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## Reasonableness of Surgical Intrusions--Fourth Amendment: Winston v. Lee, 105 S. Ct. 1611 (1985)

Jay A. Gitle

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## FOURTH AMENDMENT— REASONABLENESS OF SURGICAL INTRUSIONS

Winston v. Lee, 105 S. Ct. 1611 (1985).

### I. INTRODUCTION

In *Schmerber v. California*,<sup>1</sup> the United States Supreme Court adopted a balancing test of "reasonableness" to determine whether under the fourth amendment<sup>2</sup> the state may intrude into the human body to recover evidence. While recognizing the individual's right under the fourth amendment to protection of personal privacy and bodily dignity against unwarranted intrusions by the state,<sup>3</sup> the Court offset this right against the state's interest in gathering evidence necessary to determine the accused's guilt or innocence.<sup>4</sup> Last term, in *Winston v. Lee*,<sup>5</sup> the Supreme Court employed the *Schmerber* framework in ruling that a state may not compel an armed robbery suspect to undergo surgery requiring a general anesthetic to remove an object thought to be a bullet lodged approximately one inch deep in the muscular tissue of his chest.<sup>6</sup>

This Note examines the *Winston* opinion and concludes that the Court's decision was justified in light of the particular facts and circumstances of the case. This Note points out that the Court's decision to extend the *Schmerber* "reasonableness" framework to the context of the surgical removal of evidence will provide lower courts with the flexibility to make determinations on a case-by-case basis.

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<sup>1</sup> 384 U.S. 757 (1966). The *Schmerber* Court held, *inter alia*, "that a State may, over the suspect's protest, have a physician extract blood from a person suspected of drunken driving without violation of the suspect's right secured by the Fourth Amendment not to be subjected to unreasonable searches and seizures." *Winston v. Lee*, 105 S. Ct. 1611, 1614 (1985)(construing *Schmerber v. California*, 384 U.S. 757 (1966)).

<sup>2</sup> The fourth amendment provides:

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

<sup>3</sup> *Schmerber*, 384 U.S. at 767.

<sup>4</sup> *Id.* at 770.

<sup>5</sup> 105 S. Ct. 1611 (1985).

<sup>6</sup> *Id.* at 1615.

This flexibility, however, will be gained at the expense of consistency between lower courts' decisions. This Note concludes that this tradeoff is inherent in instances involving a "reasonableness" approach and that lower courts can capably balance the facts and circumstances of each case under the *Winston* guidelines. The Supreme Court, however, should have more carefully delineated how to weigh the factors that determine "reasonableness" in order to provide greater guidance to lower court judges and to curb potential abuses of judicial discretion in applying the test.

## II. FACTS OF *WINSTON*

On July 18, 1982, Ralph Watkinson observed an armed man approaching as Watkinson was locking his shop.<sup>7</sup> Watkinson drew his gun and was told by the other person to freeze, after which an exchange of gunfire appeared to injure both.<sup>8</sup> Twenty minutes later, and eight blocks from the incident, the police found Rudolph Lee suffering from a gunshot wound to his left chest area.<sup>9</sup> Watkinson identified Lee as the assailant when Lee entered the same hospital emergency room as Watkinson.<sup>10</sup> The police subsequently charged Lee with four felony counts.<sup>11</sup>

The Commonwealth of Virginia moved in state court for an order directing Lee to undergo surgery using a local anesthetic to remove what was thought to be a bullet from under his left collarbone.<sup>12</sup> Evidentiary hearings were conducted on the motion before the state trial judge.<sup>13</sup> Based on expert testimony of surgeons, the motion to compel surgery was granted.<sup>14</sup> Lee unsuccessfully appealed to the Virginia Supreme Court<sup>15</sup> and subsequently brought a federal action to enjoin the operation on fourth amendment grounds.<sup>16</sup> The federal district court refused to grant a pre-

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<sup>7</sup> *Id.* at 1614.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Lee was charged with attempted robbery, malicious wounding and two counts of using a firearm in the commission of a felony. *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1614-15. The expert testified that an incision of only one-half inch was necessary to recover the bullet believed to be just beneath the skin. *Id.* at 1614. He testified, furthermore, that surgery could be performed under local anesthesia and would result in no danger to Lee. *Id.*

<sup>15</sup> *Id.* at 1615. Lee petitioned for a writ of prohibition and/or a writ of habeas corpus. *Id.*

<sup>16</sup> *Id.*

liminary injunction.<sup>17</sup>

Just prior to surgery, x-rays revealed that the bullet was lodged substantially deeper than thought by the state court when it granted the motion to compel surgery.<sup>18</sup> As a result, the surgeon recommended a general anesthetic.<sup>19</sup>

Lee subsequently moved the state trial court for a rehearing that was denied.<sup>20</sup> The Virginia Supreme Court affirmed the denial.<sup>21</sup> Lee then moved successfully in federal court to enjoin the surgery.<sup>22</sup> A divided United States Court of Appeals for the Fourth Circuit affirmed the ruling.<sup>23</sup> The court of appeals found that the surgery would impose too much risk, uncertainty, and intrusiveness on the subject, and would go beyond legitimate state police practices allowable under the fourth amendment.<sup>24</sup> The United States Supreme Court granted certiorari to consider whether a state, consistent with the fourth amendment, may direct a suspect to undergo surgery requiring a general anesthetic in order to search for evidence of a crime.<sup>25</sup>

### III. SCHMERBER AND ITS PROGENY

The Supreme Court in *Winston* applied the test developed in *Schmerber v. California*<sup>26</sup> to determine whether a state may compel a surgical intrusion into a suspect's body for evidence. The *Schmerber* balancing test, however, arose out of a factual setting quite different from that of *Winston*. In *Schmerber*, the Court addressed the question of whether a state could compel a suspect accused of drunken driv-

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<sup>17</sup> *Id.* at 1615. The district court held that Lee's cause "had little likelihood of success on the merits." *Id.* (quoting *Lee v. Winston*, 551 F. Supp. 247, 247-53 (E.D. Va. 1982), *aff'd*, 717 F.2d 888 (4th Cir. 1983), *aff'd*, 105 S. Ct. 1611 (1985)).

<sup>18</sup> *Winston*, 105 S. Ct. at 1615.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* *Lee v. Winston*, 551 F. Supp. 247 (E.D. Va. 1982), *aff'd*, 717 F.2d 888 (4th Cir. 1983), *aff'd*, 105 S. Ct. 1611 (1985) (depth of bullet and requirement of general anesthesia for removal was basis of conclusion that surgical procedure would be unreasonable search under fourth amendment).

<sup>23</sup> The court of appeals affirmed by a two-to-one vote. *Lee v. Winston*, 717 F.2d 888 (4th Cir. 1983), *aff'd*, 105 S. Ct. 1611 (1985).

<sup>24</sup> *Id.* at 900-01. For an analysis of the appellate decision, see Note, *Lee v. Winston: Court-Ordered Surgery and the Fourth Amendment — A New Analysis of Reasonableness?*, 60 NOTRE DAME LAW. 139 (1984), in which the authors incorrectly suggested that the appellate decision would lead to a per se rule making all court-ordered surgery requiring a general anesthetic unreasonable.

<sup>25</sup> *Winston*, 105 S. Ct. at 1615.

<sup>26</sup> 384 U.S. at 757.

ing to submit to a blood test.<sup>27</sup>

Schmerber was convicted of drunken driving<sup>28</sup> after being arrested at a hospital while receiving treatment for injuries.<sup>29</sup> A physician drew a blood sample from Schmerber at a police officer's direction which revealed that Schmerber was intoxicated.<sup>30</sup> Schmerber contended, in part, that taking the blood sample was an illegal search and seizure in violation of his fourth amendment rights, and therefore, could not be received as evidence at trial.<sup>31</sup>

The Court in *Schmerber* made two inquiries concerning the petitioner's search and seizure claim. First, the Court questioned whether the police were justified in requiring Schmerber to submit to the blood test.<sup>32</sup> Second, the Court questioned whether the means used to take Schmerber's blood contravened the standards of

<sup>27</sup> *Id.* at 761.

<sup>28</sup> *Id.* at 758. "California Vehicle Code §23102(a) provides, in pertinent part, 'It is unlawful for any person who is under the influence of intoxicating liquor . . . to drive a vehicle upon any highway . . .'. The offense is a misdemeanor." *Id.* at 758 n.1.

<sup>29</sup> *Id.* at 758.

<sup>30</sup> *Id.* at 759.

<sup>31</sup> *Id.* Two other bodily intrusion cases were decided before the exclusionary rule under the fourth amendment was applicable to state searches of this type. In *Rochin v. California*, 342 U.S. 165 (1952), the Supreme Court, based on a violation of due process, reversed a state court conviction which had permitted the use of evidence obtained by police who had ordered that the suspect's stomach be pumped in an attempt to recover morphine capsules. In *Breithaupt v. Abram*, 352 U.S. 432 (1957), the Supreme Court, based on the due process clause, balanced individual bodily invasion against the state's interest in deterring drunk driving to affirm a state court conviction which permitted as evidence the result of a blood sample taken from an unconscious drunk driving suspect by a hospital physician.

In *Weeks v. United States*, 232 U.S. 383 (1914), the exclusionary rule was adopted to protect fourth amendment rights to freedom from unreasonable searches and seizures in federal prosecutions. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the exclusionary rule was applied to the states. The *Rochin* and *Breithaupt* decisions came prior to *Mapp*. The *Schmerber* and *Winston* cases, however, were decided after *Mapp*, and a fourth amendment analysis was therefore applicable in both cases.

<sup>32</sup> *Schmerber*, 384 U.S. at 768. In determining that the police were justified in requiring a blood test, the Court reasoned that a search warrant was unnecessary because the officer may "reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Id.* at 770 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)). In a drunken driving case such as *Schmerber*, the percentage of blood alcohol drops when drinking stops, with a resulting destruction of probative evidence. *Schmerber*, 384 U.S. at 770-71. Similarly, in a bullet removal case such as *Winston*, bullet markings may quickly corrode while in the human body, thereby lowering the bullet's probative value. *Winston*, 105 S.Ct. at 1619. A pre-surgical adversary hearing and appeal were required, however, in *United States v. Crowder*, 543 F.2d 312 (D.C. Cir. 1976)(en banc), cert. denied, 429 U.S. 1062 (1977)(defendant's fourth amendment rights unabridged by court-ordered surgical removal of superficially-lodged bullet from his arm). The issue of the necessity of obtaining a warrant for surgical searches is therefore moot.

the fourth amendment.<sup>33</sup> In holding that the police were entitled to secure a blood test as an appropriate incident to arrest, and that the means used did not contravene the fourth or fourteenth amendments,<sup>34</sup> the Court did not disregard society's interest in maintaining individual integrity. The Court cautioned that "the [fact 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."<sup>35</sup>

The decision in *Schmerber* provided a basis for lower courts<sup>36</sup> to strive to understand what is "reasonable" under the circumstances. The Court in *United States v. Crowder*<sup>37</sup> followed the *Schmerber* rule. In *Crowder*, a court ordered the surgical removal, under a local anesthetic, of a bullet from a murder suspect's arm without his consent.<sup>38</sup> The district court judge received the bullet in evidence and the court of appeals ruled that the defendant's fourth amendment rights had not been not abridged.<sup>39</sup> The *Crowder* court used language from *Schmerber* to justify its decision to extend the reasonableness framework into the new context of court-ordered surgical intrusions: "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."<sup>40</sup> The court of appeals concluded that surgical intrusions should be allowed if a court finds:

- (1) the evidence sought was relevant, could have been obtained in no other way, and there was probable cause to believe that the operation would produce it;
- (2) the operation was minor, was performed by a skilled surgeon, and every possible precaution was taken to guard against any surgical complications, so that the risk of permanent injury was minimal;
- (3) before the operation was performed the District Court held an adversary hearing at which the defendant appeared with counsel;
- (4) thereafter and before the operation was performed the defendant was afforded an opportunity for appellate review by this

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<sup>33</sup> *Schmerber*, 384 U.S. at 768. In determining that the blood test was reasonable, the *Schmerber* Court reasoned that the test was performed by a hospital physician within accepted medical practices, and that the test was effective, routine, and involved "virtually no risk, trauma, or pain." *Id.* at 771.

<sup>34</sup> The Court's holding in *Breithaupt v. Abram*, 352 U.S. 432 (1957), permitting results from blood samples to be used in evidence, necessitated rejection of *Schmerber*'s argument under the due process clause. *Schmerber*, 384 U.S. at 760.

<sup>35</sup> *Schmerber*, 384 U.S. at 772.

<sup>36</sup> See *infra* note 60 and accompanying text.

<sup>37</sup> 543 F.2d 312 (D.C. Cir. 1976)(en banc), *cert. denied*, 429 U.S. 1062 (1977).

<sup>38</sup> *Id.* at 313.

<sup>39</sup> *Id.* at 316.

<sup>40</sup> *Id.* (quoting *Schmerber*, 384 U.S. at 768).

court.<sup>41</sup>

#### IV. THE SUPREME COURT'S DECISION

In *Winston v. Lee*, the United States Supreme Court unanimously affirmed the appellate court's decision holding that to compel surgery would be an unreasonable search under the fourth amendment and would violate Lee's right to be secure in his person.<sup>42</sup> Justice Brennan delivered the opinion of the Court. He relied heavily on the analytic framework of *Schmerber* in determining the constitutionality of state compelled surgical intrusions. Justice Brennan found the procedure in *Winston* to be an example of the "more substantial intrusion" cautioned against in *Schmerber*.<sup>43</sup>

Justice Brennan stated that compelling surgery may be unreasonable even if criminal evidence would likely be produced because it implicates such high privacy and security expectations.<sup>44</sup> He determined, further, that "reasonableness" depends upon a case-by-case approach in which an individual's privacy and security interests are balanced against society's interest in performing the procedure in order to gain evidence to attempt to determine more fairly guilt or innocence.<sup>45</sup>

Justice Brennan stated that the lower courts had properly applied the *Schmerber* balancing test.<sup>46</sup> In particular, he reasoned that the vast medical uncertainties<sup>47</sup> and severe intrusion upon the privacy and bodily integrity interests that would result from this surgery clearly outweighed the Commonwealth's need to retrieve the bullet.<sup>48</sup> Justice Brennan remarked that use of a general anesthetic without the patient's consent and searching beneath the suspect's

<sup>41</sup> *Id.* at 316.

<sup>42</sup> *Winston*, 105 S. Ct. at 1614.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1616. Justice Brennan stated that "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." *Id.*

<sup>45</sup> *Id.* More specifically, the factors determining "reasonableness" include: the level of the procedure's threat to the individual's safety; the extent of intrusion upon the individual's dignity, privacy, and bodily integrity; and the community's desire to accurately determine guilt or innocence. *Id.* at 1617-18.

<sup>46</sup> *Id.* at 1620.

<sup>47</sup> *Id.* at 1618-19. Medical evidence in the record revealed among other things, disputes about the depth of the bullet, the size of the incision that would be required to remove the bullet and the length of the operation. *Id.*

<sup>48</sup> *Id.* at 1618-19. There were disputes about the probative value of the bullet because markings can not always be matched successfully to the weapon, and petitioner had other valuable evidence against the suspect. *Id.* at 1619 n.10. See also *infra* notes 62 & 79 and accompanying text.

skin for evidence of a crime "involves a virtually total divestment of respondent's ordinary control."<sup>49</sup> The Court stated that, notwithstanding the bullet, there should be sufficient evidence to prove that Lee was the assailant.<sup>50</sup>

Justice Brennan noted that in cases with lesser expectations of privacy,<sup>51</sup> or where minimal intrusions on privacy interests are involved in the search,<sup>52</sup> the Supreme Court has less stringently applied the fourth amendment's protections.<sup>53</sup> Lastly, concerning the "reasonableness" of fourth amendment searches, Justice Brennan suggested 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.'"<sup>54</sup>

Justices Blackmun and Rehnquist concurred in the judgment, and Chief Justice Burger concurred in a brief separate opinion.<sup>55</sup> Chief Justice Burger stated that he joined because he interpreted Justice Brennan's opinion as not preventing reasonable individual detentions if bodily functions may disclose internally secreted con-

<sup>49</sup> *Winston*, 105 S. Ct. at 1619. Despite this comment, Justice Brennan does not propose a bright-line rule whereby all surgery requiring use of a general anesthetic would be per se unreasonable. See *infra* note 61 and accompanying text. At least one state has proposed that all court-ordered surgeries are per se unreasonable. See *infra* note 63 and accompanying text. Lower courts tend to focus on particular facts and circumstances of each case. See *infra* note 60 and accompanying text.

<sup>50</sup> *Winston*, 105 S. Ct. at 1619. See also *infra* note 79 and accompanying text.

<sup>51</sup> 105 S. Ct. at 1620. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978) (affirmed a refusal, during a criminal trial, to suppress evidence seized in an automobile in which petitioners had been passengers); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (routine inventory search of defendant's locked and impounded automobile did not involve "unreasonable" search in violation of fourth amendment).

<sup>52</sup> *Winston*, 105 S. Ct. at 1620. See, e.g., *United States v. Hensley*, 105 S. Ct. 675 (1985) (investigatory stop of defendant based on police "wanted flyer" was constitutionally reasonable, and police were entitled to seize evidence in plain view, arrest passenger and search the passenger compartment); *Dunaway v. New York*, 442 U.S. 210-11 (1979) (seizure without probable cause violated the fourth amendment and, therefore, rendered murder confession inadmissible following the seizure and interrogation); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (Mexican patrol vehicle which stopped a car and questioned the passenger's immigration status contravened the fourth amendment where occupants' apparent Mexican ancestry was the sole basis of suspicion); *Adams v. Williams*, 407 U.S. 143 (1972) (officer justifiably took a loaded gun from the defendant's waistband after he rolled window down rather than complying with the officer's request to open the door where the officer's informant previously advised him that the defendant possessed narcotics and a gun on his waist); *Terry v. Ohio*, 392 U.S. 1 (1968) (police officer acted reasonably in seizing the defendant in order to search by patting down outer clothing and then removing weapons based on the officer's hypothesis that the defendant and his companion were contemplating robbery).

<sup>53</sup> *Winston*, 105 S. Ct. at 1620.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1620 (Burger, C.J., concurring).

traband materials.<sup>56</sup>

#### V. ANALYSIS OF WINSTON

The Court's decision to apply the *Schmerber* "reasonableness" test to surgical intrusions was well-founded. In *Schmerber*, the Court balanced the procedure's threat to the suspect's safety and health and the intrusiveness upon the suspect's dignitary interest in personal privacy and bodily integrity against the community's evidentiary interest in more fairly and accurately determining guilt or innocence.<sup>57</sup> The competing interests that arise in extracting blood from a suspect are similarly raised when a suspect undergoes surgery for the removal of bullets. In *Winston*, the Court balanced the competing interests of the suspect and the state and concluded that the state's arguments concerning its evidentiary need for the bullet inside the respondent were not compelling.<sup>58</sup> By adopting a balancing test, however, lower authorities will not be precluded from ruling that a state's need for a bullet in similar settings outweighs the suspect's fourth amendment interests.

One possible criticism of the *Winston* decision is that it is too fact-specific. The decision arguably may not lend much precedential authority to scenarios different from the one in *Winston*. For example, a lower court would not be prohibited by the decision in *Winston* from enabling a state to compel involuntary surgical removal of a bullet from a defendant where it is lodged immediately under the surface of the skin. As the *Winston* Court noted, however, weighing the states' evidentiary needs against an individual's privacy interests under the fourth amendment provides few categorical answers.<sup>59</sup> The Court, therefore, wisely refrained from attempting to establish such categories.

The challenge of providing categories as guides for other authorities is illustrated by the variant decisions reached by lower courts. Courts from at least eleven states and the District of Columbia have ruled on the question of court-ordered surgery to recover evidence for criminal prosecutions.<sup>60</sup> As is suggested by the split in

<sup>56</sup> *Id.* (Burger, C.J., concurring). See *infra* note 67 and accompanying text.

<sup>57</sup> *Schmerber*, 384 U.S. at 766-72.

<sup>58</sup> *Winston*, 105 S. Ct. at 1619.

<sup>59</sup> *Id.* at 1616-17. More specifically, Justice Brennan stated, "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." *Id.*

<sup>60</sup> Several courts have permitted court-ordered surgery. *Ex parte Johnson*, 452 So. 2d 888 (Ala. Crim. App. 1984); *Hughes v. United States*, 429 A.2d 1339 (D.C. 1981) (trial court order granting search warrant for removal of three objects thought to be bullets shot during armed robbery at defendant was proper under search warrant statute); *Doe*

these courts' decisions, providing a uniform constitutional standard may be extremely difficult.<sup>61</sup> The Court in *Winston* recognizes this difficulty and its decision enables lower authorities to apply the "reasonableness" framework on a case-by-case basis.

Granting lower authorities the freedom to make determinations on a case-by-case approach is desirable for several reasons. Trial

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v. State, 409 So. 2d 25 (Fla. Dist. Ct. App. 1982)(accused's right to privacy and freedom from bodily intrusion unabridged by court-ordered surgical removal of bullet from the accused's leg using local anesthetic where the risk of permanent injury was low, pain would be minimal and the bullet itself was corroborative evidence); *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972), cert. dismissed, 410 U.S. 975 (1973)(where neither danger to prisoner's life nor a constitutional violation is involved, evidence within a prisoner's body may be removed); *Allison v. State*, 129 Ga. App. 364, 199 S.E.2d 587 (1973), cert. denied, 414 U.S. 1145 (1974)(surgical removal of superficially lodged bullet from robbery suspect did not violate his constitutional rights); *Hughes v. State*, 56 Md. App. 12, 466 A.2d 533 (1983)(surgical extraction of bullets was proper where comparison of markings was the sole substantive evidence, surgery was "minor," the defendant was represented by counsel and had full adversary hearing and appeal prior to surgery); *State v. Richards*, 585 S.W.2d 505 (Mo. Ct. App. 1979)(court-ordered surgical removal of bullet from the defendant's hip was reasonable because it did not shock the court's conscience and did not deprive the defendant of substantial constitutional rights); *State v. Lawson*, 187 N.J. Super. 25, 453 A.2d 656 (App. Div. 1982)(state may have, for use as evidence in murder prosecution, surgical removal of bullet from suspect's body); *State v. Allen*, 277 S.C. 595, 291 S.E.2d 459 (1982)("major" surgical procedures prohibit court-ordered surgical removal from defendant, but "minor" surgical procedures permit court-ordered surgical removal).

Other courts have prohibited court-ordered surgery. *Bowden v. State*, 256 Ark. 820, 510 S.W.2d 879 (1974)(fourth amendment reasonableness standard not met where major intrusion into defendant's spinal canal for a bullet would involve pain, trauma and risk of life); *People v. Browning*, 108 Cal. App. 3d 117, 166 Cal. Rptr. 293 (1980)(witnesses have same fourth amendment rights as criminal defendants against unreasonable bodily intrusions); *Adams v. State*, 260 Ind. 663, 299 N.E.2d 834 (1973), cert. denied, 415 U.S. 935 (1974)(court-ordered surgery to remove a bullet from the defendant constituted an unreasonable search); *Bloom v. Starkey*, 65 A.D.2d 763, 409 N.Y.S.2d 773 (1978)(surgery for removal of bullet held unreasonable because it was a major intrusion); *People v. Smith*, 80 Misc. 2d 210, 362 N.Y.S.2d 909 (Sup. Ct. 1974)(operation for removal of bullet would be a major intrusion on inmate's bodily dignity); *State v. Allen*, 277 S.C. 595, 291 S.E.2d 459 (1982)("major" surgery prohibited, but "minor" surgery permitted).

For a general discussion incorporating some of these cases, see Note, *Analyzing Reasonableness of Bodily Intrusions*, 68 MARQ. L. REV. 130 (1984).

<sup>61</sup> Perhaps the way to achieve a uniform standard would be to either prohibit or permit all court-ordered surgery regardless of the facts or circumstances of particular cases. In Mandell & Richardson, *Surgical Search: Removing A Scar On the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 525 (1984), the authors proposed that all surgical searches requiring a general anesthetic be held per se unreasonable and that all surgical searches requiring a local anesthetic should rebuttably be presumed unreasonable. This approach is undesirable because it would establish a static standard preventing any court-ordered surgery using a general anesthetic. There are likely to be some situations in which the state's interests are highly compelling and such presumptions would prove overly detrimental. Mandell and Richardson's bright-line proposal is, therefore, misguided.

courts have the benefit of hearing the evidence and assessing the weight and credibility of testimony. A lower court may also have a better capacity than a reviewing court to balance the suspect's fourth amendment rights against the strength of the local community's evidentiary needs in a criminal prosecution. A lower authority will have the freedom to determine, for example, whether the evidentiary value of a bullet based on a comparison of markings,<sup>62</sup> outweighs the suspect's interests where there is little other evidence.

Despite Justice Brennan's informed approach, the *Winston* decision can be criticized on several grounds. The balancing test applied in *Winston* is successful in that it provides a basic framework for lower courts. Yet, as is often the case with "reasonableness" tests, it offers little practical guidance concerning the relative weights to be assigned to each of the interests. Justice Brennan does not appear to suggest, for example, that a state is prohibited per se from compelling a surgical intrusion that requires the use of a general anesthetic.<sup>63</sup> The opinion fails to discuss at what point the state's evidentiary needs will outweigh the suspect's fourth amendment interests. The opinion, furthermore, does not address whether the heinousness of the crime committed should be considered in the balancing test. Thus, while extending great latitude to lower authorities may be wise in many ways, such freedom and flexibility could prove folly.

As a result of the openendedness of Justice Brennan's opinion, lower authorities are likely to lack consistency in their interpretation of *Winston* and in their application of the test. One court may permit a surgical intrusion using a general anesthetic over the suspect's objections because the state has little other evidence and because the crime committed was especially heinous. Another court might prohibit the same surgery under a similar set of facts, while stressing that the intrusive nature of the surgery is offensive to the suspect's dignity and privacy.

Although categorization of any "reasonableness" test is a difficult task, the Supreme Court should have attempted to provide greater guidance to lower courts to insure more consistent and uniform decisions across all jurisdictions. Providing lower courts with an idea of the relative importance of the factors in its reasonable-

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<sup>62</sup> *Winston*, 105 S. Ct. at 1619 n.10. For a discussion of a bullet's evidentiary value, see Joling, *An Overview of Firearms Identification Evidence For Attorneys I: Salient Features of Firearms Evidence*, 26 J. FORENSIC SCI. 153, 154 (1981).

<sup>63</sup> The Supreme Court of Indiana ruled that all surgical intrusions are per se prohibited in *Adams v. State*, 260 Ind. 663, 299 N.E.2d 834 (1973), cert. denied, 415 U.S. 935 (1974). See also *supra* note 61 and accompanying text.

ness test would enable lower courts to achieve faster disposition of cases such as these. The narrowness of *Winston* and the resulting flexibility may thus require future clarification by the Supreme Court when the various jurisdictions utilize differing interpretations.

Justice Brennan could have provided better guidance for lower authorities than merely a "substantial justification" requirement by clarifying what are permissible intrusions within the "reasonableness" framework. Justice Brennan required a state to have a more "substantial justification" to invade highly valued areas of personal privacy.<sup>64</sup> By failing to expand or elaborate on this test, Justice Brennan created a vague standard for lower courts to apply.

Another issue that may require future clarification by the Supreme Court is whether a suspect, in an attempt to deny the use of evidence in a criminal prosecution against him, may prevent surgery where it is recommended by a physician. It would be useful for a court, when weighing the suspect's health and safety interests, to ignore temporarily the state's interest in gathering evidence and to inquire whether a competent physician would recommend extracting such an object in the interest of the suspect's own health. This issue was not considered in *Winston*. The risks of leaving the object in the suspect's body<sup>65</sup> often may be greater than the risks undertaken in extracting the object. When a suspect tries to avoid surgery that would be in the interest of his own health in order to deprive the state from obtaining corroborative evidence for a criminal prosecution, the state should be permitted to compel surgery.

While the *Schmerber* analysis applied in *Winston* provides authorities with a workable standard, the Court could have found additional support for employing a "reasonableness" test by considering the body cavity search line of cases. Similar competing interests between individual bodily privacy and legitimate governmental objectives emerge in both body cavity and surgical intrusion cases. Body cavity search cases frequently arise in the contexts of prison body searches<sup>66</sup> and alimentary canal drug smuggling.<sup>67</sup>

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<sup>64</sup> *Winston*, 105 S. Ct. at 1620.

<sup>65</sup> For example, decomposition of a lead foreign body could lead to symptoms of plumbism or lead poisoning. See Cagin, Diloy-Puray, & Westerman, *Bullets, Lead Poisoning & Thyrotoxicosis*, 89 ANNALS INTERNAL MED. 509 (1978). For a further discussion, see Switz, Elmorshidy, & Deyerle, *Bullets, Joints & Lead Intoxication*, 136 ARCH. INTERNAL MED. 939 (1976).

<sup>66</sup> In prison body searches, corrections officials routinely conduct visual body cavity examinations of detainees following contact visits. Contact visits are visits between detainees and persons outside the institution. See *Bell v. Wolfish*, 441 U.S. 520, 558 n.39 (1978).

<sup>67</sup> In alimentary canal drug smuggling, customs officials often detain those suspected

The leading Supreme Court case on prison body searches<sup>68</sup> is *Bell v. Wolfish*,<sup>69</sup> in which pretrial detainees challenged, in part, body cavity searches following contact visits. In holding that such body cavity searches are not unreasonable, the Court employed a balancing test similar to the one adopted in *Winston*, weighing the prison's security interests against the detainee's privacy interests. The *Wolfish* Court recognized similarly that a fourth amendment "reasonableness" test is incapable of mechanical application.<sup>70</sup> The Court reasoned that the effectiveness of the search for security and deterrence outweighed the inmates' rights against invasion of personal privacy.<sup>71</sup>

Alimentary canal smuggling cases often concern the sanctity and dignity of an individual's body much like surgical removal cases. In deciding alimentary canal search cases, courts often utilize a balancing test between public and individual interests.<sup>72</sup> In *United States v. Montoya De Hernandez*,<sup>73</sup> the defendant argued that her detention at an airport by customs officials, who suspected her of smuggling narcotics in her alimentary canal, violated her fourth amendment rights because the officials did not have a "clear indication"<sup>74</sup> of smuggling at that time. In holding that the officials were justified in detaining the respondent at the border, the Court applied a "reasonable suspicion" threshold standard in its balance of

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of "balloon swallowing." Balloon swallowing is the practice of ingesting balloons or similar containers filled with narcotics into one's alimentary canal for the purpose of smuggling it into the country. See *United States v. Montoya De Hernandez*, 105 S. Ct. 3304 (1985).

The Supreme Court decided its first alimentary canal search case, *United States v. Montoya De Hernandez*, 105 S. Ct. 3304 (1985), in the same term as, but subsequent to *Winston v. Lee*. The *Montoya De Hernandez* decision thus could not have been used as additional support for employing a "reasonableness" test by Justice Brennan in the *Winston* decision. It is discussed in this Note because it exemplifies the use of a balancing test within the similar context of alimentary canal searches, and Chief Justice Burger's brief concurrence touched on this issue. *Winston*, 105 S. Ct. at 1020 (Burger, C.J., concurring).

<sup>68</sup> See Note, *Constitutional Limitations on Body Searches in Prisons*, 82 COLUM. L. REV. 1033 (1982), for a detailed analysis of prison body searches.

<sup>69</sup> 441 U.S. 520 (1979).

<sup>70</sup> *Id.* at 559. Justice Marshall stated, "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Id.*

<sup>71</sup> *Id.* at 560.

<sup>72</sup> See, e.g., *United States v. Mosquera-Ramirez*, 729 F.2d 1352 (11th Cir. 1984) (twelve hour detention until defendant discharged stomach contents was not unreasonable where the defendant refused to consent to an x-ray search and reasonable suspicion standard was met).

<sup>73</sup> 105 S. Ct. 3304 (1985).

<sup>74</sup> See *Schmerber*, 384 U.S. at 769, from which the "clear indication" language is drawn.

state and individual interests.<sup>75</sup>

In *Winston*, unlike *Montoya De Hernandez*, the Court applied a "probable cause" rather than a "reasonable suspicion" threshold standard.<sup>76</sup> The Court recognized that the highly intrusive nature of surgical removal creates a greater privacy interest for the individual than a less intrusive alimentary canal search in which an individual is detained by officials only until the evidence is recovered through the detainee's natural bodily functions. Despite the different standards and degrees of intrusiveness, however, both body cavity search and involuntary surgical removal cases employ "reasonableness" tests to balance the competing interests of the individual and the state. Justice Brennan, therefore, could have looked to body cavity search cases for further support of his decision.

Despite some of the opinion's shortcomings, given the particular facts in *Winston*,<sup>77</sup> the Supreme Court's decision was appropriate for several reasons. First, the difference of opinion among the medical experts<sup>78</sup> concerning the surgical risks indicated that surgery may have been a threat to Lee's health. Second, the surgery probably would not have been recommended independently as in the suspect's best interests. Third, the Commonwealth had other significant evidence without the bullet to use in prosecuting the suspect.<sup>79</sup>

## VI. CONCLUSION

In *Winston v. Lee*, the United States Supreme Court reached a proper decision by extending the *Schmerber* framework to the context of surgical intrusions. Justice Brennan, writing for the Court, justifiably weighed the competing interests between the individual's right to personal privacy and bodily integrity against the state's need to gather evidence before holding that the suspect's fourth amendment rights would be violated if he were forced to submit to the surgical procedure.

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<sup>75</sup> The Court in *Montoya De Hernandez* expressed no views on the levels of suspicion needed for strip, body cavity, or involuntary x-ray searches at the border. 105 S. Ct. at 3311 n.4.

<sup>76</sup> The Court stated, "The Commonwealth plainly had probable cause to conduct the search." *Winston*, 105 S. Ct. at 1618.

<sup>77</sup> See *supra* notes 7-25 and accompanying text.

<sup>78</sup> *Winston*, 105 S. Ct. at 1617-18. See *supra* note 47 and accompanying text.

<sup>79</sup> 105 S. Ct. at 1619. The Commonwealth has the following potential evidence: the victim's spontaneous identification of Lee at the hospital, proof that Lee was found a few blocks from the incident shortly afterward and proof that the bullet location correlates with the victim's report. *Id.*

The Court adopted a flexible standard for lower authorities to apply on a case-by-case approach depending upon the particular facts and circumstances at hand. This flexibility is desirable to the extent that trial courts capably can weigh and assess the credibility of evidence and testimony to determine whether a "substantial justification" exists to compel surgery under the facts of a particular case. At the same time, however, this flexibility may lead to inconsistent results among the lower courts. In order to prevent abuses of discretion and inconsistency the Court should have clarified the weight that should be given to each of the factors of the "reasonableness" test.

JAY A. GITLES