# COURT OF APPEALS OF NEW YORK

People v. Mothersell[1]
(decided April 1, 2010)

Robert Mothersell was convicted of criminal possession of a controlled substance in the fifth degree after officers recovered cocaine during a search conducted pursuant to the issuance of an all-persons-present warrant.[2] At trial, Mothersell moved to suppress the evidence recovered from his person alleging that the search and seizure conducted violated his rights[3] under the Fourth Amendment to the United States Constitution and article I, section 12 of the New York State Constitution.[4] The trial court denied the motion to suppress and the decision was affirmed on appeal.[5] Ultimately, the New York Court of Appeals reversed the decisions of the lower courts, granted the motion to suppress the evidence, and dismissed the indictment.[6]

The trial court denied the motion to suppress on the basis of the sole affidavit which an officer submitted in support of the warrant application.[7] The affidavit described two controlled purchases of cocaine, which known and reliable informants observed outside of the subject premises.[8] The affidavit described a purchase from a man

[1] 926 N.E.2d 1219 (N.Y. 2010).

[2] *Id.* at 1221.

[3] *Id.*

[4] The United States Constitution and the New York State Constitution state:

> 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; N.Y. CONST. art. I, § 12.

[5] People v. Mothersell (*Mothersell II*), 873 N.Y.S.2d 406, 408 (App. Div. 4th Dep't 2009).

[6] *Mothersell*, 926 N.E.2d at 1226.

[7] *Id.* at 1221-22.

[8] *Id.* at 1221. The subject premises were "the first floor front apartment at 114 Isabella Street, a two-story residential building." *Id.* The "two-prong *Aguilar-Spinelli* test . . . re-

named "Tom" on February 2, 2006, and a second purchase from an unknown male during the week of February 25, 2006.[9] Relying on these transactions, the court found that there "was probable cause established to believe that the residence of 114 Isabella Street, First Floor Front Apartment, was being used for the sale and distribution of drugs . . . [and that] anyone present therein was involved in the ongoing illegal activity."[10] As a result, the court stated the affidavit satisfied the standard for an all-persons-present warrant set forth in *People v. Nieves*.[11]

Additionally, due to an unresolved factual dispute, the trial court conducted an independent hearing to determine whether the search of the defendant constituted a mere strip search, as the People claimed, or a more intrusive body cavity search, as the defendant claimed.[12] A detective who conducted the search testified at the hearing, stating that he searched the defendant pursuant to the authority he understood the warrant to convey.[13] The detective participated in "hundreds of all-persons-present warrants and [testified] that persons were routinely strip-searched pursuant to such warrants and required to facilitate the examination of their anal and genital cavi-

quires a search warrant application to demonstrate the veracity or reliability of the source of the information and the basis of the informant's knowledge." People v. Williams, 726 N.Y.S.2d 740, 743 (App. Div. 3d Dep't 2001). *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

[9] *Mothersell*, 926 N.E.2d at 1221.

[10] *Id.*

[11] 330 N.E.2d 26, 34 (N.Y. 1975) (stating that all-persons-present warrants may be issued if "the facts before the issuing Judge at the time of the warrant application, and reasonable inferences from those facts, . . . establish probable cause to believe that the premises are confined to ongoing illegal activity and that every person within the orbit of the search possesses the articles sought").

[12] *Mothersell*, 926 N.E.2d at 1222. *See* People v. Hall, 886 N.E.2d 162, 164-65 (N.Y. 2008).

> There are three distinct and increasingly intrusive types of bodily examinations undertaken by law enforcement . . . [a] "strip search" requires the arrestee to disrobe so that a police officer can visually inspect the person's body. The second type of examination–a "visual body cavity inspection"–occurs when a police officer looks at the arrestee's anal or genital cavities, usually by asking the arrestee to bend over; however, the officer does not touch the arrestee's body cavity. In contrast, a "manual body cavity search" includes some degree of touching or probing of a body cavity that causes a physical intrusion beyond the body's surface.

*Id.*

[13] *Mothersell*, 926 N.E.2d at 1222.

ties."[14] At the time the warrant was executed, six or seven individuals were present in the apartment and were subjected to a search.[15] The detective and another officer conducted the search of the defendant in a bedroom with no one else present.[16] During the search, the defendant "was required to lift his scrotum and then to bend over to expose his anal cavity. The incriminating evidence was discovered in the course of the latter exercise."[17]

Mothersell also testified on his own behalf at the hearing.[18] Mothersell testified that when he heard the officers enter the apartment, and a gunshot fired, he hid in the bedroom and pretended to sleep.[19] When the officers entered the bedroom, the defendant was thrown onto the floor and "[h]is hands were bound behind his back with plastic."[20] Twenty minutes later, the officers returned, removed the plastic fastening, and began the search.[21] Mothersell complied with the officers' requests to "remove his clothing and to lift his genitals," and the officers then "commanded [him] to turn around and spread his cheeks."[22] Mothersell alleged the officers then grabbed his arm and moved him into a position he could not escape from.[23] Mothersell observed one officer grab a coat hanger off the bed and the "officer [then] ran the coat hanger down between the cheeks of his buttocks until a plastic bag fell onto the floor."[24] Notably, the detective who testified at the hearing was not questioned about whether he used a coat hanger to remove the contraband from Mothersell's person.[25] However, two months after the hearing the officer remembered that he used to coat hanger to remove the drugs.[26]

The trial court denied the motion to suppress the evidence,

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[14] *Id.*

[15] Respondent's Brief, *Mothersell*, 926 N.E.2d 1219 (No. 2010-0043), 2009 WL 6065729, at *4.

[16] *Id.*

[17] *Mothersell*, 926 N.E.2d at 1222.

[18] Brief for Appellant, *Mothersell*, 926 N.E.2d 1219 (No. 2010-0043), 2009 WL 6065728, at *11.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Brief for Appellant, *supra* note 18.

[24] *Id.*

[25] *Id.* at n.3.

[26] *Id.*

stating that although the search at issue constituted more than a mere strip search—it involved a more intrusive visual body cavity search—the all-persons-present warrant authorized the search and the search was reasonable.[27] On appeal, the defendant contended that the court lacked sufficient evidence for the issuance of an all-persons-present warrant and, in the alternative, that even if the court properly issued the warrant, the warrant failed to authorize the body cavity search the officers performed.[28] The appellate division affirmed the decision of the trial court, stating that "the warrant application established probable cause to believe that the apartment was being used for the sale of controlled substances and that anyone present was involved in the ongoing illegal activity."[29] The New York Court of Appeals reversed, holding that the all-persons-present warrant lacked validity and that the "extraordinary intrusions could not have been within any authority the warrant was capable of conferring."[30] Thus, the court granted the defendant's motion to suppress the cocaine and dismissed the indictment.[31]

In making its determination, the court relied heavily on the decision in *Nieves*, which upheld the constitutionality of all-persons-present warrants in the state of New York as well as delineated a standard for the issuance of all-person-present warrants.[32] Relying on *Nieves*, the court determined that the all-persons-present warrant at issue failed to meet the requisite standard.[33] The warrant described only two isolated purchases of the controlled substance which the court stated "cannot suffice to show that a residential location has been given over entirely to the drug trade, much less that every person at the location is probably a participant in drug trafficking."[34] Further, the warrant application failed to state whether "any innocent use of the premises had been observed" or provide any information regarding the behavior of persons normally present at the time proposed for execution of the warrant.[35] The court further recognized

[27] *Mothersell*, 926 N.E.2d at 1222.
[28] *Id.* at 1221.
[29] *Id.* at 1222 (quoting *Mothersell II*, 873 N.Y.S.2d at 407).
[30] *Id.* at 1226.
[31] *Id.*
[32] *Mothersell*, 926 N.E.2d at 1223.
[33] *Id.* at 1225.
[34] *Id.*
[35] *Id.*

that "the only statement . . . purporting to justify the issuance of an all-persons-present warrant [was] the one in which the deponent[,] [the officer who applied for the issuance of a warrant,] offer[ed] on the basis of her past experience that it is 'not uncommon that persons found in the subject residence could reasonably be expected to conceal cocaine.' "[36] Under *Nieves*, the application for an all-persons-present warrant "requires a showing of facts from which it can be inferred that it is substantially probable that any persons present at the warrant's execution will have the sought evidence of the crime upon them."[37] Therefore, the court held the all-persons present warrant invalid.[38]

Although the court's determination of the warrant's invalidity alone compelled suppression of the evidence, the court decided to address the defendant's second contention, which stated that even if the court found the all-persons-present warrant valid, the warrant failed to authorize the officers to conduct a strip search of the defendant.[39] The court relied on prior precedent in which it held that:

> [A] post-arrest strip search must be based upon reasonable suspicion that an arrestee is hiding contraband beneath his or her clothing, and that a search involving visual examination of an arrestee's anal and genital cavities–a distinctly elevated level of intrusion, which must be separately justified–may not be performed except upon a "specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity."[40]

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[36] *Id.*

[37] *Mothersell*, 926 N.E.2d at 1225.

[38] *Id.* "Our conclusion that this all-persons-present warrant is not valid should not be taken as signifying a departure from *Nieves*'s initial holding that warrants of this sort are not categorically unconstitutional." *Id.*

> All-persons-present warrants for drug searches have been approved where the supporting affidavits supply more detailed information regarding the experience and training of the officer seeking the warrant, including that, in the officer's experience, persons engaged in the sale of drugs often work in concert with others and that those engaged in such activities frequently maintain residences separate and apart from the location where the drug-related activity is conducted.

*Id.* at 1227 (Read, J., concurring).

[39] *Id.* at 1225 (majority opinion).

[40] *Mothersell*, 926 N.E.2d at 1225 (quoting *Hall*, 886 N.E.2d at 168). *See* United States v.

Thus, in order for the search to be considered valid, there must exist "specific facts to support a reasonable suspicion that a particular person has secreted contraband beneath his or her clothes or in a body cavity."[41] While a warrant must be obtained in order to permit the search of persons, it is also required to limit the scope of the officers conducting the search because without such limitations, a warrant would "afford plenary authority for the inspection of the most private recesses of a person's anatomy."[42] The court concluded that "[s]uch a predicate did not exist at the time that the present warrant was sought and, accordingly, these extraordinary intrusions could not have been within any authority the warrant was capable of conferring."[43]

The United States Supreme Court decided the validity of all-persons-presents warrants in *Ybarra v. Illinois*.[44] In *Ybarra*, the Court addressed the constitutionality of an Illinois statute, similar to New York's Criminal Procedure Law Statute,[45] which authorized law enforcement officers to "search any person found on premises being searched pursuant to a search warrant, to protect themselves from attack or to prevent the disposal or concealment of anything described in the warrant."[46] The application for the warrant stated that an in-

Arvizu, 534 U.S. 266, 273 (2002) (stating that a court must make a reasonable suspicion determination based on the particular circumstances of the case). In order to support a reasonable suspicion, "officers [may] draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them." *Id.* *See* People v. Cantor, 324 N.E.2d 872, 877 (N.Y. 1975) ("Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man . . . to believe criminal activity is at hand. To justify such an intrusion, the police officer must indicate specific and articulable facts which, along with any logical deductions, reasonably prompted that intrusion.") (citations omitted); *see generally* People v. McIntosh, 755 N.E.2d 329, 331 (N.Y. 2001) ("Although police officers have 'fairly broad authority' to approach and pose questions, they may not do so on mere 'whim or caprice'; the request must be based on 'an articulable reason not necessarily related to criminality.' " (quoting People v. Hollman, 590 N.E.2d 204, 209 (N.Y. 1992))).

[41] *Mothersell*, 926 N.E.2d at 1226.

[42] *Id.*

[43] *Id.*

[44] 444 U.S. 85 (1979).

[45] N.Y. CRIM. PROC. LAW § 690.15(2) (McKinney 2010) ("A search warrant which directs a search of a designated or described place, premises or vehicle, may also direct a search of any person present thereat or therein.").

[46] *Ybarra*, 444 U.S. at 87 (footnote omitted). *Compare* N.Y. CRIM. PROC. LAW § 690.15(2) (McKinney 2010), *with* 725 ILL. COMP. STAT. ANN. 5/108-9 (West 2010) ("In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time: (a) To protect himself from attack, or (b) To prevent the

formant, known and reliable to the police, observed tin-foil packages of heroin at Aurora Tap Tavern behind the bar and on the bartender's person.[47] Pursuant to the application, the judge issued a warrant authorizing police to search the tavern and the bartender for evidence that may show possession of a controlled substance, namely heroin.[48]

The officers executed the warrant the same day, and upon entering the tavern explained to all those present their purpose and stated that they would conduct a standard search of each individual present for weapons.[49] The officers patted down the defendant, Ybarra, and felt something like "a cigarette pack with objects in it."[50] Once the officer patted down the rest of the customers, he returned to Ybarra, conducted another pat down, and removed the cigarette pack from Ybarra's pants pocket.[51] The cigarette pack contained "six tin-foil packets containing a brown powdery substance which later turned out to be heroin."[52]

Subsequently, the grand jury indicted Ybarra for the possession of heroin, a controlled substance.[53] Ybarra filed a motion to suppress the evidence the officer seized from his person.[54] The trial court denied the motion, stating that the officers appropriately conducted the search pursuant to Illinois statute in order to "prevent the disposal or concealment of [the] things particularly described in the warrant."[55] As a result, the court, without a jury, convicted the defendant of possession of heroin.[56] On appeal, the appellate court affirmed the decision, stating that the statute authorized "the search of persons found on premises described in a warrant only if there is some showing of a connection with those premises, [and] that the police officer reasonably suspected . . . that the person searched would destroy or conceal items described in the warrant."[57] The Illinois Su-

disposal or concealment of any instruments, articles or things particularly described in the warrant.").

47 *Ybarra*, 444 U.S. at 87-88.

48 *Id.* at 88.

49 *Id.*

50 *Id.*

51 *Id.* at 89.

52 *Ybarra*, 444 U.S. at 89.

53 *Id.*

54 *Id.*

55 *Id.* at 89 (quoting 725 ILL. COMP. STAT. ANN. 5/108-9 (b) (West 2010)).

56 *Id.*

57 *Ybarra*, 444 U.S. at 89 (internal citations omitted).

preme Court denied leave for appeal and the United States Supreme Court granted certiorari.[58]

The United States Supreme Court recognized that the warrant issued by the Magistrate failed to "authorize the search of Ybarra or of any other patron found on the premises," and therefore, the officers lacked sufficient probable cause to search Ybarra.[59] The Court stated that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."[60] Thus, because the searching officers lacked the requisite probable cause to search Ybarra, "the searches of Ybarra and the seizure of what was in his pocket contravened the Fourth . . . Amendment[]."[61] Therefore, the Court reversed the judgment and remanded to the Appellate Court of Illinois for further proceedings.[62]

In the dissent, Chief Justice Burger, Justice Blackmun, and Justice Rehnquist classified the majority's holding "as but a further hindrance on the already difficult effort to police the narcotics traffic."[63] The dissent recognized that because search warrants are "an anticipatory authorization," requiring a warrant to name all persons that the officers intend to search prior to execution of the warrant frustrates the purpose of a search, and therefore a warrant must allow police officers "enough flexibility to react reasonably to whatever situation confronts them when they enter the premises."[64] The dissent would therefore hold that the limited search of Ybarra, under the suspicions and inferences of the officers conducting the search, "was reasonable . . . [and] [t]he justification for the intrusion was linked closely to the terms of the search warrant."[65]

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[58] *Id.* at 90.

[59] *Id.* at n.2.

[60] *Id.* at 91.

[61] *Id.* at 96.

[62] *Ybarra*, 444 U.S. at 96.

[63] *Id.* at 96-97 (Burger, C.J., dissenting).

[64] *Id.* at 102. "An absolute bar to searching persons not named in the warrant would often allow a person to frustrate the search simply by placing the contraband in his pocket." *Id.*

[65] *Id.* at 109. The Court adopted the *Terry v. Ohio* test which provided "a flexible model balancing the scope of the intrusion against its justification," stating that the test for reasonableness involved a " 'balancing [of] the need to search [or seize] against the invasion which the search [or seizure] entails.' " *Ybarra*, 444 U.S. at 105 (quoting *Terry*, 392 U.S. 1, 21 (1968)).

The United States Supreme Court, in *Bell v. Wolfish*,[66] addressed the constitutionality of a correctional facility policy which required guards to inspect an inmate's body cavity as part of a strip-search conducted after each visit with an individual from outside of the facility.[67] Although the district court upheld the constitutionality of the strip-search procedure, the court mandated a showing of probable cause that the inmate was concealing contraband to justify a more intrusive body cavity search.[68] The court of appeals affirmed, stating that the "gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility."[69] Although the Supreme Court admitted that such a "practice instinctively gives us the most pause," the Court held that the practice did not violate the Fourth Amendment because it believed the searches under the circumstances were not unreasonable.[70]

The Metropolitan Correctional Center ("MCC") was constructed in 1975 in order to house persons "who are being detained in custody prior to trial for federal criminal offenses."[71] The facility employed a practice of requiring a strip-search and a body cavity search of each inmate after they had contact with individuals from outside the correctional facility.[72] In defense of their procedure, officials argued that "visual cavity searches were necessary not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the institution."[73] In analyzing whether this practice was constitutional, the Court "balanc[ed] . . . the need for the particular search against the invasion of personal rights that the search entails."[74] In order to determine whether the search was reasonable under the Fourth Amendment, the Court considered several factors, including "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in

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66 441 U.S. 520 (1979).

67 *Id.* at 558.

68 *Id.*

69 *Id.* (quoting Wolfish v. Levy, 573 F.2d 118, 131 (2d Cir. 1978)).

70 *Id.*

71 *Bell*, 441 U.S. at 524.

72 *Id.* at 558.

73 *Id.*

74 *Id.* at 559.

which it is conducted."[75] Because the facility is "fraught with serious security dangers" and smuggling is a common occurrence, which is normally attempted by concealing items in body cavities, the Court concluded that such searches were reasonable.[76] Although these searches invaded the privacy of inmates, the issue the Court faced was "whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause."[77] The Court concluded that they could and reversed the decision of the lower courts.[78]

Justice Powell dissented with respect to the Court's holding regarding body cavity searches.[79] Justice Powell reasoned that because body cavity searches require a serious intrusion on one's privacy, "some level of cause . . . should be required to justify the anal and genital searches."[80] Justice Marshall also dissented, stating that "the body-cavity searches of MCC inmates represent one of the most grievous offenses against personal dignity and common decency."[81] In Justice Marshall's view, a body cavity search, which "is so unnecessarily degrading," invokes a "compelling-necessity standard," which in his opinion could not be met in this case.[82] Lastly, Justice Stevens, with whom Justice Brennan joined, dissented, stating the body cavity search was the least justifiable policy challenged.[83] Justice Stevens stated: "[a]bsent probable cause to believe that a specific individual detainee poses a special security risk, none of these practices would be considered necessary, or even arguably reasonable . . . ."[84]

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[75] *Id.*

[76] *Bell*, 441 U.S. at 559.

[77] *Id.* at 560.

[78] *Id.*

[79] *Id.* at 563 (Powell, J., concurring in part and dissenting in part). Justice Powell concurred with the majority's decision except for the "discussion and holding with respect to body-cavity searches." *Id.*

[80] *Bell*, 441 U.S. at 563.

[81] *Id.* at 576-77 (Marshall, J., dissenting). Justice Marshall stated that the Court in making its determination overlooked critical facts. *Id.* at 577. Notably, inmates must wear "one-piece jumpsuits with zippers in the front," that make it almost impossible to conceal items in the vaginal or anal cavity without unzipping the jumpsuit. *Id.* Further, Justice Marshall stated that all visits are monitored from a glass-enclosed room where officers would observe such a disrobing procedure required in order to conceal the contraband. *Id.*

[82] *Bell*, 441 U.S. at 578.

[83] *Id.* at 594 (Stevens, J., dissenting).

[84] *Id.* at 595.

Similarly, the United States Supreme Court, in *United States v. Montoya de Hernandez*,[85] addressed the reasonableness and scope of a search conducted by customs officials at the Los Angeles International Airport.[86] The district court allowed the cocaine found in Hernandez's alimentary canal to be admitted into evidence and Hernandez "was convicted of possession of cocaine with intent to distribute . . . and unlawful importation of cocaine."[87] The Ninth Circuit reversed the conviction, holding that the evidence the customs officials possessed was insufficient to justify a sixteen-hour detention.[88] On review, the Supreme Court held that detaining an individual at the border "beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal."[89] Applying the reasonable suspicion standard, the Court recognized the need to balance the privacy right of the individual and the promotion of legitimate governmental interests when making decisions on less than probable cause.[90] Specifically, officials at the border must have a " 'particularized and objective basis for suspecting the particular person' of alimentary canal smuggling."[91]

In *Montoya de Hernandez*, customs officials detained Rosa Elvira Montoya de Hernandez ("Hernandez") upon her arrival in the United States from Bogota, Colombia.[92] Upon arrival, Hernandez proceeded to the customs desk where Inspector Talamantes reviewed her documents and observed that she made "at least eight recent trips to either Miami or Los Angeles."[93] Inspector Talamantes and another official questioned Hernandez concerning herself and the purpose of her trip.[94] After further questioning, officials suspected that Her-

[85] 473 U.S. 531 (1985).

[86] *Id.*

[87] *Id.* at 536.

[88] *Id.*

[89] *Id.* at 541.

[90] *Montoya de Hernandez*, 473 U.S. at 540-41.

[91] *Id.* at 541-42 (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

[92] *Id.* at 532.

[93] *Id.* at 533.

[94] *Id.* Hernandez communicated with the officials solely in Spanish, revealing that she had no family or friends in the United States. *Montoya de Hernandez*, 473 U.S. at 533. The inspectors discovered five-thousand dollars in cash, which Hernandez stated she was travelling to the United States with to purchase goods for her husband's store in Colombia. *Id.*

nandez "was a 'balloon swallower,' one who attempts to smuggle narcotics into th[e] country hidden in her alimentary canal."[95]

A female inspector conducted a "patdown and strip search" of Hernandez which revealed no contraband.[96] However, during the search, the inspector noticed a "firm fullness" in Hernandez's abdomen and that she "was wearing two pairs of elastic underpants with a paper towel lining the crotch area."[97] The inspectors obtained Hernandez's consent to take an x-ray at a hospital; however, she withdrew this consent when officials informed her she would have to be handcuffed.[98] "The inspector then gave [Hernandez] the option of returning to Colombia on the next available flight, agreeing to an x-ray, or remaining in detention until she produced a monitored bowel movement that would confirm or rebut the inspectors' suspicions."[99] At first, Hernandez chose to return to Colombia; however, the only flight was on a Mexican airline, which had a layover in Mexico City, and the airline refused to transport Hernandez without the proper visa.[100] Thus, Hernandez was detained for almost sixteen hours, refusing all offers of food and drink, and refused to use the toilet.[101] The inspectors noted that Hernandez "exhibited symptoms of discomfort consistent with 'heroic efforts to resist the usual calls of nature.' "[102] Finally, the customs officials obtained a court order which "authorized a rectal examination and involuntary x[-]ray."[103] A rectal examination, conducted by a physician, revealed a balloon containing a foreign substance.[104] Within the next four days, Hernandez passed a total of eighty-eight balloons which contained five-hundred and

Suspiciously, Hernandez only had cold-weather clothing, one high-heeled pair of shoes, and no hotel reservations. *Id.* at 533-34.

[95] *Id.* at 534.

[96] *Id.*

[97] *Montoya de Hernandez*, 473 U.S. at 534.

[98] *Id.*

[99] *Id*. at 534-35.

[100] *Id.* at 535.

[101] *Id.* ("She was told that if she went to the toilet she would have to use a wastebasket in the women's restroom, in order that female customs inspectors could inspect her stool for balloons or capsules carrying narcotics.").

[102] *Montoya de Hernandez*, 473 U.S. at 535 (quoting United States v. Montoya de Hernandez, 731 F.2d 1369, 1371 (9th Cir. 1984)).

[103] *Id*.

[104] *Id*.

twenty-eight grams of cocaine.[105]

The Court stated that "[t]he permissibility of a particular law enforcement practice is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' "[106] The Court concluded that the Government's interest in protecting the border outweighed Hernandez's interest in privacy.[107]

The leading case in New York State which delineated the standard for all-persons-present warrants is *People v. Nieves*.[108] In *Nieves*, the court convicted the defendant of attempted possession of gambling records and the promotion of gambling.[109] The defendant "was charged and convicted on the basis of evidence seized from his person pursuant to a search warrant authorizing the search of certain premises, a named individual not the defendant, and any other persons occupying said premises."[110] The defendant moved to suppress the evidence, arguing that the search warrant "did not meet the particularity requirements of the Fourth Amendment and was in fact an impermissible general warrant."[111] The court denied the motion, the appellate division affirmed, and the New York Court of Appeals reversed and set the conviction aside.[112]

In *Nieves*, the detective in charge of the investigation, a sixteen year veteran of the department who "made over two hundred ar-

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[105] *Id.* at 536.

[106] *Id.* at 537 (quoting United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983)) (citations omitted).

[107] *Montoya de Hernandez*, 473 U.S. at 540. The Court also addressed whether the detention of Hernandez was reasonably justified and concluded that although the "detention was long, uncomfortable, indeed humiliating; . . . its length and its discomfort resulted solely from the method by which she chose to smuggle illicit drugs into this country," and the detention was therefore not unreasonably long. *Id.* at 544. Justices Brennan and Marshall vehemently dissented, stating: "The nature and duration of the detention here may well have been tolerable for spoiled meat or diseased animals, but not for human beings held on simple suspicion of criminal activity." *Id.* at 550 (Brennan, J., dissenting). Further, according to the dissent, although Hernandez had already "been stripped and searched and probed, the customs officers decided about halfway through her ordeal to repeat the process . . . ." *Id.* at 547.

[108] 330 N.E.2d 26.

[109] *Id.* at 29.

[110] *Id.* (internal quotation marks omitted).

[111] *Id*. *See* U.S. CONST. amend. IV (stating in pertinent part: "no Warrants shall issue, but upon probable cause . . . particularly describing the place to be searched, and the persons or things to be seized").

[112] *Nieves*, 330 N.E.2d at 29.

rests in the illegal gambling area," obtained a search warrant which allowed any officer of the county to search, during the daytime, "El Parador Restaurant & Cocktail Lounge located at 1647 Fifth Avenue, North Bayshore, New York . . . the person of Elizar Vidal and any other person occupying said premises."[113] During the execution of the warrant, the officers discovered Elizar Vidal, Florencio Riverra, and the defendant on the premises.[114] The officers told the men to empty their pockets and "[w]hen [the] defendant complied, policy contraband was recovered from his possession," and the officers placed him under arrest.[115] The defendant moved to suppress the evidence claiming the search violated his constitutional rights.[116] The court denied the motion, which the appellate division affirmed.[117] On appeal, the defendant raised two issues: (1) that the criminal procedure law which allows the issuance of all-persons-present warrants "authorizes general searches in contravention of the Fourth Amendment and should be struck down[;]" and (2) "that the particular search of his person was unreasonable."[118]

Pursuant to the Fourth Amendment of the United States Constitution and article I, section 12 of the New York State Constitution, a warrant must describe with particularity the person to be seized.[119] However, according to section 690.15(2) of the New York Criminal Procedure Law, "[a] search warrant which directs a search of a designated or described place, premises or vehicle, may also direct a search of any person present thereat or therein."[120] The court in *Nieves* determined the constitutionality of this statute authorizing the issuance of an all-persons-present warrant.[121]

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[113] *Id.* ("The warrant was issued based upon Detective Smith's sworn warrant application . . . based upon his personal knowledge and investigation and upon information supplied by an undisclosed informant whose previously furnished information had led to arrests and convictions in the gambling field.").

[114] *Id.* at 30.

[115] *Id.*

[116] *Id.*

[117] *Nieves*, 330 N.E.2d at 30.

[118] *Id.*

[119] U.S. CONST. amend. IV; N.Y. CONST. art. I, § 12.

[120] N.Y. CRIM. PROC. LAW § 690.15(2) (McKinney 2010).

[121] *Mothersell*, 936 N.E.2d at 1223; *Nieves*, 330 N.E.2d at 33-34 ("[W]hile the instant case provides an illustration of the potential overbreadth and indefiniteness of the description 'any other person present,' if the statute's application is carefully circumscribed, . . . it need not be struck down.") (citation omitted).

The court in *Nieves* created a two-pronged test which must be satisfied in order for the court to issue an all-persons-present warrant.[122] A court is required "to probe not only the specificity of the defendant's description in th[e] warrant . . . , but also whether there was probable cause to believe that the property described in the warrant would be found on the persons so described at the specified premises."[123] Further, "the facts before the issuing Judge at the time of the warrant application, and reasonable inferences from those facts, must establish probable cause to believe that the premises are *confined* to ongoing illegal activity and that *every person within the orbit of the search possesses the articles sought*."[124] This, the court believed, would only authorize "invasions of privacy [that] will be justified by [the] discovery of the items sought from all persons present when the warrant is executed," and if this probability does not exist, "then each person subject to search must be identified in the warrant and supporting papers by name or sufficient personal description."[125]

In *People v. Hall*,[126] the court "consider[ed] whether it is constitutionally permissible for police to subject a person arrested for a drug sale to a visual body inspection followed by a body cavity search without first obtaining a warrant."[127] The court held that an officer can conduct a visual inspection only if the police officers "have a factual basis supporting a reasonable suspicion that the arres-

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[122] *Nieves*, 330 N.E.2d at 31-32.

[123] *Id.* In the particular case, the court determined that the sufficiency of the warrant would be determined by asking "whether there was probable cause to believe that each and every occupant of the El Parador at any time of day possessed the policy slips and gambling records sought under the warrant." *Id.* at 32.

[124] *Id.* at 34 (emphasis added). Further, the court delineated factors which the Magistrate must look for in the warrant application. *Id.* These factors include:

> [T]he character of the premises, for example, its location, size, the particular area to be searched, means of access, neighborhood, its public or private character and any other relevant fact. It must specifically describe the nature of the illegal activity believed to be conducted at the location, the number and behavior of persons observed to have been present during the times of day or night when the warrant is sought to be executed.

*Nieves*, 330 N.E.2d at 34.

[125] *Id.* Ultimately, the court in *Nieves* suppressed the evidence seized from his person and reversed the defendant's conviction, stating: "The warrant, because too general as to him, afforded no justification for his search." *Id.* at 35.

[126] 886 N.E.2d 162 (N.Y. 2008), *cert. denied*, New York v. Hall, 129 S. Ct. 159 (2008).

[127] *Id.* at 163.

tee has evidence concealed inside a body cavity and the search is conducted in a reasonable manner."[128] "If the visual inspection reveals the presence of a suspicious object, the police must obtain a warrant authorizing the object's removal unless there are exigent circumstances."[129]

In *Hall*, officers observed the defendant receive cash from an individual, enter a bodega, and emerge with two small white objects in his hands which he handed to the individuals waiting outside.[130] The officers believed the two small objects were crack cocaine and brought the defendant into police custody.[131] At the police station, the officer searched the defendant's clothing and found no drugs.[132] However, after placing the defendant in a private detention cell, the officers ordered the defendant to remove his clothing and the police "observed a string or piece of plastic hanging out of the defendant's rectum."[133] The officers believed the defendant placed a package of drugs into his body.[134] When ordered to remove the package, the defendant refused and the officers "proceeded to hold [the] defendant while . . . [one officer] pulled on the string and removed a plastic bag that was found to contain crack cocaine."[135]

Based on this finding, "[the] [d]efendant was indicted for criminal possession of a controlled substance in the third and fifth degrees."[136] The defendant moved to suppress the evidence, claiming that a body cavity search without a warrant violated his constitutional rights.[137] The court granted the motion and dismissed the indictment.[138] However, on appeal the court reversed the decision, stating that "the visual inspection of [the] defendant's body cavity was permissible because the police had reasonable suspicion to believe that [the] defendant had narcotics hidden inside his body and that, once the string was discovered, the police were allowed to immediately re-

[128] *Id.*
[129] *Id.* at 163-64.
[130] *Id.* at 164.
[131] *Hall*, 886 N.E.2d at 164.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Hall*, 886 N.E.2d at 164.
[137] *Id.*
[138] *Id.*

trieve the drugs without first obtaining a warrant."[139] Ultimately, the New York Court of Appeals granted the defendant's motion to suppress the evidence and dismissed the indictment.[140]

In reversing the ruling of the appellate division, the New York Court of Appeals reasoned that the motion to suppress must be granted based on constitutional precedent.[141] The court determined that:

> [A] strip search must be founded on a reasonable suspicion that the arrestee is concealing evidence underneath clothing and the search must be conducted in a reasonable manner. . . . [F]or a visual cavity inspection, the police must have a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity and the visual inspection must be conducted reasonably. If an object is visually detected . . . a warrant [must] be obtained before conducting a body cavity search unless an emergency situation exists.[142]

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[139] *Id.* The court stated:

> [F]actors that courts consider to determine reasonableness of strip searches include "defendant's excessive nervousness, unusual conduct, information showing pertinent criminal propensities, informant's tips, loose-fitting or bulky clothing, an itinerary suggestive of wrongdoing, incriminating matter discovered during a less intrusive search, lack of employment, indications of drug addiction, information derived from others arrested or searched contemporaneously, and evasive or contradictory answers to questions."

*Id.* at 176 (Ciparick, J., concurring) (quoting People v. Kelley, 762 N.Y.S.2d 438, 440 (App. Div. 3d Dep't 2003)).

[140] *Hall*, 886 N.E.2d at 169-70 (majority opinion).

[141] *Id.* at 168; Schmerber v. California, 384 U.S. 757, 772 (1966) ("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."); People v. More, 764 N.E.2d 967, 969 (N.Y. 2002) ("[T]here must exist a 'clear indication' that desired evidence will be found. In the absence of such an indication, the Fourth Amendment mandates that the police 'suffer the risk that such evidence may disappear unless there is an immediate search.' ") (quoting *Schmerber*, 384 U.S. at 770).

[142] *Hall*, 886 N.E.2d at 168. *See Schmerber*, 384 U.S. at 770.

> Search 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 requirement that a warrant be obtained is a requirement that inferences to support the search "be drawn by a

Because there were no exigent circumstances at the time of the search, once the object was visually detected, the police were required to obtain a warrant before conducting an intrusive body cavity search and physically removing the object, and that failure to do so violated the defendant's rights under the Fourth Amendment.[143]

The Fourth Amendment of the United States Constitution and article I, section 12 of the New York State Constitution require officers to obtain a warrant which states with particularity the premises and individuals sought to be searched. However, under New York's Criminal Procedure Law, the particularity requirement is expanded to include the search of all-persons-present at the premises intended to be searched. In reaching its decision, the court in *Mothersell* followed the state law in holding that the validity of an all-persons-present warrant depended on whether the expanded scope of the warrant created a substantial probability that the authorized search would justify the intrusion if the items sought were in fact discovered.

The court in *Mothersell* accurately followed the reasoning of *Ybarra*, noting that a person's mere existence at a location set forth in the warrant, where other individuals are involved in alleged criminal activity, does not provide the requisite probable cause needed to search the individual. However, the majority opinion in *Ybarra* failed to consider the policy implications of a blanket denial of all-persons-present warrants. In the dissent, however, the Justices re-emphasize the importance of authorizing all-persons-present warrants. The dissent correctly noted that police officers must have flexibility when executing a search warrant to draw reasonable inferences based on their past experiences when determining how and when to conduct such searches.

Further, as in *Nieves*, the court in *Mothersell* determined that the search conducted by the officers failed to meet the requisite standard and, thus, the court declared the search invalid as a matter of law. However, although the court in *Nieves* and *Mothersell* deemed these particular searches unconstitutional, the New York Court of

> neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

*Id.* (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)); *More*, 764 N.E.2d at 970 ("The absence of exigent circumstances dictates the conclusion that the body cavity search here was unreasonable," and therefore without a warrant the search violated the defendant's rights under the Fourth Amendment.).

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

Appeals declined to strike down the statute itself as unconstitutional. *Mothersell* leaves the holding in *Nieves* undisturbed, in that the New York Court of Appeals leaves open the possibility that under some circumstances–circumstances which the court provides no guidance in determining–an all-persons-present warrant may be deemed valid by the court. However, a major criticism of the New York Court of Appeals' decisions in *Nieves* and *Mothersell* is that the court provides little guidance to the lower courts, who actually issue these warrants, as to what type of circumstances and affidavits are in fact needed to deem the issuance and authorization of an all-persons-present warrant valid under our constitutional law.

While the court does not specifically delineate a particular set of circumstances which would satisfy the standard for an all-persons-present warrant, leaving open the possibility of conducting legal all-persons-present searches supports the public policy argument that such warrants ultimately curb and prevent the use of and trafficking of controlled substances. This further supports the argument that requiring police officers to obtain search warrants which name or describe with particularity each person who will be located at a particular premise prior to execution of the warrant would be burdensome, unrealistic, and hinder the officers from both effectively enforcing the law and promoting sound public policy. However, without particular guidance as to what may be valid, an officer and the issuing Magistrate are currently playing a guessing game. Understanding that the circumstances of *Nieves* and *Mothersell* failed to authorize the all-person-present warrant, officers and issuing Magistrates must look for something more; however, it is unclear what this something more entails.

Without proper guidance from either the United States Supreme Court or the New York Court of Appeals as to what circumstances would permit the authorization and execution of an all-persons-present warrant, the New York courts will continue to follow the precedents set in *Nieves* and *Mothersell* and determine that the warrants violate the defendant's constitutional rights. Additionally, the courts will continually leave until another day the determination of whether the statute authorizing the issuance of all-persons-present warrants is constitutional. When making this determination, the court should be weary of the policy implications of the all-persons-present warrant and the possibility of abuse. Until these issues are resolved,

the courts will continue to struggle with the constitutionality of the all-person-present warrant.

Additionally, the court in *Mothersell* struggled with determining the proper scope of searches permitted under an all-persons-present warrant. When a mere strip search is elevated to the level of a more intrusive body cavity search, protections must be in place to defend the intimate privacy interest that individual's possess in their persons. Using the factors that the majority in *Bell* delineated to balance the need of the search against the invasion of privacy rights, the search in *Mothersell* was appropriately deemed unreasonable under the circumstances.

First, the scope of the intrusion went beyond the measures necessary to ensure the safety of the officers on the scene. Second, the manner in which the search was conducted in *Mothersell* also proved unreasonable – the use of a coat hanger to extract the evidence from the defendant's anal cavity was unnecessarily degrading. Lastly, although the officers conducted the search in a room with no other individuals present, it was unreasonable for officers to handcuff the defendant with plastic and return to the room to conduct a body cavity search, because this was above and beyond what was necessary to ensure their safety. Thus, it seems clear that under this standard, the search of the defendant was correctly deemed unreasonable and a violation of the Fourth Amendment. Further, the court properly concluded that an all-persons-present warrant lacked sufficient cause to show that a specific individual, namely the defendant, posed a special risk and therefore the extent to which the search invaded Mothersell's privacy was neither necessary nor reasonable.

*Mothersell* accurately departed from the precedent set forth in *Montoya de Hernandez*, which required a balancing of the legitimate governmental interest with the intrusion on the individual's Fourth Amendment interest. The Court concluded that the governmental interest outweighed the defendant's interest of privacy. The overwhelming governmental interest in protecting the United States' border required officers to retain wide discretion when conducting searches of suspected drug smugglers. Distinguishing the need for wide discretion at the border, the court in *Mothersell* appropriately concluded that the officers failed to show such an overwhelming government interest which sufficiently supported the intrusion of Mothersell's person. Moreover, before conducting the body cavity

search of the defendant in *Montoya de Hernandez*, the customs officials obtained a court order which authorized an x-ray and rectal examination. The court in *Mothersell* correctly followed precedent which required officers to obtain a warrant before conducting a more intrusive search.

The court in *Mothersell* also accurately followed the precedent set forth in *Hall*. While officers may have been reasonable to conduct a visual inspection of Mothersell, from the evidence at trial it appeared that the officers had no factual basis for believing that he concealed evidence inside his body cavity. Thus, in the absence of exigent circumstances, after officers visually examined Mothersell, the police were required to obtain a warrant which authorized the body cavity search and removal of any items from his anal cavity.

It seems clear from the evidence that once the officers tied Mothersell's hands behind his back, he could not physically conceal any contraband he may have possessed. For this reason, it seems highly unlikely that after conducting a strip search, arguably founded on a reasonable suspicion, the officers had a specific factual basis to believe that Mothersell secreted evidence inside his body cavity, which would warrant a visual inspection. Assuming, however, that the officers satisfied this specific factual basis burden, under *Hall* if an object is visually detected a warrant must be obtained before conducting a body cavity search and extracting the evidence. Clearly, the officers in *Mothersell* failed to obtain a warrant. Thus, the body cavity examination, and the further extraction of the evidence with a coat hanger, constituted an unwarranted physical intrusion and violated the defendant's rights under the Fourth Amendment.

It is clear from the precedent set forth above that the Fourth Amendment of the United States Constitution and article I, section 12 of the New York State Constitution require officers to meet a stricter standard in order to lawfully expand the scope of searches conducted pursuant to a warrant. Providing officers with too much discretion in this area will lead to injustices such as those that occurred in *Bell*, *Hall*, and *Mothersell*. While an officer is provided some leeway to conduct searches when there are exigent circumstances, in all other instances a neutral Magistrate must grant permission for the expansion of a searches scope. Without following this process, officers may, within the confines of the law, begin eroding the protections

granted to individuals under the search and seizure provisions.

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