest are just as unsettled. A handful of state appellate courts have considered the question in published decisions and reached varying results.

At one end of the spectrum, a Virginia appellate court has held that the Fourth Amendment requires police to have a “clear indication that evidence is located within the suspect’s body and ... exigent circumstances,” to justify a warrantless visual body cavity search incident to arrest. *King v. Commonwealth* (Va.App. 2007) 644 S.E.2d 391, 394-396. In *King*, the defendant was stopped by Richmond police as he was leaving a house known for illegal drug activity. He had an “outstanding probation warrant,” and briefly tried to evade arrest. At the station, police conducted a visual body

cavity search and recovered a baggie of cocaine from between his buttocks. *King*, 644 S.E.2d at 393.

The Court in *King* drew a sharp distinction between a “strip search,” which it defined as “an inspection of a naked individual, without any scrutiny of his body cavities” and a “visual body cavity search,” which “extends to a visual inspection of the anal and genital areas.” *Id.*, 644 S.E.2d at 394 (citations omitted). Holding that the latter type of search was more akin to the non-consensual blood draw at issue in *Schmerber, supra*, the *King* Court held that the same justification was required, which was that police must have either a warrant, or probable cause and exigent circumstances.⁴ *Id.*, 644 S.E.2d at 394, citing *Schmerber*, 384 U.S. at 768, 86 S.Ct. at 1834.

At the other end of the spectrum, the Texas Court of Criminal Appeals has held that a visual body cavity search incident to arrest may be justified by the mere fact that police have probable cause to arrest the subject for a drug offense. *McGee v. State* (Tex. CCA 2003) 105 S.W.3d 609, 615-617. In *McGee*, police received a tip from a “concerned citizen” that McGee was with two other men selling cocaine at a specific location, and that McGee was hiding cocaine between his buttocks. When the officer contacted the men, he could see that

⁴ Other states have articulated a similar rule as a matter of state law, avoiding the federal constitutional question. *See e.g., State v. Rulan C.* (Wash. App. 1999) 970 P.2d 821, 823-824 [Washington state constitution requires a warrant or probable cause and exigent circumstances for visual body cavity search incident to arrest]; *State v. Evans* (N.J. App. 2017) 155 A.3d 580, 588-595 [New Jersey statute requires that strip search incident to arrest must be supported by either a search warrant or exigent circumstances.]

they were smoking marijuana and arrested them for that offense. *McGee*, 105 S.W.3d at 612. McGee was taken to a nearby fire station where the officer performed a visual body cavity search, finding several pieces of crack cocaine wrapped in plastic hidden in his anus. *Id.*, 105 S.W.3d at 613. The Texas Court of Criminal Appeals acknowledged that it was “unclear whether the [search incident to arrest] exception permits officers to conduct the type of search that was performed on McGee,” but applying the criteria set forth in *Wolfish* for weighing the reasonableness of strip searches in a detention facility, it concluded that the search was reasonable. *Id.*, 105 S.W.3d at 615-617:

In this case there was not a diminished expectation of privacy as McGee's search was not conducted at either a border or in a prison. But we have already established that the arresting officer had probable cause to believe that McGee was engaged in illegal activity. [...] While we do not create a *per se* rule that probable cause always justifies a body cavity search, in this instance we find from the totality of the circumstances that Officer Rowan had sufficient justification to believe that a search was necessary. *Id.*, 105 S.W.3d at 617.

At least four other state supreme courts have held that a warrantless visual body cavity search incident to arrest is justified by a reasonable suspicion that a weapon or contraband is hidden inside an arrestee's body cavity. *United States v. Scott* (D.C. 2010) 987 A.2d 1180, 1193-1197; *People v. Hall* (N.Y. 2008) 886 N.E.2d 162, 165-168; *State v. Nieves* (Md. 2004) 861 A.2d 62, 67-76; *Edwards v. State* (Ind. 2001) 759 N.E.2d 626, 629-630.

A closer look at two of these cases is instructive. In *United States v. Scott*, on facts similar to those in the present case, the D.C. Court of Appeals relied on *Wolfish* to conclude that a visual body cavity search incident to arrest must be supported by a “reasonable suspicion that a weapon or contraband may be found in the area inspected.” *Id.*, 987 A.2d at 1197. The Court in *Scott* specifically rejected the notion that a warrant is required, holding that there is a “qualitative difference between a purely visual strip search, even one involving a visual body cavity inspection, and a physical intrusion such as a manual body cavity search, that warrants a difference in the level of justification required.” *Ibid.* This is, of course, the opposite conclusion to the one reached by the Virginia court in *King*.

In *People v. Hall*, the New York Court of Appeals also considered the constitutionality of a warrantless visual body cavity search under circumstances resembling the present case. Hall was arrested by New York City police after he was seen engaging in what surveillance officers believed to be a hand-to-hand sale of cocaine. *Hall*, 886 N.E.2d at 164. At the station, a sergeant took him into a private cell and conducted a visual body cavity search, finding a string protruding from his anus. After Hall refused to remove whatever was tied to the other end of the string, the officer pulled on it and removed a baggie containing cocaine base. *Ibid.* *Hall* relied on this Court’s holding in *Wolfish* to draw a distinction between a purely visual search and a search involving a physical intrusion, and concluded that the visual inspection

of Hall's anus was justified by a "reasonable suspicion to believe the arrestee secreted evidence inside a body cavity," but the removal of the baggie required a warrant. *Id.* 886 N.E.2d at 165-167.

The concurring opinion in *Hall* argued that a visual body cavity search is "intrusive, degrading, and humiliating" enough that it should require the same constitutional safeguards as a manual cavity search or non-consensual blood draw. *Id.* 886 N.E.2d at 170-176, CIPARICK, J., concurring:

When a law enforcement official peers into the rectum of an arrestee to search for contraband, that visual inspection is clearly an intrusion into the body. The fact that "no touching" occurs is immaterial because the search represents a drastic affront to human dignity and privacy, the very fundamental constitutional interests that *Schmerber's* rule was designed to protect. *Id.*, 886 N.E.2d at 171 (internal citations omitted.)

The concurrence in *Hall* also noted that the majority's reliance on *Wolfish* as support for its holding that the search was constitutional was misplaced, because *Wolfish* was focused on balancing the intrusiveness of a visual body cavity search inside a jail or prison against society's interest in preventing the smuggling of weapons and contraband into such a facility, a concern not present in that case. *Id.*, 886 N.E.2d at 173.

C. This Split of Authority is Deeply Entrenched and Should Be Resolved by this Court.

As shown above, the decisions of lower federal and state appellate courts about the constitutionality of visual body cavity searches incident to arrest are “all over the map,” and fail to meaningfully address whether this Court’s jurisprudence supports the conclusion that the scope of a warrantless search incident to arrest may include such an intrusive search. The misapplication of Fourth Amendment doctrine in these cases alone supports a grant of *certiorari* in this case.

As the concurring opinion in *Hall* and other cases point out, *Wolfish* is not good authority for the proposition that police may conduct a warrantless visual body cavity search *incident to arrest* because that case was concerned only with suspicionless searches in detention facilities that were justified by “the need to maintain institutional security.” *Hall*, 886 N.E.2d at 173; *see also*, *Fuller*, 950 F.2d at 1447-1448; *Evans*, 407 F.3d at 1279. Likewise, the notion that *Robinson* and other cases decided by this Court concerning the search incident to arrest exception support a rule that police may conduct a warrantless visual body cavity search if they have a reasonable suspicion (or even probable cause) that an arrestee is hiding something inside a body cavity is misplaced, because it ignores that this issue was specifically reserved in *Illinois v. Lafayette*, 462 U.S. 640, 645-646, fn.2; 103 S.Ct. 2605, 2609 (1983), and contradicts this Court’s firm preference for categorical rules setting the

boundaries of that exception to the warrant requirement. *Belton, supra*, 453 U.S. at 458-460, 101 S.Ct. at 2863-2864; *Riley, supra*, 573 U.S. at ___, 134 S.Ct. at 2491-2493; *Birchfield*, 579 U.S. at ___, 136 S.Ct. at 2176, 2179-2183. This categorical approach is abandoned by a rule delegating to police the authority to decide whether to conduct a search as intrusive as a visual body cavity search incident to arrest.

Beyond these jurisprudential concerns, the split of authority among lower courts concerning the limits imposed by the Fourth Amendment on warrantless visual body cavity searches creates confusion that seriously impacts police, who lack clear guidance concerning when they may conduct these searches following an arrest; federal and state courts, tasked with ruling on the constitutionality of these searches in criminal and civil cases; and individuals subjected to these highly intrusive searches, whose sense of violation is undoubtedly magnified when the legal authority for the search is in doubt. For these reasons, the split of authority strongly favors a grant of *certiorari* in this case.

II. The Police Practices Addressed by this Case are Widespread and Should be Governed by Clear Rules.

The police practices under examination in this case are widespread, emotionally and politically charged, and prone to abuse; so clear guidelines are essential for the benefit of law enforcement and protection of the general public. Under prevailing law, police officers in the United States have the

opportunity to conduct thousands of visual body cavity searches a year outside of the judicial process and based on nothing more than a reasonable suspicion that an arrestee is hiding something, even a marijuana cigarette, inside a body cavity. Department of Justice statistics for the year 2016 show that police conducted in excess of ten million arrests in the United States, including more than 1.5 million arrests for “drug abuse violations.” *See*, U.S. Dept. of Justice, Bureau of Justice Statistics, *2016 Crime in the United States*, Table 18. Allowing a warrantless visual body cavity search incident to arrest whenever a police officer entertains a reasonable suspicion that an arrestee has something hidden inside a body cavity means that officers have enormous discretion to subject arrestees to these intrusions with little oversight or accountability.

Courts have frequently noted the degrading and humiliating nature of visual body cavity searches, even when they are conducted lawfully. *See, Mary Beth G., supra*, 723 F.2d at 1272, *quoting, Tinetti v. Wittke*, 479 F.Supp. 486, 491 (E.D.Wis.1979) [describing these searches as “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive”] The demeaning and invasive nature of these searches exacts costs to individual privacy and dignity, especially when conducted outside the judicial process and on the scale that the prevailing rule in most jurisdictions would permit. These costs to individual privacy and dignity are even higher when the practice is abused by police.

There is plenty of anecdotal evidence that these abuses occur, like the strip search in *Swain v. Spinney*, which was apparently motivated by the officer's anger at Swain for not giving information about her boyfriend in a theft investigation, *Swain, supra*, 117 F.3d at 3-4, and the strip searches in *Evans v. Stephens*, where two African American men were allegedly terrorized by a racist police officer after one of them was arrested for driving under the influence in rural Georgia. *Evans, supra*, 407 F.3d at 1275-1278.

There is also evidence that these abuses occur on a wider scale. In a 2016 Department of Justice Report on the Baltimore City Police Department, for example, investigators “found many instances in which officers strip searched individuals without legal justification ... In some cases, officers performed degrading strip searches in public, prior to making an arrest, and without grounds to believe that the searched individuals were concealing contraband on their bodies.” U.S. Dept. of Justice, Civil Rights Division, *Investigation of the Baltimore City Police Department*, August 10, 2016, at p. 6. The report goes on to detail examples of these abuses, many of which would be found unconstitutional even under prevailing law. *Id.*, at pp. 32-34.

A decision by this Court clarifying the limits imposed by the Fourth Amendment on the conduct of visual body cavity searches incident to arrest will not only help resolve the legal confusion surrounding these searches, it will also help ensure that the costs to individual privacy and dignity exacted by this practice are justified by the needs of law enforcement. Certainly a

decision holding that a warrant is required for all visual body cavity searches incident to arrest, in the absence of exigent circumstances, would reduce the opportunities for police to abuse the practice, and would be more consistent with this Court's firm preference for categorical rules defining the boundaries of the search incident to arrest exception and the balance struck in favor of requiring a warrant in *Birchfield* and *Riley*. *Birchfield*, *supra*, 579 U.S. ___, 136 S.Ct. at 2179-2182; *Riley*, *supra*, 573 U.S. ___, 134 S.Ct. at 2184-2186.

III. This Case is an Ideal Vehicle for Deciding the Question Presented

This case presents an excellent vehicle to decide whether warrantless visual body cavity searches come within the search incident to arrest exception, as this issue has been effectively isolated by the record and arguments below. First, it may be conceded for purposes of this petition that Maxwell's arrest was supported by probable cause, although it is a close question and the issue was vigorously contested in state court. Pet. App. 15a-21a. In addition, the government has not argued and the record does not support a finding that the search was justified by exigent circumstances or by the necessities of jail administration. Pet. App. 26a-27a, fn. 6. Thus, the question of whether the Fourth Amendment is violated when police conduct a warrantless visual body cavity search incident to arrest, absent exigent circumstances or other justification relating to jail security, is squarely presented by this case.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for *certiorari*.

Respectfully submitted,



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