
In the Supreme Court of the United States

GLEN 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 APPELLATE DISTRICT**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a police officer who reasonably suspects that an arrestee has concealed drugs in a body cavity must obtain a warrant before conducting a visual body cavity inspection out of public view during admission of the arrestee into a jail facility.

TABLE OF CONTENTS

	Page
Statement	1
Argument.....	6
Conclusion.....	10

TABLE OF AUTHORITIES

Page

CASES

<i>Birchfield v. North Dakota</i> 136 S. Ct. 2160 (2016).....	8
<i>Carpenter v. United States</i> 138 S. Ct. 2206 (2018).....	8
<i>Craddock v. Commonwealth</i> 40 Va. App. 539 (2003).....	9
<i>Fuller v. M.G. Jewelry</i> 950 F.2d 1437 (9th Cir. 1991).....	7, 8, 9
<i>Kentucky v. King</i> 563 U.S. 452 (2011).....	8
<i>King v. Commonwealth</i> 49 Va. App. 717 (2007)).....	9
<i>People v. Hall</i> 10 N.Y.3d 303 (2008).....	9
<i>People v. Wade</i> 208 Cal. App. 3d 304 (1989).....	5, 8
<i>Riley v. California</i> 134 S. Ct. 2473 (2014).....	8
<i>Way v. County of Ventura</i> 445 F.3d 1157 (9th Cir. 2006).....	8

CONSTITUTIONAL PROVISIONS

United States Constitution Fourth Amendment	6
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COURT RULES

California Rules of Court 8.1115(a)	10
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STATEMENT

1. a. One night in August 2012, San Jose Police Department Officers Hans Jorgensen and Matthew Blackerby were watching a street corner known for narcotics sales. Pet. App. 15a. They noticed that petitioner Glen Maxwell was standing near a bus stop but did not board any of the buses that stopped there. *Id.*

After some time, a man and a woman approached Maxwell. Pet. App. 15a. The woman gave money to the man, who in turn gave money to Maxwell. *Id.* at 15a-16a. Maxwell placed the money in the pocket of his gym shorts. *Id.* at 16a. He then retrieved a light-colored, plastic-wrapped, golf-ball-sized object from his buttocks area underneath his clothes. *Id.* Maxwell placed the object and both of his hands into the front pouch of his sweatshirt. *Id.* After moving his hands inside the pouch, Maxwell took out a small object and dropped it into the man's hand. *Id.* The man put the object into his mouth and walked away with the woman. *Id.* Maxwell moved the golf-ball-sized object from the pouch back to his buttocks area underneath his clothes. *Id.* After that, officers saw a man later identified as Thomas White approach Maxwell and give him money. *Id.* at 5a, 16a.

Officer Jorgensen believed that the golf-ball-sized object he had seen Maxwell take from his buttocks area contained illegal drugs. Pet. App. 16a. Based on his training and experience, Officer Blackerby similarly believed he had seen a drug transaction because drug dealers often conceal narcotics in

their buttocks area, and he believed that the golf-ball-sized object contained crack cocaine based on its size and the way it was packaged. *Id.* In Officer Blackerby's experience, it is common for drug dealers to sell small portions of drugs from a larger stash and for buyers to put the drugs in their mouths after buying them. *Id.* at 16a-17a.

Based on these observations, officers arrested Maxwell and White for loitering for narcotics activity, which is a misdemeanor. Pet. App. 16a. During a search of Maxwell incident to his arrest, the officers found cash and a substance they suspected was marijuana. *Id.* at 21a. However, they did not find the golf-ball-sized object Maxwell had placed in his buttocks area. *Id.*

Officers Jorgensen and Blackerby drove Maxwell in a patrol car to the police department's preprocessing center for booking. Pet. App. 21a. Maxwell was seated immediately to Officer Jorgensen's right in the front passenger seat. *Id.* Officer Jorgensen noticed that Maxwell's hands, which were handcuffed behind his back, were continually moving during the drive. *Id.* Maxwell appeared to be manipulating something near his buttocks. 1RT 15.¹

At the preprocessing center, the officers placed Maxwell in a holding cell and closed the blinds on the cell's windows and doors in preparation for a strip search. Pet. App. 22a. Officer Jorgensen had been trained on how to perform

¹ "CT" and "RT" refer respectively to the clerk's transcript and reporter's transcript of the trial court proceedings. Citations to the record are preceded by a volume number.

a strip search and had done so approximately twenty times, although no formal departmental policies or procedures governed strip searches. *Id.*

Maxwell removed his clothing according to Officer Jorgensen's instructions. Pet. App. 22a. Officer Jorgensen then directed Maxwell to turn around, spread his buttocks, and bend over at the waist. *Id.* However, Maxwell did not bend over or spread his buttocks as instructed, but instead squatted. *Id.* Maxwell failed to comply with further instructions to bend over. *Id.* The officers discontinued the search without having recovered anything from Maxwell's person. *Id.*

After Maxwell dressed, the officers drove him to the Santa Clara County main jail. Pet. App. 22a. When they informed Maxwell that a second strip search would be conducted, Maxwell asked for a sergeant. *Id.* A sergeant arrived to videotape and supervise the search; a total of five officers were present in case Maxwell became combative. *Id.* at 22a-23a.

Unlike in the preprocessing center, Maxwell complied with the instruction at the second strip search to spread his buttocks. Pet. App. 23a. Illuminating the area with his flashlight, Officer Jorgensen saw a golf-ball-sized white object that was consistent with the object the officers had earlier seen Maxwell manipulate on the street. *Id.* Officer Jorgensen did not at any time touch the inner cavities of Maxwell's body. *Id.* At the sergeant's direction, Maxwell reached between his buttocks, pulled out the object, and threw it on

the floor. *Id.* It was later determined to be a bag containing cocaine base. *Id.* at 9a.

b. Based on those facts, *see* 2RT 63-75, Maxwell moved in subsequent court proceedings to suppress the drugs. Pet. App. 13a. He argued that he was arrested without probable cause, that there was no objective basis to justify either strip search, and that the searches were conducted in an unreasonable manner. *Id.* at 14a. The trial court denied the motion to suppress. *Id.* The court held that the strip search “was entirely appropriate” because the officers had observed what appeared to be a narcotics transaction and had not found the drugs in Maxwell’s buttocks, where his hands were seen during that transaction. 2RT 74-75; *see also* Pet. App. 25a. Moreover, the court reasoned, the second strip search was necessary because during the first search Maxwell had not followed instructions to expose his anus. Pet. App. 25a. And the searches were conducted in a “professional and reasonable manner and without excessive force.” *Id.*

The case proceeded to trial, and a jury found Maxwell guilty of possession of cocaine base with intent to sell and bringing a controlled substance into a jail. Pet. App. 2a-3a. The jury also found that Maxwell had suffered several prior convictions, including one that constituted a “strike” under California’s “three strikes” law. *Id.* The court sentenced Maxwell to an eight-year prison term. *Id.* at 3a.

2. On appeal Maxwell argued, among other things, that the trial court erred in denying his motion to suppress the cocaine base because the police needed a warrant to conduct the visual body cavity searches that uncovered the drugs. He contended that the body cavity searches were not authorized by a routine departmental policy, as incident to arrest, by institutional security concerns, or by any exigency. Appellant's Opening Br. 49-53. The State responded that a warrantless visual body cavity search is justified on exigency grounds if the searching officers have lawfully arrested and brought a person into jail and reasonably believe that the person has concealed narcotics on his or her body. Respondent's Br. 34-37. The State relied primarily on *People v. Wade*, 208 Cal. App. 3d 304 (1989), which it contended authorized a warrantless visual body cavity search under such circumstances. Respondent's Br. 34-37. The State expressly did "not contend that the strip search of [Maxwell] was justified by a strip search policy ... or for the sole reason that it was incident to [Maxwell's] arrest" *Id.* at 36 n.7.

The court of appeal affirmed. Pet. App. 1a, 21a-37a. The court broadly framed the question before it as whether "'a full search incident' to arrest may routinely encompass strip searches or close visual body inspections." *Id.* at 30a. In the court's view, precedent on that question was "all over the map." *Id.* at 30a-31a. But the court's analysis of this case ultimately rested on a combination of Maxwell's status as an arrestee, the potential for loss of evidence, and the jail setting of the search. The court concluded that "an arrestee

taken into valid police custody for an offense supported by probable cause has diminished expectations of privacy” and that the “government has a weighty interest in preserving the evidence of an offense where it is reasonable to believe that the arrestee has secreted such evidence on his body and there is a real risk that the arrestee will seek to dispose of or destroy the evidence.” *Id.* at 35a. And the court observed that “the strip searches and visual inspections of [Maxwell] involved relatively brief intrusions into his bodily privacy, they were conducted by same-gender officers out of the public view, and they were accomplished without physical force or any physical touching of defendant’s genitals, buttocks, or anal area.” *Id.* at 36a (footnote omitted).

The California Supreme Court denied Maxwell’s request for discretionary review. Pet. App. 1b.

ARGUMENT

Maxwell argues that there is a conflict among federal and state courts about the circumstances under which a warrant is required for the visual body cavity search of an arrestee. Pet. 18-30. He identifies, however, no state or federal jurisdiction in which a reviewing court would have held that the search at issue in this case violated the Fourth Amendment. In any event, the unpublished decision in this case does not create or add to any precedential conflict. There is no reason for further review.

Maxwell acknowledges that nine federal circuits have upheld warrantless visual body cavity searches of arrestees upon “reasonable suspicion that

the arrestee has weapons or contraband concealed inside his or her body.” Pet. 18. The search in this case would have been approved in any of those jurisdictions because the police had more than the requisite reasonable suspicion under that standard. Maxwell does not contend otherwise.

Maxwell argues that Ninth Circuit precedent conflicts with the reasonable-suspicion standard applied in other circuits because that court 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 justified by exigent circumstances or the necessities of jail administration.” Pet. 18-19 (citing *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1449-1451 (9th Cir. 1991)). In *Fuller*, a jewelry merchant suspected two women of stealing a ring solely because the women had held and inspected the ring some time before the merchant noticed it was missing. *Fuller*, 950 F.2d at 1439. After arresting the women, officers conducted a visual strip search at the police station. *Id.* at 1440. Central to *Fuller*’s holding that the strip searches were unconstitutional was that the searching officers were not operating under exigent circumstances. *Id.* at 1449-1451.

Even if *Fuller* conflicts with the law of other circuits as to whether exigency is necessary to support a warrantless visual body cavity search, that conflict does not affect this case. In the proceedings below, the State expressly avoided defending the search here solely on the ground that it was a proper search incident to arrest. Respondent’s Br. 36 n.7. The State also argued that

“[t]he exigent circumstances lacking in *Fuller* were present in *this* case because the contraband in appellant’s anus was cocaine base, not a piece of jewelry.” *Id.* at 36. And the State observed that “strip searches to detect drug contraband are justified to keep drugs out of penal institutions, preserve the drug[s] as evidence, and prevent the drug[s] from being absorbed into the bearer’s system with possibly injurious consequences.” *Id.* at 36-37. The court of appeal agreed that the visual body cavity search here was justified, at least in part, by the exigent circumstance that “there [was] a real risk that the arrestee [would] seek to dispose of or destroy the evidence.” Pet. App. 35a. That decision comports with *Fuller*’s exigent-circumstances requirement and with this Court’s precedents. See *Carpenter v. United States*, 138 S. Ct. 2206, 2222-2223 (2018) (exigent circumstances justifying warrantless search include “prevent[ing] the imminent destruction of evidence”) (citing *Kentucky v. King*, 563 U.S. 452, 460 n.3 (2011)); accord *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016); *Riley v. California*, 134 S. Ct. 2473, 2494 (2014).² This case therefore implicates no conflict among the federal courts of appeals.

² Since deciding *Fuller* the Ninth Circuit has recognized—without apparent disagreement—the holding in *Wade*, 208 Cal. App. 3d 304, on which the State relied in the court below in arguing that the present case involved exigent circumstances sufficient to satisfy *Fuller*. See *Way v. County of Ventura*, 445 F.3d 1157, 1162 (9th Cir. 2006) (acknowledging *Wade*’s “holding that a body cavity search was justified by the arresting officers’ observation of the suspect apparently trying to put something beneath his waistband”).

Similarly, Maxwell identifies one State (Virginia) in which an intermediate appellate court has held that there must be exigent circumstances to support a warrantless visual body cavity search, and he posits a conflict between that decision and precedents from several other jurisdictions that do not require exigent circumstances. Pet. 26-27 (citing *King v. Commonwealth*, 49 Va. App. 717, 725-726 (2007)). Like *Fuller*, however, *King* does not hold that exigent circumstances are absent in a factual scenario comparable to Maxwell's. *King*, 49 Va. App. at 725-726 (search illegal because there was neither testimony that the defendant was being admitted to a correctional facility nor any clear indication that evidence was concealed in his body). In fact, *King* distinguished another Virginia case upholding a visual body cavity search of a defendant who "had been committed to jail as a pretrial detainee" and had given the searching deputies "a reason to believe that [he] was hiding contraband." *Id.* (citing *Craddock v. Commonwealth*, 40 Va. App. 539, 544-547 (2003)). As *Craddock* makes clear, the search at issue in this case would also have been upheld in Virginia.³

Finally, the court of appeal's opinion below was not certified for publication in the official reports. See Pet. 1a. In California, opinions not certified for

³ Maxwell also cites the concurring opinion from *People v. Hall*, 10 N.Y.3d 303 (2008). Pet. 30. Setting aside that a concurring opinion is not precedent that could create a conflict, the concurrence in *Hall* concluded only that a warrantless visual body cavity search required either exigent circumstances or a clear indication of concealed contraband. *Id.* at 320 (Ciparick, J., concurring).

publication generally “must not be cited or relied on by a court or a party in any other action.” Cal. R. Ct. 8.1115(a). That the opinion below cannot affect the outcome of any other case is another reason that this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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