

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4 August Term, 2012

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8 (Submitted: January 7, 2013 Decided: August 28, 2013)

9 Docket No. 11-5403

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13 JONATHAN GONZALEZ,

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15 Plaintiff-Appellant,

16
17 - v. -

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20 CITY OF SCHENECTADY; JOHN MALONEY, individually and in his
21 capacity as an employee of the City of Schenectady, New
22 York, Police Department; SEAN DALEY, individually and in his
23 capacity as an employee of the City of Schenectady, New
24 York, Police Department; ERIC PETERS, individually and in
25 his capacity as an employee of the City of Schenectady, New
26 York, Police Department; COUNTY OF SCHENECTADY,

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28 Defendants-Appellees.

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32 Before: JACOBS, Chief Judge, POOLER and CHIN,
33 Circuit Judges.

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35 Jonathan Gonzalez appeals from the judgment of the
36 United States District Court for the Northern District of
37 New York (Hurd, J.) dismissing on summary judgment
38 Gonzalez's § 1983 complaint alleging false arrest and
39 unlawful search. Because there was "arguable" probable

1 cause to arrest Gonzalez and the law relevant to the body
2 cavity search at issue was not clearly established, we
3 affirm the grant of qualified immunity. In a separate
4 opinion, Judge Pooler concurs in part and dissents in part.

5 JAMES BRIAN LeBOW, LeBow and
6 Associates, PLLC, New York, New
7 York, for Appellant.
8

9 MICHAEL JOSEPH MURPHY, Carter,
10 Conboy, Case, Blackmore, Maloney
11 & Laird, P.C., Albany, New York,
12 for Appellees.
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14 DENNIS JACOBS, Chief Judge:
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16 Jonathan Gonzalez brought suit against the City and
17 County of Schenectady and three Schenectady police officers
18 under 42 U.S.C. § 1983 and state law alleging arrest without
19 probable cause and conduct of a visual body cavity search in
20 violation of the Fourth Amendment. In an area known for
21 drug activity, Gonzalez told a confidential informant (who
22 was wearing a wire), "What do you need? I can get you
23 whatever you need." Gonzalez was arrested, taken to the
24 police station, and subjected to a visual body cavity
25 search. Gonzalez was required to take off his clothes and
26 stand against a wall, where he spread his legs and spread
27 his buttocks. Officers saw a protruding plastic bag, which
28 contained crack cocaine.

1 Gonzalez was charged with criminal possession of a
2 controlled substance and, after losing his suppression
3 motion, was convicted by a jury and sentenced to
4 two-and-a-half years' imprisonment followed by two years'
5 post-release supervision. The New York Supreme Court,
6 Appellate Division, Third Department, reversed the
7 conviction on the ground that the visual body cavity search
8 was unlawful, relying on a New York Court of Appeals case,
9 People v. Hall, that was decided after the search took
10 place.

11 Gonzalez brought suit in the Northern District of New
12 York, under 42 U.S.C. § 1983, alleging false arrest and
13 unlawful search, and naming the City, the County, and the
14 three officers involved with the search. The district court
15 granted summary judgment in favor of defendants on the
16 ground of qualified immunity. Gonzalez appeals, and for the
17 following reasons, we affirm.

18 19 **BACKGROUND**

20 On May 16, 2006, the Schenectady Police Department was
21 conducting a buy-and-bust operation using a confidential
22 informant who was wearing a wire. The confidential

1 informant drove to a parking lot in an area of Schenectady
2 known as a drug mart. With him were a woman and her
3 boyfriend Matt. The pair got out of the car while the
4 confidential information stayed inside.

5 In a conversation heard by police via the wire,
6 Gonzalez approached Matt and asked, "What's up?" Matt said
7 he was "trying to get something." Gonzalez responded: "What
8 do you need? I can get you whatever you need." Because the
9 buy and bust was targeting a different dealer, the woman
10 said, "We are all set," and Gonzalez walked away.

11 Officers John Maloney and Sean Daley, defendants here,
12 had observed the encounter but did not hear the
13 conversation. Detective Christopher Cowell, who had
14 listened in, radioed to tell them that Gonzalez had just
15 attempted to sell drugs. Gonzalez then walked to the bus
16 station to buy a ticket to the Bronx to visit his mother.
17 At the bus station, two other officers--Robert Dashnow and
18 defendant Eric Peters--approached Gonzalez with guns drawn,
19 told him to get on the ground outside the station, and
20 searched him. After finding nothing, they placed him in a
21 van, and Officer Daley began to question him and search him
22 again.

1 At the police station, Officers Peters and Maloney
2 elicited Gonzalez's background information, and then told
3 him to take his clothes off. When Gonzalez was undressed,
4 Officer Maloney instructed him to stand against the wall,
5 spread his legs, and spread his buttocks so they could see
6 inside. The officers observed a "little plastic bag
7 sticking out . . . of [his] rectum." Gonzalez alleges that
8 one of the officers then "put his fingers in [Gonzalez's]
9 rectum penetrating [his] rectum" and removed a bag
10 containing drugs. He claims that this (as opposed to the
11 storage) caused him to bleed for approximately a year
12 afterwards. Defendants assert that Gonzalez pulled it out
13 himself.

14 Gonzalez was charged with criminal possession of a
15 controlled substance. The trial court denied his motion to
16 suppress the drugs found in the search, focusing almost
17 exclusively on whether there was probable cause to arrest
18 Gonzalez, and concluding that there was. The court made
19 only a passing remark about the legality of the search
20 itself: "Subsequent to [Gonzalez's] arrest, a lawfully
21 conducted strip search did in fact reveal that [he]
22 possessed cocaine."

1 A jury convicted Gonzalez of Criminal Possession of a
2 Controlled Substance in the Third Degree and Criminal
3 Possession of a Controlled Substance in the Fourth Degree,
4 and he was sentenced to two-and-a-half years' imprisonment
5 and two years' post-release supervision.

6 On December 24, 2008, the New York Supreme Court,
7 Appellate Division, Third Department, reversed the
8 conviction, concluding that "there was no specific,
9 articulable factual basis supporting a reasonable suspicion
10 for conducting the visual cavity inspection here. . . .
11 [A]nd the evidence related to the inspection should have
12 been suppressed." People v. Gonzalez, 57 A.D.3d 1220, 1222
13 (3d Dep't 2008). The Third Department cited People v. Hall,
14 10 N.Y.3d 303 (2008), in support of its conclusion that the
15 police needed reasonable suspicion that they would find
16 contraband in Gonzalez's body cavity.

17 Gonzalez filed a summons in New York Supreme Court on
18 July 27, 2009, against the City of Schenectady, the County
19 of Schenectady, and Officers Maloney, Daley, and Peters
20 under 42 U.S.C. § 1983, arguing that the arrest and visual
21 body cavity search violated Gonzalez's Fourth Amendment

1 right to be free from unreasonable searches and seizures.¹
2 Defendants removed the case to the Northern District of New
3 York (Hurd, J.). The district court dismissed the case on
4 summary judgment in November 2011, concluding that the
5 officers were entitled to qualified immunity for the arrest
6 because there was “arguable probable cause.” It also
7 concluded that they were entitled to qualified immunity for
8 the search because the law on body cavity searches was not
9 clearly established when the search occurred, Hall having
10 been decided (in 2008) two years after the search. The
11 claims against the City and County were dismissed because
12 Gonzalez alleged only vicarious liability.²

14 DISCUSSION

15 The Court reviews de novo a decision on a motion for
16 summary judgment. Mario v. P & C Food Mkts., Inc., 313 F.3d
17 758, 763 (2d Cir. 2002); see also Miller v. Wolpoff &

¹ Gonzalez also alleged state law claims for negligent infliction of emotional distress, negligence, intentional infliction of emotional distress, malicious prosecution, and false imprisonment. He withdrew all of these except the malicious prosecution and false imprisonment claims before the district court decided the summary judgment motion.

² Gonzalez does not appeal the dismissal of the claims against the City and County.

1 Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003). Summary
2 judgment is appropriate if there is no genuine dispute as to
3 any material fact and the moving party is entitled to
4 judgment as a matter of law. Miller, 321 F.3d at 300. In
5 assessing a motion for summary judgment, a Court is
6 “required to resolve all ambiguities and draw all
7 permissible factual inferences in favor of the party against
8 whom summary judgment [was granted].” Terry v. Ashcroft,
9 336 F.3d 128, 137 (2d Cir. 2003) (internal quotation marks
10 omitted).

11 12 I

13 The doctrine of qualified immunity protects government
14 officials from suit if “their conduct does not violate
15 clearly established statutory or constitutional rights of
16 which a reasonable person would have known.” Harlow v.
17 Fitzgerald, 457 U.S. 800, 818 (1982). The issues on
18 qualified immunity are: (1) whether plaintiff has shown
19 facts making out violation of a constitutional right; (2) if
20 so, whether that right was “clearly established”; and (3)
21 even if the right was “clearly established,” whether it was
22 “objectively reasonable” for the officer to believe the

1 conduct at issue was lawful. Taravella v. Town of Wolcott,
2 599 F.3d 129, 133-34 (2d Cir. 2010).

3 To be clearly established, “[t]he contours of the right
4 must be sufficiently clear that a reasonable official would
5 understand that what he is doing violates that right.”

6 Anderson v. Creighton, 483 U.S. 635, 640 (1987). In this
7 way, qualified immunity shields official conduct that is
8 “‘objectively legally reasonable in light of the legal rules
9 that were clearly established at the time it was taken.’”

10 X-Men Sec., Inc. v. Pataki, 196 F.3d 56, 66 (2d Cir. 1999)
11 (alterations omitted) (quoting Anderson, 483 U.S. at 639);
12 see also Taravella, 599 F.3d at 134-35.

14 II

15 A § 1983 claim for false arrest is substantially the
16 same as a claim for false arrest under New York law. Weyant
17 v. Okst, 101 F.3d 845, 852 (2d Cir. 1996). “The existence
18 of probable cause to arrest constitutes justification and is
19 a complete defense to an action for false arrest, whether
20 that action is brought under state law or under § 1983.”

21 Id. (internal quotation marks omitted); see also Broughton
22 v. State, 37 N.Y.2d 451, 456-58 (1975).

1 suspicion of some generalized misconduct: "no probable cause
2 exists to arrest where a suspect's actions are too ambiguous
3 to raise more than a generalized suspicion of involvement in
4 criminal activity." United States v. Valentine, 539 F.3d
5 88, 94 (2d Cir. 2008).

6 The only facts known to the officers at the time of the
7 arrest were that (1) Gonzalez was in an area known for drug
8 sales, and (2) Gonzalez approached Matt and offered to get
9 him "whatever [he] need[ed]."³ The question is whether
10 these circumstances supported probable cause to arrest
11 Gonzalez for criminal possession of a controlled substance,
12 or for criminal sale of a controlled substance, or for an
13 attempt.

14 **1**

15 Gonzalez was convicted of Criminal Possession of a
16 Controlled Substance in the Third and Fourth Degrees. A
17 person is guilty of Criminal Possession of a Controlled
18 Substance in the Third Degree "when he knowingly and
19 unlawfully possesses . . . a narcotic drug with intent to

³ "[W]here . . . an arresting officer has acted on the basis of a radio communication from a fellow officer who has personal knowledge of the facts transmitted, he or she presumptively possesses the requisite probable cause." People v. Pacer, 203 A.D.2d 652, 653 (3d Dep't 1994).

1 sell it." N.Y. Penal Law § 220.16(1). A person is guilty
2 of Criminal Possession of a Controlled Substance in the
3 Fourth Degree "when he knowingly and unlawfully
4 possesses . . . one or more preparations, compounds,
5 mixtures or substances containing a narcotic
6 drug . . . [with] an aggregate weight of one-eighth ounce or
7 more." Id. § 220.09(1)

8 The most natural meaning of Gonzalez's statement (that
9 he could get Matt "whatever [he] need[ed]") is that Gonzalez
10 possessed no controlled substance at the moment, and that if
11 Matt needed some, Gonzalez would have to "get" it. The
12 statement did not preclude the possibility that Gonzalez was
13 keeping drugs in a body cavity, since it would not be
14 expected that he would retrieve it for delivery then and
15 there; but neither did the statement indicate that he had on
16 his person whatever drug Matt might name.

17 The officers never saw Gonzalez make a transaction, nor
18 did they see anything showing that Gonzalez possessed drugs,
19 as opposed to simply knowing where to get them. Cf. People
20 v. Eldridge, 103 A.D.2d 470, 471-72 (1st Dep't 1984)
21 (overturning finding of no probable cause where officers
22 observed defendant with glassine envelopes containing a
23 white substance in a high drug area).

Even without probable cause to believe Gonzalez possessed drugs, the officers might have had probable cause to arrest Gonzalez for Criminal Sale of a Controlled Substance, which requires a defendant to have "knowingly and unlawfully [sold] . . . a narcotic drug." N.Y. Penal Law § 220.39. Under New York Penal Law § 220.00, "'[s]ell' means to sell, exchange, give or dispose of to another, *or to offer or agree to do the same.*" (Emphasis added). The New York Court of Appeals has held that, "in order to support a conviction under an offering for sale theory, there must be evidence of a bona fide offer to sell--i.e., that defendant had both the intent and the ability to proceed with the sale." People v. Mike, 92 N.Y.2d 996, 998 (1998); see also People v. Crampton, 45 A.D.3d 1180, 1181 (3d Dep't 2007).

The Mike case is instructive:

Defendant approached two off-duty police officers and inquired whether they were interested in purchasing an unspecified type and quantity of drugs. One of the officers asked if defendant had any "dime bags;" [sic] defendant responded that he only had "twenties." Ultimately, defendant got into the officers' vehicle and led them to the driveway of a building. Defendant told the officers to give him some money, and he would go into the building and get the drugs. The officer

1 who had offered to purchase the drugs was
2 unwilling to go along with this arrangement. The
3 money belonged to the officer and he was
4 admittedly afraid that defendant would simply
5 abscond with it. Because of the officer's
6 unwillingness to either part with the money or
7 accompany defendant into the building, the
8 transaction proceeded no further and without ever
9 having exited the vehicle, defendant was placed
10 under arrest for offering to sell drugs.

11 Mike, 92 N.Y.2d at 998. The Court of Appeals held that the
12 evidence in that case "was insufficient to establish that
13 defendant had the ability to carry out the sale." Id. at
14 999; see also People v. Braithwaite, 162 Misc. 2d 613, 614-
15 16 (N.Y. Sup. Ct. 1994) (finding that the evidence was
16 insufficient to support a conviction for Criminal Sale of a
17 Controlled Substance because "[t]he offer here was anything
18 but definite. It was couched in terms such as 'if I can
19 get'; 'you want like an ounce or so'; 'you willing to spend
20 like \$800'; 'once I get the price'; and 'you know how long I
21 don't buy a ounce.'").

22
23 Gonzalez did not "offer" to sell drugs to Matt because
24 what Gonzalez said was considerably short of a "bona fide"
25 offer. Cf. People v. Rodriguez, 184 A.D.2d 439, 439 (1st
26 Dep't 1992) (concluding that an offer to sell cocaine,
27 followed by an undercover officer "asking for 'two'" and the
28 defendant reaching for a cigarette box containing the

1 cocaine, was sufficient). Once Gonzalez walked away from
2 Matt, there was no reason to believe that he had made a bona
3 fide offer.

4 There was therefore no probable cause to arrest
5 Gonzalez for Criminal Sale of a Controlled Substance.

6 **3**

7 The officers might have also had probable cause to
8 arrest Gonzalez for attempting either one of these two
9 crimes. "A person is guilty of an attempt to commit a crime
10 when, with intent to commit a crime, he engages in conduct
11 which tends to effect the commission of such crime." N.Y.
12 Penal Law § 110.00. For an attempt, it must be shown that
13 the defendant "committed an act or acts that carried the
14 project forward within dangerous proximity to the criminal
15 end to be attained." People v. Warren, 66 N.Y.2d 831, 832-
16 33 (1985) (citing People v Di Stefano, 38 N.Y.2d 640, 652
17 (1976)). A defendant cannot be convicted for Attempted
18 Criminal Sale of a Controlled Substance if "several
19 contingencies [stand] between the agreement . . . and the
20 contemplated purchase." Warren, 66 N.Y.2d at 833. The
21 court arrived at that result in Warren notwithstanding that
22 the defendant had met with an undercover officer and

1 discussed the quality, quantity, and price of the cocaine
2 purchase that was to take place later. Id. at 832.

3 As in Warren, “several contingencies [stand] between”
4 Gonzalez’s off-the-cuff statement and a sale of drugs. The
5 officers therefore lacked probable cause to believe that
6 Gonzalez had attempted to commit either crime.

7 **B**

8 The right to be free from arrest without probable cause
9 was clearly established at the time of Gonzalez’s arrest.
10 See Jenkins v. City of New York, 478 F.3d 76, 86-87 (2d Cir.
11 2007). Gonzalez’s false arrest claim therefore turns on
12 whether the officers’ probable cause determination was
13 objectively reasonable. See id. “An officer’s
14 determination is objectively reasonable if there was
15 ‘arguable’ probable cause at the time of the arrest--that
16 is, if ‘officers of reasonable competence could disagree on
17 whether the probable cause test was met.’” Id. (quoting
18 Lennon v. Miller, 66 F.3d 416, 423-24 (2d Cir. 1995)).
19 However, “[a]rguable’ probable cause should not be
20 misunderstood to mean ‘almost’ probable cause. . . . If
21 officers of reasonable competence would have to agree that
22 the information possessed by the officer at the time of

1 arrest did not add up to probable cause, the fact that it
2 came close does not immunize the officer." Id.

3 The analysis of probable cause set out above entails a
4 careful parsing of Gonzalez's statement and a close
5 examination of the elements of a number of different
6 criminal statutes. Officers charged with making moment-by-
7 moment decisions cannot be expected to undertake such a
8 project. While Gonzalez's statement on its own does not
9 satisfy the elements of any crime, he was in an area known
10 for drug sales and he said it to a person obviously trawling
11 for drugs. (The police could intuit that Matt and Gonzalez
12 were not talking about prostitutes, absinthe, or Cuban
13 cigars.) Significantly, the experienced state trial judge
14 conscientiously analyzed the probable cause question during
15 the criminal proceeding and concluded that there was indeed
16 probable cause to arrest Gonzalez.

17 We therefore conclude that there was "arguable"
18 probable cause and that the officers are entitled to
19 qualified immunity for Gonzalez's false arrest claim under
20 § 1983.⁴

⁴ This conclusion also disposes of Gonzalez's state law false imprisonment claim against the officers because "New York Law . . . grant[s] government officials qualified immunity on state-law claims except where the officials'

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A

The law governing these types of searches is far from settled; the rules alter with circumstances, and the circumstances are myriad. The key precedents turn kaleidoscopically on whether the arrest is for a felony or a misdemeanor, and whether the suspect is placed in the general prison population, among other considerations.

18

18

1 In Schmerber v. California, 384 U.S. 757 (1966), the
2 suspect was hospitalized following a car accident. Id. at
3 758. A policeman at the scene smelled alcohol on the
4 suspect's breath, and inferred from that and other
5 observations that the suspect was drunk. Id. at 768-69. At
6 the hospital, the officer made the arrest and instructed a
7 doctor to take a blood sample. Id. at 758. The Supreme
8 Court first held that there was probable cause for arrest
9 and for a search incident to arrest. Id. at 769. However,
10 the Court held that the search-incident-to-arrest doctrine
11 alone did not justify the drawing of the suspect's blood;
12 the police needed "a clear indication that in fact such
13 evidence will be found." Id. at 669-70. No warrant was
14 required, though, because of the exigent circumstance that
15 the blood-alcohol concentration would soon dissipate. Id.

16 In Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme
17 Court was asked to decide whether a blanket policy requiring
18 visual body cavity searches for all pretrial detainees being
19 housed in a correctional facility who had seen visitors was
20 constitutional. Citing Schmerber, the Court held that the
21 constitutionality of this scheme depended on "[1] the scope
22 of the particular intrusion, [2] the manner in which it is

1 conducted, [3] the justification for initiating it, and [4]
2 the place in which it is conducted.” Id. at 559. The Court
3 concluded that the scheme was reasonable because “[a]
4 detention facility is a unique place fraught with serious
5 security dangers.” Id.

6 In 1986, we held in Weber v. Dell

7 that the Fourth Amendment precludes prison
8 officials from performing strip/body cavity
9 searches of arrestees charged with *misdemeanors or*
10 *other minor offenses* unless the officials have a
11 *reasonable suspicion* that the arrestee is
12 concealing weapons or other contraband based on
13 the crime charged, the particular characteristics
14 of the arrestee, and/or the circumstances of the
15 arrest.

16
17 804 F.2d 796, 802 (2d Cir. 1986) (emphases added). In
18 Weber, the suspect was placed in a vacant cell, decreasing
19 the concerns regarding jailhouse safety. Id. at 799.

20 This rule was later applied in Shain v. Ellison, 273
21 F.3d 56 (2d Cir. 2001). The plaintiff had been arrested for
22 first degree harassment, a misdemeanor. Id. at 60. Relying
23 on Weber, we held that “it was clearly established in 1995
24 that persons charged with a misdemeanor and remanded to a
25 local correctional facility . . . have a right to be free of
26 a strip search absent reasonable suspicion that they are
27 carrying contraband or weapons.” Id. at 66.

1 Prior to the search at issue here, Judge McMahon of the
2 Southern District of New York had decided a number of cases
3 that expanded Weber to arrests for drug-related felonies.
4 In Sarnicola v. County of Westchester, Judge McMahon held
5 that “particularized reasonable suspicion” was required to
6 strip search all suspects, whether they were arrested for
7 misdemeanors or felonies. 229 F. Supp. 2d 259, 270
8 (S.D.N.Y. 2002). She observed that “[a]n automatic
9 justification for strip searches based on an arrest for a
10 drug-related crime would be inconsistent with the legal
11 concept of reasonable suspicion based on the *totality* of the
12 circumstances.” Id. at 273-74. She ruled to the same
13 effect in Bradley v. Village of Greenwood lake, 376 F. Supp.
14 2d 528 (S.D.N.Y. 2005); Bolden v. Village of Monticello, 344
15 F. Supp. 2d 407 (S.D.N.Y. 2004); and Murcia v. County of
16 Orange, 226 F. Supp. 2d 489 (S.D.N.Y. 2002). In so holding,
17 Judge McMahon noted that “the Second Circuit has not spoken
18 directly to the appropriate test for the validity of a strip
19 search incident to a felony arrest.” Sarnicola, 229 F.
20 Supp. 2d at 270; accord Murcia, 226 F. Supp. 2d at 494.

21 In 2008, the New York Court of Appeals decided People
22 v. Hall, 10 N.Y.3d 303 (2008). In Hall, police observed

1 Hall on a street corner repeatedly receive money from
2 someone, go into a nearby bodega, and return a few minutes
3 later with drugs to hand to the customer. Id. at 305-06.
4 The officers arrested him and strip-searched him at the
5 station prior to placing him with any other prisoners. Id.
6 When the officers told him to bend over, they saw a string
7 coming out of his rectum. Id. When Hall refused to remove
8 it, the officers removed it themselves and found that it was
9 attached to a bag of crack cocaine. Id.

10 The Hall court began by defining the terminology
11 outlined at the beginning of this Section. It then held as
12 follows:

13 Summarizing the relevant constitutional precedent,
14 it is clear that a [1] strip search must be
15 founded on a reasonable suspicion that the
16 arrestee is concealing evidence underneath
17 clothing and the search must be conducted in a
18 reasonable manner. To advance to the next level
19 required for a [2] visual cavity inspection, the
20 police must have a specific, articulable factual
21 basis supporting a reasonable suspicion to believe
22 the arrestee secreted evidence inside a body
23 cavity and the visual inspection must be conducted
24 reasonably. If an object is visually detected or
25 other information provides probable cause that an
26 object is hidden inside the arrestee's body, [3]
27 Schmerber dictates that a warrant be obtained
28 before conducting a body cavity search unless an
29 emergency situation exists. Under our decision in
30 More, the removal of an object protruding from a
31 body cavity, regardless of whether any insertion
32 into the body cavity is necessary, is subject to

1 the Schmerber rule and cannot be accomplished
2 without a warrant unless exigent circumstances
3 reasonably prevent the police from seeking prior
4 judicial authorization.
5

6 Id. at 310-11. The court went on to say, "Our precedent on
7 this point is unequivocal: the police are required to have
8 'specific and articulable facts which, along with any
9 logical deductions, reasonably prompted th[e] intrusion.'" Id.

10 Id. at 311 (alteration in original) (quoting People v.
11 Cantor, 36 N.Y.2d 106, 113 (1975)). However, no case cited
12 by the Hall court said that an officer needs particular,
13 individualized facts to conduct a visual body cavity search.

14 In Florence v. Board of Chosen Freeholders of County of
15 Burlington, 132 S. Ct. 1510 (2012), the Supreme Court again
16 confronted the issue of general prison strip search
17 policies. In Florence, a mistake in a computer system led
18 police to believe that there was an outstanding warrant for
19 the plaintiff's arrest. Id. at 1514. He was pulled over
20 and arrested pursuant to that warrant. Id. In jail,
21 officials performed a visual body cavity search under a
22 blanket policy. Id. The Supreme Court, building on Bell v.
23 Wolfish, held that a blanket policy of conducting visual
24 body cavity searches on new inmates was constitutional, even
25 for misdemeanor arrestees where there is no reason to

1 suspect that the arrestee would have contraband. Id. at
2 1520-21.

3 The plaintiff in Florence was placed in a general
4 prison population. The Court noted, "This case does not
5 require the Court to rule on the types of searches that
6 would be reasonable in instances where, for example, a
7 detainee will be held without assignment to the general jail
8 population and without substantial contact with other
9 detainees." Id. at 1522.

10 **B**

11 The officers do not dispute that the search violated
12 Gonzalez's right to be free from unreasonable searches;
13 their position is that the right violated was not clearly
14 established. We need not determine whether the facts
15 alleged make out a violation of a constitutional right prior
16 to determining whether that right was clearly established.
17 See Pearson v. Callahan, 555 U.S. 223, 236 (2009)
18 (dispensing with the rule announced in Saucier v. Katz, 533
19 U.S. 194 (2001), that required courts to first determine
20 whether there was a constitutional violation before
21 proceeding to the qualified immunity analysis). This is
22 especially true here, where the issue was not fully briefed

1 by the government. Id. at 225 (cautioning that courts
2 should not rule on constitutional issues where “the briefing
3 of constitutional questions is woefully inadequate”).

4 **C**

5 Defendants-Appellees are not liable under § 1983 unless
6 the right at issue was clearly established, meaning that
7 “[t]he contours of the right [are] sufficiently clear that a
8 reasonable official would understand that what he is doing
9 violates that right.” Anderson v. Creighton, 483 U.S. 635,
10 640 (1987). “In deciding whether a right was clearly
11 established, we ask: (1) Was the law defined with reasonable
12 clarity? (2) Had the Supreme Court or the Second Circuit
13 affirmed the rule? and (3) Would a reasonable defendant have
14 understood from the existing law that the conduct was
15 unlawful?” Young v. Cnty. of Fulton, 160 F.3d 899, 903 (2d
16 Cir. 1998). The answer to all three is no.

17 At the time of the search, we had never held that the
18 Fourth Amendment is violated by a suspicionless search
19 (strip search or visual body cavity search) of a person
20 arrested for felony drug possession. Although we have
21 repeatedly held that the police may not conduct a
22 suspicionless strip or body cavity search of a person

1 arrested for a misdemeanor, reasonable officers could
2 disagree as to whether that rule applied to those arrested
3 for felony drug crimes, given the propensity of drug dealers
4 to conceal contraband in their body cavities. See, e.g.,
5 Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1273 (7th
6 Cir. 1983) (describing “narcotics violations” as one of the
7 “kinds of crimes, unlike traffic or other minor offenses,
8 that might give rise to a reasonable belief that the . . .
9 arrestee was concealing an item in a body cavity”). Judge
10 McMahon (who seems to have had a full share of these cases)
11 has repeatedly emphasized that we have never applied the
12 rule from Weber and Shain to searches of suspects arrested
13 for felony drug crimes. See Sarnicola v. Cnty. of
14 Westchester, 229 F. Supp. 2d 259, 270 (S.D.N.Y. 2002);
15 Murcia v. Cnty. of Orange, 226 F. Supp. 2d 489, 494
16 (S.D.N.Y. 2002).

17 The New York Court of Appeals’ decision in People v.
18 Hall, 10 N.Y.3d 303 (2008), does not support the view that
19 the search of Gonzalez violated a clearly established
20 federal constitutional rule. Hall was decided after the
21 search at issue in this case. It is not a ruling of the
22 Supreme Court or this Court. And though the wording in Hall

1 seems promising for Gonzalez--"[o]ur precedent on this point
2 is *unequivocal*: the police are required to have 'specific
3 and articulable facts which, along with any logical
4 deductions, reasonably prompted th[e] intrusion,'" *id.* at
5 311 (emphasis added) (alteration in original) (quoting
6 People v. Cantor, 36 N.Y.2d 106, 113 (1975))--not one case
7 cited in Hall said that an officer needs particular,
8 individualized facts to conduct a visual body cavity
9 search.⁵

10 Shain v. Ellison is similarly distinguishable: the
11 arrest was for first degree harassment, a misdemeanor. 273
12 F.3d 56, 60 (2d Cir. 2001). A reasonable officer who made a
13 study of these ramified precedents could distinguish arrests
14 for offenses such as harassment from arrests for felonies--
15 especially felonies involving drugs. In any event, Shain is
16 likely no longer good law in light of Florence v. Board of
17 Chose Freeholders of County of Burlington, 132 S. Ct. 1510,
18 1515 (2012), which held that misdemeanor arrestees could be

⁵ Cantor, the case relied upon in Hall for this proposition, does not mention the words "strip search" or "body cavity search." The rule in Hall was characterized as a "pronouncement" by the trial court in People v. Crespo, reflecting its novelty. 29 Misc. 3d 1203(A), at *8 (N.Y. Sup. Ct. 2010).

1 subject to visual body cavity searches before being placed
2 in the general prison population, as the plaintiff in Shain
3 was. Shain, 273 F.3d at 60, 65-66.

4 While we can expect police officers to be familiar with
5 black-letter law applicable to commonly encountered
6 situations, they cannot be subjected to personal liability
7 under § 1983 based on anything less. There are so many
8 permutations of fact that bear upon the constitutional
9 issues of a search: the arrest can be for a misdemeanor or a
10 felony, for a drug offense or not; the search can be a strip
11 search, a visual body cavity search, or a manual one; the
12 person arrested can be headed to the general prison
13 population or a single cell; the place of the search can be
14 private or less than private; the impetus for the search can
15 be a tip, or the policeman's observations or experience or
16 hunch, or the neighborhood, or a description, or some or all
17 of the above; and other considerations as well. The
18 policeman is not expected to know all of our precedents or
19 those of the Supreme Court, or to distinguish holding from
20 dicta, or to put together precedents for line-drawing, or to
21 discern trends or follow doctrinal trajectories. Otherwise,
22 qualified immunity would be available only to a cop who is a

1 professor of criminal procedure in her spare time. The
2 police cannot be expected to know such things at risk of
3 *personal liability* for the policeman's savings, home equity,
4 and college funds. And such personal liability is the only
5 kind of liability imposed by § 1983 (absent a Monell claim).
6 That tells us something about the threshold of liability in
7 these cases.⁶

8 We conclude that a reasonable officer--even one
9 familiar with the cases described above--would not have
10 understood that conducting an otherwise suspicionless visual
11 body cavity search of a person arrested for a felony drug
12 offense was unlawful; the defendants in this case are
13 therefore entitled to qualified immunity.⁷

⁶ The premise--that a suit against an individual government employee is in substance a suit against his employer--is wrong. Doubtless in some political subdivisions of this Circuit the government supplies defense counsel and pays the judgment if an officer is personally liable under § 1983. But this Circuit includes scores of counties and hundreds of towns and municipalities; and there are thousands of political subdivisions in the nation. Not all of them will indemnify their employees for § 1983 judgments; many cannot even afford to furnish a defense; some can barely keep the school open.

⁷ Gonzalez also alleges that the defendants violated his Fourth Amendment rights when they conducted a manual body cavity search and pulled the bag of crack cocaine out of Gonzalez's anus. Who pulled the bag out is disputed, but even assuming it was the officers, they would not have violated clearly established law by doing so; once they saw

1 IV

2 Gonzalez also claims malicious prosecution under
3 § 1983. A § 1983 claim for malicious prosecution looks to
4 the relevant state common law. See Janetka v. Dabe, 892
5 F.2d 187, 189 (2d Cir. 1989). Under New York law, a
6 plaintiff must show that the underlying proceeding was
7 terminated in his favor to make out a malicious prosecution
8 claim. See id. at 189. "Where the prosecution did not
9 result in an acquittal, it is deemed to have ended in favor
10 of the accused, for these purposes, only when its final
11 disposition is such as to indicate the innocence of the
12 accused." Murphy v. Lynn, 118 F.3d 938, 948 (2d Cir. 1997).

13 Here, the officers found crack cocaine in Gonzalez's
14 rectum, eliminating any doubt that Gonzalez was, in fact,
15 guilty of at least criminal possession of a controlled
16 substance. His malicious prosecution claim therefore fails.

17

the bag protruding from Gonzalez's anus, they had probable
cause to search him for it, and we have never held that such
a search requires a warrant. Cf. Hall, 10 N.Y. 3d at 310-
11.

1

CONCLUSION

2

For the foregoing reasons, the judgment of the district

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court dismissing all of Gonzalez's claims against the

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officers in their individual capacities is AFFIRMED.

POOLER, *Circuit Judge*, dissenting:

1 I concur in the majority opinion in its statements of controlling law and its
2 conclusions as to Part I, II,¹ and IV. I respectfully dissent however, as to Part III, because
3 I believe that the relevant rule regarding body cavity searches was clearly established, as
4 it was clearly foreshadowed as a federal constitutional right, prior to Gonzalez's arrest.

¹ Although I agree with the majority's conclusion in Part II, that arguable probable cause exists in this instance, I must stress: this is a close case. Arguable probable cause exists where "officers of reasonable competence could disagree on the legality of [their] action [in this] particular factual context." *Walczyk v. Rio*, 496 F.3d 139, 154 (2d Cir. 2007) (internal quotation marks omitted). Where the "only facts known to the officers at the time of the arrest," were that (1) the location was known for drug sales and (2) Gonzalez said he *could* get drugs, see Maj. Op. at 11 (emphasis added), the question of arguable probable cause is indeed a close question. If the officers had not been able to rely on the second factor, that Gonzalez said he could get drugs, officers of reasonable competence could not disagree on the illegality of their action.

Officers must rely on something more than the location's reputation in order to find reasonable suspicion. See *Holeman v. City of New London*, 425 F.3d 184, 190 (2d Cir. 2005) (stating that driving in circuitous route in high-crime area at 4:30 a.m. not enough, standing alone, to support reasonable suspicion); *United States v. McCargo*, 464 F.3d 192, 197 (2d Cir. 2006) ("Reasonable suspicion requires considerably less of a showing than probable cause."). If a location's reputation as a "high crime area" is not enough to advance reasonable suspicion, a location's reputation as a "high drug area" certainly cannot be enough to suggest probable cause, without more information. Although officers are allowed to take a location's reputation into consideration, see *United States v. Muhammad*, 463 F.3d 115, 122-23 (2d Cir. 2006), it must be coupled with some other indication, such as flight from the scene, see *id.*, or the prevalence of drug sales at a *particular address* in order to conclude that arguable probable cause existed. See *Martinez v. City of Schenectady*, 115 F.3d 111 (2d Cir. 1997) (concluding probable cause existed where officers previously knew about drug sales from plaintiff's specific apartment address).

In this case, the general location's prevalence in drug sales can therefore not be enough to create arguable probable cause or else all residents who live in high drug or high crime areas would be vulnerable to arbitrary arrest. Nonetheless, I agree that we may conclude arguable probable cause existed in this instance because the officers in this case could couple the location's reputation with Gonzalez's statement.

1 I.

2 To determine whether a right was clearly established² we look to “(1) whether the
3 right in question was defined with ‘reasonable specificity’; (2) whether the decisional law
4 of the Supreme Court and the applicable circuit court support the existence of the right in
5 question; and (3) whether under preexisting law a reasonable defendant official would
6 have understood that his or her acts were unlawful.” *Shechter v. Comptroller of City of*
7 *N.Y.*, 79 F.3d 265, 271 (2d Cir. 1996) (internal quotation marks omitted). “If the law at
8 that time was not clearly established, an official could not reasonably be expected to
9 anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the
10 law forbade conduct not previously identified as unlawful.” *Harlow v. Fitzgerald*, 457
11 U.S. 800, 818 (1982).
12

² In resolving the question of qualified immunity, a court must decide whether the alleged conduct was a violation of a constitutional right and whether the right at issue was “clearly established” at the time of defendant’s alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Here, no one disputes that the search violated Gonzalez’s right to be free from unreasonable searches; the defendant’s position is only that the right violated was not clearly established. After Gonzalez was arrested he was told to get on the floor and was searched, but the pat down yielded nothing. Plaintiff was handcuffed and taken to police headquarters, where police conducted a full cavity search. Officers stated that Gonzalez was subjected to this search only because he was arrested on a narcotics offense. According to the Schenectady Police Department’s policy, police required Gonzalez to undress completely, turn around, put his hands on the wall, spread his feet, and use his hands to spread his buttocks. Before taking off his boxers, officers had not identified any contraband. Only after spreading his buttocks, officers located and removed a bag with drugs. The parties disagree as to whether the officers or Gonzalez removed the bag.

This is not to say that an action is clearly established only if the court has explicitly held that the behavior is unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). We have repeatedly held a law is considered clearly established if decisions of the Supreme Court or this Court “*clearly foreshadow* a particular ruling on the issue.” *Varrone v. Bilotti*, 123 F.3d 75, 79 (2d Cir. 1997) (internal quotation marks omitted) (emphasis added). *See also id.* at 79 (quoting *Shabazz v. Coughlin*, 852 F.2d 697, 701 (2d Cir. 1988) (stating in “the absence of a specific authority directly on point” we look to whether this Circuit or the Supreme Court had presaged the particular ruling). We have taken special care to apply this “clearly foreshadowed” standard in the context of the Fourth Amendment, *see Varrone*, 123 F.3d at 78; *see also Shabazz*, 852 F.2d at 701, which “is not capable of precise definition or mechanical application.” *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

II.

Here, the relevant question is whether the heightened standard for an anal body cavity search of a felony arrestee was clearly foreshadowed by this Circuit or the Supreme Court, at the time of Gonzalez’s search in 2006.³ The New York State Appellate Division initially found that the officer’s had not met the heightened reasonable suspicion standard to justify Gonzalez’s visual cavity search, indicating that the Appellate

³ The majority states that the question here regards a strip search or visual body cavity search. According to the Appellees, Gonzalez himself removed the bag from his buttocks. According to the Gonzalez, one of the officers removed the bag from his buttocks.

1 Division believed the rule was clearly established. *People v. Gonzalez*, 57 A.D.3d 1220,
2 1222 (N.Y. App. Div. 2008). The district court concluded differently, stating that the law
3 requiring a more stringent standard for body cavity searches had not been clearly
4 established until *People v. Hall*, 10 N.Y.3d 303, 310-11 (2008) subsequent to Gonzalez's
5 arrest. *Gonzalez v. City of Schenectady*, No. 09-cv-1434, 2011 WL 6010910, at *4
6 (N.D.N.Y. Nov. 30, 2011). The majority agrees with the district court, to the extent that it
7 states, "[t]he law governing these types of searches is far from settled; the rules alter with
8 circumstances, and the circumstances are myriad." However, the majority fails to apply
9 the correct test. Regardless of whether the Supreme Court or this Circuit directly held
10 this rule, it was undoubtedly foreshadowed previous to Gonzalez's arrest, thus, I must
11 disagree with the majority's conclusion in Part III.

12 Both the Supreme Court and this Circuit have held that police searches within the
13 body require a special heightened standard. In *Schmerber v. California*, 384 U.S. 757
14 (1966), the Supreme Court held that intrusions beyond the body's surface are forbidden
15 by the Fourth Amendment in the absence of clear indication that the evidence will be
16 found. *Id.* at 770. In that case, the Court held that probable cause to search a drunk
17 driver did not justify the more intrusive drawing of the suspect's blood. *Id.* "[I]nterests
18 in human dignity and privacy which the Fourth Amendment protects forbid any such
19 intrusions on the mere chance that desired evidence might be obtained." *Id.* at 769-70.
20 See also *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 613-14 (1989) ("The [Fourth]
21 Amendment guarantees the privacy, dignity, and security of persons against certain

1 arbitrary and invasive acts by officers of the Government or those acting at their
2 direction.”) Thus, “[i]n the absence of a clear indication⁴ that in fact such evidence will
3 be found, these fundamental human interests require law officers to suffer the risk that
4 such evidence may disappear unless there is an immediate search.” *Schmerber*, 384 U.S.
5 at 770.

6 In *Bell*, 441 U.S. 520, the Supreme Court extended this rule to body cavity
7 searches. There, the Court held that policies requiring pretrial detainees be given visual
8 body cavity searches after having seen a visitor may be constitutional. *Id.* at 560.
9 However, *Bell* still recognized pretrial detainees retain some Fourth Amendment rights.
10 *Id.* at 558; *see also id.* at 545 (“we have held that convicted prisoners do not forfeit all
11 constitutional protections by reason of their conviction and confinement in prison”).
12 Vigilant of these privacy interests and *Schmerber*, the Court concluded these “searches
13 must [still] be conducted in a reasonable manner.” *Id.* at 560 (citing *Schmerber*, 384 U.S.
14 at 771-72). The test for reasonableness requires courts to consider “the scope of the
15 particular intrusion, the manner in which it is conducted, the justification for initiating it,
16 and the place in which it is conducted.” *Id.* at 559.⁵

⁴ The Court clarified a “clear indication” to mean “the necessity for particularized suspicion that the evidence sought might be found within the body of the individual.” *United States v. Montoya De Hernandez*, 473 U.S. 531, 540 (1985).

⁵ The Court in *Bell* did not speak to the issue of whether arrestees were subject to the same standard.

1 Following *Bell*, this Circuit and others were wary to uphold body cavity searches
2 as constitutional, under the test for reasonableness. The Circuits hesitated, stating that
3 such searches are invasive and degrading. *See Hartline v. Gallo*, 546 F.3d 95, 102 (2d
4 Cir. 2008); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983)
5 (recognizing “strip searches involving the visual inspection of the anal and genital areas
6 as ‘demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant,
7 embarrassing, repulsive, signifying degradation and submission”); *see also Arruda v.*
8 *Fair*, 710 F.2d 886, 887 (1st Cir. 1983). In fact, the Supreme Court agreed with this
9 depiction, stating that body cavity searches were the “most intrusive” of all searches.
10 *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 672 (1995). As stated in a related Fourth
11 Amendment case, the general consensus was that, “[s]uch an invasion of bodily integrity
12 implicates an individual’s most personal and deep-rooted expectations of privacy.”
13 *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) (internal quotation marks omitted).

14 Thus, for over two decades, this Circuit understood that cavity searches for
15 misdemeanants would be unjustified unless they satisfied the heightened standard. *Weber*
16 *v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986). In *Weber*, we stated that the Supreme Court
17 had not “read out of the Constitution the provision of general application that a search be
18 justified as reasonable under the circumstances.” *Id.* at 800. Nor had it “free[d] prison
19 officials from all Fourth Amendment constraints.” *Id.* Thus, we held that a strip search
20 of a misdemeanor arrestee is unlawful unless there is “reasonable suspicion that the
21 arrestee is concealing weapons or other contraband based on the crime charged, the

1 particular characteristics of the arrestee, and/or the circumstances of the arrest.” *Id.* at
2 802.⁶

3 Following *Weber*, for years this Circuit has repeatedly affirmed the rule that body
4 cavity searches, particularly for misdemeanants, must be justified by an individualized
5 reasonable suspicion. *See Hartline*, 546 F.3d at 100-01 (quoting *Weber*, 804 F.2d at 802)
6 (citing persuasive authority for the proposition that “it is [not] reasonable to strip search
7 every inmate booked on a drug related charge” and reasoning that otherwise “strip
8 searches will become commonplace”); *see also Kelsey v. Cnty. of Schoharie*, 567 F.3d 54,
9 62 (2d Cir. 2009) (reiterating the Circuit’s “long-standing precedent covering strip
10 searches for those arrested for misdemeanors” and collecting cases) (citations omitted);
11 *N.G. v. Connecticut*, 382 F.3d 225, 232 (2d Cir. 2004) (noting that “all the circuits to have
12 considered this issue have reached the same conclusion”); *Shain v. Ellison*, 273 F.3d 56,
13 64-65 (2d Cir. 2001); *Wachtler v. Cnty. of Herkimer*, 35 F.3d 77, 82 (2d Cir. 1994);
14 *Walsh v. Franco*, 849 F.2d 66, 68-69 (2d Cir. 1988). For example, in *Shain*, we held “it
15 was clearly established in 1995 that persons charged with a misdemeanor and remanded
16 to a local correctional facility . . . have a right to be free of a strip search absent
17 reasonable suspicion that they are carrying contraband or weapons.” 273 F.3d at 66. We

⁶ In essence, this standard required more than an “inchoate and unparticularized suspicion or ‘hunch.’” *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Instead, the reasonable suspicion standard requires individualized suspicion, specifically directed to the person targeted for the strip search, and reasonable cause to believe that drugs or other contraband are concealed in the particular place to be searched with some indicia of reliability. *Hartline*, 546 F.3d at 100.

1 concluded the county’s “visual body cavity search” of a misdemeanor absent reasonable
2 suspicion violated the Fourth Amendment. *Id.*

3 Despite these consistent rulings rejecting the constitutionality of body cavity
4 searches, appellees and the majority persist in arguing that the rule was not clearly
5 foreshadowed, because in this case Gonzalez was arrested for a *felony*, and the Second
6 Circuit cases deal exclusively with *misdemeanors*. Appellees argument fails, however,
7 because this Court and the Supreme Court had both clearly foreshadowed that the
8 heightened standard applied regardless of a person’s status.

9 In *Shain*, we recognized, “we long had stressed the intrusive nature of body cavity
10 searches.” *Id.* at 63. In addition to this guiding principle, we stated that whether our
11 heightened standard applied to felony arrestees was at least an open issue, *id.* at 64,⁷ and
12 intimated that if this Circuit was asked that question, we would likely resolve it in
13 Gonzalez’s favor given that status should not affect a person’s rights, *id.* at 66 n.3.⁸
14 Although not explicitly held, this suggestion was echoed by the Supreme Court’s in
15 *Tennessee v. Garner*, 471 U.S. 1, 14 (1985), which undermined the distinction between a
16 felon and a misdemeanor as “untenable.” Thus, this Court and the Supreme Court both
17 suggested that all body cavity searches must be conducted according to a heightened

⁷ Though we did also state, “[t]here is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates.” *Shain*, 273 F.3d at 64 n.2

⁸ In a footnote, we stated that “we do not rely solely on Shain’s status as a pretrial detainee” in order to find that this search violated the Fourth Amendment. *Shain*, 273 F.3d at 66 n.3.

1 standard regardless of a person’s arrestee status. As Appellees admit in their brief, “the
2 distinction between the types of searches was evolving” in this direction. Appellees’ Br.
3 at 16.

4 Guided by these cases, the Southern District of New York came to this exact
5 conclusion. It held that, the language of the Supreme Court and this Circuit
6 foreshadowed that the stringent standard for body cavity searches applies to felony
7 arrestees as well as misdemeanants. *See Sarnicola v. Cnty. of Westchester*, 229 F. Supp.
8 2d 259 (S.D.N.Y. 2002); *Murcia v. Cnty. of Orange*, 226 F. Supp. 2d 489 (S.D.N.Y.
9 2002); *Dodge v. Cnty. of Orange*, 209 F.R.D. 65 (S.D.N.Y. 2002).⁹ In *Murcia*, the district
10 court, like the majority here, acknowledged that “the Second Circuit has not spoken
11 directly to the appropriate test for the validity of a strip search.”

12 However, unlike the majority, it correctly asked if this rule was clearly
13 foreshadowed despite “the absence of specific authority directly on point.” *Varrone*, 123
14 F.3d at 79. Applying that analysis, the district court observed that this “Circuit has held
15 blanket policies subjecting all newly-arrested misdemeanor detainees in a local
16 correctional facility to visual body cavity searches are unconstitutional.” *Murcia*, 226 F.

⁹ The majority tries to disclaim these holdings because they were decided by a single judge in the Southern District of New York. However, I know of no case law which holds that the singularity of a judge undermines the weight of the decision. Regardless this judge was not alone. Other judges in our district courts have observed this rule. *See Sims v. Farrelly*, No. 10 Civ. 4765, 2013 WL 3972460, at *8 (S.D.N.Y. Aug. 2, 2013); *Sorrell v. Inc. Vill. of Lynbrook*, 2012 WL 1999642, at *6 (E.D.N.Y. June 4, 2012); *McBean v. City of New York*, 260 F.R.D. 120, 130 (S.D.N.Y. 2009); *Harriston v. Mead*, No. 05 CV 2058, 2008 WL 4507608, at *3 (E.D.N.Y. Sep 30, 2008).

1 Supp. 2d at 493. The *Murcia* court also stated that the Supreme Court wrote in *Garner*
2 that, “[i]n the context of Fourth Amendment searches and seizures . . . the distinction
3 between felonies and misdemeanors is minor and often arbitrary,” *Id.* at 494 (internal
4 quotation marks omitted).⁹ It concluded,

5 Coupling [the Supreme Court’s] words with the Second Circuit’s strong statements
6 about constitutional protections for strip searches of accused misdemeanants,
7 [allows for the conclusion] that the law in this Circuit does not countenance a
8 policy mandating strip searches of all felony arrestees simply because they stand
9 accused of felonies.

10
11 *Id.* at 494. Having correctly determined we “clearly foreshadowed” the rule, the court
12 then held, “[t]he ‘individualized reasonable suspicion’ rule should apply to accused felons
13 as well as misdemeanants upon arrival at a local correctional facility.” *Id.*

14 In *Sarnicola*, the lower court once again came to the same conclusion. It stated
15 that although this “Circuit ha[d] not spoken directly to the appropriate test for the validity
16 of a strip search incident to a felony arrest, [the district court in *Murcia*] recently opined
17 that the Court of Appeals would apply the particularized reasonable suspicion test to
18 searches of felony arrestees as well” because “[i]n the sixteen years following *Weber*, the
19 Second Circuit has firmly held that strip searches of persons lawfully arrested for minor
20 infractions (misdemeanors and violations) must be justified by an individualized
21 reasonable suspicion of concealed weapons or contraband.” *Sarnicola*, 229 F. Supp. 2d at

⁹ The district court also cited to *Garner* for the proposition that “[m]any crimes classified as misdemeanors, or nonexistent, at common law are now felonies,” and “numerous misdemeanors involve conduct more dangerous than many felonies.” *Murcia*, 226 F. Supp. 2d at 494.

1 269-70. The lower court also observed that the Supreme Court had previously stated that
2 “the assumption that a ‘felon’ is more dangerous than a misdemeanor [is] untenable.”
3 *Id.* at 270 n.4 (citing *Garner*, 471 U.S. at 14). Thus, finding the rule had already been
4 forecast, it stated that “no constitutional prerogative [exists in creating a distinction for
5 felony arrests in order to] strip search individuals in the absence of particularized
6 reasonable suspicion that they are carrying drugs or contraband.” *Id.* at 270.

7 In these cases, the district court drew from the principles and inferences made by
8 our Circuit and the Supreme Court for nearly two decades to deduce the foreshadowed
9 conclusion that the individualized reasonable suspicion rule should apply to searches so
10 intrusive regardless of a person’s status.

11 The district court was not alone in its deduction. In *People v. More*, 97 N.Y.2d
12 209, 214 (2002), and then *People v. Hall*, 10 N.Y.3d 303, 310-11 (2008), the New York
13 Court of Appeals also found that an anal cavity search of a felony arrestee had to meet a
14 heightened standard. In *More*, officers arrested a defendant in his home in close
15 proximity to what appeared to be drugs. *More*, 97 N.Y.2d at 212. The initial “pat-down”
16 yielded no evidence of drugs, but, regardless, police conducted an anal cavity search. *Id.*
17 The New York Court of Appeals held the body cavity search of defendant incident to his
18 arrest was unreasonable and invalid, and drugs seized from his rectum must be suppressed
19 because the Fourth Amendment requires a “clear indication” that contraband will be
20
21

1 found, in order to make the more intrusive search, “beyond the body’s surface.” *Id.* at
2 212-13.¹⁰

3 In *Hall*, the New York Court of Appeals once again held that “because a manual
4 cavity search is more intrusive” a heightened standard must exist, regardless of a person’s
5 felony status. *Hall*, 10 N.Y.3d at 310-11. The court stated,

6 To advance to the next level required for a visual cavity inspection, the police must
7 have a specific, articulable factual basis supporting a reasonable suspicion to
8 believe the arrestee secreted evidence inside a body cavity and the visual
9 inspection must be conducted reasonably. If an object is visually detected or other
10 information provides probable cause that an object is hidden inside the arrestee’s
11 body, *Schmerber* dictates that a warrant be obtained before conducting a body
12 cavity search unless an emergency situation exists.

13 *Id.* The court noted that “visual cavity inspections . . . cannot be routinely undertaken as
14 incident to all drug arrests or permitted under a police department’s blanket policy that
15 subjects persons suspected of certain crimes to [this] procedure[.]” *Id.* at 311.

16 Despite Supreme Court precedent and over two decades of this Circuit’s case law
17 rejecting cavity searches, the district court stated and Appellees still contend that the rule

¹⁰ Since then, state courts have continued to hold that rule. For example, more recently, that rule was applied in a case with a similar fact pattern to the case at hand. In *People v. Robinson*, the Supreme Court of New York County found that although police had probable cause to arrest the defendant after observing him sell cocaine, the police’s strip search was unreasonable. *People v. Robinson*, 39 Misc. 3d 1234(A), at *3 (N.Y.Sup. Ct. 2013) (“There was no evidence that the [search] was based on any particularized facts that led police to believe that this particular defendant was concealing evidence beneath his clothes.”)

1 was not clearly established until *Hall*, 10 N.Y.3d at 310-11.¹¹ Regardless of *Hall*, the rule
2 established therein was already clearly suggested by the Supreme Court and presaged by
3 this Circuit. As the majority states, “we have repeatedly held that police may not conduct
4 a suspicionless strip or body cavity search.” Even if no federal case prior to *Hall* stated
5 the rule as explicitly applying to felony arrestees, the waterfall of decisions from
6 *Schmerber* to *Weber* to *Shain* to *Murcia* made *Hall*’s and *Sarnicola*’s ultimate results a
7 fait accompli—as reflections of this Circuit’s developing case law. In addition, even
8 Appellees are in accord with the district court and the New York Court of Appeals,
9 recognizing that the rule on searches was “evolving” in this direction. Appellees’ Br. at
10 16. We have held that such foreshadowing requires the rule to be deemed clearly
11 established. *See Varrone*, 123 F.3d at 78-79; *Scott v. Fischer*, 616 F.3d 100, 105 (2d Cir.
12 2010). Accordingly, where the Supreme Court and this Court clearly foreshadowed a

¹¹ The majority correctly clarifies the present question is not just whether there was a clearly established rule but whether there was a clearly established *federal* constitutional right. Therefore, *Hall* is not determinative. But what the majority fails to notice is that *Hall* stated it was only reaffirming pre-existing law of the Supreme Court. The New York court recognized, “the rule announced in *Schmerber* is unequivocal . . . searches involving intrusions beyond the body’s surface” require some stricter standard. *Hall*, 10 N.Y.3d at 313 (citing *Schmerber*, 384 U.S. at 769). *Hall* thus clarified it was not a new rule but a directive from the Supreme Court’s holding in *Schmerber*. *Id.* at 310 (“*Schmerber* . . . dictates that a more stringent standard be applied to a physical search of an arrestee’s body cavity”). Moreover, that case opined that the state court had itself adopted this rule previously in *More*. The *Hall* court stated, “[in o]ur most recent decision addressing a search into a person’s body[,], *People v. More*, 97 N.Y.2d 209 (2002) We recognized that a search of this nature was at least as intrusive as the blood test procedures in *Schmerber* . . . [and] we held that the removal of the object from the defendant’s rectum without prior judicial authorization violated the Fourth Amendment.” *Hall*, 10 N.Y.3d at 310 (internal quotation marks and alteration omitted).

1 ruling on the issue, and other courts have also acknowledged this outcome, we should
2 conclude that the rule was clearly established.

3 III.

4 Moreover, “[e]ven in the absence of binding precedent, a right is clearly
5 established if the contours of the right are sufficiently clear that a reasonable official
6 would understand that what he is doing violates that right. The unlawfulness must be
7 apparent.” *Young v. Cnty. of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998) (citing *Anderson*,
8 483 U.S. at 640) (internal quotation marks and alterations omitted). “Officials are held to
9 have constructive knowledge of established law.” *Salahuddin v. Coughlin*, 781 F.2d 24,
10 27 (2d Cir. 1986).

11 The majority admits “we have repeatedly held that police may not conduct a
12 suspicionless strip or body cavity search” and also that “we can expect police officers to
13 be familiar with black-letter law.” It further states, “[t]he officers do not dispute that the
14 search violated Gonzalez’s right to be free from unreasonable searches.” However, still it
15 somehow concludes that “reasonable officers could disagree as to whether that rule
16 applied to those arrested for felony drug crimes.” I do not agree. An objectively
17 reasonable officer, familiar with our case law, would certainly have understood that
18 conducting Gonzalez’s suspicionless body cavity search was unlawful. In addition to
19 cases in this Circuit having consistently affirmed that cavity searches require heightened
20 particularity, *Hall* pronounced, “[o]ur precedent on this point [as to felony arrestees] is
21 unequivocal,” *Hall*, 10 N.Y.3d at 311, thus demonstrating that officers with presumed
22 knowledge of the law were clearly on notice.

1 In addition the initial search and pat down revealed no protruding object. Without
2 more particularized suspicion—that the evidence sought was likely to be found within
3 Gonzalez’s body—no officer could have concluded the cavity search was reasonable.
4 Unlike other circumstances where a “small hard object” was detected in a defendant’s
5 initial strip search, Gonzalez’s initial strip search did not reveal any hard objects. *Cf.*
6 *People v. Clayton*, 57 A.D.3d 557, 558 (N.Y. App. Div. 2008). Therefore, as in
7 *Schmerber*, absent some more, clear indication of Gonzalez harboring drugs or other
8 paraphernalia, the cavity search was a clear violation of plaintiff’s Fourth Amendment
9 rights, such that no officer could find it reasonable.

10 The facts here are also distinguishable from *Clayton*, 57 A.D.3d 557, where the
11 searching officer testified that the defendant had a history of secreting contraband. *Id.* at
12 559. Here, “Gonzalez was not a target of the police’s buy bust operation.” *Gonzalez*,
13 2011 WL 6010910, at *1 n.1. Therefore, we may assume the police had no background
14 information on Gonzalez, his connection to the drug trade, or his history as to secreting
15 contraband. Thus, the officers lacked requisite information for the body cavity search to
16 be considered reasonable and unjustifiably still conducted a suspicionless search.

17 Here, the only thing giving police suspicion that Gonzalez was secreting
18 contraband was “defendant’s statement that he *could* get” drugs, having said, “*I can get*
19 *you* whatever you need.” However, that statement did not explain 1) what kind of drugs;
20 2) what amount; or 3) when the sale would occur. As the Appellate Division in this case
21 stated, “[Gonzalez’s] representation that he could ‘get you whatever you need’ was vague

1 as to whether he actually possessed narcotics at the time and did not provide a specific,
2 articulable basis to prompt the visual cavity inspection.” *Gonzalez*, 57 A.D.3d at 1222.
3 In fact, Gonzalez’s use of the future tense suggests the opposite conclusion, that he had
4 no drugs on his person and therefore *could* get it if requested. *See Schmerber*, 384 U.S. at
5 769-70 (“the Fourth Amendment . . . forbid[s] any such intrusions on the mere chance
6 that desired evidence might be obtained.”)

7 Moreover, even accepting that the strip search of the defendant was in accordance
8 with police procedure, that, too, does not excuse police who should have known that to
9 perform a strip search of the defendant absent reasonable suspicion was unjustified. *See*
10 *Hartline*, 546 F.3d at 100-01 (“even if there were a departmental policy of strip searching
11 all arrestees without making any assessment of particularized circumstances, the relevant
12 question is still: Do the circumstances of [the] arrest support a reasonable suspicion that
13 she was secreting contraband on her person?”).

14 Accordingly, where the unlawfulness was “apparent,” *Anderson*, 483 U.S. at 640,
15 and the searching officers suspicion was based on “vague” information, an objectively
16 reasonable person in the officer’s position should have known that this conduct was
17 unreasonable and qualified immunity should therefore not apply.

18 IV.

19 The gross violation of personal privacy cannot be outweighed by the government’s
20 interest where only a mere chance existed that the desired evidence would be obtained.
21 “There is no iron curtain drawn between the Constitution and the prisons of this country.”

1 *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). Included in those constitutional rights
2 “when it comes to the Fourth Amendment,” is the rule that “the home is the first among
3 equals.” *Florida v. Jardines*, 33 S. Ct. 1409, 1413-14 (2013). It is at the Amendment’s
4 “‘very core.’” *Id.* As a person’s body is the ultimate home, it must be at the nucleus of
5 the Amendment. Thus, an invasion into the body is just as much—if not even
6 more—extreme in practice than an intrusive entry into a home. *See United States v.*
7 *Martinez-Fuerte*, 428 U.S. 543, 561 (1976) (explaining that body searches are “ordinarily
8 afforded the most stringent Fourth Amendment protection”). In fact, the Court has
9 recently reaffirmed its commitment to the reasonableness inquiry and *Schmerber* rule, as
10 touchstones of the Fourth Amendment analysis. *See McNeely*, 133 S. Ct. at 1565. (“We
11 have never retreated, however, from our recognition that any compelled intrusion into the
12 human body implicates significant, constitutionally protected privacy interests.”)

13 Therefore, these protections stand regardless of a person’s arrestee status. The
14 proscription against unreasonable body cavity searches, held as a consistent and core rule
15 of the Fourth Amendment, should not be ignored simply because of an arbitrary
16 distinction as to a person’s status. To hold otherwise suggests that body cavity searches
17 are so commonplace that we do not treat them as the ultimate invasive search. *See*
18 *Veronia*, 515 U.S. at 672 (stating these are the “most intrusive searches”). Such a
19 conclusion is unacceptable in any society that takes privacy, dignity, and bodily integrity
20 seriously.

1

V.

2

For these reasons, I respectfully dissent as to Part III of the majority's opinion.

3