CONSTITUTIONAL LAW—SEARCH AND SEIZURE—GEORGIA SUPREME COURT EXPANDS UPON EXTENT OF PERMISSIBLE BODY INTRUSION

Creamer v. State[1] held that it did not violate the fourth and fifth amendments of the United States Constitution or the right against self-incrimination under Georgia statutory law and the Georgia Constitution to judicially compel a defendant in a criminal proceeding to submit to a surgical operation for the removal of evidence allegedly concealed within his body, provided such operation is performed under "proper circumstances" and there is no danger to the life or limb of the defendant.

Defendant was arrested for a double murder which occurred in 1971. An informer, who had been at the scene of the crime,[2] alleged that defendant had been shot at the scene by one of the victims and that the bullet was still in him. Upon this information, a hearing was held to determine if a search warrant should be issued to remove the bullet from defendant's body for possible use in connecting him with the double murder. Defendant admitted the presence of a bullet in his body and agreed to an examination, but refused to submit to an operation to remove the bullet. After a court-ordered physical examination was made to determine if removal of the bullet would substantially impair the health of defendant, the examining physician testified that there was a steel object, which could be a bullet, in the fat, subcutaneous area of the right side of defendant's chest and that it could be surgically removed within fifteen minutes using a local anesthetic. He also testified that there would be no risk to defendant in administering a local anesthetic or in removing the bullet, although it would require a cutting procedure.

The trial court issued an order for the removal of the bullet, but this was stayed by a supersedeas entered by the Georgia Supreme Court upon the direct appeal of defendant.[3] By agreement, a hearing of the question of continuance of the supersedeas was joined with a hearing on the whole case.

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1. 229 Ga. 511, 192 S.E.2d 350 (1972).

2. This fact was substantiated by the informer being familiar with the scene of the crime, the physical layout of the home, the location of furniture therein, which lights were on, where the bodies were found and a knowledge of the clothes one of the victims was wearing at the time of the murder. *Id.* at 512-13, 192 S.E.2d at 351.

3. In addition to appealing the trial court's judgment regarding the bullet removal, defendant also appealed the trial court's judgments overruling defendant's habeas corpus and other pleadings, which are not considered in this note.

The main issues presented on appeal were whether the court-ordered removal of the bullet from defendant's body, without his consent, would violate his rights against unreasonable searches and seizures and against self-incrimination as guaranteed by the United States Constitution, and Georgia Code sections 2-106[4] and 38-416.[5]

The federal constitutional question was quickly disposed of by citing and expanding upon the United States Supreme Court decision in *Schmerber v. California*.[6] *Schmerber* was a "taking of blood" case which held that fifth amendment rights regarding self-incrimination pertained only to "communications" or "testimony" and not "real or physical evidence," and that fourth amendment rights regarding unreasonable searches and seizures did not prevent involuntary blood-taking under the facts of the case. The state constitutional question, however, presented some difficulty. Nevertheless the court, after an extensive review of past "self-incrimination" cases, ultimately held that: "You cannot force a defendant to act, but you can, under proper circumstances, produce evidence from his person."[7] In other words, the court based the right or privilege against self-incrimination upon whether defendant was compelled to act or whether he was compelled to submit to being acted upon; the latter being constitutionally permissible, while the former is constitutionally prohibited. The court concluded that the search itself was reasonable, since there was probable cause to believe that the bullet was in defendant's body and that it was connected with the murders; furthermore, according to uncontested expert testimony, neither the defendant's life nor limbs would be harmed by the removal of the bullet.

The sole case which the Georgia Supreme Court cited and relied upon for its holding that the removal of the bullet from defendant's body would not be unconstitutional under the United States Constitution was *Schmerber v. California*.[8] The defendant in *Schmerber* had been hospitalized after an automobile accident. Since it appeared that he had been driving while under the influence of alcohol, the officer who arrested him directed a physician to take a blood sample from him, which was done over defendant's objection. The blood sample confirmed defendant's intoxication and was admitted into evidence, over objection, in

4. "No person shall be compelled to give testimony tending in any manner to incriminate himself." GA. CONST. art. I, § I, ¶ VI.

5. "No person, who shall be charged in any criminal proceeding with the commission of any indictable offense or any offense punishable on summary conviction, shall be compellable to give evidence for or against himself." GA. CODE ANN. § 38-416 (Supp. 1972).

6. 384 U.S. 757 (1966).

7. 229 Ga. at 517, 192 S.E.2d at 354.

8. 384 U.S. 757 (1966).

convicting defendant of drunken driving. After the appellate court affirmed the conviction, rejecting arguments of due process, self-incrimination, right to counsel, and search and seizure, the case was appealed to the United States Supreme Court on its constitutional questions.

In affirming the conviction, the Supreme Court, in a four to four decision, specifically held that the involuntary taking of blood was not violative of defendant's fifth amendment rights against self-incrimination, for "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."[9] In other words, the Supreme Court held that the fifth amendment right against self-incrimination pertains only to evidence of a "testimonial" or "communicative" nature, and not to real or physical evidence. The court then continued, stating that

> once the privilege against self-incrimination has been found not to bar compelled intrusions into the body . . . 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.[10]

The United States Supreme Court clearly stated that the intrusion into defendant's body itself was not violative of the fifth amendment, and that any further constitutional protestations regarding the fourth amendment would be based upon the "reasonableness" of the circumstances and the facts of the individual cases.

This is not to say, however, that the *Schmerber* rule has no limitations, for in addition to very strong and explicit dissents,[11] the majority

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9. *Id.* at 761.

10. *Id.* at 768.

11. Mr. Justice Black, dissenting, with Mr. Justice Douglas joining him, was of the opinion that blood is "testimonial and communicative," since it is offered as such to the court and evidence must be ultimately communicated. He stated, "To reach the conclusion that compelling a person to give his blood to help the State convict him is not equivalent to compelling him to be a witness against himself strikes me as quite an extraordinary feat." *Id.* at 773. Mr. Justice Douglas dissented in a separate opinion stating:

> [T]he Fifth Amendment marks a "zone of privacy" which the government may not force a person to surrender. Likewise the Fourth Amendment recognizes that right when it guarantees the right of the people to be secure "in their persons." No clearer invasion of this right of privacy can be imagined than forcible blood-letting of the kind involved here.

Id. at 778-79. Mr. Justice Fortas, dissenting in a separate opinion, attacked the Court's holding in an altogether different, yet equally adamant, vein, stating:

> [U]nder the Due Process Clause, the State, in its role as prosecutor, has no right to

opinion itself issued a caveat, which the Georgia Supreme Court in *Creamer* noted. The United States Supreme Court stated:

> [W]e reach this judgement only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the State's 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.[12]

The end result, however, despite the above caveat, was that after *Schmerber* it was constitutionally permissible to have an involuntary "minor intrusion" into a man's body, seemingly subject only to reasonable standards of justification and manner. Blatantly absent were any concrete definitions of what constituted a "minor intrusion" and what constituted more than a "minor intrusion," although the Court did state that the intrusion was permissible, on the facts, due to the presence of probable cause and the reasonableness of the test used.[13]

The development of the case law and the subsequent constitutional interpretations of the fourth and fifth amendments leading up to the *Schmerber* decision, can be seen generally through several key decisions. The first major case to interpret the fourth and fifth amendments was *Boyd v. United States,*[14] which involved the constitutionality of a search and seizure of a man's private papers. The Court, in ruling that such a search and seizure was unconstitutional as being equivalent to compelling him to be a witness against himself, stated that in such a case the fourth and fifth amendments "run almost into each other." The Court based this assertion upon the view that "the essence of the offense . . . is the invasion of defendant's indefeasible right of personal security, personal liberty and private property . . . ."[15] Moreover, the Court specifically pointed out that constitutional provisions for the security of the person and property should be "liberally construed."

The next major case which interpreted the fifth amendment was *Holt*

> extract blood from an accused or anyone else, over his protest. As prosecutor, the State has no right to commit any kind of violence upon the person, or to utilize the results of such a tort, and the extraction of blood, over protest, is an act of violence.

Id. at 779.

12. *Id.* at 772.

13. The Court considered the test to be reasonable, based on the fact that the test: (1) was an effective means of determining intoxication; (2) imposed virtually no risk, pain or trauma to the defendant; and (3) was performed in a reasonable manner by a physician in a hospital. *Id.*

14. 116 U.S. 616 (1886).

15. *Id.* at 630.

v. United States,[16] in which the Supreme Court upheld the defendant's conviction for murder, notwithstanding the defendant's protestation of being compelled to put on a blouse to see if it fit, the results of which were used as evidence against him. The Court's reply to the defendant's appeal based upon the fifth amendment was, "But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it is material."[17]

Cases dealing with the constitutionality of body intrusions have developed fairly recently.[18] In 1952, the Supreme Court held in *Rochin v. California*[19] that the defendant's rights under the fourteenth amendment's due process clause were violated. The evidence showed that on "some information" the state police broke into defendant's home and bedroom and, upon seeing him put something in his mouth, tried to open his mouth by force to recover whatever he put into it. Unsuccessful, the police took him to a hospital, where an emetic was forced into his stomach causing him to vomit up two capsules of morphine, for which he was tried and convicted. The Court said that such conduct "shocks the conscience" and that "[d]ue process of law . . . says that convictions cannot be brought about by methods that offend 'a sense of justice.' "[20] The Court continued and stated that "[t]o attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coercial confessions."[21]

The apparent holding that it was unconstitutional to "intrude" into one's body, as *Rochin* could be interpreted, was soon to be removed by the 1957 blood-taking case of *Breithaupt v. Abram*.[22] Under basically

16. 218 U.S. 245 (1910).

17. *Id.* at 252-53.

18. For a good general history, with comparative analysis of military law under the U.C.M.J., *see* Eckhardt, *Intrusions Into The Body*, 52 MIL. L. REV. 141 (1971); *see also*, Comment, *Constitutional Limitations on the Taking of Body Evidence*, 78 YALE L.J. 1074 (1969).

19. 342 U.S. 165 (1952).

20. *Id.* at 173.

21. *Id.* The concurring opinions written by Mr. Justice Black and Mr. Justice Douglas strike very closely to their dissenting opinions in *Schmerber*, a full fourteen years later. Mr. Justice Black stated, "I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when, as here, incriminating evidence is forcibly taken from him by a contrivance of modern science." *Id.* at 175.

Mr. Justice Douglas was a bit stronger in his opinion: "But I think that words taken from his lips, capsules taken from his stomach, blood taken from his veins are all inadmissible provided they are taken from him without his consent. They are inadmissible because of the command of the Fifth Amendment." *Id.* at 179.

22. 352 U.S. 432 (1957).

the same set of facts as *Schmerber,* except that the defendant was unconscious when the blood was taken, the defendant was convicted of involuntary manslaughter. The Supreme Court upheld the conviction, specifically holding that the defendant was not deprived of his due process rights under the fourteenth amendment and stated that "the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right."[23] In essence, after the Court stated that the taking of blood by a skilled technician, against defendant's consent, was not conduct which "shocks the conscience" nor offends a "sense of justice," it continued and balanced the interests of public protection and safety (from drunken drivers) against the right of the individual to immunity from unconsented-to body invasions. The Court found that the public safety far outweighed the individual right.[24] *Breithaupt* and *Holt* became the nucleus for *Schmerber.*[25]

The grounds upon which the Georgia Supreme Court ruled that de-

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23. *Id.* at 435.

24. Once again Justices Black and Douglas dissented, being joined by Mr. Chief Justice Warren. They expressed explicitly what they considered to be the minimum requirements for compliance with constitutional due process:

> We should, in my opinion, hold that due process means at least that law enforcement officers in their best efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking the skin, puncturing tissue or extracting bodily fluids, whether they contemplate doing it by force or by stealth.

Id. at 442.

25. This is not taking into account numerous cases referred to as "border search" cases, which involve various constitutional problems resulting from searches for and seizures of contraband from persons attempting to enter the United States. These cases are somewhat distinguishable inasmuch as they require different standards of probable cause necessary for intensive searches of persons suspected of smuggling contraband, quite often in body cavities, including the stomach, rectum and vagina. While most of these cases revolve about the probable cause aspect of "reasonable search and seizure," a representative number permit substantial intrusions into the body: Blackford v. United States, 247 F.2d 745 (9th Cir. 1957) (held that it was not unreasonable search and seizure to remove narcotics from defendant's rectum, without consent, given probable cause, examination by qualified physician, sanitary conditions and medically approved procedures); Lane v. United States, 321 F.2d 573 (5th Cir.), *cert. denied* 377 U.S. 936 (1963) (held that the use of an emetic on defendant to recover swallowed narcotics was not an unreasonable search and seizure, but the court characterized unreasonable search as one forceful or a series of untoward acts toward the defendant's person or property); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied* 386 U.S. 945 (1967) (search of rectum or any body cavity for contraband is constitutional if done gently, in a medically approved manner under probable cause); Blefare v. United States, 362 F.2d 870 (9th Cir. 1966) (forced stomach pumping is not unreasonable search and seizure under probable cause); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967) (vaginal search unreasonable due to lack of probable cause—search itself is constitutional).

For a more detailed coverage, *see* Comment, *Border Searches and the Fourth Amendment,* 77 YALE L.J. 1007 (1968). It must also be noted that *Schmerber* has not been appreciably expanded upon since it was handed down in 1966; for the most part the holdings involved have been strictly followed and construed much the same as in *Creamer.*

fendant's rights were not violated, under the guarantees of the Constitution of Georgia and state statutory law against being compelled to produce self-incriminating evidence, were equally as well developed as the federal constitutional questions.[26] After citing a host of state cases,[27] the court was able to discern the trend that cases which ruled that a defendant's rights were violated under the Georgia self-incrimination laws did so because the defendant was forced or coerced into acting and providing the evidence for the state.[28] Therefore, the court could logically hold that real evidence is inadmissible only if the defendant himself was forced into producing it, and conversely, real evidence is admissible if the state took it from the defendant, with or without his consent. Applying this rationale, the court was then correct in its statement that, "[i]n the case sub judice the defendant is forced to submit his body for the purpose of having the evidence removed. He is not forced to himself remove it and herein lies the distinction in this case."[29] The net result was that the court concluded that since the bullet constituted real evidence, and was obtained from him and not by him, then it accordingly followed that the defendant's rights under the Constitution of Georgia and Georgia statutory laws were not violated.

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26. It must be noted that it was the Georgia constitutional and statutory law interpretation upon which Justice Gunter dissented from the majority opinion. Justice Gunter, after briefly discussing the history of the constitutional and statutory interpretations, came to exactly the opposite conclusion from the court, stating basically that, in his view, the "[s]tate cannot compel a person to give 'any evidence' *in any manner* against himself that tends to incriminate him." 229 Ga. at 524, 192 S.E.2d at 358.

In other words, Justice Gunter reached exactly the opposite interpretation of the Georgia Constitution and statutory law, although based upon the same cases.

27. Aldrich v. State, 220 Ga. 132, 137 S.E.2d 463 (1964); Calhoun v. State, 144 Ga. 679, 87 S.E. 893 (1916); Elder v. State, 143 Ga. 363, 85 S.E. 97 (1915); Springer v. State, 121 Ga. 155, 48 S.E. 907 (1904); Evans v. State, 106 Ga. 519, 32 S.E. 659 (1899); Day v. State, 63 Ga. 668 (1879).

28. In fact, Calhoun v. State, 144 Ga. 679, 87 S.E. 893 (1916), seemed to clearly articulate this exact distinction. While ruling upon certified questions presented by the court of appeals relating to the admissibility of testimony, the Georgia Supreme Court stated:

> The criterion is, who furnished or produced the evidence? If the person suspected is made to produce the incriminating evidence, it is inadmissible [citing *Evans*]. But, if his person or belongings are searched by another, although without a vestige of authority, the evidence thus discovered may be used against him.

Id. at 683, 87 S.E. at 894.

This position is only slightly altered today, through the ruling in Mapp v. Ohio, 367 U.S. 643 (1961), which held that all evidence obtained by search and seizure in violation of the Federal Constitution is inadmissible in a criminal trial in a state court. Therefore, before evidence may now be introduced into a state court, it must be obtained by a valid search and seizure; *i.e.*, with the adequate probable cause for search and a valid search warrant, when applicable.

29. 229 Ga. at 518, 192 S.E.2d at 354.

Finally, addressing itself to the reasonableness of the compelled surgical operation, the court reasoned that since the hearing had sufficiently established probable cause, both as to the fact of the bullet being in defendant's body and its possible or probable connection with the double murder, and had furthermore sufficiently established, by uncontradicted expert testimony, that neither defendant's life nor limb was in any danger, then it could not be unreasonable to order the search. The majority's conclusion undoubtedly followed directly from the criteria as established in *Schmerber,* although *Creamer* concerned a surgical cutting, as opposed to a mere needle insertion.

While *Creamer* was a case of first impression in the state of Georgia,[30] it can easily be seen from the foregoing that the Georgia Supreme Court based its decision on very "good" and substantiated authority. The question, therefore, comes down to what is considered or what can be considered "reasonable," under the facts of each case, when the state wants to intrude into a criminal defendant's body, without his consent, in order to obtain evidence to be used against him. *Schmerber* clearly established minimum standards upon the reasonableness of bloodtaking,[31] but, as aforementioned, failed to define what constituted a "minor intrusion," thereby leaving open the extent and degree of intrusion into a defendant's body. It is submitted that, although based upon "good" authority, the extension which the Georgia Supreme court permitted under the *Schmerber* ruling is unreasonable per se, *i.e.,* any intrusion into a criminal defendant's body against his consent, over and above the Supreme Court's specifically permitted blood-taking,[32] is unreasonable and, therefore, unconstitutional.

This contention is based upon a number of points. First, the Court,

30. Only two other cases have been found relating to the same factual situation and constitutional issues. One was the unreported case of Crowder v. Curran, No. 71-1105 (C.A.D.C. 1970), in which the United States Court of Appeals for the District of Columbia denied a writ of prohibition to the defendant upon basically the same factual background and grounds as found in *Creamer.* The other case, Allison v. Simms, Civil No. 2791 (M.D. Ga. 1972), arose after *Creamer* in a Georgia state court. In this case, a civil action was maintained to restrain the execution of a state order for the removal of a bullet in the defendant's body. The state courts followed the *Creamer* ruling and denied defendant's relief. Upon appeal to federal courts, Mr. Justice Powell sitting as the Fifth Circuit Court of Appeals judge, ruled, without reaching the merits of the case, that it was not an "extraordinary" circumstance, as required for federal intervention under 28 U.S.C. 2283 (1970), and denied the defendant federal relief.

31. *See* note 13 *supra.*

32. While the author has reservations as to the constitutionality of blood-taking as sanctioned by *Schmerber* (supported by the dissents in *Schmerber*) it is not within the scope of this note to refute that decision. It is only contended that any expansion over the *Schmerber* decision, such as found here, is unreasonable and, therefore, unconstitutional.

in *Schmerber*, specifically stated that it did not, by holding that "minor intrusions" were not constitutionally prohibited, permit "more substantial intrusions, or intrusions under other conditions."[33] There can be little doubt that a surgical operation, involving a local anesthetic and a cutting procedure, is a "more substantial intrusion," which the Court specifically stated it did not sanction. On this ground alone it is contended that the *Creamer* decision is erroneous. Second, upon the same basis as upon which Mr. Justice Fortas dissented in *Schmerber*,[34] to permit an unauthorized and unconsented-to surgical operation to be performed on any person is to commit a personal tort upon that person, which no governmental or social interest should be permitted to outweigh or sanction.[35] Third, it is questioned how the state can constitutionally compel a person to submit to a surgical operation in order to obtain evidence to be used against him, while at the same time the state cannot constitutionally compel a person to produce his "private papers" to be used against him.[36] From all appearances, one would think that where one was unconstitutional, the other would be also.

Finally, and possibly most importantly, the *Creamer* decision is refuted on the ground that it, like *Schmerber*, made no attempt to articulate any standards or criteria for determination of what constitutes a "minor intrusion" (and is therefore constitutionally permitted) and what is more than a "minor intrusion" (rendering the intrusion constitutionally impermissible). This omission unfortunately has left open the possibility that another state court might judicially expand upon the *Creamer* holding and permit an even larger intrusion to be performed on an unwilling criminal defendant.[37] Because of the difficulties inherently involved in properly and adequately defining the full extent of the term "minor intrusion," it is submitted that the limit of constitutionally permitted body intrusions should either remain as it was under

33. 384 U.S. at 772.

34. *See* note 11 *supra*.

35. Mr. Justice Douglas, writing a separate dissent in *Breithaupt*, stated quite clearly what he considered to be the result of any such sanctioning: "The Court seems to sanction in the name of law enforcement the assault made by the police on this unconscious man. If law enforcement were the chief value in our constitutional scheme, then due process would shrivel and become of little value in protecting the right of the citizen." 352 U.S. at 442-43.

36. *See*, Boyd v. United States, 116 U.S. 616 (1886).

37. Indeed, the fears expressed by Justice Ely, in his dissent in Blefare v. United States, 362 F.2d 870 (9th Cir. 1966), which held that it was not unconstitutional to forcibly administer a stomach pump to a person suspected of smuggling contraband in his stomach, have come true in the *Creamer* decision. He stated that a not-unbelievable consequence of the court's decision would be to next allow the cutting with a knife to recover contraband. That now being the law in Georgia, what next?

Schmerber or, better yet, that it revert back to any internal intrusions, without consent, being unconstitutional and, therefore, prohibited.

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