TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 25
Number 4 *Annual New York State Constitutional Issue*

Article 6

December 2012

Court of Appeals of New York – People v. Hall

Christopher Shishko

Follow this and additional works at: https://digitalcommons.tourolaw.edu/lawreview

Part of the Constitutional Law Commons, and the Fourth Amendment Commons

Recommended Citation

Shishko, Christopher (2012) "Court of Appeals of New York – People v. Hall," *Touro Law Review*: Vol. 25 : No. 4 , Article 6.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol25/iss4/6

This Search and Seizure is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

COURT OF APPEALS OF NEW YORK

People v. Hall[1]

(decided March 25, 2008)

Azim Hall was arrested under suspicion of selling narcotics.[2] Following the arrest, Hall was "indicted for criminal possession of a controlled substance in the third and fifth degrees."[3] Prior to trial, Hall filed a motion to suppress certain evidence obtained during a strip search.[4] The trial court granted Hall's motion to suppress the evidence and dismissed the indictment.[5] The decision was appealed to the Appellate Division, First Department, which unanimously reversed and reinstated the indictment.[6] In response, Hall appealed to the New York Court of Appeals, asserting that the search was unreasonable under the United States Constitution[7] and the New York Constitution.[8] The Court of Appeals determined that the search was unreasonable and reversed, reinstating the order suppressing the evidence and dismissing the indictment.[9]

---

[1] *People v. Hall* (*Hall II*) 886 N.E.2d 162 (N.Y. 2008), *cert. denied*, 129 S. Ct. 159 (2008).

[2] *Id.* at 164.

[3] *Id.*

[4] *Id.*

[5] People v. Hall (*Hall I*), 829 N.Y.S.2d 85, 86-87 (App. Div. 1st Dep't 2007).

[6] *Id.* at 89.

[7] U.S. CONST amend. IV, states, in pertinent part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ."

[8] N.Y. CONST art. I, § 12 states, in pertinent part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ."

[9] *Hall II*, 886 N.E.2d at 178-79.

On February 10, 2005, the police conducted a narcotics sting operation in Manhattan.[10] From the roof of a building, Sergeant Burnes of the New York City Police Department observed the front of a bodega where a man named Meyers took money from two individuals and subsequently delivered it to the defendant.[11] Burnes watched as two individuals accosted Meyers and after a brief conversation, gave him money.[12] Hall then entered the bodega for approximately three minutes, and upon his return "handed something to Meyers," who in turn handed "two small, white objects" to the individuals.[13] Burnes testified that the objects appeared to be crack cocaine.[14]

Drawing on his twenty years of experience as a police officer, Burnes suspected a drug deal had taken place and notified Officer Spiegel of the transaction.[15] Subsequently, Hall and Meyers were arrested and taken into custody.[16] Upon arrival at the police station, Spiegel searched Hall's clothing, but did not find any drugs.[17] He then requested that Hall disrobe.[18] Hall was ordered to bend over for a visual body cavity search, and Burnes and Spiegel observed a string or a portion of a plastic bag protruding from Hall's rectum.[19]

Burnes believed the item to be part of a package of drugs

---

[10] *Id.* at 164.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Hall II*, 886 N.E.2d at 164.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Hall II*, 886 N.E.2d at 164.

within Hall's body, and ordered him to remove it.[20] Hall refused to comply, so Spiegel restrained him while Burnes removed the object.[21] Predictably, the item removed from Hall's rectum was a bag containing crack cocaine rocks.[22] Apparently, this type of concealment is not uncommon as there was testimony that " 'a good majority' of the persons arrested for narcotic offenses within a four-block radius of where [the] defendant made his sale were found to have drugs hidden between their buttocks."[23]

The trial court granted Hall's motion to suppress the evidence and dismissed the indictment.[24] This decision was appealed to the appellate division which unanimously reversed and reinstated the indictment.[25] On further appeal, the Court of Appeals determined that an intrusion into an arrestee's body requires a warrant absent exigent circumstances.[26] Because there were no exigent circumstances that required the extraction of the bag without a warrant, the court determined that " 'interests in human dignity and privacy' " required the police to obtain a warrant by showing " 'a clear indication that . . . [relevant] evidence will be found' inside the arrestee's body."[27] The facts in this case did not satisfy the "exigent circumstances" exception to the warrant requirement, because there was no possibility that the evidence would be lost or destroyed before a warrant could be ob-

---

[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at 169.
[24] *Hall I*, 829 N.Y.S.2d at 86.
[25] *Id.* at 106.
[26] *Hall II*, 886 N.E.2d at 165.
[27] *Id.* (quoting Schmerber v. California, 384 U.S. 757, 769-70 (1966)).

tained.[28]

The court laid out four levels of searches that are progressively more intrusive, and therefore, require a higher standard under the Fourth Amendment before they may be administered.[29] The police are free to search an arrestee's outer body following an arrest, and may require a strip search based only on reasonable suspicion that the arrestee is concealing evidence underneath her clothing.[30] However, in order to commence with a visual cavity inspection, the police must have "particular, individualized facts . . . that justify subjecting an arrestee to these procedures."[31] A visual body cavity inspection is limited only to what the police can observe, and does not extend to the highest level of searching, whereas a manual body cavity search actually entails inserting or probing the inside of a suspect's body.[32] The court determined that the police were justified in this situation in performing a visual body cavity search, and that the search was reasonable.[33]

In order to understand the Court of Appeals' reasoning, it is necessary to examine federal court decisions regarding intrusive searches into a person's body. In *Schmerber v. California*, the defendant moved to suppress evidence of his blood alcohol content, which had been obtained through a blood test performed at a hospital.[34] The defendant was taken to the hospital following an accident in which he

---

[28] *Id.* at 169.
[29] *Id.* at 164-65 (citing Blackburn v. Snow, 771 F.2d 556 n.3 (1st Cir. 1985)).
[30] *Id.* at 166; *see also* United States v. Robinson, 414 U.S. 218, 233-35 (1973).
[31] *Hall II*, 886 N.E.2d at 168.
[32] *Id.*
[33] *Id.* at 169.
[34] *Schmerber*, 384 U.S. at 759.

was allegedly driving drunk.[35] While there, the police ordered that a blood sample be taken despite the absence of a warrant.[36]

The United States Supreme Court determined that under the Fourth Amendment,[37] the protection against unreasonable search and seizure would normally be violated by the police intrusion into a person's body to obtain evidence absent a search warrant.[38] However, in light of the exigent circumstances presented, including the fact that the blood alcohol content of an individual will diminish over time, the Court concluded that the test was constitutional.[39]

The Court set forth an additional requirement that in the event that exigent circumstances require a warrantless intrusion into a suspect's body, the search should be done in a reasonable manner.[40] The Court did not outline a bright line rule for what constitutes a reasonable search, but noted that the drawing of the suspect's blood had been in a controlled environment of a hospital and was performed "according to accepted medical practices."[41] However, in finding this intrusion to be constitutional and reasonable, the Court was also noted that under different circumstances, such as at a police station, the search may be "unjustified."[42]

In *Winston v. Lee*,[43] the Supreme Court addressed whether

---

[35] *Id.* at 758.
[36] *Id.*
[37] U.S. CONST. amend. IV, states, in pertinent part: "The right of people . . . against unreasonable searches and seizures, shall not be violated . . . ."
[38] *Schmerber*, 384 U.S. at 771.
[39] *Id.* at 770-71.
[40] *Id.* at 771-72.
[41] *Id.* at 771.
[42] *Id.* at 772.
[43] 470 U.S. 753 (1985).

surgically removing a bullet from a suspect's body constituted an illegal search.[44] In *Winston*, the defendant was shot by a storekeeper during an attempted robbery and taken into custody by the police a few blocks from the store.[45] The trial court ordered that, despite the suspect's refusal, the bullet should be surgically removed for evidentiary purposes.[46] The Supreme Court determined that the surgery would violate the suspect's Fourth Amendment right against unreasonable searches even if it was "likely to produce evidence of a crime."[47]

The Court's opinion focused on the definition of "reasonable" within the Fourth Amendment.[48] Particularly, the Court emphasized that, at the bare minimum, probable cause was required before a search could be instituted.[49] However, because this case involved such an extreme form of intrusion, the Court determined that an individual's privacy and security interests should be weighed against the interest society has in the procedure on a case-by-case approach.[50]

Then, the Court balanced various factors before concluding that the surgical intrusion was unreasonable. First, the "extent to which the procedure may threaten the safety or health of the individual."[51] Second, the "extent of intrusion upon the individual's digni-

[44] *Id.* at 753.
[45] *Id.* at 755-56.
[46] *Id.* at 756-57.
[47] *Id.* at 759.
[48] U.S. CONST. amend. IV, states, in pertinent part: "The right of people...against unreasonable searches and seizures, shall not be violated."
[49] *Winston*, 470 U.S. at 760.
[50] *Id.*
[51] *Id.* at 761.

tary interests in personal privacy and bodily integrity."[52] Finally, the Court considered the potential evidentiary value to the state in effectuating such an intrusion.[53] Ultimately, the Court considered that the surgery posed a serious threat, and would severely intrude into the suspect's privacy, and that the need for the evidence was minimal as there was other evidence available to accomplish the same goal.[54]

Winston expands on a previous Supreme Court decision in which a balancing test was formulated to determine reasonableness of searches. In *Bell v. Wolfish*,[55] the Court determined that a prison policy of allowing visual cavity searches of inmates following visitation sessions was constitutional.[56] The Court noted that the prison had instituted this policy as a means of maintaining security within the prison.[57] In addition, this case dealt with the right against unreasonable searches of detainees who had been charged with a crime but not yet tried.[58]

Despite this distinction between pre-trial detainees and those who have merely been arrested on suspicion of a crime, the Court determined that a policy of conducting visual cavity searches must be "reasonably related to a legitimate goal."[59] However, if no legitimate goal existed, then the Court would infer that the purpose of the policy was to punish the inmates, in violation of the United States Constitu-

---

[52] *Id.*
[53] *Id.* at 765.
[54] *Winston*, 470 U.S. at 766.
[55] 441 U.S. 520 (1979).
[56] *Id.* at 558.
[57] *Id.* at 560.
[58] *Id.* at 523.
[59] *Id.* at 539.

tion.[60] The Court concluded that a "test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."[61] Ultimately, the Court set forth what became the reasonableness test that many courts would use as a basis for determining the extent to which a search may be conducted with or without a warrant.[62]

In *Fuller v. M.G. Jewelry*,[63] the Ninth Circuit Court of Appeals affirmed its prior decision in *Kennedy v. Los Angeles Police Department*,[64] and found a Los Angeles Police Department ("LAPD") policy, requiring that all arrested felony suspects be subjected to a visual body cavity search, to be unconstitutional.[65] In *Fuller*, the defendant was arrested after being accused by a jewelry store owner of stealing a ring that she had been examining.[66] Following her arrest, she underwent a visual strip search which was part of the LAPD's policy for felony arrests.[67] The police did not find the ring and the suspect was released without any charges being filed.[68]

The circuit court determined that in order for a search to be constitutional under *Bell*, the police must have reasonable suspicion that the suspect may have concealed something that would threaten

[60] *Bell*, 441 U.S. at 539.

[61] *Id.* at 559.

[62] *Id.* ("Courts 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.").

[63] 950 F.2d 1437 (9th Cir. 1991).

[64] 901 F.2d 702 (9th Cir. 1989).

[65] *Fuller*, 950 F.2d at 1445.

[66] *Id.* at 1439.

[67] *Id.* at 1440 (noting that the policy had been declared unconstitutional after the search was made but before the present decision was delivered).

[68] *Id.* The ring was never found.

the security of the institution.[69] Accordingly, the court determined that *Schmerber* was controlling in this situation.[70] In addition, the court expanded on this determination by finding that "*Schmerber* governs all searches that invade the interior of the body—whether by a needle . . . or visual intrusion into a body cavity."[71]

An interesting twist on this scenario arose in *United States v. Oyekan*,[72] in which two Nigerian citizens were detained when entering the country.[73] The Eighth Circuit upheld as constitutional "rectal and pelvic examinations" following an x-ray which showed objects inside the suspects' bodies.[74] Although the court did not draw a distinction between manual and visual body cavity searches, it did note that "a body cavity search must be conducted consistently with the *Schmerber* factors, even though such a search does not technically require piercing the skin, because both the degree and kind of intrusion involved are of analogous proportions."[75] This observation was made despite the fact that "a rectal examination . . . produced a packet containing heroin," suggesting that the court does not distinguish between a visual body cavity search and the removal of contraband from a body cavity.[76]

In *Richmond v. City of Brooklyn Center*,[77] the Eighth Circuit Court of Appeals elaborated on its opinion of body cavity searches.

---

[69] *Id.* at 1448.
[70] *Fuller*, 950 F.2d at 1449.
[71] *Id.*
[72] 786 F.2d 832 (8th Cir. 1986).
[73] *Id.* at 833.
[74] *Id.* at 839.
[75] *Id.* at 839, n.13.
[76] *Id.* at 834.
[77] 490 F.3d 1002 (8th Cir. 2007).

In *Richmond*, a suspect was arrested at a motel on suspicion of selling narcotics.[78] While searching the suspect within the motel room, the arresting officers suspected that he was concealing narcotics within his body.[79] One officer then restrained the suspect, while the other conducted a visual body cavity search.[80] The officer noticed a "piece of tissue protruding from [the suspect's] buttocks," and proceeded to remove the item.[81] It was disputed whether the officer actually penetrated the suspect's anus, but ultimately, the evidence was suppressed as being "the fruit of an illegal search," and the case was dismissed.[82]

However, in *Richmond*, the defendants did not appeal whether the strip search itself had been reasonable under the Fourth Amendment, and therefore the court did not specifically address that question.[83] Rather, the court's opinion suggested that the search had been performed in a reasonable manner, in that it was performed in a private area, by officers of the same sex as the suspect, and in a hygienic manner.[84] It is interesting to note that no distinction was made as to whether the removal of the item had any bearing on whether the search would be reasonable.

The First Circuit Court of Appeals has also not expressly ruled on the same situation, however, in *Rodriques v. Furtado*,[85] the court upheld the issuance of a warrant to manually inspect a suspect's

---

[78] *Id.* at 1005.
[79] *Id.* (noting that the officers had found the suspect to be in possession of small amount of marijuana, various drug paraphanalia and had "several previous felony narcotic arrests").
[80] *Id.*
[81] *Id.*
[82] *Richmond*, 490 F.3d at 1005.
[83] *Id.* at 1007.
[84] *Id.* at 1008.
[85] 950 F.2d 805 (1st Cir. 1991).

body cavity.[86] In *Rodriques*, the suspect was detained on suspicion of selling narcotics.[87] The police obtained a warrant prior to the arrest, which specifically mentioned that there was a "strong possibility that [the] appellant was hiding heroin in a prophylactic in her vagina."[88] Following her arrest, the suspect was taken to a hospital and a doctor performed the search of her vagina, although no contraband was discovered.[89]

The details of the inspection were disputed, including the duration of the inspection and the conditions in which it was performed.[90] Nevertheless, the First Circuit held that a body cavity search is reasonable if performed under the authorization of a warrant.[91] The court specifically mentioned its "revulsion for body cavity searches not supported by probable cause," and went on to distinguish between manual and visual cavity searches.[92] However, the court did not make a clear distinction as to when a visual body cavity search becomes a manual body cavity search. Instead, the court noted that this particular type of search was a "total intrusion of personal privacy," but necessary in the interest of "prevention and punishment of drug trafficking."[93] *Rodriques* affirms a basic principle; searches must be conducted privately, and "in a medically approved manner" while at the same time distinguishing between different lev-

---

[86] *Id.* at 808.
[87] *Id.*
[88] *Id.* at 808, n.1.
[89] *Id.* at 808.
[90] *Rodriques*, 950 F.2d at 808.
[91] *Id.* at 811.
[92] *Id.* at 810-11.
[93] *Id.* at 811.

els of intrusion into the body.[94]

The Fifth Circuit had the opportunity to deal with this matter more directly in *United States v. Himmelwright*.[95] In *Himmelwright*, a suspect was taken into custody at Miami International Airport, and detained after customs officers noticed that she had the characteristics of a drug smuggler, and changed her story as to her reason for entering the country.[96] The suspect was removed to a separate room and a female officer ordered the suspect to remove her clothes.[97] The inspector proceeded to inspect the suspect's crotch area and noticed a "tab protruding from [the suspect's] vagina."[98] The inspector ordered that the suspect remove the object, and after some objection, she complied; removing in total six condoms containing 105 grams of cocaine.[99] At trial, the defendant moved to suppress this evidence as having been obtained in violation of the Fourth Amendment.[100] The motion was denied and the defendant appealed to the Fifth Circuit.[101]

The Fifth Circuit found that the officers had the proper basis of "reasonable suspicion" for the search and that the search was reasonable.[102] In addition, the court noted that this search was only an "exterior search of the suspect's body," and that "[t]here was no probing . . . of [the suspect's] orifices."[103] Furthermore, the court

---

[94] *Id.*
[95] 551 F.2d 991 (5th Cir. 1977).
[96] *Id.* at 992.
[97] *Id.* at 993.
[98] *Id.*
[99] *Id.*
[100] *Himmelwright*, 551 F.2d at 993.
[101] *Id.*
[102] *Id.* at 995.
[103] *Id.* at 996.

opined that it may if no object had been noticed protruding from the suspect, further searching would likely have been unconstitutional."[104]

The New York Court of Appeals' decision in *People v. Hall* is derived from a long history of cases where the court had to interpret what constitutes an unreasonable search. The court in *Hall*, based its decision primarily on a precedent set in *People v. More*.[105] In *More*, the police responded to an apartment building after receiving a tip that cocaine was being prepared for sale in one of the apartments.[106] After being admitted by another tenant, the police entered the apartment and observed the defendant next to a table with cocaine on it.[107] The police arrested the defendant and performed a strip search on him while he was still within the residence.[108] As the strip search escalated into a visual body cavity search, the police discovered cocaine concealed in the defendant's rectum.[109]

The defendant moved to suppress the drugs seized from his rectum; the motion was denied by the county court, and affirmed by the appellate division.[110] On appeal, the Court of Appeals noted that there were no exigent circumstances that required the police to act immediately.[111] The court found that "body cavity searches incident to an arrest are at least as intrusive as blood test procedures," and as a

---

[104] *Id.*
[105] 764 N.E.2d 967 (N.Y. 2002).
[106] *Id.* at 968.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *More*, 764 N.E.2d at 968.
[111] *Id.* at 969.

result the search was unreasonable.[112] The court took particular note of the fact that the search was conducted in the defendant's residence, expressly reserving the question of whether such a search would be constitutional if conducted within a police station instead of a residence.[113]

In *People v. De Bour*,[114] the Court of Appeals established a reasonableness standard for one of the most common types of police searches, the stop and frisk.[115] In *De Bour*, the defendant was apprehended by police officers who noticed that he crossed the street to avoid walking directly past them.[116] Since it was after midnight and the area had "a high incident of narcotics crimes," the officers became suspicious and stopped him to inquire into where he was going.[117] The defendant indicated that he was going to his girlfriend's house, at which time one of the officer's noticed a bulge in the defendant's waistline.[118] The officer asked him to open his coat, and when he did, the officer noticed a revolver, and subsequently arrested the defendant.[119]

After the defendant pleaded guilty to attempted possession of a weapon, he appealed, and the Appellate Division, Second Department affirmed the conviction.[120] On appeal, the Court of Appeals re-

---

[112] *Id.*
[113] *Id.* at 970 n*.
[114] 352 N.E.2d 562 (N.Y. 1976).
[115] *Id.* at 566.
[116] *Id.* at 565.
[117] *Id.* at 565-66.
[118] *Id.* at 565.
[119] *De Bour*, 352 N.E.2d at 565.
[120] *Id.*

iterated the standard of reasonableness for search and seizures[121] set forth in *People v. Cantor*,[122] which requires "weighing of the government's interest against the encroachment involved with respect to an individual's right to privacy and personal security."[123] The court noted that a search may not be validated "by what it produces."[124] The court concluded that "[t]he overriding requirement of reasonableness . . . must prevail."[125] Ultimately, the court considered this level of intrusion as being "extremely minimal" and found that the officer's action was "consonant with the respect and privacy of the individual and as such was reasonable."[126]

However, in *People v. Spinelli*,[127] the Court of Appeals found a warrantless search of the backyard of an arrestee unconstitutional.[128] In *Spinelli*, the defendant was arrested after the FBI observed two stolen vehicles on his property.[129] However, the police obtained a warrant to arrest the defendant for crimes unrelated to the stolen trucks, and had no warrant to arrest or search for the stolen vehicles.[130] Although the police argued that the trucks were "in plain view,"[131] the court found that the officer's subsequent search of the

[121] N.Y. CONST art. I, § 12 states, in pertinent part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ."

[122] 324 N.E.2d 872 (N.Y. 1975).

[123] *De Bour*, 352 N.E.2d at 566.

[124] *Id.* at 567.

[125] *Id.* at 568.

[126] *Id.* at 570.

[127] 315 N.E.2d 792 (N.Y. 1974).

[128] *Id.* at 795.

[129] *Id.* at 793.

[130] *Id.*

[131] *Id.* at 794. The plain view exception provides that "[a] person who leaves an article in plain view has no legitimate expectation of privacy with respect to that item." However, the fact that the item is in plain view is not sufficient to justify a search: the item must have

rear of the house after making the arrest at the front door was unreasonable.[132]

The court, almost apologetically, commended the police for their work, but nevertheless indicated that "there was ample time for the law enforcement officials to secure a warrant in order to make a significant intrusion onto the defendant's premises."[133] Furthermore, there were no exigent circumstances that required immediate action by the police.[134] The court explained that merely because obtaining a warrant may be a burden, it is never a justification for not one."[135] The court concluded by commending the police for their excellent work, but indicating that privacy and decency are more important to society than allowing police to use unfettered discretion in effectuating searches.[136]

The Court of Appeals detailed a system for determining reasonableness in *People v. Perel*;[137] the greater the extent of the intrusion into a person's privacy, the greater the level of justification that will be necessary to conduct the search.[138] In *Perel*, the defendant was arrested on charges of performing an illegal abortion.[139] At the time of his arrest, the defendant was in possession of a note with the name of the woman on whom he had performed the abortion.[140] The

"come into plain view inadvertently." *Id.*

[132] *Spinelli*, 315 N.E.2d at 795.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] 315 N.E.2d 452 (N.Y. 1974).

[138] *Id.* at 454.

[139] *Id.*

[140] *Id.*

police noticed the name on the slip after it was taken from the defendant to be placed in an evidence envelope.[141]

The Court of Appeals applied intuitive logic that "if a greater intrusion is justified, a lesser related intrusion is unobjectionable" and concluded that because the "maximum intrusion" had already been caused by the "arrest and detention pending arraignment," the search of the defendant's personal effects was reasonable.[142] While this suggests that once an arrest has been made, any search of the person would be reasonable, the court added that searches should be conducted with a warrant, "absent specified categorical exceptions."[143] Furthermore, the court indicated that an arrest does not necessarily import the right to conduct a "full-blown search of the person" and that such a search should be reasonable based on "the administrative and security requirements of detention."[144]

Another case which illuminates the concept of reasonable searches within New York is *People v. Hanlon*,[145] where the Court of Appeals declared itself to be the arbiter between "law enforcement and individual rights."[146] Moreover, the court emphasized its aversion to over-empowering law enforcement by indicating its belief that warrants prevent "the dangers of unbridled power."[147] Furthermore,

[141] *Id.*
[142] *Perel*, 315 N.E.2d 455-56.
[143] *Id.* at 455.
[144] *Id.* at 456-57.
[145] 330 N.E.2d 631 (N.Y. 1975)
[146] *Id.* at 635.
[147] *Id.* at 637. The facts of this case dealt with whether or not hearsay statements could be used to obtain a warrant. The court's history of balancing the rights of individuals against enabling law enforcement to perform its duties is consistently utilized even in other types of search and seizure cases.

in *People v. Evans*,[148] the Court of Appeals determined that a search beyond the outer layer of clothing that would normally accompany an arrest is unconstitutional unless the arrest occurs nearly simultaneously with the search.[149] In addition, the court stressed that to validate a search merely because there was probable cause would be to "pu[t] the cart before the horse," essentially establishing an order of events to ensure the reasonableness of a search.[150]

In comparing the federal court decisions regarding body searches to those in New York, it is clear that New York provides greater protection. Despite finding that a visual search was constitutional, the *Hall* Court determined that in order to initiate a manual body cavity search, there must either be a warrant to do so, or exigent circumstances, such as a possibility that the evidence will be destroyed or lost.[151] The majority opinion was only joined by one other justice, two justices concurred in part, and three justices dissented.[152] The concurring opinion would require a warrant for any body cavity search, absent exigent circumstances.[153] The dissenting opinion suggests that *Schmerber* does not cause the removal of a visible object from a body to upgrade a visual cavity search to a more intrusive manual cavity search.[154]

The dissenting opinion differs in its understanding of the

---

[148] 371 N.E.2d 528 (N.Y. 1977).

[149] *Id.* at 531. The defendant was arrested nearly a month after the search took place.

[150] *Id.* at 531.

[151] *Hall II*, 886 N.E.2d at 169.

[152] *Id.* at 164 n.1. Chief Judge Kaye concurred with Judge Graffeo's opinion, Judge Ciparick concurred in result along with Judge Jones, Judge Smith dissented and voted to affirm in a different opinion in which Judges Read and Pigott concurred.

[153] *Id.* at 170 (Ciparick, J., concurring in part and dissenting in part).

[154] *Id.* at 177 (Smith, J., dissenting in part).

facts. The dissenting justices agree that *Schmerber* requires a warrant for an intrusive body cavity search, but distinguishes intrusion into the body from the removal of an item from the body.[155] The dissent also points out the obvious result of the majority's ruling: that police officers may now conduct a visual search of a body cavity without a warrant, but upon finding any evidence, the search must be discontinued until a warrant is obtained.[156]

Bearing in mind New York's history of distancing itself from the United States Supreme Court[157], the examination of the various circuit court opinions interpreting related Supreme Court decisions on issues similar to the one presented in *Hall* reveals that the circuit courts are split along the same lines as the concurrence and dissent in *Hall.* Interestingly, the majority opinion, which distinguished visual body cavity searches, as not requiring warrants, from manual body cavity searches, which did require a warrant, stands as a precedent distinct from the circuit court decisions.[158] The circuit court opinions have not based a warrant requirement on the distinction between manual or visual body cavity searches.[159]

In *Fuller*, the court did not distinguish between visual and manual body cavity searches. Instead, the court indicated that

---

[155] *Id.* at 178 (Smith, J., dissenting in part).

[156] *Hall*, 10 N.E.2d at 178 (Smith, J., dissenting in part).

[157] *See* Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK L. REV. 1, 281-91 (1996).

[158] *See supra* text accompanying notes 62-104.

[159] *See supra* text accompanying notes 62-104. *See generally* William J. Simonitsch, *Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment*, 54 U. MIAMI. L. REV. 665 (2000) (discussing the differences between visual and manual body cavity searches as applied by state and federal courts).

Schmerber governed visual searches and searches within the body.[160] This opinion is similar to the concurrence in *Hall*, which would have required a search warrant for either visual or manual body cavity searches, absent exigent circumstances.[161]

Similarly, the First Circuit in *Rodriques* did not lay out a bright line rule for when a search becomes unreasonable. However, the court was adamant in its disapproval of body cavity searches and suggested that a warrant would ensure reasonableness.[162] This opinion is most closely aligned with the concurrence in *Hall* which would require a search warrant for both a visual and manual body cavity inspection.[163] That is not to say, however, that the First Circuit would necessarily agree with the concurrence, as it does not specifically state a bright line rule for when a search must be conducted with a warrant.

The court in *Himmelwright* distinguished between the removal of an item protruding from a body cavity, to actually penetrating a body cavity in search of contraband.[164] This clearly indicates that the court does not equate a visual body cavity search with a manual body cavity search. Accordingly, this decision correlates to the dissenting opinion in *Hall*, which refused to liken the removal of a visible object to a manual body cavity search.[165] However, the decision stands in contrast to the concurrence in that there was no warrant

---

[160] *Fuller*, 950 F.2d at 1449; *see supra* text accompanying notes 69-71.

[161] *Hall II*, 886 N.E.2d at 170 (Ciparick, J., concurring in part and dissenting in part); *see supra* text accompanying notes 31-33.

[162] *Rodriques*, 950 F.2d at 811, *see supra* text accompanying notes 90-94.

[163] *Hall II*, 886 N.E.2d at 170 (Ciparick, J., concurring in part and dissenting in part).

[164] *Himmelwright*, 551 F.2d at 996.

[165] *Hall II*, 886 N.E.2d at 178 (Smith, J., dissenting in part).

in this case, and yet the search was found to be reasonable.[166]

Finally, the court in *Richmond* stressed reasonableness as the touchstone of a body cavity search, but did not emphasize the difference between visual and manual cavity searches. This opinion found the search to be unreasonable based on the location and manner in which it was conducted.[167] Accordingly, this opinion is more in line with the dissent in *Hall* in that the search in *Hall* was conducted privately, in a police station and with minimal use of force.

It should be noted that on June 13, 2008 a writ for certiorari was submitted to the United States Supreme Court to appeal the decision in *Hall*.[168] The petition makes specific note of the issues this recent case addresses, among other concerns. Specifically, the petition notes that "in the forty-two years since *Schmerber*, courts nationwide have struggled to interpret what constitutes an intrusion into the body requiring a warrant."[169] On October 6, 2008, the Supreme Court denied certiorari, ending the possibility that much needed clarification would be provided.[170]

This issue has generated a great deal of a controversy and uncertainty, especially within police departments regarding the limits of what can and cannot be done.[171] Aside from the difficulty in implementing standards that will withstand constitutional scrutiny, individuals could not possibly know at what point their rights are being

---

166 *Himmelwright*, 551 F.2d at 996.

167 *Richmond*, 490 F.3d at 1008.

168 Petition for Writ of Certiorari, *New York v. Hall*, 2008 WL 2445477 (No. 07-1568).

169 *Id.* at *38.

170 New York v. Hall, 129 S. Ct. 159 (2008).

171 Simonitsch, *supra* note 159, at 681-88 (citing examples of states who have codified a warrant requirement to ensure law enforcement officials conduct reasonable searches).

violated during a post-arrest search. The time is ripe for the Supreme Court to step in and clarify exactly what is meant by an intrusion, and lay out in clear terms exactly what the United States Constitution says about the right to privacy in regard to the most private parts of a person's body.

I think that the Supreme Court will someday decide this issue as it becomes more pronounced. When that time comes, the Court will likely apply a balancing test that will clarify the difference between a visual and a manual body cavity search. In the end, the reasoning of the concurrence in *People v. Hall* is likely to hold the most weight. Only by requiring that a neutral party authorize a search of the most private areas of a person's body, can it be assured that a person's rights are not violated.

Ultimately, I do not think the Supreme Court will resort to making unclear distinctions between visual searching and removing of an object that is observed. Rather, the Court will lay down a rule that clearly defines the circumstances in which police may conduct searches without a warrant, and at what point it will be clear that a warrant is required, and finally what point a search is patently unreasonable.

Christopher Shishko

CONFRONTATION CLAUSE

United States Constitution Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . .

New York Constitution article I, section 6:

In any trial in any court whatever the party accused shall . . . be confronted with the witnesses against him or her.