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**INTRODUCTION**

Defendant Latoria Ellis (“Ellis”) filed this Motion to Suppress all evidence obtained as a result of a visual body cavity search on April 2, 2009. An evidentiary hearing was held on October 19, 2009. Based upon the reasons set forth below, Ellis’s motion must be granted.

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**FACTS**

Ellis was arrested on or about December 19, 2008 after the Milford Police Department executed a search warrant on a co-defendant’s apartment. The basis for the search warrant was a confidential informant’s assertion that drugs were being sold in the apartment. Ellis was sitting in the living room when the police arrived. She was taken into custody along with the other individuals in the apartment.

The male suspects were separated from the female suspects at the Milford Police Department. Ellis was placed in a cell with two other female suspects and handcuffed to a bench. The suspects could be seen by the officers at all times through an open door. Shortly thereafter, one of the other female suspects, later identified as a confidential informant, was removed from the cell. This informant told a Milford Police Lieutenant that Ellis had secreted a bag containing crack cocaine in her vagina. This prompted the Lieutenant to request, in the presence of Ellis, that a female Sergeant come to the station to conduct a strip search. Ellis became anxious and requested to go to the bathroom.

Prior to the female Sergeant’s arrival, the Lieutenant left a message for a Deputy Attorney General asking whether a warrant was necessary for a body cavity

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and strip search of Ellis. Before the Deputy Attorney General responded, however, the female Sergeant arrived at the police station. She took Ellis to a bathroom and performed a search. The Sergeant had Ellis remove all of her clothing and squat to permit a visual inspection of her genitalia. After the Milford Police Department conducted this visual body cavity search, the Deputy Attorney General called back to indicate that a warrant was necessary before they could conduct a visual body cavity search.

Nevertheless, the visual search revealed a plastic bag which the Sergeant concluded contained contraband. After refusing to remove the bag herself, Ellis was transported to Milford Memorial Hospital for further testing. The doctors ordered a CT scan which revealed the presence of a foreign object in Ellis's vagina. The police then obtained a warrant based upon the results of the CT scan and the Sergeant's visual body cavity search.

Ellis was informed that she could either submit to a full body cavity search pursuant to the search warrant or voluntarily remove the object. Ellis still refused to remove the object. A doctor then ordered a sedative be given for the search. Ellis, upon seeing this, acquiesced and threw the object on the floor. The object was then seized by the Sergeant as evidence.

### ***The State's Arguments***

The State contends that visual body cavity searches are not *per se* invalid in Delaware. The State avers that, under the circumstances of this case, it is not unreasonable to conduct a routine visual body cavity search to search for evidence.

Even so, the State argues that there were sufficient exigent circumstances to justify the search. That is, the State contends that an application of the *Ada* factors<sup>1</sup> indicates that sufficient exigent circumstances were present; namely, the danger posed to Ellis's health by having a high quantity of cocaine secreted in her vagina and the probability that evidence may be destroyed.

### ***Defendant Ellis's Arguments***

Ellis proffers two arguments in favor of suppression. First, Ellis contends that the visual body cavity search violated the protection against unreasonable searches and seizures afforded by both the Fourth Amendment to the United States Constitution and Article I, Section 6 of the Delaware Constitution. She contends that there were not sufficient exigent circumstances to justify the search. Second, Ellis avers that the subsequent search was also unreasonable because two male officers remained in Ellis's hospital room while the events transpired.

### **DISCUSSION**

The State has the burden of establishing, by a preponderance of the evidence, that the conduct of law enforcement officers did not violate the United States

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<sup>1</sup> See *State v. Ada*, 2001 WL 660227, at \*3 (Del. Super.) (identifying five factors for determining whether exigent circumstances exist: [1] degree of urgency and amount of time necessary to obtain a warrant; [2] reasonable belief that contraband is about to be removed; [3] possibility of danger to officers guarding the site of contraband while a search warrant is sought; [4] awareness of suspects that police are on their trail; and [5] ready destructibility of contraband and knowledge that efforts to dispose of narcotics are characteristic of those engaged in narcotics traffic).

Constitution, the Delaware Constitution, or Delaware statutory law.<sup>2</sup> Both the Fourth Amendment to the United States Constitution and Article I, Section 6 of the Delaware Constitution of 1897 provide individual protection “against unreasonable searches and seizures.”<sup>3</sup> The protections afforded by the Fourth Amendment have been incorporated by the states through the Fourteenth Amendment.<sup>4</sup> An individual’s right to be free from unreasonable searches and seizures is violated when government authorities search, without a warrant, an area where the individual had a reasonable expectation of privacy.<sup>5</sup>

*Visual Body Cavity Search*<sup>6</sup>

The validity of a strip search was thoroughly considered by the Delaware Superior Court in *State v. Doleman*.<sup>7</sup> The Court first noted that a warrantless search of an individual incident to a lawful arrest is reasonable under the Fourth

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<sup>2</sup> *State v. Robinson*, 2006 WL 1148477, at \*3 (Del. Super.) (citing *State v. Hughes*, 2003 WL 21213709 (Del. Super.)); see also *Hunter v. State*, 783 A.2d 558, 560 (Del. 2001) (noting that the State bears the burden of proof on a motion to suppress evidence seized during a warrantless search).

<sup>3</sup> U.S. Const. Amend. IV; Del. Const. of 1897 art. I, § 6.

<sup>4</sup> See *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>5</sup> *Robinson*, 2006 WL 1148477 at \*3, citing *Hughes*, 2003 WL 21213709 at \*2.

<sup>6</sup> In this case, the Milford Police Department, after a search incident to an arrest and while Ellis was in police custody, conducted a strip search resulting in a visual body cavity search. The search in question was referred to during the hearing as a strip search or a very limited visual body cavity search. The Court, however, under the circumstances of this case, will call the search in question a visual body cavity search conducted without a warrant.

<sup>7</sup> 1995 WL 339184 (Del. Super.).

Amendment.<sup>8</sup> The United States Supreme Court, in *Robinson*, noted,

It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that amendment.<sup>9</sup>

The *Doleman* Court noted that this principle has been extended to validate both the “removal and examination of clothing of an arrestee who had already been held in custody overnight,” and the “routine station-house inventory of property found on or in the possession of an arrested person who is to be jailed.”<sup>10</sup> The *Doleman* Court, however, concluded that the United States Supreme Court had not addressed the specific issue of strip searches.<sup>11</sup> Nevertheless, the Court noted that several courts had cited *Robinson*, *Gustafson*, and *Chimel* to conclude that a strip search incident to a lawful arrest is permissible.<sup>12</sup>

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<sup>8</sup> *Id.* at \*4 (citing *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973); *Chimel v. California*, 395 U.S. 752 (1969); *Rew v. State*, 622 A.2d 1097 (Del. 1993); *State v. Culver*, 288 A.2d 279 (Del. 1972); *Jarvis v. State*, 600 A.2d 38 (Del. 1991)).

<sup>9</sup> 414 U.S. at 235.

<sup>10</sup> 1995 WL 339184, at \*5 (citations omitted).

<sup>11</sup> *Id.*

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

The *Doleman* Court next considered prison strip search policies.<sup>13</sup> The Court noted that a strip search of pre-trial detainees incarcerated in a short-term custodial facility was permissible because, “a detention facility is fraught with serious security dangers when smuggling of money, drugs, weapons and other contraband occurs.”<sup>14</sup> The United States Supreme Court, in *Bell*, arrived at this conclusion by balancing the security interests of the institution against the privacy interests of the inmates.<sup>15</sup> The *Doleman* Court noted that other courts ruling on civil rights actions have conducted this balancing analysis and concluded that routine strip searches of every arrestee booked into jail for a minor offense are invalid.<sup>16</sup>

The *Doleman* Court then concluded that, “[t]he controlling principle . . . is that the custodial search incident to arrest must be *reasonable*.”<sup>17</sup> Consequently, the Court will “closely scrutinize the reasonableness of any strip search.”<sup>18</sup> In doing so, a search will only be deemed reasonable where, “at a minimum . . . the facts upon

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<sup>13</sup> The *Bell* Court addressed strip searches of inmates, both convicted prisoners and pre-trial detainees, entering actual detention facilities. The Court found the searches to be reasonable given the serious security dangers associated with such facilities. This case does not concern these detention facilities. Instead, the search here was conducted at a police station.

<sup>14</sup> *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

<sup>15</sup> *Bell*, 441 U.S. at 559-60.

<sup>16</sup> 1995 WL 339184, at \*6 (citing *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983)).

<sup>17</sup> *Id.* (emphasis in original) (citing *Mary Beth G.*, 723 F.2d at 1270).

<sup>18</sup> *Id.* (citation omitted).

which an intrusion is based [are] capable of measurement against ‘an objective standard.’”<sup>19</sup> The *Doleman* Court concluded that the more intrusive the search, the greater the need to demonstrate probable cause.<sup>20</sup>

The *Doleman* Court ultimately concluded that the strip search in question was valid. In doing so, however, the Court noted expressly that it was only considering strip searches involving the removal of one’s clothing.<sup>21</sup> The Court did not consider the validity of strip searches accompanied by visual body cavity inspections. This task fell to the Court in *State v. Haith*.<sup>22</sup>

In *Haith*, the defendant was asked to remove his pants and underwear.<sup>23</sup> When he did so, the police officer saw a clear plastic bag wedged between the defendant’s buttocks.<sup>24</sup> The officer donned latex gloves and pried the bag from the defendant’s posterior.<sup>25</sup> The Court concluded that the purpose of the warrant requirement is to insure prior judicial authorization of intrusions into areas where an individual has a

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<sup>19</sup> *Id.* (citation omitted).

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

<sup>21</sup> *Id.* at \*7.

<sup>22</sup> 1999 WL 167824 (Del. Super.).

<sup>23</sup> *Id.* at \*1.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*



reasonable expectation of privacy.<sup>26</sup> Courts are to consider the totality of the circumstances when conducting this analysis.<sup>27</sup>

In evaluating the totality of the circumstances, the Court noted that,

The privacy interest at stake in a strip search, even one where an officer conducts a mere visual inspection of body cavities cannot be understated. The feelings of humiliation and degradation associated with being forced to expose one's nude body to strangers for visual inspection cannot be disputed. There are indeed "few exercises of state authority that intrude on citizens' privacy and dignity as severely as visual anal and genital searches."<sup>28</sup>

Consequently, the Court, after balancing the state's interest against the invasion of the defendant's privacy, concluded that a warrant should have been obtained for the strip or body cavity search.<sup>29</sup> Specifically, the Court noted that, absent exigent circumstances, a citizen may not be ordered to remove his or her clothing and display his or her private body parts without a warrant from a neutral and detached judicial officer.<sup>30</sup>

Nevertheless, the State, in the case *sub judice*, contends that the *Haith* decision is inapplicable. Specifically, the State avers that the *Haith* Court was not concerned

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<sup>26</sup> *Id.* at \*4 (citing *Steigler v. Anderson*, 496 F.2d 793 (3d. Cir. 1974)).

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

<sup>28</sup> *Id.* (citations omitted).

<sup>29</sup> *Id.* at \*8.

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

with the search alone, but with the fact that the search occurred after a series of events beginning with a routine traffic stop. The Court disagrees. Notwithstanding the language of the *Haith* decision, the *Haith* Court’s conclusion finds some support in *Schmerber v. California*.<sup>31</sup>

In *Schmerber*, the United States Supreme Court considered whether extracting a blood sample for chemical analysis to determine whether the defendant was driving under the influence violated the Fourth Amendment.<sup>32</sup> The Court, after considering relevant Fourth Amendment standards of reasonableness, concluded that it did not.<sup>33</sup> The Court noted that, “[s]earch warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned.”<sup>34</sup> The Court noted further that, “[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another’s body in search of evidence of guilt is indisputable and great.”<sup>35</sup>

Ultimately, the Court concluded that the potential for destruction of evidence was a sufficient “emergency” to permit authorities to extract blood without a

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<sup>31</sup> 384 U.S. 757 (1966).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 768.

<sup>34</sup> *Id.* at 770.

<sup>35</sup> *Id.*

warrant.<sup>36</sup> Even so, the Court concluded by noting, “[t]hat we today told [sic] that the Constitution does not forbid the States [sic] 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>37</sup>

Debate exists among the courts over whether visual body cavity inspections are akin to the intrusions envisioned by the *Schmerber* Court. The Ninth Circuit, for example, has likened visual body cavity inspections to *Schmerber*-type intrusions.<sup>38</sup> The First Circuit, however, has held that at least reasonable suspicion is required to justify strip and visual body cavity searches.<sup>39</sup> In so holding, the *Swain* Court tempered a prior decision.<sup>40</sup> The *Swain* Court noted that, “sensitive to the developing doctrine, this circuit has repeatedly recognized that strip and/or visual body cavity searches are not routine, and must be carefully evaluated.”<sup>41</sup>

Regardless, the Delaware Supreme Court, in *Jenkins v. State*, set forth

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 772 (emphasis added).

<sup>38</sup> See *Doleman*, 1995 WL 339184, at \*7 n.1 (citing *Fuller v. M.G. Jewelry*, 950 F.2d 1437 (9th Cir. 1991); *Giles v. Ackerman*, 746 F.2d 614, 616 (9th Cir. 1984)).

<sup>39</sup> See *Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997).

<sup>40</sup> See *United States v. Klein*, 522 F.2d 296 (1st Cir. 1975) (the Court in *Swain* noted that the conclusion in *Klein* that visual body cavity searches are merely valid searches incident to arrest does not survive the most recent First Circuit precedent and the Supreme Court decisions in *Illinois v. Lafayette*, 462 U.S. 640 (1983) and *Bell*).

<sup>41</sup> *Id.* at 8.

parameters to consider when deciding the validity of strip searches.<sup>42</sup> In *Jenkins*, the defendant was arrested and strip searched following a routine traffic stop.<sup>43</sup> The defendant moved, in part, to suppress evidence found during the strip search. The defendant cited *Haith* to support his motion. The Court, in arriving at its conclusion, considered the facts of both *Haith* and *Doleman*:

In *Haith*, the police stopped the defendant for a traffic violation and arrested him for driving without a license. When the defendant and police arrived at the police station, the defendant was ordered to completely disrobe, at which point a plastic bag containing cocaine was found wedged in his buttocks. Holding that a warrant was necessary for a strip search and visual cavity search, the Superior Court granted the defendant's motion to suppress, explaining that "[t]here are indeed 'few exercises of state authority that intrude on citizens' privacy and dignity as severely as visual anal and genital searches.'"

In *State v. Doleman*, a case involving similar facts, however, the Superior Court upheld a strip search. In *Doleman*, the defendant was arrested on paraphernalia charges, but no narcotics were discovered at the scene. At the police station, police told the defendant they were going to strip search him. While the defendant was removing his pants, a bag containing crack cocaine fell to the floor. The Superior Court denied the defendant's motion to suppress, holding that, "law enforcement officers may conduct a strip search incident to a lawful arrest provided there is a reasonable suspicion that the arrestee is concealing weapons or other contraband beneath his or her clothing." Reasonableness is to be evaluated under the "totality of the

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<sup>42</sup> 970 A.2d 154 (Del. 2009).

<sup>43</sup> *Id.* at 155-56.

circumstances including such factors as the nature of the offense, the arrestee's appearance and conduct, and any arrest record.”<sup>44</sup>

The Court then concluded that the facts in *Jenkins* were closer to those in *Doleman* than in *Haith*.<sup>45</sup> That is, the Court concluded that, “[a]t no point did the police visually inspect Jenkins’ private areas.”<sup>46</sup> As a result, the Court concluded that the police did not violate the defendant’s constitutional rights by subjecting him to a strip search that did not involve a visual cavity inspection.<sup>47</sup>

The Delaware Supreme Court, in *Jenkins*, with some degree of ratiocination, adopted the *Haith* Court’s conclusion that there is a different standard for strip searches that involve a visual cavity inspection. That is, *Jenkins* stands for the proposition that where the facts at issue are most analogous to those in *Doleman*, the question to consider is whether there is reasonable suspicion that an arrestee is concealing weapons or other contraband beneath his or her clothing. Conversely, if the facts at issue are most analogous to those in *Haith*, where a defendant is subject to a strip search involving a visual cavity inspection, the question to consider is whether an “emergency” situation exists to negate the warrant requirement.

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<sup>44</sup> *Id.* at 159-60 (citations omitted) (emphasis added).

<sup>45</sup> *Id.* at 160.

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

<sup>47</sup> *Id.*

The facts of the case *sub judice* are closer to those in *Haith* than *Doleman*.<sup>48</sup> Ellis was taken to a bathroom at the Milford Police Department. She was asked to remove all of her clothing. Ellis was then instructed to squat while a female police sergeant performed a visual body cavity search. Although the sergeant did not physically touch Ellis, the sergeant's instruction to squat and her subsequent visual search are sufficient to differentiate the search in question from the search envisioned by *Doleman*.

Consequently, as the Deputy Attorney General informed the police on the night in question, a warrant was required to conduct the visual body cavity search. Therefore, this Court, pursuant to *Jenkins*, is required to simply consider whether an "emergency" situation exists to negate the warrant requirement. The Court finds that no such emergency was present. An emergency situation is present where, under the circumstances, there is no time to seek out a magistrate and secure a warrant.<sup>49</sup> In other words, an emergency situation requires the presence of an immediate risk.

In the present case, the State proffers two arguments in favor of the warrantless visual body cavity search: (1) an imminent threat that evidence will be destroyed; and (2) an imminent threat to Ellis's health.

First, there was no imminent threat that evidence would be destroyed. Ellis

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<sup>48</sup> It is worth noting that even though the search in question did not result from a routine traffic stop, as was the case in *Haith*, the State's main contention, nevertheless, is that there were exigent circumstances permitting the search; namely, a fear that the evidence would be destroyed and a concern for Ellis's safety.

<sup>49</sup> *Schmerber*, 384 U.S. at 771.

was handcuffed to a bench in the police station and was under constant surveillance. Any attempt to destroy the object would have been stifled by the police. Even so, the State contends that Ellis could have simultaneously removed the object and flushed it during a bathroom break. The Lieutenant, however, testified that procedures were in place to ensure that suspects did not destroy evidence during bathroom breaks. There existed no imminent threat that evidence would be destroyed.

Second, there was no imminent threat to Ellis's health. The Sergeant testified that the visual body cavity search was conducted out of concern for Ellis's safety. That is, the Sergeant testified that Ellis could have overdosed on cocaine if the bag would have ruptured. Consequently, the sergeant testified that an immediate search was necessary to prevent harm.

Ellis was transported to the hospital after the visual body cavity search revealed that a foreign object was in her vagina. The Sergeant testified that her supervisor, the Lieutenant, instructed her to have the doctors perform a scan to use for a warrant. A CT scan was ordered shortly thereafter. The police then used the results from the visual body cavity search and the CT scan to secure a warrant. All the while, the foreign object remained inside Ellis's vagina. It was not until after a warrant had been obtained that the object was ultimately removed. The State, therefore, is arguing that it was unable to obtain a warrant because of an imminent threat to Ellis's health, despite the fact that the police waited until they had a warrant to actually have the object removed. The dalliance of this argument is such that the Court is not persuaded.

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*Presence of Male Officers*

Ellis's second contention is moot given this Court's decision regarding the initial visual body cavity search.

**CONCLUSION**

For the foregoing reasons, Ellis's Motion to Suppress is GRANTED.  
IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
Honorable William L. Witham, Jr.

WLW/dmh  
oc: Prothonotary  
xc: R. David Favata, Esquire  
Melissa L. Dill, Esquire