

[CAPTION]

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS
(BODILY INTRUSIONS)**

FACTS

[INSERT FACTS]

ARGUMENT

It is beyond dispute that the physical intrusion into Defendant's body is subject to Fourth Amendment and Article I, Section II limitations. See Cutter v. State, 646 N.E.2d 704, 711 (Ind. Ct. App. 1995). The primary precedent regarding the performance of medical procedures to obtain evidence from a suspect in the state courts is that established in Adams v. State, 299 N.E.2d 834 (Ind. 1973), where it was held that "an operation performed upon a defendant to secure evidence comes within the constitutional prohibition of an unreasonable search." Id. at 838. Like this case, the Adams case involved a search warrant that was invalidated, so it cannot be argued that that case only applied to warrantless searches. In so holding, the Indiana Supreme Court relied upon the United States Supreme Court's opinion in Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (holding that a forced stomach pumping of a suspect in order to obtain evidence of possession of narcotics was per se unreasonable). A more recent United States Supreme Court decision on point is found, in Winston v. Lee, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), where it was held that the surgical removal of a bullet from a suspect in an armed robbery was unreasonable. In Winston v. Lee, the Court relied primarily upon its earlier decision regarding blood draws in drunk driving investigations, Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). According to the Winston Court, in Schmerber, the Court placed heavy reliance on the fact that the authorities clearly had probable cause to believe that the blood draw would reveal evidence that was exceptionally probative in confirming the belief that Schmerber was driving while intoxicated and that there was no other way to obtain the evidence necessary to obtain the conviction. The Court held that the reasonableness of surgical procedures beneath the skin depends on a case by case approach in which the individual's privacy

interests and security are weighed against society's interests in conducting the procedure. Among the factors that may be considered are the extent to which the procedure may threaten the safety or health of the suspect and the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity. The balance is struck against the public's interest in performing the procedure. In this regard, it was noted that a blood test is a highly effective means of determining degree of impairment and that there was no doubt that the blood draw would result in the obtaining of the desired evidence and that that evidence was vital to the prosecution of the offense. In conducting the balancing test established in Schmerber, the Supreme Court, in the Winston case, found that the prosecution clearly established probable cause that Lee had a bullet in him so it concentrated on the extent of the intrusion and the prosecution's need for the evidence. The Court recognized that there was some risk in the procedure required to remove the bullet and that a general anesthetic may be required. It was noted that the general anesthetic involves a total divestment of the suspect's ordinary control over his bodily integrity. It was also noted that the prosecution actually did not need the evidence to prove the case in that it had available substantial additional evidence. In conclusion, the Court stated:

the Fourth Amendment's command that searches be "reasonable" requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search "reasonable."

Winston v. Lee, 470 U.S. at 767.

[APPLY FACTS TO TEST: In applying the balancing test established by Schmerber to the facts of this case it is most important to recognize that, in the first instance, there was no probable cause to believe the Defendant had ingested any evidence. In fact, according to the officer, the Defendant told him upon initially being arrested that he had flushed the drugs down the toilet. The idea that the Defendant had swallowed evidence was nothing more than mere conjecture and suspicion based upon unreliable information about his brothers. The remaining factors established in Schmerber also weigh in favor of suppression. The type of procedure performed, the risks associated with the procedure, and the invasion into bodily integrity inherent in that procedure are clear and will be developed by the testimony of the

medical professionals involved in that procedure. In order to perform the endoscopy the suspect was given a general anesthetic and a camera was sent down his throat to take pictures of his gastro-intestinal tract, simply to look to see if the sought after balloon even existed. It might be another matter if the existence of the balloon was clear, as was the case with the bullet in Lee's body or the blood in Schmerber's body. This procedure, in fact, was not even to recover evidence known to be extant. It was to see if evidence even existed.

The evidence the State sought to discover, and then obtain, was not even necessary to the case. The Defendant had earlier delivered controlled substances directly to an undercover policeman and had been observed doing so by the informant and other surveillance units. The State can establish all elements of the case without use of the evidence recovered in the procedure.

When comparing the privacy interests in bodily integrity infringed upon to the State's interests in recovering the evidence, in light of the purely speculative nature of the belief that the evidence even existed, it is clear that suppression is appropriate.]

The Defendant has also asserted that the search conducted was not authorized by the warrant. The warrant is attached hereto and it speaks for itself. The warrant does not specifically authorize the performance of an endoscopy. Rather, the warrant allows the police "to search the body of the Defendant, and any fecal matter or any other substances *excreted* from his digestive system." Permission to search the body cannot be read as permission to conduct invasive medical procedures under general anesthesia or to inject fluids into the Defendant's body to force him to excrete substances. A search warrant must be specific in designating the extent of the invasion of privacy that is allowed thereby. A warrant that leaves the police the discretion to decide how to conduct the search and what to search is invalid. Levenduski v. State, 876 N.E.2d 798, 802 (Ind.Ct.App. 2007). This warrant left it to the discretion of the officers as to how they would search the body of the Defendant. Normally, a search of a body would be considered to include a visual search and even a strip search. However, it cannot be thought to automatically include the performance of a medical procedure under general anesthesia or the injection of fluids into the body. In conducting the medical procedures forced upon the Defendant, the police

exceeded the scope of the warrant and did what the warrant did not allow. Finally, the use of various fluids injected into the Defendant's body to induce the Defendant to pass the balloon was not authorized by the warrant. In this regard, it is helpful to look to Chief Justice Burger's concurrence in Winston where his only point is to approve the detention of a suspect if there are reasonable grounds to believe that natural bodily functions will disclose the presence of contraband. The warrant allowed the officers to search what was excreted. It did not allow them to force the Defendant to excrete anything.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to grant the Motion tot Suppress, and for all other relief just and proper in the premises.

(Signature)

CASE LAW

CASEBANK Z.2.c.3

Florence v. Board of Chosen Freeholders of County of Burlington, 132 S. Ct. 1510, 182 L.Ed.2d 566 (2012) (jail officials may subject arrestees to strip searches without need for individualized suspicion in order to ensure for the safety and security of the staff and other prisoners); cf. Edwards v. State, 759 N.E.2d 626 (Ind. 2001) (routine warrantless strip searches of misdemeanor arrestees are unreasonable and impermissible under the Indiana Constitution in the absence of reasonable suspicion that the arrestee is concealing weapons or contraband). But see Bryant v. State, 959 N.E.2d 215 (Ind.Ct.App. 2011) (circumstances surrounding misdemeanor arrest gave rise to reasonable suspicion that Defendant was carrying weapon or contraband, as to justify warrantless strip search, where police had probable cause at time of arrest to believe that Defendant had also committed dealing in a narcotic drug, a major felony, and Defendant's actions indicated to officer that he was attempting to conceal something).

Grier v. State, 868 N.E.2d 443 (Ind. 2007) (the application of force to a detainee's throat to prevent swallowing of suspected contraband violates constitutional prohibitions against unreasonable search and seizure). See also Conwell v. State, 714 N.E.2d 764 (Ind.Ct.App. 1999).

Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (search warrants are required absent an emergency where intrusions into the human body are concerned).

Winston v. Lee, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985) (factors in determining reasonableness of intrusion are: extent to which procedure threatens safety or health of individual; extent of intrusion upon individual's dignitary interests in personal privacy and bodily integrity, and community's interest in fairly and accurately determining guilt or innocence).

Adams v. State, 260 Ind. 663, 299 N.E.2d 834 (1973) (removal of bullet from inside Defendant's body to secure evidence for the purpose of establishing guilt or innocence constituted unreasonable search; Fourth Amendment prohibits forcible removal of bullet from Defendant's body as intrusion into Defendant's body, even with a search warrant).

Balding v. State, 812 N.E.2d 169 (Ind.Ct.App. 2004) (convicted offenders may be compelled to submit a DNA sample for inclusion in state DNA database).

Smith v. State, 744 N.E.2d 437 (Ind. 2001) (State's retention and use of DNA profile from unrelated case in which Defendant was acquitted did not violate U.S. or Indiana Constitutions).

Garcia-Torres v. State, 949 N.E.2d 1229 (Ind. 2011) (because the intrusion caused by a buccal swab for DNA is slight, Pirtle does not apply).

Powell v. State, 898 N.E.2d 328 (Ind.Ct.App. 2008) (cutting Defendant's underwear in order to retrieve cocaine from pocket-type enclosure in the underwear during a search incident to arrest along side the road in a non-residential area was reasonable).

Hendricks v. State, 897 N.E.2d 1208 (Ind.Ct.App. 2008) (Court agrees that the area of one's buttocks would be considered private; however, in the totality of the circumstances of this case, pulling out Defendant's waistband and subsequently removing a napkin full of cocaine protruding from his buttocks was reasonable under the Indiana Constitution).

People v. Hall, 886 N.E.2d 162 (N.Y. 2008) (police officers, during a lawful body cavity examination of an arrested drug dealer, violated the Fourth Amendment when they saw an object protruding from Defendant's rectum and removed the object).

Maryland v. King, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013) (search of detainee's person when he is booked into custody may involve relatively extensive exploration, including requiring detainee to lift their genitals or cough in squatting position).