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Abstract

At 1:30 a.m. on a summer evening, the proprietor of a market, while locking up his business, sees a man approach with a gun in his hand.

KEYWORDS: snatchers, bullet, invasion

The Fourth Amendment and Surgical Searches: Invasion of the Bullet Snatchers

I. Introduction

At 1:30 a.m. on a summer evening, the proprietor of a market, while locking up his business, sees a man approach with a gun in his hand. The proprietor draws the gun he carries for protection. Shots are fired and both men are injured. Ambulances transport the two men to the hospital where the proprietor identifies his alleged assailant, and, later, police charge him with several felonies. The state attorney now wants the bullet which is lodged in the alleged felon's chest as evidence. Surgery using general anesthesia is required to obtain the bullet. Because the alleged felon refuses to undergo this surgical search, the state seeks a court order to compel his compliance.[1]

The fourth amendment to the United States Constitution[2] protects a person from official intrusion into areas in which one has a reasonable expectation of privacy,[3] absent a showing that the intrusion is reasonable.[4] When the area to be searched is physical property, a dwelling or some other structure, the searcher demonstrates reasonableness by establishing probable cause[5] to believe the object sought is in the place for which a search warrant is to be issued. Once probable cause is proven, the intrusion is deemed reasonable and the search warrant is issued.[6]

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1. The facts described are similar to the facts of Winston v. Lee, discussed *infra*.
2. The fourth amendment 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.

   U.S. CONST. amend. IV.
3. *See* Katz v. United States, 389 U.S. 347 (1967).
4. L. WADDINGTON, ARREST, SEARCH AND SEIZURE *passim* (1974).
5. See, *e.g.*, Johnson v. United States, 333 U.S. 10 (1948), stating that the determination of probable cause shall be decided "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 14.
6. L. WADDINGTON, *supra* note 3, at 9.

When authorities seek to search an individual, the nature and extent of this intrusion also must not exceed the bounds of the fourth amendment's protection of an individual's privacy and dignity. The individual's privacy interest must be balanced against the state's interest in obtaining the evidence.[7] However, a physical search of an individual's body has the potential of being much more intrusive than a premises search since an individual has a stronger expectation of privacy in the integrity of his body because of its obvious private nature. Since the expectation of privacy in the contents of one's body is greater than the expectation of privacy in, for example, the contents of one's dresser drawers, a mere showing that the evidence is present in the body is often, by itself, insufficient to meet the reasonableness requirement of the fourth amendment. Authorities must demonstrate a more compelling need for the search than the mere fact that the evidence is present in the person's body and that the state needs it. "The overriding function of the fourth amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[8]

When the state desires to search the human body, an evaluation of the reasonableness of the official conduct begins with a determination of the characteristics of the intrusion;[9] more specifically, whether the intrusion is an exterior or interior bodily intrusion.[10] The evidence sought may be on the body's surface, in body cavities, or actually lodged inside the body.[11] Intrusions on the body's surface are exterior intrusions, and include as examples scrapings of fingernails and skin,[12] and clippings of hair.[13] Exterior intrusions are traditionally considered reasonable because of the very limited nature of the intrusion. The state's need for the evidence outweighs the individual's privacy interest. Interior intrusions are classified as intrusions into the body and include the pinprick necessary for a blood alcohol test,[14] stomach pumping,[15]

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7. Elkin v. United States, 364 U.S. 206 (1960).

8. Schmerber v. California, 384 U.S. 757 (1966).

9. 2 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.1(d) (1978).

10. *See generally* Eckhardt, *Intrusion into the Body*, 52 Mil. L. Rev. 141 (1971).

11. *Id.* at 141.

12. *See, e.g.*, Cupp v. Murphy, 412 U.S. 291 (1973) (scraping of dried blood from under fingernails).

13. *See, e.g.*, In re Grand Jury Proceedings (Mills), 686 F.2d 135 (3d Cir. 1981), *cert. denied*, 103 S. Ct. 386 (1982) (hair samples from scalp and face).

14. *See, e.g.*, *Schmerber*, 384 U.S. at 757.

and the most interior of intrusions, surgery.[16] This note focuses on the last of these three intrusions: the surgical search.

States which have considered the question of surgical searches differ over the reasonableness of the search, and selectively apply different standards according to their own particular preferences.[17] Because of the highly invasive nature of surgical searches, a special set of standards is necessary to determine when such a procedure is a permissible intrusion and, therefore, a reasonable search for fourth amendment purposes.

Arguably, the standards utilized to determine the fourth amendment reasonableness of a surgical search, until now, have been necessarily fair and just standards and have provided a flexible, case-by-case framework for the resolution of this issue. This note, however, advocates the adoption of a bright-line standard, which modern medical technology requires, to prevent the potential for serious abuse and the threatened further erosion of the protections afforded an individual by

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15. *See, e.g.*, Blefare v. United States, 362 F.2d 870 (9th Cir. 1966).

16. *See, e.g.*, Crowder v. United States, 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

17. At present, most jurisdictions follow the reasonableness standard set forth in *Schmerber* in determining whether a surgical intrusion passes constitutional muster. These jurisdictions, however, while adopting the general *Schmerber* approach, may vary as far as determining the weight to be given to various factors used in balancing the interests at stake. Some stress location of the evidence in the body as definitive. Others stress a major/minor surgery distinction. Most jurisdictions take into account time required for surgery, use of general anesthesia, whether the surgical candidate is the defendant or a victim/witness, and the presence or absence of consent. *See, e.g.*, State v. Allen, 277 S.C. 595, 291 S.E.2d 459 (1982); State v. Maring, 404 So. 2d 960 (1981); People v. Scott, 21 Cal. 3d 284, 578 P.2d 123, 145 Cal. Rptr. 876 (1978); and Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972).

In Adams v. State, 260 Ind. 663, 299 N.E.2d 834 (1973), *cert. denied*, 415 U.S. 935 (1974), the Indiana Supreme Court held all surgical intrusions per se unconstitutional under the fourth amendment. While the Supreme Court of Georgia also seemed to endorse a per se rule, the surgical candidate involved was a witness to the crime and not the defendant. State v. Haynie, 240 Ga. 866, 242 S.E.2d 713 (1978). Therefore, it remains unresolved as to whether that court meant to adopt a per se rule in all surgical intrusion cases, or only in those involving surgical searches of people other than the defendant.

Also, in Lee v. Winston, 717 F.2d 888 (4th Cir. 1983), *aff'd*, Winston v. Lee, 53 U.S.L.W. 4367 (March 20, 1985)(No. 83-1334), petitioners suggested that the respondent wished the United States Supreme Court to apply a per se rule in that case. *See* Brief for Petitioners at 9, Lee v. Winston, 717 F.2d 888 (4th Cir. 1983), *aff'd*, Winston v. Lee, No. 83-1334 (U.S. March 20, 1985).

the fourth amendment. The previously employed case-by-case analysis should be retained only in those few cases not encompassed by the bright-line standard. Declaring all surgical searches requiring the use of general anesthesia as unconstitutional per se is the appropriate bright-line standard.

II. The Traditional Bounds of Permissible and Impermissible Bodily Intrusions: *Rochin v. California*[18] and *Schmerber v. California*[19]

Over the years, the United States Supreme Court began to delineate the boundaries of what constituted a reasonable search for constitutional purposes. *Rochin v. California* and *Schmerber v. California* became the endpoints for what was and was not permissible official conduct regarding searches of the human body.

Rochin laid the foundation for what constituted impermissible conduct. In *Rochin*, after gaining illegal entry to Rochin's home and bedroom on information that Rochin was selling drugs, police officers noticed two capsules on his bedside table.[20] Rochin quickly grabbed the pills and shoved them into his mouth[21] in an effort to prevent the police from obtaining them as evidence against him. A violent struggle ensued as the officers attempted to pry open the defendant's mouth to retrieve the capsules. The attempt failed and Rochin swallowed the pills. The officers then handcuffed Rochin, rushed him to a hospital, and ordered a doctor, despite Rochin's resistance, to place a tube down the defendant's throat and pump an emetic solution down the tube into Rochin's stomach.[22] The emetic caused vomiting. The two capsules retrieved from the vomitus were tested and found to contain morphine.[23]

The trial court admitted the capsules into evidence despite Rochin's objection that the capsules were obtained in such an unorthodox manner. The pills were admitted into evidence even though the unorthodox means of obtaining them was frankly set forth in the testimony.[24] The Appellate Court affirmed the conviction and the Califor-

18. 342 U.S. 165 (1952).
19. 384 U.S. 757 (1966).
20. *Rochin*, 342 U.S. at 166.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

nia Supreme Court, without opinion, denied Rochin's petition for a hearing.[25]

The United States Supreme Court reversed Rochin's conviction. Interestingly, however, the Supreme Court did not base the reversal on fourth amendment grounds,[26] but on the grounds that the method of obtaining the capsule from Rochin's stomach violated the due process clause of the fourteenth amendment.[27] The Court found that the official conduct was so egregious as to make Rochin's trial fundamentally unfair. "This is conduct which shocks the conscience."[28] This course of conduct is "bound to offend even hardened sensibilities."[29] The method utilized was "too close to the rack and the screw to permit of constitutional differentiation."[30] *Rochin* established the first standard. Conduct which shocked the conscience, offended a sense of justice, and which ran "counter to the 'decencies of civilized conduct' "[31] became unreasonable per se and, therefore, in violation of due process. *Rochin* represents conduct impermissible because it violates due process/fundamental fairness standards. *Rochin*'s prohibition, however, applies only to the most extreme and outrageous conduct.[32]

At the other end of the spectrum of reasonableness is *Schmerber*, where the United States Supreme Court set the standard for what is permissible official conduct under the fourth amendment. Schmerber was involved in an automobile accident. While Schmerber received

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25. *Id.* at 166, 167.

26. The Court did not consider whether this conduct would constitute an unreasonable search under the fourth amendment because this case was decided prior to Mapp v. Ohio, 367 U.S. 643 (1961), which applied the exclusionary rule of Weeks v. U.S., 232 U.S. 383 (1914) to the states.

27. *Rochin*, 342 U.S. at 168. The Due Process Clause provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV.

28. *Rochin*, 342 U.S. at 172.

29. *Id.*

30. *Id.*

31. *Id.* at 175.

32. It is clear that the *Rochin* Court objected to the entire line of official conduct, and did not feel that it was the stomach pumping alone that was particularly offensive. In fact, subsequent stomach pumping cases have been held to be reasonable searches. *See, e.g., Blefare*, 362 F.2d at 870. The court distinguished this case from *Rochin* on the fact that the search was a border search, where the state's interest in obtaining the evidence is very high, and on the fact that the method used to administer the emetic was not by forced pumping, as in *Rochin*, but was by a drip method often used on children. *See generally* Note, *Constitutionality of Stomach Searches, 10* U.S.F.L. REV. 93 (1975).

treatment in a hospital for injuries sustained in the accident, police officers directed the attending physician to withdraw a blood sample from Schmerber.[33] The doctor withdrew the blood and a chemical analysis indicated Schmerber was intoxicated.[34] The blood analysis results were admitted into evidence at trial over Schmerber's objection.[35] Schmerber was convicted of driving under the influence and appealed his non-jury conviction on four grounds. He claimed the introduction into evidence of the blood alcohol test results: 1) denied him due process of law under the fourteenth amendment;[36] 2) violated his privilege against self-incrimination under the fifth amendment;[37] 3) violated his right to counsel under the sixth amendment;[38] and 4) violated his right

33. *Schmerber*, 384 U.S. at 758 (1966).

34. *Id.* at 759.

35. *Id.* At trial, defendant's objection was based on the ground that the blood had been withdrawn in spite of his refusal to consent to the test on the advice of his counsel. The defendant felt this non-consensual conduct violated his right to due process of law under the fourteenth amendment. The Appellate Department of the California Superior Court rejected this argument, as did the United States Supreme Court on certiorari. *See Schmerber*, 384 U.S. at 759.

Quoting Justice Warren's dissent in Breithaupt v. Abram, 352 U.S. 432, 441 (1957), the *Schmerber* Court noted that it made no "difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest." *Schmerber*, 384 U.S. at 759. The defendant in *Breithaupt* was unconscious at the time the blood was withdrawn, and argued a due process violation based on his inability to object to the procedure. The Court rejected Breithaupt's due process argument on the precedent of *Rochin*, stating that such withdrawal of blood did not offend a sense of justice, in that it did not rise to the level of the objectionable official conduct outlined in the *Rochin* case. *See supra* note 30 and accompanying text.

In *Schmerber*, the Court rejected Schmerber's due process argument based on *Breithaupt* and *Rochin*. The Court held the official conduct was simply not offensive enough to be prohibited on the grounds found violative of due process standards in *Rochin*. *See Schmerber*, 384 U.S. at 760.

36. *Schmerber*, 384 U.S. at 759.

37. *Id.* The Court held that the defendant's fifth amendment rights had not been violated since that amendment had never been interpreted broadly enough to cover this conduct. The fifth amendment privilege extends only to testimonial or communicative evidence. Since a blood test is not within these categories, fifth amendment rights do not attach, and the Court rejected this ground for appeal. *But cf.* United States v. Dionisio, 410 U.S. 1, 36-37 (1973)(Marshall, J. dissenting) stating that fifth amendment rights should attach beyond testimonial and communicative evidence to protect the introduction of any evidence that the government needs a defendant's cooperation to obtain.

38. *Schmerber*, 384 U.S. at 765-66. The argument that the defendant had been denied a right to counsel was also rejected by the Court. Sixth amendment rights do

not to be subjected to unreasonable searches and seizures under the fourth amendment.[39]

The Court held that the blood test procedure involved in this case did not constitute an unreasonable fourth amendment search.[40] The Court characterized the pinprick necessary for a blood test as a minor intrusion which the Court considered permissible when performed under stringently limited conditions such as those present in the facts of that case.[41] Although the Court limited the holding to the facts of the case, *Schmerber*, nonetheless, sets forth the factors it considers vital to an analysis of whether a particular intrusion beneath the body's surface is a reasonable search for fourth amendment purposes.

First, the *Schmerber* majority believes "[t]he interests in human dignity and privacy which the fourth amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained."[42] Thus, the threshold determination when authorities seek an unconsented surgical search is whether there is a clear indication beyond mere chance that the evidence sought will be found.[43] This clear-indication standard is another way of expressing the elements of probable cause.[44] Rather than expressing the traditional elements of probable cause, the Court used the term "clear indication" because it wanted to stress that the same facts used to meet probable cause for the arrest should not automatically support an intrusive search of the body.[45] In Schmerber's case, for example, this clear indication was met based on the smell of his breath and the general indication of intoxication from his physical appearance. These facts were not the same facts used to establish probable cause for his initial arrest. Once this clear indication

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not attach until the initiation of adversarial judicial proceedings. See Kirby v. Illinois, 406 U.S. 682 (1972) defining the scope of the "critical stage of the prosecution," which was held as the time when sixth amendment rights attached in United States v. Wade, 388 U.S. 218 (1967).

The majority held that sixth amendment rights had not attached at the time Schmerber's blood was taken, since adversarial judicial proceedings had not as yet been initiated. Therefore, since the defendant "was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it." *Schmerber*, 384 U.S. at 766.

39. *Schmerber*, 384 U.S. at 759.
40. *Id.* at 772.
41. *Id.*
42. *Id.* at 769-70.
43. *Id.*
44. Eckhardt, *supra* note 9, at 150.
45. *Id.*

was present, the circumstances of the search should be examined to determine if it is fourth-amendment reasonable.

The Court outlined the factors it believed determinative of the reasonableness of a search. These factors include: 1) whether the procedure itself is reasonable, considering the extent of the procedure, and taking into account the effectiveness and widespread use, if any, of the procedure; 2) whether the performance of the procedure is done in a reasonable manner; e.g., whether it is done by a physician in a hospital environment according to accepted medical practices; and 3) whether there is a virtual absence of risk, trauma, or pain for most persons.[46] After setting forth these factors, the *Schmerber* Court emphasized that its holding was limited to minor bodily intrusions under these stringently limited conditions and gave no indication that it would permit "more substantial intrusions, or intrusions under other conditions."[47] The blood test in *Schmerber* represents the least-invasive interior bodily intrusion, and the Court's decision sets forth the factors determinative of permissible fourth amendment conduct.[48]

Therefore, utilizing *Rochin*'s standards for impermissible official conduct at one end, and *Schmerber*'s standards for permissible official conduct at the other, one could logically envision these cases on a line continuum of search behavior.[49] At the far right end of the line is *Rochin.* At the far left of the line is *Schmerber.* Somewhere in the middle of the line is conduct which violates the fourth amendment as an unreasonable search. All conduct so outrageous, by *Rochin* standards, that it is violative of due process, would also be violative of the fourth amendment. All conduct conforming to *Schmerber* standards would not be violative of either due process or the fourth amendment, because it is considered a minor intrusion justified by necessity and is therefore reasonable. In the middle of this behavior continuum is con-

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46. *Schmerber*, 384 U.S. at 771.

47. *Id.* at 772.

48. Since *Schmerber*, blood alcohol tests are generally considered reasonable searches under the fourth-amendment analysis. Therefore, several states have passed statutes to provide more protection from bodily intrusions for blood samples. These so-called implied consent statutes allow the police to take blood only upon the driver's consent. Refusal to consent, however, will generally result in suspension of one's driver's license. For a discussion of the constitutional and statutory issues involving implied consent, exemplified by Florida's implied consent statute, see Dobson, *Florida's New "Drunk Driving" Laws: An Overview of Constitutional and Statutory Problems*, 7 NOVA L.J. 179 (1983).

duct which is more intrusive than that at issue in *Schmerber* and which violates the fourth amendment, but yet does not rise to the level of a *Rochin* due process, fundamental fairness violation.

The conduct with which this note is concerned falls in the middle of this continuum and concerns the most intrusive of bodily searches: surgical searches. Most surgical searches arise when the state desires to retrieve bullets from a criminal suspect's body which the state needs to use as evidence against him.

III. The Bullet Cases

Courts which have considered cases questioning the permissibility of court-ordered surgical searches for bullets have held such procedures constitutionally permissible when justified under the circumstances and when performed in the proper manner.[50] Extending the factors set forth

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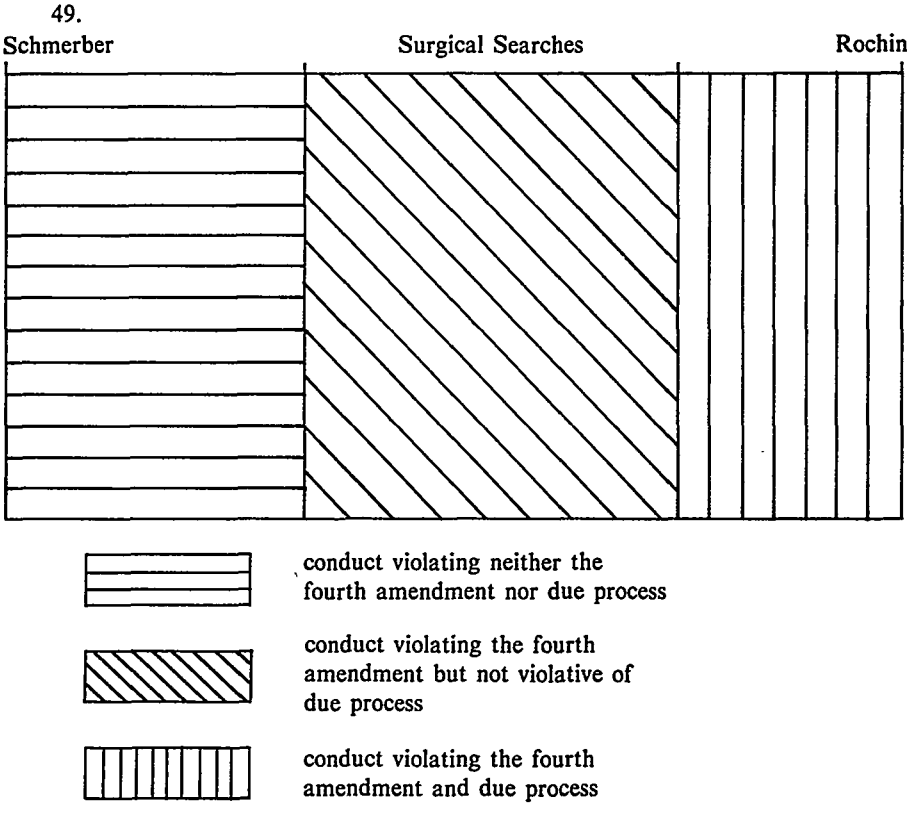

50. *See, e.g.*, Allison v. State, 129 Ga. App. 364, 199 S.E.2d 587 (1973), *cert. denied*, 414 U.S. 1145 (1974); Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974); United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062

by the foundation cases of *Rochin* and *Schmerber*, these courts have considered three categories of criteria in determining the reasonableness of surgical searches for bullets.

The first inquiry is forthright and usually easy to satisfy: whether the evidence is relevant and "could have been obtained in no other way, and whether there was probable cause to believe that the operation would produce it."[51] This consideration, set forth in *United States v. Crowder*,[52] is similar to the *Schmerber* requirement that there be a clear indication the evidence sought will be found.[53] If this threshold inquiry is not met, the fourth amendment analysis terminates. For if the evidence is not relevant, or there is no probable cause to believe it even exists, then the search for it would be unreasonable under the fourth amendment since the fourth amendment was designed specifically with the intention of preventing all general searches based on official curiosity alone.[54]

The one problem which may arise in this threshold-inquiry area is that the bullet may have become unidentifiable due to deterioration while in contact with bodily fluids. If deterioration occurs, then the bullet may not be used as evidence since identification of the caliber and, thus, the source of the bullet is unreliable.[55] Therefore, "[g]iven the possibility that the bullet will be unidentifiable, it is not *certain* that evidence will be found."[56] While the court in *Lee v. Winston*[57] raised the question, it simply stated that it was satisfied that in that case there was a clear indication that evidence would be found, but did not elaborate on its reasons for that satisfaction. In most cases, however, this first inquiry can easily be addressed and resolved. For example, often x-rays can determine with great accuracy whether the evidence certainly exists and in what condition it is.

The second important inquiry in surgical-search bullet cases concerns the location of the bullet. Location is not restricted to where the bullet is located in the body; for example, the head, arm, leg, or chest.

(1977); State v. Allen, 277 S.C. 595, 291 S.E.2d 459 (1982).

51. *Crowder*, 543 F.2d at 316.

52. *Id.* at 312.

53. *Schmerber*, 384 U.S. at 770.

54. *See generally* L. WADDINGTON, supra note 3.

55. Winston v. Lee, 551 F. Supp. 247, 252 (E.D. Va. 1982). *See also Lee*, 717 F.2d at 888. An analysis of the length of time necessary for bullet deterioration and its attendant questions is beyond the scope of this article.

56. *Lee*, 551 F. Supp. at 252 (emphasis in original).

57. *Id.* at 247.

The location inquiry determines how deeply within the area the bullet rests and how near other structures, for example, nerves, organs, or blood vessels, the bullet may lie.[58] The position of the bullet within the body often helps the court to categorize the surgery as either major or minor, based on medical testimony.[59]

The third inquiry, which overlaps somewhat with the major/minor surgery determination, concerns the procedure necessary to remove the bullet. The courts elaborate upon the basic guidelines of *Schmerber*. In addition to the guideline as to whether the surgery is performed "by a physician in a hospital environment according to accepted medical practices,"[60] courts consider the time needed to perform the surgery,[61] possible danger to the defendant's life or limb,[62] and the major surgery versus minor surgery distinction.[63] Inquiry includes whether a general

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58. *See, e.g., Crowder*, 543 F.2d at 312 (surgical removal of bullet in defendant's arm reasonable; from defendant's leg, unreasonable); *Allen*, 277 S.C. at 595, 291 S.E.2d at 459 (surgical removal of bullet in defendant Allen's left chest, less than one-quarter inch below the skin is reasonable; surgical removal of bullet in defendant Childer's left thoracic "gutter" unreasonable). *See also* State v. Richards, 585 S.W.2d 505 (Mo. App. 1979) (surgery reasonable to obtain bullet four inches below skin since there were no vital organs in that area). *But see Bowden*, 256 Ark. at 820, 510 S.W.2d at 879 (surgical removal of bullet from defendant's spinal canal unreasonable); State v. Overstreet, 551 S.W.2d 621 (1977)(surgical removal of bullet from buttocks reasonable).

59. *See Crowder*, 543 F.2d at 312; *Allen*, 277 S.C. at 595, 291 S.E.2d at 459; *Richards*, 585 S.W.2d at 505; *Bowden*, 256 Ark. at 820, 510 S.W.2d at 879; *Overstreet*, 551 S.W.2d at 621.

60. *Schmerber*, 384 U.S. at 771.

61. *See, e.g., Allen*, 277 S.C. at 595, 291 S.E.2d at 459 (15 minutes indicative of minor intrusion and thus reasonable); *Creamer*, 229 Ga. at 511, 192 S.E.2d at 350 (reasonable if surgery under local anesthesia and did not exceed 15 minutes).

62. *See, e.g., Bowden*, 256 Ark. at 822, 510 S.W.2d at 881. There was medical testimony that fatal risk was involved with surgery. While doctors recommended removal of the bullet for purposes of defendant's health, the court did not sanction removal of the bullet as evidence since the risk of fatality from the procedure would make the search unreasonable. The court did not address whether the bullet, obtained by surgery for the defendant's health, could then be obtained from the doctors for use as evidence at trial. *See also Allen*, 277 S.C. at 595, 291 S.E.2d at 459, 464. Even though the court held Allen's surgery to be reasonable and thus ordered it to be performed, the order also provided that if at any time during surgery "danger to the life of Larry Ford Allen develops such removal procedures shall cease and such steps shall be taken as may be necessary to protect the health and life of Larry Ford Allen." *Id.*

63. *See, e.g., Crowder*, 543 F.2d at 312 (operation minor and therefore reasonable); *Bowden*, 256 Ark. at 820, 510 S.W.2d at 879 (major surgical intrusion into spinal canal unreasonable).

anesthesia or a local anesthesia is necessary.[64] The three considerations of certainty the evidence will be found, bullet location, and where the surgery must be performed, taken together, arguably comprise a totality of the circumstances approach to this fourth amendment analysis. Using this totality of the circumstances approach on a case-by-case basis, and balancing all the factors affecting an individual's privacy interests in his own body, all courts considering surgical searches for bullets have found these searches reasonable in all cases where the proposed surgery falls within the "ambit of *Schmerber*"[65] and within the factors developed by "subsequent bullet-removal cases from other jurisdictions."[66] Most courts hold that "[t]he human body is not, of course, a sanctuary in which evidence may be concealed with impunity. . . . Appropriate procedures to retrieve such evidence are neither 'unreasonable' per se under the fourth amendment, nor violations of 'due process' procedures guaranteed by the fifth and fourteenth amendments."[67]

In fact, only one court holds such surgical searches per se unconstitutional.[68] The defendant in *Adams v. State*[69] sought to preclude the surgical removal of bullet fragments from his buttocks. Despite the fact that the surgery could be accomplished under local anesthesia, the Indiana Supreme Court held, on the authority of *Rochin*, that any such bodily intrusion constitutes a fourth amendment violation per se.[70] Arguably, however, the Court's reliance on *Rochin* is misplaced. It was not the stomach pumping intrusion alone which violated Rochin's rights, but the totality of the official misconduct. *Rochin* involved an illegal entry of the home and an abusive struggle to open Rochin's mouth in addition to the "forcible extraction of his stomach's

64. *See, e.g., Lee*, 551 F. Supp. at 247. The district court ordered surgery as reasonable since it could be accomplished with local anesthesia. While the defendant was being x-rayed in preparation for surgery, the location of the bullet was determined to be deeper within the defendant's chest wall, thus necessitating the use of general anesthesia. When presented with this new evidence, the court in a supplemental opinion rescinded its order of surgery based on its belief that the changed circumstances necessitating the use of general anesthesia now made the surgery unreasonable under the fourth amendment. *See also Lee*, 717 F.2d at 888.

65. *Allen*, 277 S.C. at 595, 291 S.E.2d at 463.

66. *Id.*

67. People v. Scott, 21 Cal.3d 284, 293, 578 P.2d 123, 127, 145 Cal. Rptr. 876, 880 (1978).

68. *See Adams*, 260 Ind. at 663, 299 N.E.2d at 834. *See also supra* note 16.

69. *Id.*

70. *Adams*, 260 Ind. at 663, 299 N.E.2d at 834.

contents."[71]

An argument suggests [72] the *Adams* Court's reliance on *Rochin* was also misplaced based on the fact that *Rochin* was a due process case and not a fourth amendment case.[73] However, since both due process and fourth amendment analyses are used to measure official conduct, it is perfectly proper to invoke the *Rochin* standard when, as in *Adams*, the Court is examining search behavior. The Indiana Supreme Court is the only court in the nation to adopt a per se rule of unconstitutionality regarding surgical searches. An argument rightly asserts that, even assuming the *Adams* holding is valid, "this single case hardly constitutes a 'line' of authority."[74] Arguably, however, it is not a *line* of authority that is needed in order for a per se rule to be a viable tool in determining the reasonableness of search conduct. What is needed, instead, is a *correct* authority. As set forth above, it appears that reliance on *Rochin* under the *Adams* facts is misplaced and that *Adams* is not the correct authority that is needed. But this is not, as petitioners suggest, because *Rochin* was decided on due process grounds and *Adams* is a fourth amendment case, but instead because the *Adams* Court misapprehended the reason for the due process violation. Due process was not violated on the search intrusion alone, but by the totality of the misconduct engaged in by the *Rochin* officers. Therefore, holding the *Adams* search *alone* per se violative of due process, without more, is not a proper conclusion to be drawn from the facts of *Rochin*. The holding of *Adams* appears to be aberrant and not a conclusive test of this issue by any means.

It is, therefore, apparent that the analysis presently utilized to determine the fourth-amendment reasonableness of surgical searches for bullets consists of a case-by-case, totality-of-the-circumstances approach. In applying this approach, the courts rely on a consideration of the factors developed by *Schmerber* and elaborated upon by the subsequent bullet removal cases.

IV. *Winston v. Lee*: The Fourth Amendment's Protective Door Left Ajar

With improved medical technology, the validity and usefulness of

71. *Rochin*, 342 U.S. at 172.
72. Lee v. Winston, 717 F.2d at 888.
73. Brief for Petitioners at 10-11, *Lee*, 717 F.2d at 888.
74. Brief for Respondents at 15, *Lee*, 717 F.2d at 888.

these traditional standards as a means of measuring constitutionally reasonable conduct for fourth amendment purposes has come into question. The most recent surgical search case to be decided by the United States Supreme Court in the light of the above factors is *Winston v. Lee*.[75] The Court heard oral argument,[76] and recently rendered an opinion that court ordered surgical removal of the bullet imbedded in Mr. Lee's chest would violate the fourth amendment's prohibition against unreasonable searches and seizures.[77] By so holding, the Court halted the attack on Mr. Lee's fourth amendment protection against an unreasonable search. However, by failing to adopt a bright-line standard, the Court, though well intentioned, has left future defendants' fourth amendment protections vulnerable.

A proprietor of a market shot defendant Lee in the left side of the chest when he saw Lee approach with a gun in his hand.[78] Lee shot the proprietor in the leg. The two men were transported separately to the hospital for treatment, where the proprietor identified Lee as the man who shot him.[79]

Lee was charged with four felony counts and the Commonwealth attorney for the City of Richmond filed a motion to compel the surgical removal of the bullet from Lee's chest. Lee refused to undergo the surgery voluntarily.[80] Hearings to determine the reasonableness of the proposed court ordered surgery were held in the state circuit court. Based on testimony that the bullet was 0.5 centimeters below the skin, that local anesthesia could be used, and that there was little risk of harm or injury to the defendant, the court found this surgery reasonable, but stayed the performance of the surgery pending appellate review of the order.[81] Lee filed a petition for writ of habeas corpus and a writ of prohibition with the Supreme Court of Virginia, which summarily denied the writs.[82] After exhausting his state remedies, Lee petitioned the United States District Court for the Eastern District of Virginia for habeas corpus relief. The defendant again raised the issue that compelling this surgery would violate his rights under the fourth amend-

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75. 53 U.S.L.W. 4367 (March 20, 1985)(No. 83-1334).

76. The United States Supreme Court heard oral arguments on October 31, 1984.

77. *Winston*, 53 U.S.L.W. 4367 (March 20, 1985)(No. 83-1334).

78. *Lee*, 717 F.2d at 890.

79. *Id.*

80. *Id.*

81. *Id.* at 890-91.

82. *Id.* at 891.

ment.[83] After hearing evidence of the shallow bullet location and the virtual lack of risk to the defendant under local anesthesia, the district court authorized the surgery to proceed.[84]

Pre-surgical x-rays, however, indicated the bullet was in a deeper position in the chest wall than originally believed. The bullet was approximately 2.5 to 3.0 centimeters below the skin's surface.[85] With this new information, Lee petitioned for rehearing due to changed circumstances. Medical testimony indicated, in addition to the newly established depth of the bullet, that the bullet was imbedded in muscle tissue and that the more extensive surgery necessary to remove the bullet would require general anesthesia.[86] In a supplemental opinion, the district court, after reviewing this evidence in the light of *Rochin*, *Schmerber*, and their progeny, rescinded its order of surgery and permanently enjoined the procedure.[87] The court held that this procedure went "far beyond the prick of a needle in *Schmerber*, the slight intrusion in *Crowder*, and the minor procedure originally supposed to be required in this matter."[88] The district court did not identify any single element of the proposed procedure as the linchpin of its determination that this intrusion would be unreasonable, but said that "the fact that general anesthesia is involved is very important to the Court's [sic] conclusion that the procedure shocks the conscience."[89] In emphasizing that such a procedure as the surgery contemplated here could not be said to involve "virtually no . . . trauma"[90] by *Schmerber* standards, the court stated that it was "appalled at the prospect of government authorities rendering a person unconscious, cutting him open, and probing around inside his body for evidence which might, or indeed might not, aid them in convicting him of a crime."[91]

The state appealed this reversal to the Fourth Circuit Court of Appeals[92] which affirmed the district court's holding that surgery would violate Lee's fourth amendment protection against unreasonable

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83. *Id.*
84. *Lee*, 551 F. Supp. at 247.
85. *Id.* at 259.
86. *Id.*
87. *Id.* at 261.
88. *Id.*
89. *Id.*
90. *Id.* (quoting *Schmerber*, 384 U.S. at 771).
91. *Id.* at 261.
92. *Lee*, 717 F.2d at 888.

searches.[93] The Fourth Circuit, stating that "fourth amendment questions are peculiarly fact-specific,"[94] indicated that there was a sufficient body of case law on the specific facts peculiar to bullet removal from which the court could draw guidance as to a general principle.[95] The Fourth Circuit believed that the general principle to be utilized was that once the state has shown the evidence is relevant and can be obtained in no other way, "the reasonableness of removing it forcibly from a person's body is judged by the extent of the surgical intrusion and the extent of the risks to the subject."[96] In adopting this principle, the Fourth Circuit utilized the test applied in the majority of surgical search cases; arguably the totality of the circumstances approach. Since this surgery was not medically necessary to the patient's health, and involved general anesthesia and a more invasive procedure than originally thought, Lee's risk of pain, trauma, and injury, was increased. Therefore, the Fourth Circuit held it was not surgically reasonable and, therefore, not constitutionally reasonable.

On certiorari to the United States Supreme Court,[97] the petitioners in *Winston v. Lee* argued that the proposed surgery was constitutionally reasonable. Petitioners state that it is "very common in the 1980's to place patients under general anesthesia."[98] Citing the increasing incidence of outpatient surgical procedures using general anesthesia, petitioners suggested that surgery under general anesthesia has risen to the routine-procedure status of the *Schmerber* blood alcohol test. Stressing the *doctor's* preference that an uncooperative surgical candidate be rendered unconscious through general anesthesia,[99] the state analogized the substantial risk of this major surgical procedure to, what they termed, the substantial risk involved in "waking up, getting dressed and eating breakfast in the morning."[100] It can be inferred from this argument that the state believed the district court's concern over the forced use of general anesthesia to render a person unconscious, cut him open, and probe around in his body was an antiquated concern, no longer reasonable in the enlightened technology of 1984. "In the 20th century, with the modern medical advances that have

93. *Id.* at 901.
94. *Id.* at 899.
95. *Id.*
96. *Id.*
97. Writ of certiorari was granted April 16, 1984.
98. *Supra* note 70, at 16.
99. *Id.* at 16, 17.
100. *Id.* at 17.

been made, this surgery is not unreasonable at all."[101]

The respondent referred to petitioners' "marvels of modern science"[102] as "claims made without reference to the record or to any legal, medical, or scientific literature."[103] Referring to the dissent rendered in the court below, the respondent characterized this surgical search as an assault on the body and dignity of Mr. Lee,[104] and urged the Court not to be the first to authorize a surgical search which would require general anesthesia.[105]

The record of *Winston* indicates that it would be difficult to satisfy even the threshold inquiry utilized by several previous surgical search cases involving bullets; i.e., whether the evidence is relevant, and "could have been obtained in no other way."[106] Lee did not share the district court's conviction that there was a clear indication the evidence would be found,[107] nor that it would then meet the relevance test. In addition to a concern that the bullet might be unidentifiable because of the effect of bodily fluids upon it, Lee was concerned that there was a probability the specimen would be useless, because there would be nothing to compare it with,[108] since the proprietor's gun would not be capable of refirings.[109] If proven true, these facts suggest the bullet would not be admissible as relevant evidence even if obtained.

Even assuming the bullet is identifiable, and therefore relevant evidence, Lee asserted this evidence could be obtained and demonstrated by the use of x-rays and medical testimony, and that he could be identified through the testimony of the proprietor of the market. This argument by Lee seems to negate compliance with the requirement that the evidence could be obtained in no other way. Since a showing of the evidence's relevance, in addition to a showing that the evidence can be obtained in no other way, is a threshold requirement which must be met before further analysis of the factors concerning bullet location and surgical procedure is undertaken, it appears that this surgical search would not be considered a reasonable one under the precedents

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101. *See* Reaves, *Bullet Battle*, A.B.A.J., Jan. 1984, at 28 (quoting petitioners' attorney Stacy Garrett).

102. *Supra* note 71, at 6.

103. *Id.*

104. *Id.* at 7.

105. *Id.*

106. *Crowder*, 543 F.2d at 316.

107. *See supra* note 53.

108. *Supra* note 71, at 7.

109. *Id.*

of fourth amendment case law.

Even assuming, arguendo, the desired *Winston* surgical search met the first inquiry, the location of the bullet imbedded in the muscle tissue, and the extent of the procedure necessitating the use of general anesthesia, in themselves, fall outside previous parameters of reasonable surgical searches. For the Supreme Court to hold this surgery reasonable would have necessitated a radical extension of the standards set forth in prior case law, opening the door to a new era resulting in the further erosion of rights protected by the fourth amendment. Thus, the Supreme Court's holding is sound in Mr. Lee's case, but the danger to others' fourth amendment rights continues. Justices Blackmun and Rehnquist concurred in the judgment only.[110] From this, it can be reasonably inferred that at least two members of the Court feel the majority's opinion is lacking a complete resolution, even though the correct result was reached.

Arguably, the Court applied a 1966 *Schmerber* balancing approach[111] to a 1985 Orwellian case. The danger in using *Schmerber* lies in the unaddressed possibilities of the future. The pending question after *Winston* is whether any surgical search requiring general anesthesia will be fourth-amendment reasonable as soon as some state convinces the Court it is as routine in, for example, 1990 as the *Schmerber* blood test was in 1966. This analysis ignores the vast difference between the minor intrusion of a needle stick versus a major intrusion several inches into the chest wall. In fact, the Court states such a minor/major characterization is not controlling in their view.[112]

Arguably, *Schmerber*'s case-by-case approach is inadequate. While the totality-of-the-circumstances and the balancing-the-factors approaches have served the interests of justice over the last thirty years, technology has advanced to a point where it can too easily stack those factors against the individual's interest in the sanctity of his person. The case law must move with the decades. Therefore, arguably, the Court should have drawn a bright-line standard saying, in effect, "beyond this point, you shall not go."

V. A Proposed Chalkline

While a totality-of-the-circumstances approach has worked well in

110. *Winston*, ___ U.S. ___, 53 U.S.L.W. 4367 (March 20, 1985).
111. *Id.* at 9.
112. *Id.* at 10-11 n.99.

the past, *Winston v. Lee* demonstrated the fact that this test is hard to apply in the shadows of developing technology. Even while signaling a need for a more structured framework for the analysis of these delicate fourth amendment searches, *Winston*, itself, suggested where the courts can draw the first line of that framework. While the district court was hesitant to cite a single factor as controlling its belief that the surgery involved was unreasonable,[113] it still acknowledged that the use of general anesthesia was important to its decision.

General anesthesia is a logical, just and fair place to draw a line limiting the state's intrusion inside the human body. It is also a sufficiently flexible standard. For example, if the surgery is elective, courts can draw the line at general anesthesia and hold all procedures requiring it constitutionally unreasonable. If, however, the surgery is necessary to the health of the defendant, such that the surgery would be required anyway, a court could allow the use of the evidence obtained from this surgery since the general anesthesia was necessary for the surgery, not the search.

An unreasonable search is characterized as one violative of the sanctity, dignity, and privacy of the human body.[114] What could be more violative of that sanctity than the restraint and control exercised by rendering one's conscious mind inactive and ransacking through the body in search of evidence to be used against one, should one survive the procedure itself? The potential for abuse is vast. For if we justify bodily searches involving general anesthesia on the basis of our technological advances, we must inevitably justify a search of one's mind whenever our technology reaches that level of sophistication—only on probable cause, of course.

The Framers of the fourth amendment did not have the resources to foresee the possibilities inherent in the general language of the amendment they drafted. But our jurisprudence and science fiction make us better soothsayers. In order to prevent the abuses within our technological grasp, it makes sense to draw the line at general anesthesia and say, "beyond this point, you shall not go."

VI. Conclusion

The fourth amendment to the United States Constitution protects the sanctity of the individual from unreasonable searches and seizures.

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113. *Lee*, 551 F. Supp. at 261.
114. *Schmerber*, 384 U.S. at 770.

The surgical search of the human body is the most intrusive search possible. While traditionally case law has balanced the totality of the circumstances on a case-by-case basis to determine the reasonableness of a surgical search, technology is forcing the courts to structure more carefully a framework for this delicate fourth amendment analysis in order to prevent the potential abuses inherent in runaway jurisprudence. A special standard is necessary to test a particular surgical search for constitutional reasonableness. A rational, workable, special standard is a simple bright-line rule. An intrusion requiring the use of general anesthesia should be held per se constitutionally unreasonable absent a special, clear showing that general anesthesia was necessary for the defendant's health or life, and not necessary for the surgical search alone. Only by such a bright-line rule can the potential for serious abuse be curtailed and the further erosion of fourth amendment rights be halted.

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