10-1984

Winston v. Lee

Lewis F. Powell Jr.

DENY CERT

Coldwell

OK to expedite

CA 4 - on H/C - held that State of Va. could not compel Resp. to submit to surgery to remove a bullet.

CA 4 applied principles of Schmerber & Rochin. May have been wrong but I see no purpose in reviewing

March 2, 1984 Conference
List 3, Sheet 3

No. 83-1334

WINSTON (City Sheriff), et al.
(Comm. Atty.)

v.

LEE (att. robbery suspect)

Motion of Respondent to Expedite Consideration of Petition for Certiorari. (Also Petition for Writ of Cert)

Motion of Respondent for Leave to Proceed In Forma Pauperis

Deny

SUMMARY: Resp, a suspect in an attempted robbery who has an allegedly incriminatory bullet lodged in his chest, moves for expedited review of the government's cert petn. On cert, the government seeks to determine whether the CA 4 erred in enjoining petr on Fourth Amendment grounds from performing any involuntary surgery under a general anesthetic to remove a bullet lodged one inch below resp's skin.

FACTS: On July 18, 1982 at approximately 1:00 a.m., Ralph Watkinson was closing his store in Richmond, Va. He noticed an armed stranger approaching from across the street. Watkinson drew his own gun and exchanged shots. Both persons received gunshot wounds, and the stranger fled. Watkinson called

Grant motion / Deny cert

David

the police who apprehended resp about eight blocks from Watkinson's store about 20 minutes after the incident had occurred. Resp was suffering from a gunshot wound to the left side of his chest. Resp and Watkinson were transported separately to a local hospital but were placed in the same emergency room by medical personnel. When Watkinson saw resp, he exclaimed: "That's the man that shot me." Resp explained to police that he had himself been the victim of a robbery by two males who had shot him. After investigating, the police determined resp's story to be untrue and charged him with four felony counts.

The government sought to obtain the bullet from resp's chest as evidence. Resp refused. The government moved in Richmond Circuit Court to compel production of the evidence. At a hearing, a forensic scientist and the surgeon who would remove the bullet testified that the surgery would entail little risk of harm or injury because the bullet was believed to be only one-half centimeter below the skin and could be removed with the use of local anesthesia. On this testimony, the circuit court ordered the surgery. It stayed its order pending review in the Virginia S.Ct., which denied resp's request for a writ of prohibition.

Resp then filed a petn for a writ of habeas corpus in the DC (ED Va.) as well as a suit under 42 U.S.C. §1983 in an attempt to enjoin the state from proceeding with the surgery. Agreeing that resp would likely suffer no risk of harm, the DC (Merhige) denied all relief on October 15, 1982.

Preparation began on October 18, 1982 at the Medical College of Virginia to remove the bullet. Resp again protested the surgery and the surgeon refused to perform the operation against resp's will. A second surgeon was designated, and he ordered the standard pre-surgery tests. X-rays performed at this time demonstrated that the bullet was much deeper in the chest wall than initially believed. Specifically, the bullet was found to be

approximately 2.5 centimeters beneath the skin. As a result, the new surgeon decided that general anesthesia, rather than local would be necessary.

When resp's counsel was informed, he moved for rehearing in the Richmond Circuit Court on the same day, October 18, 1982. On the following day, the circuit court scheduled a hearing for October 21, 1982. Resp's counsel unsuccessfully requested additional time to prepare and urged the court to grant a continuance to permit him to obtain an independent expert or to develop expertise in anesthesiology prior to the court's decision. The circuit court denied resp's request and ordered that the surgery proceed.

Resp filed a similar motion for a rehearing in the DC, which granted the request and allowed resp two weeks to prepare. In the subsequent hearing, resp presented a general surgeon who testified about the medical risks. After hearing the evidence, the DC concluded that surgery under the new circumstances--particularly the use of general anesthesia and the necessarily greater intrusion into resp's body--would constitute an unreasonable search under the Fourth Amendment. Accordingly the court enjoined the state from proceeding with the surgery and issued a writ of habeas corpus. Petr appealed to CA 4.

CA 4 DECISION: (1) CA 4 (Phillips, Sprouse) (Widener, dissenting) first sought to determine whether the claim should be considered cognizable solely under 42 U.S.C. §1983 or under 28 U.S.C §2254. It concluded that injunctive relief under civil rights provisions was more appropriate than habeas corpus. The court reasoned that habeas is primarily a vehicle for attack by a confined person on the legality of custody where the relief would be release. On the other hand, §1983 relief is provided to one seeking to enjoin persons acting under color of state law from depriving a citizen of a constitutional right.

(2) CA 4 next sought to determine whether collateral estoppel should apply to bar the §1983 claim on the ground that it relitigates issues decided

adversely to resp in the state criminal proceedings. Guided by Allen v. McCurry, 449 U.S. 90 (1980) and Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982), the CA 4 stated that it was unable to determine whether the Virginia courts would give the earlier decisions preclusive effect. Nevertheless, CA 4 stated that full faith and credit is not required to be given to the state proceedings where they have failed to satisfy the minimum procedural due process requirements of the Fourteenth Amendment. Given the fact that resp made several pleas for a continuance and that he was given insufficient time in the state court proceedings to prepare (two days), CA 4 concluded that he was denied procedural fairness.

(3) Finally, CA 4 turned to the reasonableness of the intrusion. CA 4 acknowledged that the controlling principles are those enunciated in Schmerber v. California, 384 U.S. 757 (1966), and Rochin v. California, 342 U.S. 165 (1952). Schmerber upheld the admissibility of test results on blood involuntarily removed from a defendant. However, it cautioned that only minor intrusions would be permissible, stating:

> The integrity of an individual's person is a cherished value in our society. That we today hold that the Constitution does not forbid the States' minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions. Id. at 772.

In Rochin, the Court condemned the use of stomach-pumping to extract evidence from a suspect. More recently in United States v. Crowder, 543 F.2d 312 (D.C. Cir., 1976) (en banc), the Court stated that the reasonableness of removing a bullet forcibly from a person's body is judged by the extent of the surgical intrusion and the extent of the risk to the person. Id., at 316. In application of these principles, CA 4 found the proposed surgergy to be too intrusive because: the bullet is lodged approximately 2.5 to 3 centimeters in the muscle tissue; it would require an incision of 5 centimeters to extract;

such surgery exposes resp to risks of injury to the muscle, nerves, blood vessels and other tissue, as well as increased risk of infection; the procedure would require administration of general anesthesia which includes a probable morphine injection, as well as sodium pentathol, a barbiturate, and a continuous gaseous mixture of oxygen and nitrous oxide; and surgery might last up to two-and-one-half hours.

(4) Accordingly, CA 4 affirmed the order permanently enjoining petrs from proceeding with the surgery. However it vacated that portion of the DC's order which granted habeas relief.

CA 4 DISSENT: In dissent, Judge Widener expressed his disapproval of federal court intervention especially where an injunction is issued regarding state criminal proceedings, citing Younger v. Harris, 401 U.S. 37 (1971), and in the absence of proven governmental harassment or prosecutions undertaken in bad faith, citing Perez v. Ledesna, 401 U.S. 82 (1971). On the facts of this case, Judge Widener disagreed that resp was denied a full and fair opportunity to present his state case, and further disagreed that the risks attending surgery were too great.

CONTENTIONS ON THE MERITS: Petrs contend that cert should be granted for two reasons. First, petrs contend that a conflict exists between Crowder and the present case. In Crowder, the suspect had two bullets in his body: removal of the one in the leg was forbidden as it might have caused reduction or loss of function; removal of the one from the forearm was deemed minor surgery and was permitted. The instant case presents a set of circumstances falling in between those in Crowder. However, the CA 4 followed the Schmerber rule which limits intrusions to the "prick of the needle." On such interpretation, the present case is in conflict with Crowder. Second, petrs contend that this Court must define the Fourth Amendment proscriptions against unreasonable searches in this area to aid law enforcement in cases such as

this where the bullet is one inch below the surface. Five states and the District of Columbia have authorized court-ordered surgery to remove evidence in criminal prosecutions. A rule of uniformity must therefore be established by this Court.

Resp contends that this case presents no conflict with Crowder. The CA 4 cited Crowder with approval, but distinguished it. Moreover, the CA 4 did not construe Schmerber to state that no intrusion greater than a needle is permissible. Simply stated, the two courts have applied the same principle to different facts, and have reached understandably different conclusions. Secondly, the state cases cited by petr are distinguishable from the present case. None of those cited ordered such extensive surgery under general anesthesia as that involved here.

CONTENTIONS ON THE MOTION: Resp urges expedited consideration of the cert petn to resolve the criminal charges that have been pending since July 1982.

DISCUSSION: This case does not challenge whether Schmerber and Rochin establish the proper test regarding the reasonableness under the Fourth Amendment of intrusions into the body. The parties do not appear to disagree that minor intrusions into the body under stringently limited conditions do not offend the Fourth Amendment. The present disagreement merely concerns application of that principle. When the bullet was thought to be only slightly below the surface of the skin and removable under local anesthesia, the courts below were uniform in their holding that court-ordered removal was proper. When the bullet was later discovered to be significantly deeper, the DC and CA 4 majority again applied the Schmerber test and found the intrustion no longer to be minor. Accordingly, petrs were enjoined from performing the surgery and the case is fact-specific.

Moreover, the conflict cited by petr is strained. As resp states, the CA 4 in the present case and the Crowder court simply applied the same rule to different facts and reached necessarily different conclusions.

Because the uncertainty of surgery has surrounded this litigation for nearly two years, expedited review seems warranted.

I recommend that the motion to expedite be granted and that the petn for cert be denied.

There is a response.

2/29/84 Caldwell Ops & Ords in Petn

PJC

Argued ....., 19... *Assigned* ....., 19... No. 83-1334

Submitted ....., 19... *Announced* ....., 19...

WINSTON

vs.

LEE

Motion for leave to proceed ifp. Also motion to expedite consideration of petition for cert. ← Granted

Grant motion to Expedite

D

Relist
for
WHR.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.		✓											
Brennan, J.			✓										
White, J.			✓										
Marshall, J.					Out								
Blackmun, J.		✓											
Powell, J.			✓										
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.			✓										

Argued ....., 19... *Assigned* ....., 19... No. 83-1334

Submitted ....., 19... *Announced* ....., 19...

WINSTON

vs.

LEE

Motion for leave to proceed ifp. Also motion to expedite consideration of petition for cert.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Argued ....., 19... *Assigned* ....., 19...

Submitted ....., 19... *Announced* ....., 19...

No. 83-1334

WINSTON

vs.

LEE

Motion for leave to proceed ifp. Also motion to expedite consideration of petition for cert.

Relist
for
WHR.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

of Schmerber. Also I ~~[illegible]~~ think that the opinion below was probably correct. Surgery that requires general anesthesia is not "fairly minor in character." It is not rare for general anesthesia to prove harmful or even lethal to patients.

David

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: MAR 28 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

ANDREW J. WINSTON, SHERIFF AND AUBRY M. DAVIS, JR. *v.* RUDOLPH LEE, JR.

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

No. 83-1334. Decided March ——, 1984

Still Deny
LFP
3/28

JUSTICE REHNQUIST, dissenting from the denial of certiorari.

In the early morning hours of July 18, 1982, a Richmond storekeeper observed an armed man approaching his store. The storekeeper drew his gun and opened fire. The approaching stranger returned the fire and during the ensuing shoot-out, both men were hit by gunfire. Within minutes after the shooting, Richmond police apprehended respondent about eight blocks from the store. Respondent was suffering from a gunshot wound to the left side of his chest and was taken to the same hospital emergency room where the storekeeper had been brought. The storekeeper, upon seeing respondent, exclaimed, "That's the man who shot me."

After respondent's explanation for the gunshot wound proved unconvincing, he was charged with four felony counts arising out of the attempted robbery of the storekeeper. The Commonwealth Attorney for the City of Richmond filed a motion to compel evidence to recover surgically the bullet in respondent's chest. After several hearings on the state's motion, at which the Richmond Circuit Court heard testimony from a forensic scientist and the surgeon who would remove the bullet, the court ruled that the bullet could be properly removed, since the surgery was a minor procedure that would be done in a hospital under medical conditions that would protect respondent's health. At the time the Circuit Court made its ruling, it was believed that the bullet was only one-half centimeter below the skin and could be removed with the use of local anesthesia.

After respondent's petitions for writs of habeas corpus and prohibition were denied by the Virginia Supreme Court, he filed a petition for writ of habeas corpus and a suit under 42 U. S. C. § 1983 in federal district court to enjoin the state from proceeding with the surgery. The District Court initially agreed with the state circuit court that the surgery presented virtually no risk of harm to respondent and denied his request for relief. Subsequently, a new surgeon was obtained to perform the surgery, who determined following additional testing that the bullet was approximately 2.5 centimeters beneath the skin, somewhat deeper than initially estimated. Because of the greater depth of the bullet, the surgeon determined that general anesthesia, rather than local anesthesia, should be used to perform the surgery.

Respondent then filed a motion for rehearing in Richmond Circuit Court, claiming that the surgery would now violate his Fourth Amendment right against an unreasonable search. The Richmond Circuit Court ruled that the surgery could proceed as planned because there was no material change of circumstance. Respondent then filed for a new hearing on his federal claims in District Court. The District Court concluded that the new circumstances, especially the use of general anesthesia and the more extensive surgery, would constitute an unreasonable search under the Fourth Amendment. 551 F. Supp. 247, 261 (E. D. Va. 1982).

The Court of Appeals for the Fourth Circuit affirmed the finding of the District Court on the Fourth Amendment issue. 717 F. 2d 888 (1983). Applying what it believed were the controlling principles established by this Court in *Schmerber* v. *California*, 384 U. S. 757 (1966), the Court of Appeals concluded that the proposed surgery was not the type of minor intrusion on body sanctity authorized in *Schmerber*. The court concluded that because the surgery in this case had some potential risk and could result in trauma or pain, the surgery constituted an unreasonable search within the meaning of the Fourth Amendment and should be

enjoined.[1] Judge Widener dissented, arguing that the record indicated that removal of the bullet was in every way routine.

This case presents an important and recurring question concerning the necessity for court-ordered surgery to secure evidence relevant to an ongoing criminal investigation. The lower federal courts and various state courts have split widely on whether *Schmerber* authorizes more invasive surgical procedures to recover evidence such as a bullet. Compare *United States* v. *Crowder*, 543 F. 2d 312 (CADC 1976) (en banc), *cert. denied*, 429 U. S. 1062 (1977); *Hughes* v. *State*, 466 A. 2d 533 (Md. Ct. Sp. App. 1983); *State* v. *Lawson*, 187 N. J. Super. 25, 453 A. 2d 556 (1982); *State* v. *Richards*, 585 S. W. 2d 505 (Mo. Ct. App. 1979); and *Creamer* v. *State*, 229 Ga. 511, 192 S. E. 2d 350 (1972), *cert. dismissed*, 410 U. S. 975 (1973), with *Doe* v. *State*, 409 So. 2d 25 (Fla. Ct. App. 1981); *Bowden* v. *State*, 256 Ark. 820, 510 S. W. 2d 879 (1974); *People* v. *Smith*, 80 Misc. 2d 210, 362 N. Y. S. 2d 909 (Sup. 1974); and *Adams* v. *State*, 260 Ind. 663, 299 N. E. 2d 834 (1973), *cert. denied*, 415 U. S. 935

Split

---

[1] The District Court had granted respondent's habeas petition and awarded him injunctive relief on his § 1983 claim. The Court of Appeals determined that respondent's claim was not cognizable on habeas, since his claim related only to conditions of confinement, not the fact of confinement as such. The propriety of this ruling may be open to some doubt, see *Preiser* v. *Rodriguez*, 411 U. S. 475, 499–500 (1973), but the issue is raised only by respondent in his cross-petition. See Brief of Petitioner in No. 83-6351. A more problematic aspect of the decision below is the majority's complete failure to deal with the *Younger* abstention questions raised by the District Court's injunction issued against the state in a criminal proceeding. In the companion cases of *Younger* v. *Harris*, 401 U. S. 37 (1971) and *Perez* v. *Ledesma*, 401 U. S. 82 (1971), we held that principles of federalism prevented federal courts from granting injunctive relief against pending state prosecutions unless the prosecutions were undertaken in bad faith or other extraordinary circumstances prevailed. While the present injunction does not prevent the State from prosecuting respondent, I believe the injunction raises an important federalism question. The State does not press the issue in its petition, however.

Younger abstention question raised by DC's injunction vs the State in a criminal case.

(1974). See also *State* v. *Allen*, 291 S. E. 2d 459 (S. C. 1982). While the proposed surgery plainly presents a greater intrusion to respondent than did the blood sampling taken in *Schmerber*, I do not believe that the reasonableness clause of the Fourth Amendment necessarily proscribes this surgery.[2] We have never held that the minimal intrusions represented by the prick of a needle or scraping of a fingernail are the outer limits beyond which the State may not go to obtain evidence. Cf. *Cupp* v. *Murphy*, 412 U. S. 291 (1973); *Schmerber* v. *California*, *supra*. Indeed, the record in this case indicates that the surgery demanded by the State is fairly minor in character. The bullet is estimated to be less than an inch deep, the incision to remove the bullet would be small, and the time in surgery would be, by one estimate, 20 minutes or less. The Court of Appeals, however, treated our decision in *Schmerber* as the outer boundary to obtaining evidence from a person's body. I would grant certiorari in this case to review this question and provide guidance to the

---

[2] The Fourth Circuit in this case seemed to view *Schmerber* as the outer limit to permissible medical procedures for obtaining evidence, but the Court of Appeals for the District of Columbia Circuit employs a more flexible approach in determining whether surgery will be permitted to obtain evidence. In *United States* v. *Crowder*, 543 F. 2d 312 (CADC 1976), *cert. denied*, 429 U. S. 1062 (1977), the appellate court was presented with a defendant who had been shot twice, once in the thigh and once in the forearm. The court established a four part test to determine whether surgery would be reasonable under the Fourth Amendment. Under its standard, surgery was permissible if relevant evidence could be obtained no other way, the surgery was minor and every precaution would be taken, the defendant had an opportunity for an adversary hearing to contest the state's motion to compel surgery, and appellate review was available prior to surgery. Applying its test, the court determined that the bullet in the defendant's thigh could not be removed because it posed a risk of reducing the use or function of the defendant's leg, but the bullet in the defendant's forearm could be removed since the surgery presented a negligible risk. A fair reading of the standard applied in *Crowder* suggests that in the District of Columbia Circuit, at least, the State's motion in this case would have been granted.

lower courts to determine under what circumstances a court may order surgery to recover evidence from a person.

Court ..... Voted on....., 19...

Argued ....., 19... Assigned ....., 19... No. 83-1334

Submitted ....., 19... Announced ....., 19...

WINSTON

vs.

LEE

Motion for leave to proceed ifp. Also motion to expedite consideration of petition for cert.

Relist
on
WHR

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.			✓										
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

No. 83-1334, Winston, et al. v. Lee

Memorandum to File

This is a summary memo on the basis of a preliminary reading of the briefs.

This is the CA 4 case involving the attempt of Virginia authorities to obtain court approval to remove a bullet from the shoulder of respondent Lee. The petitioners are Winston, Sheriff of the City of Richmond, and Aubrey Davis, Commonweath's Attorney. Respondent is charged with attempted robbery and wounding of a storekeeper named Watkinson. In a "gun battle" between respondent and Watkinson, both were wounded. Petitioners obtained authority from the Circuit Court of the City of Richmond to remove the bullet lodged approximately one inch below the surface of respondent's skin.

Respondent - following various proceedings that no longer are relevant - brought this suit in federal DC to enjoin the state from carrying out the court order to remove the bullet. Respondent's complaint sought relief in federal habeas corpus under §2254 and also injunctive relief under §1983.

The DC apparently thought relief was appropriate under both statutes (I am not sure of this), and enjoined enforcement of the state court order. On appeal, in a typically long opinion by Judge Phillips, joined by Judge Sprouse, CA 4

affirmed. It considered §2254 an inappropriate remedy as respondent was not seeking freedom from jail where CA 4 found he properly was detained. Rather, CA 4 construed the complaint as alleging a violation of Fourth Amendment rights for which §1983 afforded a proper means of injunctive relief.

Various issues were involved, the more serious of which was whether federal courts were precluded by collateral estoppel from reviewing the state court order. By reasoning that is unpersuasive to me (see dissenting opinion of Judge Widener), CA 4 held that Allen v. McCurry did not compel collateral estoppel because respondent had been "denied procedural fairness" in the state courts. As the State of Virginia does not contest the collateral estoppel ruling, or indeed any other procedural ruling, the only question presented is whether removal of the bullet pursuant to a state court order would violate respondent's Fourth Amendment rights. That Amendment provides, of course, that persons shall be "secure in their persons ... against unreasonable searches and seizures." Thus, the question is whether the proposed involuntary surgery would constitute an unreasonable search of respondent's person.

CA 4 correctly recognized that the primary authority is Schmerber v. California, 384 U.S. 757. Also Rochin v. California, 342 U.S. 165 is relevant.

CA 4 ruled that the "basic principle" to be derived from these cases is that:

> "Once the state has demonstrated the relevancy of evidence and the inability to obtain it otherwise, the reasonableness of removing it forceably from a person's body is judged by the extent of the surgical intrusion and the extent of the risk to the person."

Apparently the medical testimony in this case was extensive (there were two hearings, the second revealing that the bullet was more deeply embedded than initially thought), and the majority view of the evidence differs quite considerably from Judge Widener's view. Subject to more careful consideration, my impression is that the facts are not in dispute. The location of the bullet, its size, the nature of the medical procedure and the anesthesia required - all of these are not contested. The opinions of the physicians do differ in degree.

The CA 4 majority took the gloomier picture. It perceived risk in cutting muscles, even when the wound is shallow. General anesthesia was thought to entail risks, although the great weight of medical authority - specifically with respect to respondent - was to the contrary. Some physicians describe the surgery as "minor", and others apparently use different language without characterizing it as "major". There is a view, that makes some sense, that any "cutting" of the body that requires general anesthesia is not minor.

It is not easy for me to identify the legal question in this case. The brief on behalf of the state is poorly written, apparently without help from the Attorney General's Office. It argues that CA 4 has adopted a "per se" rule to the effect that "all intrusions into the human body are per se unconstitutional". Br. p. 8, et seq.

I do not read CA 4's opinion as adopting any such rule, although it does read Schmerber very narrowly.

This is another case we should not have taken. The more important issue - at least for me - is whether CA 4 erred in its denial of collateral estoppel. I would think that a strong persumption exists that where a state court has acted in a case of this kind, a federal court should not intervene except in circumstances far clearer than those that exist in this case. There had been hearings and proceedings in the

state courts that Judge Widener thought were entirely consistent with due process. But the state did not appeal this issue. Perhaps we can clarify Schmerber, but this probably is not necessary. Case appears to involve only opinions as to the seriousness of the intrusion (the cutting) and the risk of a general anesthetic. (As I have had this in six major operations, the risk is not as great as driving auto under certain conditions).

LFP

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 83-1334

Submitted ....., *19*... *Announced* ....., *19*...

WINSTON

vs.

LEE

Motion for leave to proceed ifp. Also motion to expedite consideration of petition for cert.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.			✓										
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.		✓											
Powell, J.			✓										
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.								Absent					
.....													

Returned 10/23 - Lynda thanks

lgs 10/23/84 The medical procedure would not under Schmerber (84) violate 4th Amend.

But in balancing interests of State & that of the Δ [under Del. v Prouse], the interest of State is not compelling: (i) no showing that bullet when recovered would be suitable for comparison [may have been damaged or ~~erode~~ eroded after 2 yrs]; (ii) ballistic tests not invariable dependable; and (iii) the State here has ~~no~~ a firm identification of Resp. (see p2) of Δ & probably can convict w/o the bullet.

But identification testimony of eye w. unreliable & can be destroyed on X-Exam. A bullet, if it can be tested, could be conclusive.

BENCH MEMORANDUM

To: Mr. Justice Powell October 23, 1984

From: Lynda

No. 83-1334 Winston v. Lee (CA4 affirming J. Merhige)

Close case for me.

Question Presented

Whether requiring a defendant charged with malicious wounding to undergo surgery to remove a bullet from his shoulder to be used as evidence against him violates the Fourth Amendment's proscription against unreasonable searches of the person, when the bullet is located approximately one inch beneath the skin, general anesthesia will be required during the surgery, the incision will be approximately 5 centimeters long, and the surgery

will be done in a hospital, in a case in which the State has proved probable cause exists to believe the bullet is there and the defendant had an adversary hearing before a neutral judge and an opportunity for appellate review?

I. Background

A. Facts and Decisions Below

Shortly after midnight on July 18, 1982, Ralph Watkinson, a storekeeper in Richmond, was closing his business for the night when he observed an armed gunman approaching him. Watkinson drew his own gun and the two exchanged fire. The gunman was hit in the left side of his body, and Watkinson was wounded in both legs. The gunman fled. Police transported Watkinson to a local emergency room; another police car in the area of the store responded to a call for resp, who had suffered a gunshot wound in the left chest-shoulder area. By chance, resp was taken to the same emergency room as Watkinson, whereupon Watkinson exclaimed, "That's the man that shot me!" Resp reported to police that he had been shot after being robbed by two men, but police investigated the story and found it to be untrue.

Resp was subsequently arrested and charged with four felony counts: attempted robbery, use of a firearm in an attempted robbery, malicious wounding, and use of a firearm in such a wounding. The State filed a motion to

compel evidence, seeking to have the bullet in resp's shoulder removed to determine whether it had been fired from Watkinson's gun.

There followed a series of court proceedings, in which resp was represented by counsel throughout. After hearings, the Va. circuit court granted the State's motion to compel, finding that surgery to remove the bullet did not violate the Fourth Amendment as an unreasonably intrusive search of the person, because the bullet was located one-half centimeter below the skin and the procedure to remove it would be minor, requiring only a local anesthetic. The Va.S.Ct. affirmed, and the federal DC denied resp's requests for a writ of habeas corpus and for relief under §1983.

Resp was taken to the hospital to have the surgery performed. During the course of preparation, x-rays were taken that revealed that the bullet was deeper than had originally been thought, and the surgeon consequently decided that general anesthesia, instead of a local, should be used. Resp's counsel then returned to the circuit court requesting a rehearing based on changed circumstances.

After taking additional evidence, the court adhered to its prior ruling. The Va.S.Ct. affirmed, and resp moved again in DC for habeas or §1983 relief. After a hearing, the DC (Merhige) granted the relief sought, holding that the change in circumstances was material and that permitting the surgery would deny resp his Fourth Amendment right against unreasonable intrusions of his person. CA4

substantially affirmed (Phillips and Sprouse), with Judge Widener dissenting.[1]

B. Relevant Case Law

In Schmerber v. California, 384 U.S. 757 (1966), the Court ruled that the Fourth Amendment is not violated by the nonconsensual withdrawal of a person's blood to determine blood alcohol level for purposes of resolving charges based on drunken driving. The Court noted that for an intrusion beyond the surface of the skin to be reasonable under the Fourth Amendment, there must be a "clear indication" that it would produce the evidence desired and that the evidence was not obtainable otherwise; the Court stressed the importance of an "informed, detached, and deliberate" determination of probable cause. Id., at 770. The Court's decision to permit the extraction of blood was premised in part on the facts that such a test is highly effective in accurately producing the evidence needed for conviction; that the procedure for extraction is commonplace and involves "virtually no risk, trauma, or pain"; and that

---

[1] CA4 concluded that habeas relief was not appropriate because resp was not challenging the conditions of his custody. It therefore dismissed the DC's grant of the habeas writ. It ruled that resp was entitled to §1983 relief, however, and that he was not collaterally estopped from raising the issue by the state courts' resolution of the issue against him because he had not received a full and fair hearing there. The State does not appeal this issue here.

it was performed in a reasonable manner--by a doctor, in a hospital setting, according to accepted medical practices that would minimize the risk of injury or infection to the defendant. Id., at 771. The Court's holding was narrow: it ruled only that the Fourth Amendment does not prohibit "minor intrusions under stringently limited conditions"; it left open the question of whether more substantial intrusions or intrusions under other conditions would be constitutional. Id., at 772.

The other major decision of this Court involving the constitutionality of a bodily intrusion against the consent of the defendant for the purpose of procuring evidence was Rochin v. California, 342 U.S. 165 (1952). There, the Court ruled that the defendant's rights had been violated by the actions of police in unlawfully entering his house and bedroom; attempting to remove capsules from the defendant's mouth after observing him swallow them, assaulting and battering him in the process; and transporting him to a hospital against his will to have his stomach pumped and the capsules thus revealed. The Court did not base its decision on Fourth Amendment grounds, however, but on the fact that the searches and seizures had been conducted without either a warrant or consent and that the entire course of events was so shocking as to violate defendant's rights to due process of law. Id., at 172.

Although quite a few state courts have addressed the question, only one CA besides the court below has ruled

on the reasonableness under the Fourth Amendment of surgery to remove a bullet needed for evidence. In that case, United States v. Crowder, 543 F.2d 312 (CADC 1976), cert. denied, 429 U.S. 1069 (1967), CADC ruled en banc that the defendant in a murder case had not been deprived of his Fourth Amendment rights by the surgical removal of a bullet located just under the skin of his arm, to produce evidence that would show he had been shot by the same gun used to kill the murder victim. The court based its decision on the following factors: (1) that the evidence was relevant, otherwise unobtainable, and there was probable cause to believe the surgery would produce the evidence; (2) the operation was minor and performed by a skilled surgeon under circumstances in which all possible medical precautions had been taken so that the risks to the defendant were minimal; (3) the defendant had a pre-operation adversary hearing at which he was represented by counsel; and (4) the defendant was given a chance for appellate review before the operation was performed. The DC had ruled that the bullet was located just under the skin of the arm, that removal would not affect any nerves, and that the operation could be performed using a local anesthetic; the same was not true of another bullet located in the defendant's thigh, because it was lodged more deeply and the DC had found that removal might impair the leg's function. A dissent disagreed with the majority's holding, in part because it contended that procuring the bullet and finding that it was fired from the

murder weapon could have proved no more than that the defendant was present at the scene of the crime, a fact that was not disputed at trial.

II. Discussion

As you noted in your memo to the file, the legal question in this case is very difficult to pin down. State cases following Schmerber, as well as the CADC, all view the issue of the reasonableness of a bodily intrusion as depending on the facts of each case, such as how deep the incision must be, how close the bullet is to vital organs, whether a general or local anesthetic is required, and what are the foreseeable risks of trauma to the defendant. The removal of a bullet is an inherently more complicated procedure than a blood test, requiring the services of a surgeon in a hospital setting. Thus, detailed advance planning is required in these cases, and rarely at issue are the factors that Schmerber was most concerned about: whether probable cause exists to believe that the procedure will produce the item of evidence desired; whether probable cause has been determined by a neutral and detached magistrate; and whether the procedure will be performed in a reasonable manner--by a doctor, in a hospital, observing accepted medical practices. Because of the infinitely variable nature of the factors that must be considered in each case, and the consequent difficulty in formulating a

most cases decided on facts. no rule of law

general rule of law, the Court should probably not have granted cert in this case. Since the case is here, however, the Court must decide whether this particular intrusion is reasonable.

We should not have granted cert.

In another Fourth Amendment context, the Court has stated the general truth that "the permissibility of a particular law enforcement practice is judged by 'balancing' its intrusion on the individual's Fourth Amendment rights against its promotion of legitimate governmental interests." Delaware v. Prouse, 440 U.S. 648, 654 (1979). Applying that standard here, it is clear that an accused, who has not yet been convicted of a crime, has a great interest in not lightly being compelled to submit to general anesthesia and a more than superficial surgery upon his body. On the other hand, the State has a compelling governmental interest in prosecuting crimes of the sort in which it believes resp was involved. A useful way to analyze this case, therefore, may be to look first at the circumstances relevant to the surgery and its impact upon the resp, followed by an examination of the State's interest in, and need for, the evidence that could be revealed by the surgery.

Prouse standard can be applied

A. The Surgery and Its Impact

In Schmerber, the Court declined to make any sweeping statements about the outer limits of what the Fourth Amendment permits in the area of bodily intrusions. In permitting the blood test, however, it did rely on the

facts that the test is commonplace and that it involves virtually no risk, trauma, or pain. Resp cites this as proof that the surgery requested by the State here is unconstitutional.

There is no question that the surgery required here involves considerably more risk, trauma, and pain to the patient than did the blood test in Schmerber. I do not read Schmerber, however, as requiring the conclusion that this surgery is an unconstitutional intrusion. Even though the Court cautioned there that greater intrusions might not be constitutional, it carefully stated that it reached its judgment "only on the facts of the present record," and that it held only "that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions," 384 U.S., at 772. The Court did not purport to decide the constitutionality of other types of intrusions under other circumstances. Here, as in Schmerber, the conditions under which the surgery will be performed will be "stringently limited" in that the operation will be performed by a doctor, in a hospital, pursuant to standard medical practices. The only question remaining as to the proposed surgery, therefore, is whether it is so major that it violates the Fourth Amendment. That question is not answered by Schmerber.

Analogies to other Fourth Amendment cases from this Court are also unhelpful, as the Schmerber Court noted, see id., at 769, because intrusions beyond the surface of

the skin involve concerns of privacy and human dignity that are not implicated by the more usual searches of the person. Petr and resp each analyze the relevant state court cases and attempt to draw from them some overriding principle that will determine when an intrusion becomes too great. As discussed above, however, such an overriding principle cannot exist because the reasonableness of an intrusion will vary infinitely and materially from case to case. Even cases of a particular category of intrusion, such as those involving the surgical removal of a bullet, do not lend themselves to a more manageable standard because the depth of the bullet, its proximity to vital organs, the health of the defendant, and other such crucial facts cannot either be predicted or categorized.

CA4 and the DC attempt to separate the medical determination of whether a particular type of surgery is "minor" under the circumstances, from the legal determination of whether the surgery is minor enough to be constitutionally permissible. (See CA4's decision, Petn App. at 43.) Those courts are correct to the extent that a medical determination of that sort is, of course, not made with a constitutional standard in mind. By the same token, however, once a court concludes (1) that the proper legal precautions of ensuring that probable cause exists and that the deft has had an adversary hearing and appellate review have been taken, and (2) that the surgery will be conducted in a reasonable and medically safe manner, the only question

remaining is the determination of how relatively major or minor the intrusion will be. Although a court making this decison must bear the Fourth Amendment in mind, it may properly consider the question only after being informed of the medical evaluation of how risky or traumatic the procedure will be. Thus, I believe CA4 and the DC erred in putting aside as irrelevant the medical determination that the surgery is "minor."

B. The State's Interest in the Evidence

In analysing the State's need for the evidence to accomplish its governmental purpose of bringing a felon to justice, it is somewhat helpful once again to look at Schmerber. One of the primary reasons given there for permitting the blood test was that such a test is highly effective in producing the evidence that is needed for conviction: the defendant's blood alcohol level. By comparison, in this case the same degree of effectiveness is lacking, because although there is no question that the surgery would produce the bullet, there is substantial question whether the evidence needed for conviction could be deduced from tests on the bullet after it was removed. The State does not contest resp's contention that ballistics tests are sufficiently unreliable that it may well be impossible to tell from examining the bullet that it was fired from Watkinson's gun--even if the bullet were in perfect shape. Moreover, there is considerable doubt here

about what the bullet's condition is, because it may have been damaged by entry or by having been exposed for over two years to the apparently corrosive effect of bodily fluids. Therefore, production of the bullet may be far from conclusive as to resp's guilt. Bullet may be of little probative value

Furthermore, casting additional doubt on the value of the bullet as evidence is the fact that the State has what is evidently a competent eyewitness identification of resp made by Watkinson shortly after the shooting occurred. Therefore, even assuming that examination of the bullet would reveal that it came from Watkinson's gun, that piece of evidence may well be unnecessary to convict resp.

The Schmerber Court held that "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such [bodily] intrusion on the mere chance that desired evidence might be obtained." 384 U.S., at 760-770 (emphasis added). Although this might be construed as requiring, in this case, only a certainty that the bullet exists and may be obtained by the proposed surgical procedure, I believe a better way to read it, in light of the facts of Schmerber, is to require that the evidence be needed for conviction, as was the blood test in Schmerber, and that there be a reasonable chance that the evidence needed for conviction will be obtained by employing the procedure. Here, the State should be required to show a reasonable likelihood that tests will demonstrate that the

The bullet must be highly re-relevant ev.

bullet was fired from Watkinson's gun, not just a likelihood that the bullet exists.

C. Weighing Both Sides of the Question

In the end, the Court must simply weigh all of the factors supporting the State's need for the evidence versus the complexity of the procedure and its risk to the resp, and make a judgment about the reasonableness of the surgery. Recognizing that my judgment may very well differ from yours, I conclude on balance that the surgery proposed here is not reasonable under the Fourth Amendment. Although there are always some risks involved with general anesthesia, certainly the resp is an unusually good risk, given his previous successful exposure to such anesthetics and his youth and good health. The incision required is a fairly deep one, more than the superficial incision involved in Crowder or the pinprick in Schmerber; it involves some risk of damage to nerves and muscles. On the other hand, the general anesthetic apparently substantially decreases the chance that any such damage will occur, because the muscles will be relaxed. Also in favor of a conclusion that the intrusion is reasonable is the fact that the bullet is located near no vital organs. Based on these medical considerations alone, the case is close, but I would probably lean toward a conclusion that the operation was not unduly intrusive.

On medical considerations alone I would think the operation was not unduly intrusive

In the end, however, I am persuaded that this operation should not be permitted because the State has not demonstrated that removal of the bullet would be likely to enable it to obtain a conviction it would not otherwise be able to obtain. As noted above, the State already has a competent and convincing eyewitness identification of resp by Watkinson. Moreover, there is a substantial chance that tests on the bullet will be inconclusive as to whether the bullet was fired from Watkinson's gun. Weighing these factors is, for me, enough to shift the balance to a conclusion that requiring the operation would be unreasonable.

Conclusion

Because the question of the reasonableness of a bodily intrusion by Fourth Amendment standards necessarily depends on the facts of each case, and because the facts of these cases are so infinitely variable, it is difficult to ascertain an overriding legal principle that will apply across the board. Schmerber provides some help, although it is not dispositive, because the Court there strictly limited its judgment to the case's facts. Looking to the general principle of Fourth Amendment law that the permissibility of a law enforcement procedure should be judged by balancing the intrusion to the person against its promotion of legitimate governmental interests, I conclude that the

Yes - That is why I voted to grant -

proposed surgery in this case would violate the Fourth Amendment. The medical procedures alone present a substantial intrusion, but not one that I would consider to be unreasonable. Combined with the likelihood that tests on the bullet would be inconclusive as to resp's guilt and the lack of need for those tests, given the eyewitness identification of resp as the assailant, I believe the balance tips against permitting the surgery. Therefore, I recommend that you vote to affirm.

83-1334 WINSTON AND DAVIS v. LEE Argued 10/31/84

(removal of bullet)

Resp. given no reason for refusing to allow surgery except he did not want any surgery

(JPS says bullet is not needed by State. No evidence other than accused's that someone else shot him. Refusal of D to allow removal can be put in ev.)

Garrett agreed case would go forward w/o bullet.

- Richmond)

Garrett (Deputy Commonwealth Atty, ~~Rich~~

(See my notes on preceding pg)

Winston (for Resp).

Just hearing - ½ centimeter

Winston's ~~F~~ advocated a ~~pay~~ se rule at first series of hearings — no cutting of ~~the~~ Δ's body regardless of state's need.

~~F~~ On the facts as now known ~~(bullet~~ (bullet deeper & general anthesia required

Answering Q's, Winston said rule should be same as to bullet in a witness - & same test if Δ wanted MRI or.

~~Record~~.

Victim identified Δ in emergency room. Record does not show ~~a~~ whether there was any other identification - e.g. line-up or viewing of photos.

Younger ruled on by DC but not presented in CA4 or here.

Winston (cont.)

Nothing in record as to the subsequent firing of gun & ~~them~~ verifying that grooves in barrel were in good shape.

~~Winston~~

The Resp. gave no reason for her refusal other than that he - & he alone - has right to refuse any cutting of his body. This is a matter of "privacy" & "personal dignity".

Doesn't concede that the refusal of D to agree to surgery may be admitted in ev.

(Only 1983 case - not H/C)

Va S/Ct rejected all relief.

Garrett (Reply)

Bullet is most reliable ev.

11/1/84

83-1334 Winston v Lee

Inclined to affirm

Apply a balancing analysis as in Del. v. Prouse:

State's interest: Counsel conceded Resp would be tried w/o the bullet. Probably correct:

1. Eye witness
2. No proof of Resp alibi
3. Resp's refusal to agree to removal will be known to jury - X ray, etc

Resp's interest - Arguably significant. Some people fear any surgery.

No bright line rule.

10/27

83-1934 Winston v Lee (CA4)

CA4 (2-1) affirmed DC (Merhige) holding that surgery to remove a bullet less than an inch below the skin, would violate 4th amend ~~strike~~.

Unlike Schmerber (warrantless taking of blood sample), here surgery - with gen. anesthesia - was viewed by CA4 as so obstrusive as to be an illegal search.

CA4 viewed Schmerber as going to outer limit of permissible. We have not so held.

Here, State proceeded with care, & sought & obtained state court auth. to remove the bullet.

Analysis: balance State's need vs degree of intrusion.

1. State has not shown a compelling need for this evidence. There was an eye witness.

2. Nor did State show likelihood that bullet was undamaged.

"balancing" analysis.

Delaware v Prouse - 5

The Chief Justice ~~Rev~~ Affirm

No per se rule as to all body intrusions.
Schmerber crossed that bridge.
Not ~~any~~ major surgery - risk is minimal.
Rochin also irrelevant.

Justice Brennan Affirm

Case is fact bound. Would not reverse.
On record, CA 4 reasonably could find surgery was intrusive.
Presumption of innocence irrelevant

Justice White Affirm

Ev. ~~that~~ is relevant & ~~was~~ would be admissible - but this alone does not justify all body ~~and~~ intrusions.
Gen. ~~anesthetic~~ anesthetic (sp?!) in place to draw line
Should not consider State's need for evidence - this would require a trial.

Justice Marshall Affirm

Would not go beyond Schmerber

Justice Blackmun [redacted] Reverse

Risk in any type of ~~not~~ surgical procedure

Would not adopt bright line rule

Would not draw line but.

local & general

Balancing test

Justice Powell Affirm

Agree generally with HAB's factors.

(he ~~interrupted~~ listed a number of factors.)

A liberty interest - integrity of body.

State's interest is a critical factor

Justice Rehnquist Rev.

Agree with H AB.
no bright line
~~Do~~ Would not consider state's interest.

Justice Stevens Aff in

Agree with LFP.
Const. issue would be same if bullet were in a witness.
Agree with ~~not~~ LFP that interest of State – need of State for ev. – is highly relevant.
Here State's need is not great as there in other ev.

Justice O'Connor Aff in

State's need for ev. is an important factor. Agree with LFP.
Would draw no bright line.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 17, 1985

Re: 83-1334 - Winston and Davis v. Lee

Dear Bill:

My reaction to your draft was pretty much the same as that expressed by Sandra. Moreover, in this particular case I was strongly influenced by my belief that the prosecutor really doesn't need the bullet anyway. For the time being, therefore, I shall also await other reactions.

Sincerely,

John

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 17, 1985

No. 83-1334 Winston and Davis v. Lee

Dear Bill,

At Conference, I voted to affirm in this case, but your sweeping approach to it gives me pause. I had thought Schmerber gave us all the tests and guidelines we needed to balance the state's interest against those of the defendant on the facts of this case. Your draft appears to adopt a new strict four-part test, including an adversarial proceeding and appellate review, in every instance of any violation of a person's bodily integrity. I am unwilling to follow more than a reasonable balancing approach, taking into account the crucial factors in this particular case. Moreover, I am also concerned with the apparent expansion of the characterization of the Fourth Amendment protections as outlined in Part II of the opinion.

For now, I will wait for possible further writing. Failing that, I plan to write something concurring in the judgment.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 18, 1985

No. 83-1334

Winston v. Lee

Dear Sandra,

I will be circulating a revised draft that I hope will accommodate you.

Sincerely,

Bill

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 24, 1985

83-1334 - Winston and Davis v. Lee

Dear Bill,

I doubt that I can join your opinion in its present form and will very likely concur on much narrower grounds.

Sincerely yours,

Justice Brennan

Copies to the Conference

pp. 5-13

Justice White
Justice Marshall
Justice Blackmun
Justice Powell ✓
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

2/13/85
Joined by HAB

From: **Justice Brennan**

Circulated: _____

Recirculated: FEB 6 1985

2nd DRAFT

Received 2/14

I have same concerns expressed by Lynda.

SUPREME COURT OF THE UNITED STATES

No. 83-1334

ANDREW J. WINSTON, SHERIFF AND AUBREY M. DAVIS, JR., PETITIONERS *v.* RUDOLPH LEE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[February ——, 1985]

JUSTICE BRENNAN delivered the opinion of the Court.

Schmerber v. *California*, 384 U. S. 757 (1966), held *inter alia* that a State may, over the suspect's protest, have a physician extract blood from a person suspected of drunk driving without violation of the suspect's right secured by the Fourth Amendment not to be subjected to unreasonable searches and seizures. However, *Schmerber* cautioned "That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." *Id.*, at 772. In this case, the Commonwealth of Virginia seeks to compel the respondent Rudolph Lee, who is suspected of attempting to commit armed robbery, to undergo a surgical procedure under a general anesthetic for removal of a bullet lodged in his chest. The Commonwealth alleges that the bullet will provide evidence of respondent's guilt or innocence. We conclude that the procedure sought here is an example of the "more substantial intrusion" cautioned against in *Schmerber*, and ~~consequently~~ hold that to permit the procedure would violate respondent's right to be "secure in [his] person" guaranteed by the Fourth Amendment.

opinion ~~under~~ otherwise the suggests that even more substantial intrusions are impermissible

This revised draft is much improved, and I believe comes very close to something you could join.

(see back)

I

A

At approximately 1:00 a. m. on July 18, 1982, Ralph E. Watkinson was closing his shop for the night. As he was locking the door, he observed someone armed with a gun coming toward him from across the street. Watkinson was also armed and when he drew his gun, the other person told him to freeze. Watkinson then fired at the other person, who returned his fire. Watkinson was hit in the legs, while the other individual, who appeared to be wounded in his left side, ran from the scene. The police arrived on the scene shortly thereafter, and Watkinson was taken by ambulance to the emergency room of the Medical College of Virginia (MCV) Hospital.

Approximately 20 minutes later, police officers responding to another call found respondent eight blocks from where the earlier shooting occurred. Respondent was suffering from a gunshot wound to his left chest area and told the police that he had been shot when two individuals attempted to rob him. An ambulance took respondent to the MCV Hospital. Watkinson was still in the MCV emergency room and, when respondent entered that room, said "[T]hat's the man that shot me." App. 14. After an investigation, the police decided that respondent's story of having been himself the victim of a robbery was untrue and charged respondent with attempted robbery, malicious wounding, and two counts of using a firearm in the commission of a felony.

B

The Commonwealth shortly thereafter moved in State court for an order directing respondent to undergo surgery to remove an object thought to be a bullet lodged under his left collarbone. The court conducted several evidentiary hearings on the motion. At the first hearing, the Commonwealth's expert testified that the surgical procedure would take 45 minutes and would involve a three to four percent

chance of temporary nerve damage, a one percent chance of permanent nerve damage, and a one-tenth of one percent chance of death. At the second hearing, the expert testified that on re-examination of respondent, he discovered that the bullet was not "back inside close to the arteries," App. 52, as he originally had thought. Instead, he now believed the bullet to be located "just beneath the skin." App. 57. He testified that the surgery would require an incision of only one and one-half centimeters (slightly more than one-half inch), could be performed under local anesthesia, and would result in "no danger on the basis that there's no general anesthesia employed." App. 51.

The state trial judge granted the motion to compel surgery. Respondent petitioned the Virginia Supreme Court for a writ of prohibition and/or a writ of habeas corpus, both of which were denied. Respondent then brought an action in the United States District Court for the Eastern District of Virginia to enjoin the pending operation on Fourth Amendment grounds. The court refused to issue a preliminary injunction, holding that respondent's cause had little likelihood of success on the merits. 551 F. Supp. 247, 247–253 (1982).[1]

On October 18, 1982, just before the surgery was scheduled, the surgeon ordered that X-rays be taken of respondent's chest. The X-rays revealed that the bullet was in fact lodged two and one-half to three centimeters (approximately one inch) deep in muscular tissue in respondent's chest, substantially deeper than had been thought when the state court granted the motion to compel surgery. The surgeon now believed that a general anesthetic would be desirable for medical reasons.

---

[1] Respondent's action in the District Court was styled as a petition for habeas corpus and an action under 42 U. S. C. § 1983 for a preliminary injunction. Because the District Court denied the relief sought, it found it unnecessary to consider whether *res judicata*, see *Allen* v. *McCurry*, 449 U. S. 90 (1980), would bar consideration of the § 1983 claim. 551 F. Supp., at 252, n. 4.

Respondent moved the state trial court for a rehearing based on the new evidence. After holding an evidentiary hearing, the state trial court denied the rehearing and the Virginia Supreme Court affirmed. Respondent then returned to federal court, where he moved to alter or amend the judgment previously entered against him. After an evidentiary hearing, the District Court enjoined the threatened surgery. 551 F. Supp. 247, 253–261 (ED Va. 1982) (supplemental opinion).[2] A divided panel of the Court of Appeals for the Fourth Circuit affirmed. 717 F. 2d 888 (1984).[3] We

---

[2] Respondent had moved to reopen the petition for habeas corpus, as well as to alter or amend the judgment. Petitioner moved to dismiss the petition for habeas on the ground that respondent was not at that time "in custody" for purposes of 28 U. S. C. § 2241. The District Court rejected this contention, holding that habeas was available because petitioner was objecting to a *future* custody that would take place when the operation was to be performed. 247 F. Supp., at 257–259. The Court of Appeals held that respondent's claim was cognizable only under § 1983. 717 F. 2d, at 893 (1983). Respondent has not cross-petitioned for review of this holding, and it is therefore not before us.

[3] The Fourth Circuit held that *Allen* v. *McCurry*, 449 U. S. 90 (1980), did not bar respondent's attempt to relitigate in federal court the same Fourth Amendment issues previously litigated in state court. The court agreed with the District Court's conclusion, see 551 F. Supp., at 258–259, that respondent had not had a full and fair opportunity to litigate in the state trial court. 717 F. 2d, at 895–899. Respondent filed his motion for rehearing in state court on October 18, the day he was informed of the changed circumstances regarding the removal of the bullet. On October 19, the state court ordered an evidentiary hearing to be held on October 21. The Court of Appeals was "satisfied from the record that counsel was not able, despite obviously diligent effort, to obtain an independent review of the medical record by outside physicians nor was he able to consult with the independent expert in anesthesiology in order to prepare a presentation on the risks of general anesthesia." *Id.*, at 897. Yet, despite the crucial nature of the medical evidence, the state court refused to grant respondent's repeated request for a continuance. Because "[t]he arbitrary truncation of preparation time deprived [respondent] of a fair opportunity to determine the crucial factors relevant to his claim and to obtain independent expert witnesses to testify about these factors," 717 F. 2d, at

granted certiorari, —— U. S. —— (1984), to consider whether a State may consistently with the Fourth Amendment compel a suspect to undergo surgery of this kind in a search for evidence of a crime.

II

The Fourth Amendment protects "expectations of privacy," see *Katz* v. *United States*, 389 U. S. 347 (1968)—the individual's legitimate expectations that in certain places and at certain times he has "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting). Putting to one side the procedural protections of the warrant requirement, the Fourth Amendment generally protects the "security" of "persons, houses, papers and effects" against official intrusions up to the point where the community's need for evidence surmounts a specified standard, ordinarily "probable cause." Beyond this point, it is ordinarily justifiable for the community to demand that the individual give up some part of his interest in privacy and security to advance the community's vital interests in law enforcement; such a search is generally "reasonable" in the Amendment's terms.

A compelled surgical intrusion into an individual's body for evidence, however, implicates expectations of privacy and security of such magnitude that the intrusion may be "unreasonable" even if likely to produce evidence of a crime. Cf. *Tennessee* v. *Garner*, —— U. S. ——, —— (1985) (holding that "seizure" by means of deadly force may not be justifiable despite the presence of probable cause sufficient to permit arrest). In *Schmerber* v. *California*, 384 U. S. 757 (1966), we addressed a claim that the State had breached the Fourth Amendment's protection of the "right of the people to be secure in their *persons* . . . against unreasonable searches

898–899, the Court of Appeals refused to grant preclusive effect to the state court's findings. Petitioner does not challenge this ruling.

and seizures" (emphasis added) when it compelled an individual suspected of drunk driving to undergo a blood test. Schmerber had been arrested at a hospital while receiving treatment for injuries suffered when the automobile he was driving struck a tree. *Id.*, at 758. Despite Schmerber's objection, a police officer at the hospital had directed a physician to take a blood sample from him. Schmerber subsequently objected to the introduction at trial of evidence obtained as a result of the blood test.

The authorities in Schmerber clearly had probable cause to believe that he had been driving while intoxicated, *id.*, at 768, and to believe that a blood test would provide evidence that was exceptionally probative in confirming this belief. *Id.*, at 770. Because the case fell within the exigent circumstances exception to the warrant requirement, no warrant was necessary. *Id.* The search was not more intrusive than reasonably necessary to accomplish its goals. Nonetheless, Schmerber argued that the Fourth Amendment prohibited the authorities from intruding into his body to extract the blood that was needed as evidence.

Schmerber noted that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Id.*, at 767. Citing *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949), and *Mapp* v. *Ohio*, 367 U. S. 643 (1961), we observed that these values were "basic to a free society." We also noted that "[b]ecause we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—'houses, papers, and effects'—we write on a clean slate." 384 U. S., at 767–768. The intrusion perhaps implicated Schmerber's most personal and deep-rooted expectations of privacy, and the Court recognized that Fourth Amendment analysis thus required a discerning inquiry into the facts and circumstances to determine whether the intrusion was justifiable. The Fourth Amendment neither forbids nor permits all such intrusions; rather,

the Amendment's "proper function is to constrain, not against all intrusions as such, but against those intrusions which are not justified in the circumstances, or which are made in an improper manner." *Id.*, at 768.

The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case, the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers. We believe that *Schmerber*, however, provides the appropriate framework of analysis for such cases.

Schmerber recognized that the ordinary requirements of the Fourth Amendment would be the threshold requirements for conducting this kind of surgical search and seizure. We noted the importance of probable cause. *Id.*, at 768–769. And we pointed out that "[s]earch warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. . . . The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Id.*, at 770.

Beyond these standards, *Schmerber's* inquiry considered a number of other factors in determining the "reasonableness" of the blood test. A crucial factor in analyzing the magnitude of the intrusion in *Schmerber* was the extent to which the procedure may threaten the safety or health of the individual. "[F]or most people [a blood test] involves virtually no risk, trauma, or pain." *Ibid.* Moreover, all reasonable medical precautions were taken and no unusual or untested procedures were employed in *Schmerber*; "the procedure was performed by medical technicians in a hospital environment according to accepted medical practices." *Ibid.* Notwithstanding the existence of probable cause, a search for evi-

dence of a crime may be unjustifiable if it endangers the life or health of the suspect.[4]

Another factor is the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity. Intruding into an individual's living room, see *Payton* v. *New York*, 445 U. S. 573 (1980), eavesdropping upon an individual's telephone conversations, see *Katz* v. *United States*, 389 U. S. 347, 361 (1968), or forcing an individual to accompany police officers to the police station, see *Dunaway* v. *New York*, 442 U. S. 200 (1979), typically do not injure the physical person of the individual. Such intrusions do, however, damage the individual's sense of personal privacy and security and are thus subject to the Fourth Amendment's dictates. In noting that a blood test was "a commonplace in these days of periodic physical examinations," 384 U. S., at 771, *Schmerber* recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity.[5]

---

[4] Numerous courts have recognized the crucial importance of this factor. See, *e. g.*, *Bowden* v. *State*, 256 Ark. 820, 823, 510 S. W. 2d 879, 882 (1974) (refusing to order surgery because of medical risk); *People* v. *Smith*, 80 Misc. 2d 210, 362 N. Y.S. 2d 909 (Sup. Ct. 1974) (same); *State* v. *Allen*, 277 S. C. 595, 291 S. E. 2d 459 (1982) (same); see also *Lee* v. *Winston*, 717 F. 2d 888, 900 (CA4 1983); *id.*, at 905–908 (Widener, J., dissenting); *United States* v. *Crowder*, 177 U. S. App. D. C. 165, 169, 543 F. 2d 312, 316 (1976) *(en banc)*, cert. denied, 429 U. S. 1062 (1977); *State* v. *Overstreet*, 551 S. W. 2d 621, 628 (Mo. 1977) *(en banc)*. See generally Note, 68 Marquette L. Rev. 130, 135 (1984) (discussing cases involving bodily intrusions); Note, 60 Notre Dame Law Review 149, 152–156 (1984) (same); Note, 55 Texas L. Rev. 147 (1976) (same).

[5] See also *Schmerber*, 384 U.S, at 771 ("The blood test has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors") (quoting *Breithaupt* v. *Abram*, 352 U. S. 432, 436 (1957)). The degree of intrusion in *Schmerber* was minimized as well by the fact that a blood test "involves virtually no risk, trauma, or pain," 384 U. S., at 771, and by the fact that the blood test was conducted "in a hospital envi-

Weighed against these individual interests is the community's interest in fairly and accurately determining guilt or innocence. This interest is of course of great importance. We noted in *Schmerber* that a blood test is "a highly effective means of determining the degree to which a person is under the influence of alcohol." *Id.*, at 771. Moreover, there was "a clear indication that in fact [desired] evidence [would] be found" if the blood test were undertaken. *Id.*, at 770. Especially given the difficulty of proving drunkenness by other means, these considerations showed that results of the blood test were of vital importance if the State were to enforce its drunk driving laws. In *Schmerber*, we concluded that this State interest was sufficient to justify the intrusion, and the compelled blood test was thus "reasonable" for Fourth Amendment purposes.

III

Applying the *Schmerber* balancing test in this case, we believe that the Court of Appeals reached the correct result. The Commonwealth plainly had probable cause to conduct the search. In addition, all parties apparently agree that respondent has had a full measure of procedural protections and has been able fully to litigate the difficult medical and legal questions necessarily involved in analyzing the reasonableness of a surgical incision of this magnitude.[5] Our

Bah Test

ronment according to accepted medical practices." *Id.* As such, the procedure in *Schmerber* contrasted sharply with the practice in *Rochin* v. *California*, 342 U. S. 165 (date), in which police officers broke into a suspect's room, attempted to extract narcotics capsules he had put into his mouth, took him to a hospital, and directed that an emetic be administered to induce vomiting. *Id.*, at 166. *Rochin*, recognizing the individual's interest in "human dignity," *id.*, at 174, held the search and seizure unconstitutional under the Due Process Clause.

[5] Because the State has afforded respondent the benefit of a full adversary presentation and appellate review, we do not reach the question whether the State may compel a suspect to undergo a surgical search of this magnitude for evidence absent such special procedural protections. Cf. *United States* v. *Crowder*, 177 U. S. App. D. C. 165, 169, 543 F. 2d

inquiry therefore must focus on the extent of the intrusion on respondent's privacy interests and on the state's need for the evidence.

The threats to the health or safety of respondent posed by the surgery are the subject of sharp dispute between the parties. Before the new revelations of October 18, the District Court found that the procedure could be carried out "with virtually no risk to [respondent]." 551 F. Supp., at 252. On rehearing, however, with new evidence before it, the District Court held that "the risks previously involved have increased in magnitude even as new risks are being added." *Id.*, at 260.

The Court of Appeals examined the medical evidence in the record and found that respondent would suffer some risks associated with the surgical procedure.[7] One surgeon had testified that the difficulty of discovering the exact location of the bullet "could require extensive probing and retracting of the muscle tissue," carrying with it "the concomitant risks of injury to the muscle as well as injury to the nerves, blood vessels and other tissue in the chest and pleural cavity." 717 F. 2d, at 900. The court further noted that "the greater intrusion and the larger incisions increase the risks of infection." *Ibid.* Moreover, there was conflict in the testimony concerning the nature and the scope of the operation. One surgeon stated that it would take 15–20 minutes, while another predicted the procedure could take up to two and one-half hours. *Ibid.* The court properly took the resulting uncertainty about the medical risks into account.[8]

312, 316 (1976) *(en banc)*, cert. denied, 429 U. S. 1062 (1977); *State* v. *Lawson*, 187 N. J. Super. 25, ——, 453 A. 2d 556, 558 (App. Div. 1982).

[7]The Court of Appeals concluded, however, that "the specific physical risks from putting [respondent] under general anesthesia may be considered minimal." 717 F. 2d, at 900. Testimony had shown that "the general risks of harm or death from general anesthesia are quite low, and that [respondent] was in the statistical group of persons with the lowest risk of injury from general anesthesia." *Ibid.*

[8]One expert testified that this would be "minor" surgery. See App. 99. The question whether the surgery is to be characterized in medical

Both lower courts in this case believed that the proposed surgery, which for purely medical reasons required the use of a general anesthetic, would be a severe intrusion on respondent's personal privacy and bodily integrity. When conducted with the consent of the patient, surgery requiring general anesthesia is not necessarily demeaning or intrusive. In such a case, the surgeon is carrying out the patient's own will concerning the patient's body and the patient's right to privacy is therefore preserved. In this case, however, the Court of Appeals noted that the Commonwealth proposes to take control of respondent's body, to "drug the citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness," 717 F. 2d, at 901, and then to search beneath his skin for evidence of a crime. This kind of surgery, which involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin, is an extremely severe intrusion.

The other part of the balance concerns the Commonwealth's need to intrude into respondent's body to retrieve the bullet. The Commonwealth claims to need the bullet to demonstrate that it was fired from Watkinson's gun, which in turn would show that respondent was the robber who confronted Watkinson. However, although we recognize the difficulty of making determinations in advance as to the strength of the case against respondent, petitioners' assertions of a compelling need for the bullet are hardly persuasive. The very circumstances relied on in this case to demonstrate probable cause to believe that evidence will be found tend to vitiate the Commonwealth's need to compel respondent to undergo surgery. The Commonwealth has available

terms as "major" or "minor" is not controlling. We agree with the Court of Appeals and the District Court in this case that "there is no reason to suppose that the definition of a medical term of art should coincide with the parameters of a constitutional standard." 551 F. Supp., at 160 (quoted at 717 F. 2d, at 901); accord, *State* v. *Overstreet*, 551 S. W. 2d 621, 628 (Mo. 1977). This does not mean that the application of medical concepts in such cases is to be ignored. However, no specific medical categorization can control the multi-faceted legal inquiry that the court must undertake.

substantial additional evidence that respondent was the individual who accosted Watkinson on the night of the robbery. No party in this case suggests that Watkinson's entirely spontaneous identification of respondent at the hospital would be inadmissible. In addition, petitioners can no doubt prove that Watkinson was found a few blocks from Watkinson's store shortly after the incident took place. And the Commonwealth can certainly show that the location of the bullet (under respondent's left collarbone) seems to correlate with Watkinson's report that the robber "jerked" to the left. App. 13. The fact that the Commonwealth has available such substantial evidence of the origin of the bullet severely restricts the need for the State to compel respondent to undergo the contemplated surgery.[9]

In weighing the various factors in this case, we therefore reach the same conclusion as the courts below. The operation sought will intrude substantially on respondent's protected interests. The medical risks of the operation, although apparently not extremely severe, are a subject of considerable dispute; the very uncertainty militates against

[9] There are also some questions concerning the probative value of the bullet, even if it could be retrieved. The evidentiary value of the bullet depends on a comparison between markings, if any, on the bullet in respondent's shoulder and markings, if any, found on a test bullet that the police could fire from Watkinson's gun. However, the record supports some doubt whether this kind of comparison is possible. This is because the bullet's markings may have been corroded in the time that the bullet has been in respondent's shoulder, thus making it useless for comparison purposes. See 717 F. 2d, at 901, n. 15. In addition, respondent argues that any given gun may be incapable of firing bullets that have a consistent set of markings. See R. J. Joling, An Overview of Firearms Identification Evidence for Attorneys I: Salient Features of Firearms Evidence, 26 J. Forensic Sci. 153, 154 (1981). The record is devoid of any evidence that the police have attempted to test-fire Watkinson's gun, and there thus remains the additional possibility that a comparison of bullets is impossible because Watkinson's gun does not consistently fire bullets with the same markings. However, because the courts below made no findings on this point, we hesitate to give it significant weight in our analysis.

finding the operation to be "reasonable." In addition, the intrusion on respondent's privacy interests entailed by the operation can only be characterized as extremely severe. On the other hand, although the bullet may turn out to be useful to the Commonwealth in prosecuting respondent, the Commonwealth has failed to demonstrate a compelling need for it. We believe that in these circumstances the Commonwealth has failed to demonstrate that it would be "reasonable" under the terms of the Fourth Amendment to search for evidence of this crime by means of the contemplated surgery.

IV

The Fourth Amendment is a vital safeguard of the right of the citizen to be free from unreasonable governmental intrusions into any area in which he has a reasonable expectation of privacy. Where the Court has found a lesser expectation of privacy, see, *e. g.*, *Rakas* v. *Illinois*, 439 U. S. 128 (1978); *South Dakota* v. *Opperman*, 428 U. S. 364 (1976), or where the search involves a minimal intrusion on privacy interests, see, *e. g.*, *United States* v. *Hensley*, —— U. S. —— (1985); *Dunaway* v. *New York*, 442 U. S. 200, 210–211 (1979); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 880 (1975); *Adams* v. *Williams*, 407 U. S. 143 (1972); *Terry* v. *Ohio*, 392 U. S. 1 (1968), the Court has held that the Fourth Amendment's protections are correspondingly less stringent. Conversely, however, the Fourth Amendment's command that searches be "reasonable" requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search "reasonable." Applying these principles, we hold that the proposed search in this case would be "unreasonable" under the Fourth Amendment.

Affirmed.

I have marked a few portions of the opinion that still trouble me. I view this as a close case; perhaps if the State had a greater need for the evidence or the evidence was more likely to be probative, I would not view the ~~this~~ surgical procedure to be unduly intrusive. The opinion's liberal use of modifiers such as "extremely" and "severely," however, seem to me to come close to foreclosing the permissibility of surgical procedures that probe beneath the skin without the defendant's consent. In particular, on page 11, I think the opinion perhaps makes too much of the fact that the procedure is without Lee's consent — this will ~~must~~ always be the case, and I think more weight should be given to the risk the proposed procedure ~~would~~ involves.

Nonetheless, the opinion has eliminated most of what I found objectionable in the first draft. Perhaps you will decide you can join this draft — or this draft with a few minor modifications, as I have noted within.

Lynda

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 12, 1985

No. 83-1334 Winston and Davis v. Lee

Dear Bill,

If you would be willing to omit the citation to Tennessee v. Garner on p. 5, I would be pleased to join the 2nd Draft of your opinion.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 12, 1985

83-1334 - Winston v. Lee

Dear Bill,

I find that I can go along with your 2nd draft in this case.

Sincerely yours,

Byron

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 13, 1985

No. 83-1334

Winston v. Lee

Dear Sandra,

Thank you very much for your note. Of course I'll delete the citation you mentioned.

Sincerely,

Bill

Justice O'Connor
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 14, 1985

No. 83-1334 Winston v. Lee

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

lfp/ss 02/15/85

MEMORANDUM

TO: Lynda DATE: Feb. 15, 1985

FROM: Lewis F. Powell, Jr.

83-1334 Winston v. Lee

As you will see, I have substantially reframed your draft of a letter to Justice Brennan, but relied on the basic points that you so correctly make.

Please feel free to improve the language in my dictated draft. I would like to get this circulated as promptly as we can before other people join Bill Brennan. I know that Elizabeth has required your attention today. Perhaps we could get this letter out tomorrow, even though it is Saturday. For example, you can send material to me by having the Marshal's office - that is the police - use a Court car to bring it down to me at my request, if it should be inconvenient for one of you to drop it off at the gatehouse.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 16, 1985

No. 83-1334 Winston v. Lee

Dear Bill:

I was not able until yesterday to read the draft opinions that have circulated in this important case. Your second draft comes quite close to an opinion that I could join. I do have concerns, however, that I outline briefly.

1. I thought the Court agreed that we would apply the Schmerber balancing test, and much of your opinion purports to do this. It seems to me, however, that certainly language in the opinion will be read as imposing a substantially heavier burden on the state whenever a surgical procedure is involved - a burden shifting that can be read as departing from the basic balancing that is the centerpiece of Schmerber.

For example, on p. 1 you state that "the procedure sought here is an example of the 'more substantial intrusion' cautioned against in Schmerber, and consequently [we] hold that to permit the procedure would violate respondent's [Fourth Amendment rights] . . . ." I am afraid this language could be read - in light of other language in the opinion - as indicating a blanket disapproval of almost any surgical procedure or at least a strong presumption against its validity. This would be a departure from the Schmerber requirement that a Court should consider all of the relevant facts and circumstances.

With respect to this sentence on p. 1, deleting the word "consequently" would eliminate the implication that a surgical procedure - any surgical procedure - necessarily imposes a different balancing than Schmerber.

2. Your opinion emphasizes that the procedure is conducted without the respondent's consent. But will this not always be true? Otherwise, there would be no case.

One interesting point in this case is that it could be argued, I suppose, that respondent's strong opposition prompted the evidence that a general anesthetic was desirable simply to make certain that respondent could be counted on to remain perfectly still during the procedure.

3. In several places in your opinion language is modified by the use of "extremely" and "severely" (e.g., p. 11, lines 2, 17; p. 12, line 12; p. 13, line 2). Use of this language contributes to what seems to me to be the overall tone of the opinion that any surgical procedure places the case in a different context from the Schmerber balancing of all relevant facts and circumstances.

In sum, Bill, I view this as an extremely close case. If the State of Virginia had shown a compelling need for the evidence, the balance very well could have shifted the other way. It does not seem to me that your opinion emphasizes sufficiently that the issue in a case of this kind necessarily involves a weighing of all relevant facts and circumstances. The term "surgical procedure" embraces everything that may require the use of a surgical instrument. The term would embrace, for example, everything from removing a small splinter to the type of surgery I experienced out at Mayo. I think my concerns expressed above would require only the most modest changes in your opinion. If you are inclined to make them, I will be happy to join. If not, I probably will write separately.

Sincerely,

Lewis/lgs

Justice Brennan
lfp/ss
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 19, 1985

Re: No. 83-1334-Winston v. Lee

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 19, 1985

In view of these changes, I'll join

No. 83-1334 -- Winston v. Lee

Dear Lewis:

Thanks for your letter of February 16. I hope that the following changes will take care of the issues you raised. Your first suggested change will be made in the next draft.

With respect to your second point, however, I am a little less sure what to do. It seems to me that, although use of a general anesthetic could become necessary in a case like this because of the lack of cooperation of the suspect, this was not what happened here. The parties do not seem to argue that this was the purpose of the general anesthetic in this case, and the Court of Appeals stated that "[t]he new surgeon decided that the greater depth of the bullet required the use of general anesthesia in the surgery." 717 F.2d, at 891. The testimony of the surgeon was that it was up to the surgeon to decide whether to use general anesthesia, J.A. 91, and that "it would be safer to remove the bullet under general anesthesia," J.A. 83. He elaborated on this point at J.A. 91-92 and explained on J.A. 94 that the pain caused by the operation, even under a local anesthetic, may cause a patient to "tighten up," which consequently could make the operation "more difficult." Finally, at J.A. 102-109, he resisted the suggestion that the general anesthetic would be necessary because of respondent's lack of cooperation. In the light of all of this, it seems that the general anesthetic is necessary here for "purely medical reasons," as the opinion suggests on p. 11, line 2. See also p. 3, last line. Would it resolve your doubts if I added the following footnote to the passage on p. 11: "Somewhat different issues would be raised if the use of a general anesthetic became necessary because of the patient's refusal to cooperate. Cf. State v. Lawson, 187 N.J. Super 25, 453 A.2d 556 (App. Div. 1982)."

With respect to your third point, I believe that I can make the necessary changes. At the top of p. 11, the language merely reports the lower courts' views. I would change this sentence to read: "Both lower courts in this case believed that the proposed surgery, which for purely medical reasons required the use of a

general anesthetic, would be an 'extensive' intrusion on respondent's personal privacy and bodily integrity. 717 F.2d, at 900." In the middle of p. 11, I would modify the sentence to read: "This kind of surgery involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin." On p. 12, I would omit the word "severely." On p. 13, I would omit the word "extremely." All of these passages relate only to the particular facts of this case, and I do not believe that, especially as modified, they suggest that all forms of surgery ought to be treated similarly. The current draft of the opinion explicitly employs a totality of the circumstances "balancing" process. See, e.g., pp. 6, 7, 9, 12.

I hope that these changes are satisfactory.

Sincerely,

Bill

Justice Powell

Copies to the Conference

February 20, 1985

83-1334 Winston v. Lee

Dear Bill:

In light of the changes indicated in your letter of February 17, I will be happy to join your opinion.

I appreciate your willingness to make these changes.

Sincerely,

Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 21, 1985

Re: 83-1334 - Winston and Davis v. Lee

Dear Bill:

After further reflection, I have decided to withdraw my separate concurrence and simply join your opinion as revised to accommodate Lewis' suggestions.

Respectfully,

JPS

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 12, 1985

No. 83-1334 Winston and Davis v. Lee

Dear Bill,

If you would be willing to omit the citation to Tennessee v. Garner on p. 5, I would be pleased to join the 2nd Draft of your opinion.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 12, 1985

83-1334 - Winston v. Lee

Dear Bill,

I find that I can go along with your 2nd draft in this case.

Sincerely yours,

Byron

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 13, 1985

No. 83-1334

Winston v. Lee

Dear Sandra,

Thank you very much for your note. Of course I'll delete the citation you mentioned.

Sincerely,

Bill

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 14, 1985

No. 83-1334 Winston v. Lee

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

lfp/ss 02/15/85 LEE1 SALLY-POW

83-1334 Winston v. Lee

Dear Bill:

I was not able until yesterday to read the draft opinions ~~who~~ that have circulated in this important case. Your second draft comes quite close to an opinion that I could join. I do have concerns, however, that I outline briefly.

1. I thought the Court agreed that we would apply the Schmerber balancing test, and much of your opinion purports to do this. It seems to me, however, that certainly language in the opinion will be read as imposing a substantially heavier burden on the state whenever a surgical procedure is involved - a burden

shifting that can be read as departing from the basic balancing that is the centerpiece of Schmerber.

For example, on p. 1 you state that "the procedure sought here is an example of the 'more substantial intrusion' cautioned against in Schmerber, and consequently [we] holding that to permit the procedure would violate respondent's [Fourth Amendment rights]. . . ." I am afraid this language could be read - in light of other language in the opinion - as indicating a blanket disapproval of almost any surgical procedure or at least a strong presumption against its validity. This would be a departure from the Schmerber requirement that a Court should consider all of the relevant facts and circumstances.

With respect to this sentence on p. 1, deleting the word "consequently" would eliminate the implication that a surgical procedure - any surgical procedure - necessarily imposes a different balancing than Schmerber.

2. Your opinion emphasizes that the procedure is conducted without the respondent's consent. But this not always be true? Otherwise, there would be no case.

One interesting point in this case is that it could be argued, I suppose, that respondent's strong opposition prompted the evidence that a general anesthetic was desirable simply to make certain that respondent could be counted on to remain perfectly still during the procedure.

3. In several places in your opinion language is modified by the use of "extremely" and "severely"

(e.g., p. 11, lines 2, 17; p. 12, line 12; p. 13, line 2). Use of this language contributes to what seems to me to be the overall tone of the opinion that any surgical procedure places the case in a different context from the Schmerber balancing of all relevant facts and circumstances.

In sum, Bill, I view this as an extremely close case. If the state of Virginia had shown a compelling need for the evidence, the balance very well could have shifted the other way. It does not seem to me that your opinion emphasizes sufficiently that the issue in a case of this kind necessarily involves a weighing of all relevant facts and circumstances. The term "surgical procedure" embraces everything that may require the use of a surgical instrument. The term would embrace, for

example, everything from removing a small splinter to the type of surgery I experienced out at Mayo. I think my concerns expressed above would require only the most modest changes in your opinion. If you are inclined to make them, I will be happy to join. If not, I probably will write separately.

Sincerely,

Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 19, 1985

In view of these changes, I'll join

No. 83-1334 -- Winston v. Lee

Dear Lewis:

Thanks for your letter of February 16. I hope that the following changes will take care of the issues you raised. Your first suggested change will be made in the next draft.

With respect to your second point, however, I am a little less sure what to do. It seems to me that, although use of a general anesthetic could become necessary in a case like this because of the lack of cooperation of the suspect, this was not what happened here. The parties do not seem to argue that this was the purpose of the general anesthetic in this case, and the Court of Appeals stated that "[t]he new surgeon decided that the greater depth of the bullet required the use of general anesthesia in the surgery." 717 F.2d, at 891. The testimony of the surgeon was that it was up to the surgeon to decide whether to use general anesthesia, J.A. 91, and that "it would be safer to remove the bullet under general anesthesia," J.A. 83. He elaborated on this point at J.A. 91-92 and explained on J.A. 94 that the pain caused by the operation, even under a local anesthetic, may cause a patient to "tighten up," which consequently could make the operation "more difficult." Finally, at J.A. 102-109, he resisted the suggestion that the general anesthetic would be necessary because of respondent's lack of cooperation. In the light of all of this, it seems that the general anesthetic is necessary here for "purely medical reasons," as the opinion suggests on p. 11, line 2. See also p. 3, last line. Would it resolve your doubts if I added the following footnote to the passage on p. 11: "Somewhat different issues would be raised if the use of a general anesthetic became necessary because of the patient's refusal to cooperate. Cf. State v. Lawson, 187 N.J. Super 25, 453 A.2d 556 (App. Div. 1982)."

With respect to your third point, I believe that I can make the necessary changes. At the top of p. 11, the language merely reports the lower courts' views. I would change this sentence to read: "Both lower courts in this case believed that the proposed surgery, which for purely medical reasons required the use of a

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell ✓
Justice Rehnquist
Justice Stevens
Justice O'Connor

L 78.

p. 1, 11, 12, 13

From: **Justice Brennan**

Circulated: _____

Recirculated: FEB 22 1985

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1334

ANDREW J. WINSTON, SHERIFF AND AUBREY M. DAVIS, JR., PETITIONERS *v.* RUDOLPH LEE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[February ——, 1985]

I've joined on basis of these changes.

JUSTICE BRENNAN delivered the opinion of the Court.

Schmerber v. *California*, 384 U. S. 757 (1966), held *inter alia* that a State may, over the suspect's protest, have a physician extract blood from a person suspected of drunk driving without violation of the suspect's right secured by the Fourth Amendment not to be subjected to unreasonable searches and seizures. However, *Schmerber* cautioned "That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." *Id.*, at 772. In this case, the Commonwealth of Virginia seeks to compel the respondent Rudolph Lee, who is suspected of attempting to commit armed robbery, to undergo a surgical procedure under a general anesthetic for removal of a bullet lodged in his chest. The Commonwealth alleges that the bullet will provide evidence of respondent's guilt or innocence. We conclude that the procedure sought here is an example of the "more substantial intrusion" cautioned against in *Schmerber*, and hold that to permit the procedure would violate respondent's right to be "secure in [his] person" guaranteed by the Fourth Amendment.

These changes were made to accommodate us. – All ok.

Lynda

I

A

At approximately 1:00 a. m. on July 18, 1982, Ralph E. Watkinson was closing his shop for the night. As he was locking the door, he observed someone armed with a gun coming toward him from across the street. Watkinson was also armed and when he drew his gun, the other person told him to freeze. Watkinson then fired at the other person, who returned his fire. Watkinson was hit in the legs, while the other individual, who appeared to be wounded in his left side, ran from the scene. The police arrived on the scene shortly thereafter, and Watkinson was taken by ambulance to the emergency room of the Medical College of Virginia (MCV) Hospital.

Approximately 20 minutes later, police officers responding to another call found respondent eight blocks from where the earlier shooting occurred. Respondent was suffering from a gunshot wound to his left chest area and told the police that he had been shot when two individuals attempted to rob him. An ambulance took respondent to the MCV Hospital. Watkinson was still in the MCV emergency room and, when respondent entered that room, said "[T]hat's the man that shot me." App. 14. After an investigation, the police decided that respondent's story of having been himself the victim of a robbery was untrue and charged respondent with attempted robbery, malicious wounding, and two counts of using a firearm in the commission of a felony.

B

The Commonwealth shortly thereafter moved in State court for an order directing respondent to undergo surgery to remove an object thought to be a bullet lodged under his left collarbone. The court conducted several evidentiary hearings on the motion. At the first hearing, the Commonwealth's expert testified that the surgical procedure would take 45 minutes and would involve a three to four percent

chance of temporary nerve damage, a one percent chance of permanent nerve damage, and a one-tenth of one percent chance of death. At the second hearing, the expert testified that on re-examination of respondent, he discovered that the bullet was not "back inside close to the arteries," App. 52, as he originally had thought. Instead, he now believed the bullet to be located "just beneath the skin." App. 57. He testified that the surgery would require an incision of only one and one-half centimeters (slightly more than one-half inch), could be performed under local anesthesia, and would result in "no danger on the basis that there's no general anesthesia employed." App. 51.

The state trial judge granted the motion to compel surgery. Respondent petitioned the Virginia Supreme Court for a writ of prohibition and/or a writ of habeas corpus, both of which were denied. Respondent then brought an action in the United States District Court for the Eastern District of Virginia to enjoin the pending operation on Fourth Amendment grounds. The court refused to issue a preliminary injunction, holding that respondent's cause had little likelihood of success on the merits. 551 F. Supp. 247, 247–253 (1982).[1]

On October 18, 1982, just before the surgery was scheduled, the surgeon ordered that X-rays be taken of respondent's chest. The X-rays revealed that the bullet was in fact lodged two and one-half to three centimeters (approximately one inch) deep in muscular tissue in respondent's chest, substantially deeper than had been thought when the state court granted the motion to compel surgery. The surgeon now believed that a general anesthetic would be desirable for medical reasons.

---

[1] Respondent's action in the District Court was styled as a petition for habeas corpus and an action under 42 U. S. C. § 1983 for a preliminary injunction. Because the District Court denied the relief sought, it found it unnecessary to consider whether *res judicata*, see *Allen* v. *McCurry*, 449 U. S. 90 (1980), would bar consideration of the § 1983 claim. 551 F. Supp., at 252, n. 4.

Respondent moved the state trial court for a rehearing based on the new evidence. After holding an evidentiary hearing, the state trial court denied the rehearing and the Virginia Supreme Court affirmed. Respondent then returned to federal court, where he moved to alter or amend the judgment previously entered against him. After an evidentiary hearing, the District Court enjoined the threatened surgery. 551 F. Supp. 247, 253–261 (ED Va. 1982) (supplemental opinion).[2] A divided panel of the Court of Appeals for the Fourth Circuit affirmed. 717 F. 2d 888 (1984).[3] We

---

[1]Respondent had moved to reopen the petition for habeas corpus, as well as to alter or amend the judgment. Petitioner moved to dismiss the petition for habeas on the ground that respondent was not at that time "in custody" for purposes of 28 U. S. C. § 2241. The District Court rejected this contention, holding that habeas was available because petitioner was objecting to a *future* custody that would take place when the operation was to be performed. 247 F. Supp., at 257–259. The Court of Appeals held that respondent's claim was cognizable only under § 1983. 717 F. 2d, at 893 (1983). Respondent has not cross-petitioned for review of this holding, and it is therefore not before us.

[2]The Fourth Circuit held that *Allen* v. *McCurry*, 449 U. S. 90 (1980), did not bar respondent's attempt to relitigate in federal court the same Fourth Amendment issues previously litigated in state court. The court agreed with the District Court's conclusion, see 551 F. Supp., at 258–259, that respondent had not had a full and fair opportunity to litigate in the state trial court. 717 F. 2d, at 895–899. Respondent filed his motion for rehearing in state court on October 18, the day he was informed of the changed circumstances regarding the removal of the bullet. On October 19, the state court ordered an evidentiary hearing to be held on October 21. The Court of Appeals was "satisfied from the record that counsel was not able, despite obviously diligent effort, to obtain an independent review of the medical record by outside physicians nor was he able to consult with the independent expert in anesthesiology in order to prepare a presentation on the risks of general anesthesia." *Id.*, at 897. Yet, despite the crucial nature of the medical evidence, the state court refused to grant respondent's repeated request for a continuance. Because "[t]he arbitrary truncation of preparation time deprived [respondent] of a fair opportunity to determine the crucial factors relevant to his claim and to obtain independent expert witnesses to testify about these factors," 717 F. 2d, at

granted certiorari, —— U. S. —— (1984), to consider whether a State may consistently with the Fourth Amendment compel a suspect to undergo surgery of this kind in a search for evidence of a crime.

II

The Fourth Amendment protects "expectations of privacy," see *Katz* v. *United States*, 389 U. S. 347 (1968)—the individual's legitimate expectations that in certain places and at certain times he has "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting). Putting to one side the procedural protections of the warrant requirement, the Fourth Amendment generally protects the "security" of "persons, houses, papers and effects" against official intrusions up to the point where the community's need for evidence surmounts a specified standard, ordinarily "probable cause." Beyond this point, it is ordinarily justifiable for the community to demand that the individual give up some part of his interest in privacy and security to advance the community's vital interests in law enforcement; such a search is generally "reasonable" in the Amendment's terms.

A compelled surgical intrusion into an individual's body for evidence, however, implicates expectations of privacy and security of such magnitude that the intrusion may be "unreasonable" even if likely to produce evidence of a crime. In *Schmerber* v. *California*, 384 U. S. 757 (1966), we addressed a claim that the State had breached the Fourth Amendment's protection of the "right of the people to be secure in their *persons* . . . against unreasonable searches and seizures" (emphasis added) when it compelled an individual suspected of drunk driving to undergo a blood test. Schmerber had been arrested at a hospital while receiving treatment for injuries

898–899, the Court of Appeals refused to grant preclusive effect to the state court's findings. Petitioner does not challenge this ruling.

suffered when the automobile he was driving struck a tree. *Id.*, at 758. Despite Schmerber's objection, a police officer at the hospital had directed a physician to take a blood sample from him. Schmerber subsequently objected to the introduction at trial of evidence obtained as a result of the blood test.

The authorities in Schmerber clearly had probable cause to believe that he had been driving while intoxicated, *id.*, at 768, and to believe that a blood test would provide evidence that was exceptionally probative in confirming this belief. *Id.*, at 770. Because the case fell within the exigent circumstances exception to the warrant requirement, no warrant was necessary. *Ibid.* The search was not more intrusive than reasonably necessary to accomplish its goals. Nonetheless, Schmerber argued that the Fourth Amendment prohibited the authorities from intruding into his body to extract the blood that was needed as evidence.

Schmerber noted that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Id.*, at 767. Citing *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949), and *Mapp* v. *Ohio*, 367 U. S. 643 (1961), we observed that these values were "basic to a free society." We also noted that "[b]ecause we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—'houses, papers, and effects'—we write on a clean slate." 384 U. S., at 767–768. The intrusion perhaps implicated Schmerber's most personal and deep-rooted expectations of privacy, and the Court recognized that Fourth Amendment analysis thus required a discerning inquiry into the facts and circumstances to determine whether the intrusion was justifiable. The Fourth Amendment neither forbids nor permits all such intrusions; rather, the Amendment's "proper function is to constrain, not against all intrusions as such, but against those intrusions

which are not justified in the circumstances, or which are made in an improper manner." *Id.*, at 768.

The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case, the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers. We believe that *Schmerber*, however, provides the appropriate framework of analysis for such cases.

Schmerber recognized that the ordinary requirements of the Fourth Amendment would be the threshold requirements for conducting this kind of surgical search and seizure. We noted the importance of probable cause. *Id.*, at 768–769. And we pointed out that "[s]earch warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. . . . The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Id.*, at 770.

Beyond these standards, *Schmerber*'s inquiry considered a number of other factors in determining the "reasonableness" of the blood test. A crucial factor in analyzing the magnitude of the intrusion in *Schmerber* is the extent to which the procedure may threaten the safety or health of the individual. "[F]or most people [a blood test] involves virtually no risk, trauma, or pain." *Ibid.* Moreover, all reasonable medical precautions were taken and no unusual or untested procedures were employed in *Schmerber;* "the procedure was performed by medical technicians in a hospital environment according to accepted medical practices." *Ibid.* Notwithstanding the existence of probable cause, a search for evi-

dence of a crime may be unjustifiable if it endangers the life or health of the suspect.[4]

Another factor is the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity. Intruding into an individual's living room, see *Payton* v. *New York*, 445 U. S. 573 (1980), eavesdropping upon an individual's telephone conversations, see *Katz* v. *United States*, 389 U. S. 347, 361 (1968), or forcing an individual to accompany police officers to the police station, see *Dunaway* v. *New York*, 442 U. S. 200 (1979), typically do not injure the physical person of the individual. Such intrusions do, however, damage the individual's sense of personal privacy and security and are thus subject to the Fourth Amendment's dictates. In noting that a blood test was "a commonplace in these days of periodic physical examinations," 384 U. S., at 771, *Schmerber* recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity.[5]

[4] Numerous courts have recognized the crucial importance of this factor. See, *e. g.*, *Bowden* v. *State*, 256 Ark. 820, 823, 510 S. W. 2d 879, 882 (1974) (refusing to order surgery because of medical risk); *People* v. *Smith*, 80 Misc. 2d 210, 362 N. Y. S. 2d 909 (Sup. Ct. 1974) (same); *State* v. *Allen*, 277 S. C. 596, 291 S. E. 2d 459 (1982) (same); see also *Lee* v. *Winston*, 717 F. 2d 888, 900 (CA4 1983); *id.*, at 905–908 (Widener, J., dissenting); *United States* v. *Crowder*, 177 U. S. App. D. C. 165, 169, 543 F. 2d 312, 316 (1976) *(en banc)*, cert. denied, 429 U. S. 1062 (1977); *State* v. *Overstreet*, 551 S. W. 2d 621, 628 (Mo. 1977) *(en banc)*. See generally Note, 68 Marquette L. Rev. 130, 135 (1984) (discussing cases involving bodily intrusions); Note, 60 Notre Dame Law Review 149, 152–156 (1984) (same); Note, 55 Texas L. Rev. 147 (1976) (same).

[5] See also *Schmerber*, 884 U.S, at 771 ("The blood test has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors") (quoting *Breithaupt* v. *Abram*, 352 U. S. 432, 436 (1957)). The degree of intrusion in *Schmerber* was minimized as well by the fact that a blood test "involves virtually no risk, trauma, or pain," 384 U. S., at 771, and by the fact that the blood test was conducted "in a hospital envi-

Weighed against these individual interests is the community's interest in fairly and accurately determining guilt or innocence. This interest is of course of great importance. We noted in *Schmerber* that a blood test is "a highly effective means of determining the degree to which a person is under the influence of alcohol." *Id.*, at 771. Moreover, there was "a clear indication that in fact [desired] evidence [would] be found" if the blood test were undertaken. *Id.*, at 770. Especially given the difficulty of proving drunkenness by other means, these considerations showed that results of the blood test were of vital importance if the State were to enforce its drunk driving laws. In *Schmerber*, we concluded that this State interest was sufficient to justify the intrusion, and the compelled blood test was thus "reasonable" for Fourth Amendment purposes.

III

Applying the *Schmerber* balancing test in this case, we believe that the Court of Appeals reached the correct result. The Commonwealth plainly had probable cause to conduct the search. In addition, all parties apparently agree that respondent has had a full measure of procedural protections and has been able fully to litigate the difficult medical and legal questions necessarily involved in analyzing the reasonableness of a surgical incision of this magnitude.[6] Our

ronment according to accepted medical practices." *Ibid.* As such, the procedure in *Schmerber* contrasted sharply with the practice in *Rochin* v. *California*, 342 U. S. 165 (1952), in which police officers broke into a suspect's room, attempted to extract narcotics capsules he had put into his mouth, took him to a hospital, and directed that an emetic be administered to induce vomiting. *Id.*, at 166. *Rochin*, recognizing the individual's interest in "human dignity," *id.*, at 174, held the search and seizure unconstitutional under the Due Process Clause.

[6] Because the State has afforded respondent the benefit of a full adversary presentation and appellate review, we do not reach the question whether the State may compel a suspect to undergo a surgical search of this magnitude for evidence absent such special procedural protections. Cf. *United States* v. *Crowder*, 177 U. S. App. D. C. 165, 169, 543 F. 2d

inquiry therefore must focus on the extent of the intrusion on respondent's privacy interests and on the state's need for the evidence.

The threats to the health or safety of respondent posed by the surgery are the subject of sharp dispute between the parties. Before the new revelations of October 18, the District Court found that the procedure could be carried out "with virtually no risk to [respondent]." 551 F. Supp., at 252. On rehearing, however, with new evidence before it, the District Court held that "the risks previously involved have increased in magnitude even as new risks are being added." *Id.*, at 260.

The Court of Appeals examined the medical evidence in the record and found that respondent would suffer some risks associated with the surgical procedure.[7] One surgeon had testified that the difficulty of discovering the exact location of the bullet "could require extensive probing and retracting of the muscle tissue," carrying with it "the concomitant risks of injury to the muscle as well as injury to the nerves, blood vessels and other tissue in the chest and pleural cavity." 717 F. 2d, at 900. The court further noted that "the greater intrusion and the larger incisions increase the risks of infection." *Ibid.* Moreover, there was conflict in the testimony concerning the nature and the scope of the operation. One surgeon stated that it would take 15–20 minutes, while another predicted the procedure could take up to two and one-half hours. *Ibid.* The court properly took the resulting uncertainty about the medical risks into account.[8]

312, 316 (1976) *(en banc)*, cert. denied, 429 U. S. 1062 (1977); *State* v. *Lawson*, 187 N. J. Super. 25, ——, 453 A. 2d 556, 558 (App. Div. 1982).

[7] The Court of Appeals concluded, however, that "the specific physical risks from putting [respondent] under general anesthesia may be considered minimal." 717 F. 2d, at 900. Testimony had shown that "the general risks of harm or death from general anesthesia are quite low, and that [respondent] was in the statistical group of persons with the lowest risk of injury from general anesthesia." *Ibid.*

[8] One expert testified that this would be "minor" surgery. See App. 99. The question whether the surgery is to be characterized in medical

Both lower courts in this case believed that the proposed surgery, which for purely medical reasons required the use of a general anesthetic,[8] would be an "extensive" intrusion on respondent's personal privacy and bodily integrity. 717 F. 2d, at 900. When conducted with the consent of the patient, surgery requiring general anesthesia is not necessarily demeaning or intrusive. In such a case, the surgeon is carrying out the patient's own will concerning the patient's body and the patient's right to privacy is therefore preserved. In this case, however, the Court of Appeals noted that the Commonwealth proposes to take control of respondent's body, to "drug the citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness," 717 F. 2d, at 901, and then to search beneath his skin for evidence of a crime. This kind of surgery involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin.

The other part of the balance concerns the Commonwealth's need to intrude into respondent's body to retrieve the bullet. The Commonwealth claims to need the bullet to demonstrate that it was fired from Watkinson's gun, which in turn would show that respondent was the robber who confronted Watkinson. However, although we recognize the difficulty of making determinations in advance as to the strength of the case against respondent, petitioners' assertions of a compelling need for the bullet are hardly persuasive. The very circumstances relied on in this case to dem-

---

terms as "major" or "minor" is not controlling. We agree with the Court of Appeals and the District Court in this case that "there is no reason to suppose that the definition of a medical term of art should coincide with the parameters of a constitutional standard." 551 F. Supp., at 160 (quoted at 717 F. 2d, at 901); accord, *State* v. *Overstreet*, 551 S. W. 2d 621, 628 (Mo. 1977). This does not mean that the application of medical concepts in such cases is to be ignored. However, no specific medical categorization can control the multi-faceted legal inquiry that the court must undertake.

[8] Somewhat different issues would be raised if the use of a general anesthetic became necessary because of the patient's refusal to cooperate. Cf. *State* v. *Lawson*, 187 N. J. Super. 25, 453 A. 2d 556 (App. Div. 1982).

onstrate probable cause to believe that evidence will be found tend to vitiate the Commonwealth's need to compel respondent to undergo surgery. The Commonwealth has available substantial additional evidence that respondent was the individual who accosted Watkinson on the night of the robbery. No party in this case suggests that Watkinson's entirely spontaneous identification of respondent at the hospital would be inadmissible. In addition, petitioners can no doubt prove that Watkinson was found a few blocks from Watkinson's store shortly after the incident took place. And the Commonwealth can certainly show that the location of the bullet (under respondent's left collarbone) seems to correlate with Watkinson's report that the robber "jerked" to the left. App. 13. The fact that the Commonwealth has available such substantial evidence of the origin of the bullet restricts the need for the State to compel respondent to undergo the contemplated surgery.[10]

In weighing the various factors in this case, we therefore reach the same conclusion as the courts below. The operation sought will intrude substantially on respondent's pro-

---

[10] There are also some questions concerning the probative value of the bullet, even if it could be retrieved. The evidentiary value of the bullet depends on a comparison between markings, if any, on the bullet in respondent's shoulder and markings, if any, found on a test bullet that the police could fire from Watkinson's gun. However, the record suports some doubt whether this kind of comparison is possible. This is because the bullet's markings may have been corroded in the time that the bullet has been in respondent's shoulder, thus making it useless for comparison purposes. See 717 F. 2d, at 901, n. 15. In addition, respondent argues that any given gun may be incapable of firing bullets that have a consistent set of markings. See R. J. Joling, An Overview of Firearms Identification Evidence for Attorneys I: Salient Features of Firearms Evidence, 26 J. Forensic Sci. 153, 154 (1981). The record is devoid of any evidence that the police have attempted to test-fire Watkinson's gun, and there thus remains the additional possibility that a comparison of bullets is impossible because Watkinson's gun does not consistently fire bullets with the same markings. However, because the courts below made no findings on this point, we hesitate to give it significant weight in our analysis.

tected interests. The medical risks of the operation, although apparently not extremely severe, are a subject of considerable dispute; the very uncertainty militates against finding the operation to be "reasonable." In addition, the intrusion on respondent's privacy interests entailed by the operation can only be characterized as severe. On the other hand, although the bullet may turn out to be useful to the Commonwealth in prosecuting respondent, the Commonwealth has failed to demonstrate a compelling need for it. We believe that in these circumstances the Commonwealth has failed to demonstrate that it would be "reasonable" under the terms of the Fourth Amendment to search for evidence of this crime by means of the contemplated surgery.

IV

The Fourth Amendment is a vital safeguard of the right of the citizen to be free from unreasonable governmental intrusions into any area in which he has a reasonable expectation of privacy. Where the Court has found a lesser expectation of privacy, see, *e. g.*, *Rakas* v. *Illinois*, 439 U. S. 128 (1978); *South Dakota* v. *Opperman*, 428 U. S. 364 (1976), or where the search involves a minimal intrusion on privacy interests, see, *e. g.*, *United States* v. *Hensley*, —— U. S. —— (1985); *Dunaway* v. *New York*, 442 U. S. 200, 210–211 (1979); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 880 (1975); *Adams* v. *Williams*, 407 U. S. 143 (1972); *Terry* v. *Ohio*, 392 U. S. 1 (1968), the Court has held that the Fourth Amendment's protections are correspondingly less stringent. Conversely, however, the Fourth Amendment's command that searches be "reasonable" requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search "reasonable." Applying these principles, we hold that the proposed search

in this case would be "unreasonable" under the Fourth Amendment.

Affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 4, 1985

Re: No. 83-1334 - Winston v. Lee

Dear Bill:

I join. I shall be filing the following as a brief concurrence:

> "I join because I read the Court's opinion as not preventing detention of an individual if there are reasonable grounds to believe that natural bodily functions will disclose the presence of contraband materials secreted internally."

Regards,

Justice Brennan

Copies to the Conference

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

file

From: **The Chief Justice**

Circulated: MAR 5 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

I'll not join

No. 83-1334

ANDREW J. WINSTON, SHERIFF AND AUBREY M. DAVIS, JR., PETITIONERS *v.* RUDOLPH LEE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[March ——, 1985]

CHIEF JUSTICE BURGER, concurring.

I join because I read the Court's opinion as not preventing detention of an individual if there are reasonable grounds to believe that natural bodily functions will disclose the presence of contraband materials secreted internally.

Do not join. - This issue is not even raised by this case, but is raised by a case in which the Court recently granted cert - No. 84-755, U.S. v. deHernandez, involving a woman who smuggled drugs in this country in her intestines.

Lynda

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 7, 1985

Re: No. 83-1334, Winston v. Lee

Dear Bill:

At the end of your opinion would you please add:

"JUSTICE BLACKMUN concurs in the judgment."

Sincerely,

Harry

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 8, 1985

Re: No. 83-1334 Winston v. Lee

Dear Bill,

Would you please show that, like Harry, I concur in the judgment.

Sincerely,

Justice Brennan

cc: The Conference

83-1334 Winston v. Lee (Lynda)

WJB for the Court 11/9/84
1st draft 1/16/85
2nd draft 2/6/85
3rd draft 2/14/85
4th draft 2/22/85
5th draft 3/11/85
6th draft 3/14/85
Joined by BRW 2/12/85
SOC 2/14/85
TM 2/19/85
LFP 2/20/85
JPS 2/21/85

JPS concurring
1st draft 2/13/85
Withdrew concurrence on 2/21/85
to join WJB

CJ concurring
1st draft 3/5/85

HAB concurs in the judgment 3/7/85
WHR concurs in the judgment 3/8/85
SDO will await further writing 1/17/85
JPS will await further writing 1/17/85
BRW will concur on narrower grounds