Circuit Court for Washington County
Case No. C-21-CR-23-000543

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1753

September Term, 2024

JA-MO KIMU SMITH

v.

STATE OF MARYLAND

Berger,
Kehoe, S.,
Hotten, Michele D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.
Dissenting Opinion by Hotten, Michele D., J.

Filed: June 10, 2026

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Ja-Mo Kimu Smith ("Smith"), was charged with possession of suboxone, possession of fentanyl, possession with intent to distribute fentanyl, and possession of 28 grams or more of a fentanyl mixture. Prior to trial in the Circuit Court for Washington County, Smith moved to suppress the fentanyl recovered from his person after police conducted a sexually invasive search on the side of a public street, in a "high traffic" area, at around 3:00 a.m. The circuit court denied the motion to suppress after concluding that the search was reasonable. Subsequently, a jury convicted Smith of all four counts. Smith was sentenced to one year imprisonment for possession of suboxone, a consecutive term of twenty years' imprisonment, with all but eight suspended, and five years' probation for possession of fentanyl with intent to distribute,[1] and to a consecutive term of five years' imprisonment without parole for possession of 28 grams or more of a fentanyl mixture. This appeal followed.

Smith presents two questions for our review, which we have rephrased as follows:[2]

[1] For sentencing purposes, the circuit court merged the conviction of possession of fentanyl into the conviction of possession of fentanyl with intent to distribute.

[2] Appellant phrased the questions as follows:

> 1. Did the trial court err in denying the motion to suppress evidence recovered from Mr. Smith during a warrantless sexually invasive search conducted on a public street in Hagerstown?
>
> 2. Are separate, consecutive sentences for both possession with intent to distribute fentanyl and possession of 28 grams or more of a fentanyl mixture improper?

I. Whether the circuit court erred in denying the motion to suppress evidence recovered from Smith's person during a sexually invasive search conducted on a public street.

II. Whether the circuit court erred by imposing separate, consecutive sentences for possession with intent to distribute fentanyl and possession of 28 grams or more of a fentanyl mixture.

As we shall explain, we answer question one in the negative and affirm Smith's judgments of conviction. We, however, answer question two in the negative. Accordingly, we vacate Smith's sentence for count four -- possession of 28 grams or more of a fentanyl mixture.

BACKGROUND

When called on to review "a ruling on a motion to suppress, we are limited to considering the facts presented at the motions hearing, and we must review those facts in the light most favorable to the prevailing party." *Carter v. State*, 236 Md. App. 456, 464 (2018) (internal citations omitted). Our discussion of facts reflects these principles.

At approximately 1:44 a.m. on May 27, 2023, Officers St. Clair and Huff, both of the Hagerstown Police Department, were on patrol when they observed a Mazda minivan ("the vehicle") parked across from a Sheetz gas station on South Cannon Avenue with its brake lights on. An hour later, at approximately 2:44 a.m., Officers St. Clair and Huff observed the same vehicle, in the same location, with its brake lights still on. Officers St. Clair and Huff pulled behind the vehicle and Officer Huff ran a check on the license plate and learned that the vehicle's registration expired in April. The vehicle's license plate, however, had a July registration sticker.

Officers St. Clair and Huff then approached the vehicle. Officer St. Clair, who approached from the vehicle's driver's side, observed Smith asleep in the driver's seat. At that point, Officer St. Clair walked around to the passenger side of the vehicle, so as to be out of the lane of travel, and began to knock on the window. Smith eventually woke up and rolled down his window to speak with Officer St. Clair. Smith stated that he was tired and "waiting for his girl," who lived in a house nearby.

Thereafter, Officer St. Clair observed a loose blue and white packet in the center console of the vehicle, which he recognized as suboxone. Meanwhile, Officer St. Clair proceeded to ask Smith whether he was on medication. Smith replied that he was not. At that point, Officer St. Clair directed Officer Huff to get Smith out of the vehicle because, in Officer St. Clair's view, Smith was technically under arrest due to the suboxone. Officer St. Clair then asked Smith if he had any firearms and Smith responded in the negative. Next, Officer St. Clair asked if Smith had any drugs like cocaine, fentanyl, heroin, or suboxone in the vehicle. Smith shook his head "no," but then stated "yeah, I got suboxone, that's my medication."[3]

From the driver's side of the vehicle, Officer Huff asked Smith if he could check for weapons. Smith consented. While conducting a pat-down, Officer Huff felt a "rock-hard object," inconsistent with human anatomy, near Smith's genitals. Based on his knowledge, training, and experience, Officer Huff was aware that people frequently secret

[3] At the subsequent suppression hearing, Officer St. Clair testified that he did not hear Smith say "that's my medication" when responding that he had suboxone in the vehicle.

large amounts of controlled dangerous substances ("CDS") in the area around their genitals. Officer Huff handcuffed Smith.

Thereafter, Officer Huff escorted Smith "out of public view" to search him further. Officer Huff positioned Smith on the pavement between the closed rear passenger's side door of Officer Huff's police cruiser and the curb. Smith's vehicle -- which was being searched by Officer St. Clair -- was directly in front of the cruiser, and two additional cruisers were behind. Smith was facing the patrol cruiser with his back to the curb. A vacant grass lot leading to an open parking lot was behind Smith and a Sheetz gas station was approximately 50 yards in front of him, across South Cannon Avenue. Although the Sheetz was closed at the time, security was on premises and had a vehicle parked blocking one of the entrances. Smith was not searched directly in front of any residential buildings, but a house was next to the vacant lot and an apartment building was located approximately 150 feet further down South Cannon Avenue. Neither Officer Huff nor Officer St. Clair noticed any members of the public in the vicinity.

With two other officers flanking Smith, Officer Huff proceeded to search Smith. Ultimately, Officer Huff recovered a clear bag with off-white powder from Smith's underwear. The powder was later identified as 39.92 grams of a fentanyl mixture.

On September 5, 2023, the State filed a four-count indictment in the Circuit Court for Washington County charging Smith with possession of suboxone (count 1), possession of fentanyl (count 2), possession with intent to distribute fentanyl (count 3), and possession of 28 grams or more of a fentanyl mixture (count 4).

Thereafter, Smith moved to suppress the fentanyl. A suppression hearing was held on February 12, 2024, at which Officer St. Clair, Officer Huff, and Smith testified. The body-worn camera footage from both Officer St. Clair and Officer Huff were admitted into evidence, and portions of the footage were viewed by the circuit court during the hearing.

Officer Huff testified regarding the scope of the search. Specifically, Officer Huff testified that he "took [Smith's] belt off, unbuttoned his pants, unzipped his . . . jean shorts," then pulled the shorts and Smith's "underwear away from his body."[4] Officer Huff explained that he did not pull down either Smith's shorts or underwear. According to Officer Huff, he manipulated the item -- a "knotted cellophane sandwich style baggie" filled with "tightly compacted" off-white powder -- from the outside of Smith's shorts. It was not until the item came into view, seated in Smith's underwear to the "side of his genitals," that Officer Huff reached into Smith's underwear and pulled in out. Officer Huff testified that he did not manipulate Smith's genitals when retrieving the item. The relevant portion of the search lasted approximately thirteen seconds.

On cross-examination, Officer Huff testified that he "didn't think [Smith] was an escape risk." Officer Huff explained that he searched Smith in a public place prior to transport because "[t]here's been numerous occasions where subjects are able to remove CDS from their crotch area even while being handcuffed behind their back on the way to Central Booking and are able to dispose of, destroy or scatter CDS in the rear of the patrol car." Smith did not testify regarding Officer Huff's search of his person.

[4] Officer Huff later corrected his testimony, explaining that it was a fanny pack, not a belt, that he first took off Smith.

In closing, the State argued that police had probable cause to arrest Smith because of the loose suboxone observed in plain view and that Smith consented to the initial pat-down for weapons. Further, the State contended that, upon feeling a hard object inconsistent with human anatomy, Officer Huff conducted a reasonable search incident to arrest. Smith asserted, among other things, that the search was unreasonable because it was a sexually invasive search conducted in public without any exigent circumstances.

The circuit court found that the location where Smith was searched "is a high traffic area day and night, even at 3:00 in the morning." Further, the circuit court concluded that there was no "testimony of concern that [Smith] would have any weapons on him, or [that] the Officers were concerned for their safety at all." The circuit court reviewed Officer Huff's body-worn camera footage and found that it was consistent with Officer Huff's testimony regarding the scope of the search and his assertion that he did not manipulate Smith's genitals. Although the circuit court agreed that the search was sexually invasive, it concluded that it was, nevertheless, reasonable:

> this is a de minimis intrusion based on the exigent circumstance of preventing that substance from being altered, destroyed, hidden, spread around the back of a police car or the argument being created as we hear frequently as those drugs were in the car already because the officers didn't search it. It would be foolish of the Officers to allow this defendant to get in the back of the police car with that item and it is consistent with sound public policy to do a minimal, and this is a strip search, a minimal strip search. His pants were never taken down. The pants were pulled out, a reach in type of strip search to get that item separated from him. If this was made to further demean the defendant by pulling his pants down around his legs or that's how it was gotten, that'd be a different situation. It would be a Paulino situation. In this situation it was d[e]

> minimis so, d[e] minimis and necessary by the exigent circumstances created at the scene.

The circuit court denied Smith's motion to suppress the fentanyl.

Thereafter, a jury found Smith guilty of all four counts. Smith noted a timely appeal. We shall include additional details in our forthcoming discussion as necessary.

DISCUSSION

I. The circuit court's denial of Smith's motion to suppress is properly before us.

As an initial matter, we must address the State's argument that Smith waived his suppression claim by failing to comply with the requirements of Maryland Rule 4-252 ("Rule 4-252"). The State reasons that Smith's timely "generic omnibus motion," which was filed prior to any evidence being produced in discovery, did not preserve his challenge to the constitutionality of the subject search, which was made in a subsequent, untimely, standalone motion to suppress. Further, the State contends that Smith did not argue, nor did the circuit court find, good cause for his untimely motion.

Smith counters that his suppression claim was not waived because his omnibus motion to suppress was supplemented with a more specific motion before the suppression hearing and the State did not allege prejudice. Further, Smith contends that the State waived its waiver argument because it failed to raise the timeliness of the motion to suppress prior to this appeal.

Rule 4-252 provides the requirements for mandatory motions in criminal cases. In relevant part, Rule 4-252 provides:

> **(a) Mandatory Motions.** In the circuit court, the following matters shall be raised by motion in conformity with this Rule and if not so raised are waived unless the court, for good cause shown, orders otherwise:
>
> . . .
>
> (3) An unlawful search, seizure, interception of wire or oral communication, or pretrial identification;
>
> . . .
>
> **(b) Time for Filing Mandatory Motions.** A motion under section (a) of this Rule shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213(c), except when discovery discloses the basis for a motion, the motion may be filed within five days after the discovery is furnished.
>
> . . .
>
> **(e) Content.** A motion filed pursuant to this Rule shall be in writing unless the court otherwise directs, shall state the grounds upon which it is made, and shall set forth the relief sought. . . . Every motion shall contain or be accompanied by a statement of points and citation of authorities.

Rule 4-252 is "designed to facilitate the fair consideration of a suppression motion in advance of trial." *Sinclair v. State*, 444 Md. 16, 29 (2016). "The obvious and necessary purpose of" Rule 4-252(e)'s content requirement "is to alert both the court and the prosecutor to the precise nature of the complaint, in order that the prosecutor have fair opportunity to defend against it and that the court understand the issue before it." *Id.* (quoting *Denicolis v. State*, 378 Md. 646, 660 (2003)).

The Supreme Court of Maryland discussed the use of generic, omnibus motions in *Denicolis*:

> It has apparently become the practice of some defense counsel to file this kind of motion, seeking a panoply of relief based on bald, conclusory allegations devoid of any articulated factual or legal underpinning, presumably in the belief that if the motion complies with the time requirement of Rule 4-252(b), compliance with Rule 4-252(e) is unnecessary. That is not the case. If a motion fails to provide either a factual or legal basis for granting the requested relief, it cannot be granted. Recognizing the time constraints under which defense counsel and *pro se* defendants often operate, however, some courts have routinely overlooked the impermissible generality of such motions and have permitted the defendant to make the complaint more specific at, or in preparation for, a hearing on the motion. *Although that practice is not what the Rule anticipates and is not to be encouraged, we have not disturbed the discretion of the trial courts to permit defendants to supplement unsupported allegations in motion at or before the hearing, at least where the State is not unduly prejudiced* by being called upon to respond immediately to allegations of which it had no prior notice.

Denicolis, 378 Md. at 660 (emphasis added). In *Sinclair*, the Court reiterated this rationale, explaining that "[t]he flexibility contemplated . . . in *Denicolis* involves situations in which a defendant files a bare-bones suppression motion and then supplements it with more specific information before or at the motions hearing." *Sinclair*, 444 Md. at 35.

In the present case, the events unfolded as follows. On September 13, 2023, Smith made his initial appearance. On October 11, 2023, Smith's counsel entered an appearance and filed a generic omnibus motion.[5] The October 11 motion ("omnibus motion") provided, in pertinent part:

> Defendant, pursuant to Rules 4-252 and 4-253 of the Maryland Rules of Criminal procedure respectfully represents the following to this Honorable Court:

[5] In an apparent typographical error, counsel dated both of these documents July 19, 2023. The documents, however, were submitted on October 11, 2023.

> . . .
>
> 2. That article of evidence taken from Defendant by police authorities were obtained as the result of an illegal search and seizure in violation of Defendant's constitutional rights.
>
> WHEREFORE, Defendant respectfully prays that this Honorable Court suppress all evidence obtained by police authorities as the result of an illegal search and seizure.

The next day, on October 12, 2023, the State produced evidence to Smith, including footage from Officer Huff's body-worn camera. Also on October 12, the State responded to Smith's omnibus motion contending, in pertinent part:

> The State of Maryland . . . responds to and opposes the Motions Pursuant to Maryland Rule 4-252 . . . and respectfully states as follows:
>
> 1. That the defendant lacks standing to raise the allegations set forth in his Motions pursuant to Maryland Rule[] 4-252 . . .
>
> 2. That it denies each of the generic, boilerplate allegations set forth in said Motions.
>
> 3. That, by way of further response, both the recovery of the evidence and acquisition of statements in this matter where [sic] in all regards lawful and violative of neither defendant's State or Federal constitutional rights.

Thereafter, on November 16, 2023, Smith filed a standalone motion to suppress ("motion to suppress") arguing, among other things, that: "the scope of the search of the Defendant was overly invasive without sufficient justification and contrary to law[;]" "the manner of searching the Defendant was contrary to law[;]" and "all evidence resulting from the stop, search, and seizure has been illegally obtained pursuant to Constitutional, federal,

and state law." Additionally, Smith's motion to suppress included a list of authorities, namely case citations, in support of his arguments. The State filed a response to Smith's motion to suppress on November 29, 2023 that was nearly identical to that which it filed in response to Smith's omnibus motion. Subsequently, the circuit court conducted a suppression hearing on February 12, 2024.

The State relies heavily on *Sinclair* in arguing that Smith waived his suppression claim. The facts of *Sinclair*, however, are readily distinguishable. Indeed, as the Court explained in *Sinclair*:

> If a defendant may file a bare bones motion that provides no notice as to the evidence it seeks to suppress or the reasons for doing so, withdraw the motion to avoid its disposition at a pretrial motions hearing, renew it with the missing detail on the morning of trial without any showing that there is "good cause" for the belated action and without time for an evidentiary hearing, and then litigate the issue on appeal without an adequate factual record, Rule 4-252 will have been completely defeated. That is what happened here.

Sinclair, 444 Md. at 36.

That, however, is not what happened here. Rather, what occurred in the present case mirrors the precise situation contemplated by the Court in *Denicolis*. To be sure, Smith filed a bare-bones omnibus motion seeking suppression of evidence on October 11, 2023, less than 30 days after his initial appearance. Smith then supplemented that motion with more specific information by filing the motion to suppress on November 16, 2023. Thereafter, a suppression hearing was held on February 12, 2024, at which Officer St. Clair, Officer Huff, and Smith testified. Although not what Maryland Rule 4-252 anticipates, we will not disturb the discretion of the circuit court to permit Smith to supplement his bare

bones motion before the suppression hearing, "at least where the State is not unduly prejudiced by being called upon to respond immediately to allegations of which it had no prior notice." *Denicolis*, 378 Md. at 660. The State does not allege that it was unduly prejudiced in this case, and we discern no such prejudice after reviewing the record. Indeed, the State received the supplemented motion to suppress almost three months in advance of the suppression hearing. We, therefore, conclude that Smith did not waive his suppression claim.[6]

II. The circuit court did not err in denying Smith's motion to suppress the fentanyl recovered from his person because the search was reasonable.

We now turn to the question whether the circuit court erred in denying Smith's motion to suppress the fentanyl recovered from his person. This question turns on whether Officer Huff's warrantless, sexually invasive search,[7] of Smith in public was constitutional.

In reviewing a circuit court's suppression ruling,

> we defer to that court's findings of fact unless we determine them to be clearly erroneous, and, in making that determination, we view the evidence in a light most favorable to the party who prevailed on that issue, in this case the State. We review the [circuit] court's conclusions of law, however, and its application of the law to the facts, without deference.

[6] In light of this conclusion, we need not address Smith's claim that the State waived its waiver argument.

[7] As we shall explain, it is undisputed that the subject search was sexually invasive. The parties, however, disagree as to the type of sexually invasive search involved.

Faith v. State, 242 Md. App. 212, 235 (2019) (quoting *Taylor v. State*, 448 Md. 242, 244 (2016)).

Smith argues that the circuit court erred in denying his motion to suppress the fentanyl because the sexually invasive search was not reasonable, and, therefore, was unconstitutional. Specifically, Smith contends that the search was highly invasive and that, contrary to the circuit court's determination that the search was a reach-in, the search was in fact a visual body cavity search. Further, Smith argues that the State failed to prove exigent circumstances sufficient to justify such a public search. Finally, Smith contends that the manner and location of the search were unreasonable because it took place on a well-lit, highly trafficked public road where members of the public were present.

The State counters that the subject search was constitutional. The State reasons that the search was narrow in scope -- a reach-in -- and justified because of Officer Huff's discovery of suspected CDS during the initial pat-down. Further, the State asserts that the past experience of Officers St. Clair and Huff, namely that arrestees sometimes "dispose of, destroy or scatter CDS in the rear of the patrol car" presented the pressing need to retrieve the suspected CDS at the scene. The State additionally contends that law enforcement took steps to protect Smith from public view and that the members of the public that Smith cites were only in the vicinity *after* the sexually invasive search was completed. On balance, therefore, the State argues that the search was reasonable and that the circuit court properly denied Smith's motion to suppress.

A. Legal standards governing sexually invasive searches.

The Fourth Amendment of the United States Constitution, made applicable to Maryland through the Fourteenth Amendment, protects "against unreasonable searches and seizures." U.S. Const. amend. IV; *Paulino v. State*, 399 Md. 341, 349 (2007). Absent some exceptions, "warrantless searches are *per se* unreasonable under the Fourth Amendment." *Paulino*, 399 Md. at 349 (quoting *State v. Nieves*, 383 Md. 573, 583 (2004)). It is well established that "the State bears the burden of rebutting the presumption that a warrantless search, such as the one at issue here, was unreasonable." *Faith*, 242 Md. App. at 235 (citing *Paulino*, 399 Md. at 348). "[W]hen the government has violated a defendant's Fourth Amendment rights," the appropriate remedy is generally exclusion of any illegally obtained evidence. *Sizer v. State*, 456 Md. 350, 364 (2017) (citation omitted). Accordingly, a defendant may challenge evidence obtained from an unreasonable, and therefore unconstitutional, search by filing a motion to suppress. *Faith*, 242 Md. App. at 235.

One exception to the per se rule against warrantless searches is the search incident to arrest. Indeed, incident to a lawful arrest, police are entitled to search an arrestee "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect [their] escape . . . [or] to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Paulino*, 399 Md. at 350 (quoting *Chimel v. California*, 395 U.S. 753, 763 (1969)). The search incident to arrest exception to the warrant requirement is "based on an exigency rationale, that is, the safety of the officer and the preservation of evidence." *Stackhouse v. State*, 298 Md. 203, 211 (1983) (citing *Chimel*, 395 U.S. at 763).

A search incident to arrest, however, only allows police to "search an arrestee's outer garments, including pockets." *Faith*, 242 Md. App. at 236 (citing *Paulino*, 399 Md. at 351). To be sure, a search incident to arrest may "not involve a bodily intrusion." *Paulino*, 399 Md. at 350 (citing *Schmerber v. California*, 384 U.S. 757, 769 (1966)). Here, although Officer Huff's initial pat-down of Smith may well have been a valid search incident to arrest, the challenged search did not end at Smith's outer garments.

When a search exceeds the scope of "a routine custodial search" permitted pursuant to the search incident to arrest exception, a more stringent standard applies. *See Faith*, 242 Md. App. at 236-37 (quoting *Paulino*, 399 Md. at 351). Notably, when a search incident to arrest amounts to a sexually invasive search, "the necessity for such an invasive search must turn upon the exigency of the circumstances and reasonableness[,]" otherwise, "every search incident could result in a strip search." *Paulino*, 399 Md. at 351.

A sexually invasive search is one that involves "movement of clothing to facilitate the visual inspection of a person's naked body."[8] *Faith*, 242 Md. App. at 256 (quoting *Sims v. Labowitz*, 885 F.3d 254, 261 (4th Cir. 2018)) (cleaned up). Maryland cases identify four modes by which law enforcement may conduct a sexually invasive search. First, "a 'look-in' search involves manipulating clothing so that a police officer can visually inspect external genitalia." *Faith*, 242 Md. App. at 256. Second, a reach-in search is one "in which clothing is manipulated to enable a police officer to reach in and retrieve the contraband without exposing the arrestee's private areas to others." *Id.* Third, "[a] 'visual body cavity

[8] We adopt the umbrella term "sexually invasive search" rather than "strip search" as we did in *Faith*, 242 Md. App. at 256.

search' extends to a visual inspection of the anal and genital areas." *Paulino*, 399 Md. at 352 (quoting *Nieves*, 383 Md. at 586). Fourth, and finally, a manual body cavity search "includes some degree of touching or probing of body cavities." *Id.* Irrespective of the mode, courts have routinely characterized sexually invasive searches as "an extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual" and described such searches "as terrifying, demeaning, and humiliating." *Faith*, 242 Md. App. at 237 (quoting *Sims*, 885 F.3d at 260-61).

In assessing the constitutionality of any sexually invasive search, we employ the test of reasonableness adopted in *Bell v. Wolfish*, 441 U.S. 520 (1979). As we explained in *Faith*:

> Pursuant to *Bell*, we examine the search in its complete context and consider the following factors: (1) the scope of the particular intrusion; (2) the manner in which the search was conducted; (3) the justification for initiating the search; and (4) the place in which the search was performed. [*Bell*, 441 U.S. at 559.]

Faith, 242 Md. App. at 237 (quoting *Sims*, 885 F.3d at 260-61). The *Bell* balancing test charges appellate courts with "[t]aking into account the relative strength of each factor and balancing the need to ferret out crime against the invasion of personal rights[.]" *Williams v. State*, 231 Md. App. 156, 185 (2016).

B. Sexually invasive search cases.

Cases analyzing the constitutionality of sexually invasive searches under the *Bell* balancing test are legion. We focus our discussion on the cases upon which the parties rely. Smith contends that the search at issue here is akin to the searches held unreasonable

in *Paulino v. State*, 399 Md. 341 (2007) and *Faith v. State*, 242 Md. App. 212 (2019). The State counters that the facts in the present case are far closer to *Partlow v. State*, 199 Md. App. 624 (2011), *Allen v. State*, 197 Md. App. 308 (2011), and *United States v. Williams*, 477 F.3d 974 (8th Cir. 2007). We discuss each case in turn.

In *Paulino*, police learned from a confidential informant that Paulino would be in possession of CDS at a certain time and place and were further informed that Paulino "typically hides the [CDS] in the area of his buttocks." *Paulino*, 399 Md. at 344. Police surveilled the area. *Id.* at 345. After observing Paulino in the passenger seat of a vehicle entering the bay of a car wash, police arrested him. *Id.* The car wash was rather secluded -- "at the very end of [a] little parking lot" past the "entrance to a storage facility" and "an auto repair center." *Id.*

The search occurred around 11:15 p.m. in a "well-lit" area and, except for the other passengers of Paulino's vehicle, there were "[n]o civilian personnel" present. *Id.* at 346, 360 & n.7 (2007). Police removed Paulino from the vehicle and laid him on the ground. *Id.* at 346. Thereafter, a police officer reached into Paulino's pants and removed CDS. *Id.* During the search, the officers manipulated Paulino's shorts "in such a manner that his buttocks could be more readily viewed." *Id.* at 353. It was not until the officers "spread apart" "the cheeks of Paulino's buttocks" that the CDS became visible. *Id.* at 354. Because the search not only involved the manipulation of Paulino's clothing, but also the manipulation of his buttocks to inspect his anal cavity, the Court concluded that the search "amounted to a 'visual body cavity search.'" *Id.*

Balancing the *Bell* factors, the Court determined that the search was unreasonable. As to the scope of the search, the Court held "that the police officers' search of Paulino was highly intrusive and demeaning." *Id.* at 356. Although the "police officers were justified in initiating the search of Paulino," the Court noted that they were not "justified in searching him to the extent he was searched under the circumstances." *Id.* at 357. Regarding the place and manner of the search, the Court concluded that the officers did not make "any attempt to protect Paulino's privacy interests," noting that officers did not "attempt to limit the public's access to the car wash or . . . limit the ability of the public or any casual observer from viewing the search of Paulino." *Id.* at 358. Accordingly, the Court concluded that the State's "failure to prove exigent circumstances and the reasonableness of the search [was] determinative." *Id.* at 360. Regarding the lack of exigency, the Court explained that:

> There was no testimony at the suppression hearing . . . that Paulino was attempting to destroy evidence, nor that he possessed a weapon such that an exigency was created that would have required the police officers to search Paulino at the precise moment and under the circumstances, in a 'well-lit' public car wash . . . [where] members of the public were present, specifically the other passengers in [Paulino's vehicle].

Id. The Court ultimately concluded that the search of Paulino was unreasonable and, therefore, unconstitutional. *Id.* at 361.

Similarly, in *Faith*, we held that a sexually invasive search on the side of Interstate 70, conducted in daylight hours with moderate to heavy traffic passing by, was unreasonable. There, police conducted a lawful traffic stop of the vehicle Faith was driving

on Interstate 70 at 7:18 p.m. *Faith*, 242 Md. App. at 217-18. In the vehicle with Faith were a female companion and Faith's three-year-old son. *Id.* at 218. After noticing track marks on Faith's arms, which are consistent with intravenous drug use, and "squinting," the deputy opined that Faith may be under the influence of CDS are requested a K-9 unit. *Id.* Faith and the two passengers were ordered from the vehicle and were patted down for weapons, none of which were found. *Id.* Thereafter, the dog alerted at the door of Faith's car and the deputy called for an officer to "conduct a female search" of Faith while he searched the vehicle. *Id.* The search of the vehicle yielded drug paraphernalia and suspected CDS in the driver's area. *Id.* at 219.

During the vehicle search, Sergeant Ensor arrived, parking her cruiser "as the fourth car lined up along the shoulder of Interstate 70." *Id.* at 219. Faith was taken approximately "a car-length away" from where her two companions and son stood with other officers. *Id.* Sergeant Ensor proceeded to search Faith "[w]hile it was still daylight outside" and "[a]s moderate to heavy traffic passed on the highway[.]" *Id.* At the suppression hearing, Sergeant Ensor testified that she had performed thousands of female searches and stated that she performed a "systematic search" of Faith between the patrol cruisers. *Id.* at 224. There was conflicting testimony concerning whether Faith was facing traffic during Sergeant Ensor's search, but it was undisputed that Faith had her back to the male officers and other passengers of her vehicle. *Id.* at 226-27.

Sergeant Ensor testified that she asked Faith to "[u]nbutton [her] shorts" and "pull them away from [her] body" without pulling them down. *Id.* at 227. Once Faith did this, Sergeant Ensor observed a "condom protruding" from Faith's vaginal area. *Id.* at 226-27.

Although Sergeant Ensor told Faith that she would be transported to the station for a further search to retrieve the suspected CDS, Faith agreed to retrieve it herself. *Id.* at 228. Subsequently, Sergeant Ensor escorted Faith, still fully clothed, up to Faith's vehicle where Faith proceeded to sit "on the edge of the passenger seat," out of view of the male officers and passengers of her vehicle, "reache[d] in her underwear and pull[ed] the condom out of the side of her shorts." *Id.*

Applying the *Bell* factors, we concluded that the search was unreasonable. *Id.* at 271. We first concluded that the search was "a visual body search because the sergeant required the rearrangement of clothing to enable her to view Faith's vaginal area." *Id.* at 256. Regarding the justification for initiating the search, we determined that the K-9 alert and discovery of drug paraphernalia and CDS in Faith's vehicle justified the search incident to Faith's lawful arrest. *Id.* at 258-59. We concluded, however, that no exigent circumstances existed to justify the sexually invasive search in such a "highly public manner and location," explaining:

> Here, the suppression record establishes that Faith's search was both actually and potentially witnessed by onlookers. . . . She was wearing very brief shorts and a sleeveless shirt, which made it difficult for her to conceal contraband in her clothing but easy for onlookers to see that her private parts were being inspected by Sergeant Ensor. . . . Even if we credit Sergeant Ensor's testimony that Faith was not facing directly into oncoming traffic during the search, rather than both deputies' testimony that she was, Faith was required to unzip and open the front of her shorts, then hold out her underwear for Sergeant Ensor to look in, while moderate to heavy traffic drove past and her companion and son waited within view.

Id. at 259, 262. In such circumstances, we concluded that "the non-exigent visual inspection of the genital area of a person suspected of concealing CDS" was unreasonable where the search is undertaken in such a public setting. *Id.* at 271.

Conversely, the State relies on three cases in which sexually invasive searches were upheld as reasonable under the Fourth Amendment. First, in *Partlow*, police received a tip that Partlow was selling CDS from his car at a particular time and location. *Partlow*, 199 Md. App. at 630. Thereafter, police conducted a lawful traffic stop of Partlow's vehicle and "noticed 'a large amount of U.S. currency overflowing from the center armrest,' as well as numerous air fresheners in the car, which to [the officer], indicated an attempt to mask the smell of CDS." *Id.* at 630. A subsequent K-9 alert near the driver's side door led to a search of Partlow's person, during which an officer "felt a hard object 'underneath Mr. Partlow's buttocks within his clothes.'" *Id.* at 631. Suspecting the item was CDS, the officer attempted to remove it but was unable to do so. *Id.* The officer proceeded to pull Partlow's underwear away from his body and "used a pocket knife to cut a small piece—'the size of a baseball maybe'—out of the underwear to retrieve the" suspected CDS. *Id.* at 631. The search, which concluded at approximately 9:56 p.m., left a portion of Partlow's buttocks exposed. *Id.*

We determined that the search "fell somewhere between a reach-in and a strip search." *Id.* at 643. We described the location of the search as "away from the view of traffic" behind "the passenger side of the police cruiser" and explained that the officer stood behind Partlow, making "some effort to protect [Partlow's] privacy." *Id.* at 644. We observed that,

> [a]lthough the search was undertaken on a public thoroughfare, the testimony showed that it was conducted in an area that was "fairly wooded" on one side. The other side of the street did contain houses, but most of the houses were 30 to 40 yards away from the street, and the search did not occur in front of a house. Moreover, it was "fairly dark" at the time, and . . . the suppression court found that [Partlow's] coat or shirt covered the area he alleged was exposed. Only police officers were present during the search; no civilians were in the area, and no cars stopped on the side of the road.

Id. at 645.

As for the exigency necessitating a public search, we described testimony presented at the suppression hearing:

> When asked by defense counsel if he could have taken [Partlow] somewhere private to conduct the search, [the officer] stated, 'Not at that point' because the officers "wanted to preserve the evidence, make sure it was not discarded in some way." Although the suppression court agreed that it may "have been a nicer idea to do it in the confines of a room in a police station," it credited the officer's testimony that he took some precautions to ensure [Partlow's] privacy and found that the small amount of exposed skin on his buttocks did not render the search unreasonable.

Id.

We concluded that the search was "not as invasive as the one in *Paulino*" and explained that "[t]he search was brief, [Partlow] was not disrobed, his private parts were not manipulated, and there were no non-police citizens around to view the cutting away of a small portion of [Partlow's] underwear that was covered by a long shirt or coat." *Id.* at 646. Balancing the *Bell* factors, therefore, we concluded that the search was reasonable. *Id.*

Similarly, in *Allen*, we upheld a reach-in search. In that case, co-appellants Allen and Smith were arrested after police observed them selling suspected CDS. *Allen v. State*, 197 Md. App. at 312. Thereafter, police conducted a search incident to arrest of both Allen and Smith. *Id.* at 312-13. After searching Allen and Smith's outer clothing and pockets, officers "pulled back" the waistband of their respective pants and observed a plastic bag "kind of half concealed" in each arrestee's "buttocks area." *Id.* Allen was directed to "spread his legs and squat," and the bag of suspected CDS dropped out, allowing the officer to reach in Allen's underwear area and pull it out. *Id.* The officer searching Smith "reached down and pulled [the bag] out" of his buttocks area. *Id.* at 313. The searches were conducted on "a wide alley" next to "a series of storage garages" with "residential homes on the other side of the block." *Id.* Neither Allen nor Smith's genitalia were manipulated and, although other police officers were present, only the searching officers observed the arrestees' buttocks. *Id.* at 313-14.

Applying the *Bell* factors, we concluded that the searches were reasonable. *Id.* at 327. We explained that "[a]lthough a 'reach-in' search that exposes a person's private area is invasive, and therefore not automatically permitted as a search incident to arrest, it is less intrusive than a full strip search." *Id.* at 324. We noted that:

> Here, the police officers merely pulled the appellants' pants and underwear away from their waist, at which point the police observed a plastic bag protruding from the appellants' buttocks. Appellants' clothing was not removed, and the private areas of their bodies were not publicly exposed. The officers took steps to protect appellants' privacy. In each case, the officer involved testified, and the court credited the testimony, that the officer stood directly behind the suspect, and he was the only one who could see appellants' buttocks

> during the search. The scope and manner of the searches were not unreasonable.

Id. at 324-25 (footnote omitted). Regarding the location of the searches, we explained that, although the searches occurred on a public street, "the testimony was that the searches were conducted out of public view. The officers testified that the searches occurred in front of storage garages, not homes, and there were 'no civilians in the area.'" *Id.* at 325.

We contrasted the "substantially different" facts in *Paulino*, explaining that the subject searches "were not as highly invasive" because "they were brief and conducted in a manner such that appellants' private areas were not publicly exposed." *Id.* at 326-27. We explained that "[i]t was the highly invasive nature of the search in *Paulino*, as well as the lack of evidence that Paulino's privacy was protected in any way, that led the Court to hold that exigent circumstances were required before such a search in a public place was reasonable." *Id.* In such circumstances, we concluded that the searches were reasonable under the Fourth Amendment. *Id.* at 327.

Finally, the State relies on *United States v. Williams*, 477 F.3d 974 (8th Cir. 2007), which the *Paulino* court distinguished on the facts. *See Paulino*, 399 Md. at 359-61. In *Williams*, police "obtained a warrant to search Williams's home and person for drugs and firearms." *Williams*, 477 F.3d at 975. Thereafter, police conducted a traffic stop after observing Williams drive away from his residence. *Id.* Police then pat-down Williams and felt something inside his pants. *Id.*

The officers elected not to conduct a more extensive search of Williams at the location of the traffic stop, which was a busy street. *Id.* Instead, the officers "took Williams

into custody, placed him in a squad car, and drove him several blocks to the police department's . . . [p]recinct building." *Id.* At the precinct building, officers took Williams to the

> rear parking lot, which was used for squad cars and vehicles belonging to employees. The parking lot is surrounded by the back of the precinct building, a brick wall, and a chain link fence topped with barbed wire. The neighborhood surrounding the precinct is mostly residential. After removing Williams from the squad car, an officer searched Williams in the parking lot. The officer, who was wearing a latex glove, opened Williams's pants, reached inside Williams's underwear, and retrieved a large amount of crack and powder cocaine near Williams's genitals.

Id.

The court upheld the search as reasonable, noting that "there is no evidence that [a citizen] would have seen the private areas of Williams's body or any contact between the gloved hand of the officer and Williams's genitals, which remained obscured from the view of passers-by." *Id.* at 977.

C. *Bell* Analysis

We now turn to the balancing of the *Bell* factors in the instant case. "Applying the analytical framework established in *Bell*, we must consider the manner and location of the challenged search, in light of its scope and justification, to balance the need for this roadside search against the invasion of personal rights that the search entailed." *Faith*, 242 Md. App. at 255 (citing *Paulino*, 399 Md. at 355).

1. *Scope of the search*

The parties do not dispute that Officer Huff's search of Smith was intrusive and constituted a sexually invasive search. They disagree, however, as to precisely what type of sexually invasive search occurred. According to Smith, the circuit court erred in classifying the search as a reach-in. Instead, Smith contends, the subject search is more properly classified as a visual body cavity search akin to the search in *Paulino*. Smith reasons that, although Officer Huff testified that he did not manipulate Smith's genitalia to retrieve the CDS, the body-worn camera footage depicts Officer Huff "rummaging around" Smith's pants. The State counters that the circuit court properly classified Officer Huff's search of Smith as a reach-in because Officer Huff merely "reached into the groin area" and did not manipulate Smith's genitalia or separate body parts. Further, the State reasons that the search was brief, lasting approximately thirteen seconds, and that Smith's genitals were only briefly exposed to Officer Huff and the officers in the immediate vicinity.

As an initial matter, we note that, despite now arguing that the circuit court should have classified the subject search as a visual body cavity search, Smith made no such argument at the suppression hearing. Indeed, during the suppression hearing, Smith conceded that the search was *not* a visual body cavity search:

> [SMITH]: So, I mean under -- Paulino found that the scope of the intrusion involved in the search of the person was great if the defendant had to suffer the indignity of having the officer view his naked body as well as having to endure the humiliation of an officer manipulating his buttocks.
>
> THE COURT: Right, that's the second part of Paulino. That's a strip search and then it's a body cavity search. This is not a body cavity search. This is just, this is a, this is a strip search under Paulino, but not a body cavity search.

[SMITH]: I agree.

THE COURT: Visual body cavity, cavity search.

[SMITH]: I agree. . . .

Regardless of whether Smith's claim as to type of search conducted is preserved, we find no error in the circuit court's classification of the search as a reach-in. As explained *supra*, a reach-in search is one "in which clothing is manipulated to enable a police officer to reach in and retrieve the contraband without exposing the arrestee's private areas to others." *Faith*, 242 Md. App at 256. A visual body cavity search, on the other hand, "extends to a visual inspection of the anal and genital areas." *Paulino*, 399 Md. at 352 (quoting *Nieves*, 383 Md. at 586).

When asked by the State to describe the search of Smith, Officer Huff testified that he "took [Smith's] belt off, unbuttoned his pants, ... [u]nzipped his jean shorts and pulled his jean shorts, his underwear away from his body and I didn't pull them down." According to Officer Huff, he "then [] reached down underneath [Smith's] genitals in the underwear and removed a knotted cellophane sandwich style baggie." Officer Huff stated that he did not manipulate Officer Huff's genitals in any way. Subsequently, Officer Huff clarified how he retrieved the suspected CDS:

> THE COURT: . . . [D]id you ever -- when you, when you were finding the item in [Smith's] pants, did you ever see it, or did you do it all by the feel?
>
> . . .
>
> [OFFICER HUFF]: While I pulled the underwear away from his body and was starting to push it upwards, I saw the package.

THE COURT: Push what upwards?

[OFFICER HUFF]: The item.

THE COURT: The item.

[OFFICER HUFF]: I could see the package.

THE COURT: Not just the underwear, but the item. You started -- so you have, you have one hand down, down outside of his pants --

[OFFICER HUFF]: Yes, sir.

THE COURT: -- in contact with the hard item?

[OFFICER HUFF]: Yes, Your Honor.

THE COURT: All right. So, my question was did you ever see it? What happened next? So, you're pushing the item up with your fingers from the outside of his pants, go ahead, what happened next?

[OFFICER HUFF]: I began to saw [sic] the object and then I used my other hand to grab it.

THE COURT: All right.

[OFFICER HUFF]: And remove it from his pants.

THE COURT: Where was the object when you saw it?

[OFFICER HUFF]: It was to the right of his, or the left side of his genitals when I began to see it.

THE COURT: And you're on his left side?

[OFFICER HUFF]: Yes.

THE COURT: And you're pushing the item up past his genitals and you see it and reach down with your right hand and grab it?

[OFFICER HUFF]: Yes, Your Honor.

THE COURT: You could see it when you grabbed it?

[OFFICER HUFF]: Yes.

Smith did not testify to the contrary.

The circuit court found Officer Huff's testimony credible. Ultimately, the circuit court concluded that Smith's "pants were never taken down," but were instead "pulled out," and that "a reach in type of strip search" was conducted by Officer Huff to get the suspected CDS "separated from [Smith]." Further, the circuit court distinguished the facts of *Paulino*, explaining that, unlike *Paulino*, Officer Huff did not "further demean [Smith] by pulling his pants down."

Although, from our review of Officer Huff's body-worn camera footage, it is clear that Smith's genitals and pubic hair were visible to Officer Huff, and perhaps the other officers around, momentarily, we cannot fault the circuit court's conclusion that no manipulation of genitals occurred. What is more, Smith did not testify that Officer Huff manipulated his genitals. Similarly, we discern no error in the circuit court's classification of the subject search as a reach-in, rather than a visual body cavity search. Indeed, Officer Huff's search, was not a visual inspection of Smith's genitals, rather Officer Huff's testimony was that he manipulated the suspected CDS by feel before quickly reaching in to retrieve it when it came into view. The manipulation of Smith's clothing, therefore, was not to better view Smith's genitals, but instead was to retrieve the object. In such circumstances, we cannot say that the circuit court's conclusion that the search was a reach-in is erroneous.

To be sure, the subject search is similar to those which we approved in *Allen* and *Partlow*. Officer Huff took steps to protect Smith from public view by situating him behind a police cruiser with two other officers creating "a kind of wall" around him. Further, Officer Huff did not pull Smith's shorts or underwear down, rather he merely pulled them out. The circuit court credited Officer Huff's testimony that he did not manipulate Smith's genitals to retrieve the suspected CDS, but instead manipulated the object itself from the outside of Smith's shorts before briefly reaching in to pull the object out once it came into view. As we explained in *Allen*, "[a]lthough a 'reach-in' search that exposes a person's private area is invasive, and therefore not automatically permitted as a search incident to arrest, it is less intrusive than a full strip search." *Allen*, 197 Md. App. at 324. We, therefore, conclude that the scope of the search was reasonable.

2. *Justification for initiating the search*

A sexually invasive search incident to arrest may be conducted if there is reasonable suspicion to believe that CDS, weapons, or other contraband are concealed on the suspect's body. *Id.* at 323 (citing *Nieves*, 383 Md. at 596). The State argues, and Smith does not dispute, that Officer Huff's search was incident to a lawful arrest for possession of suboxone and that, based on the initial pat-down search, it was reasonable for Officer Huff to believe that Smith was concealing CDS in his crotch area. We agree.

While conducting the initial pat-down -- which Smith consented to -- Officer Huff encountered a hard object inconsistent with human anatomy in Smith's crotch area. Officer Huff testified that, "[b]ased on [his] knowledge, training and experience," the crotch area is "a common place where people" secret "large amount[s] of CDS." We conclude that

this knowledge was sufficient to generate reasonable suspicion that Smith was concealing contraband on his person.

Smith contends that additional justification was required. Specifically, Smith argues that the search was not justified because the State failed to show exigent circumstances necessary to justify such an invasive search in a public place. Smith reasons that, without evidence that Smith attempted to destroy evidence, to flee, or that he possessed a weapon, there were no exigent circumstances to justify Officer Huff's sexually intrusive search. To support this argument, Smith compares the search of his person to the searches held unreasonable in *Paulino* and *Faith* and distinguishes the circumstances surrounding his search from the exigent circumstances we discussed in *Turkes v. State*, 199 Md. App. 96 (2011).

The State counters that the exigencies of the situation, namely Officer Huff's knowledge and experience that suspects sometimes "dispose of, destroy or scatter CDS in the rear of the patrol car," further justified the search. The State contends that Smith's reliance on *Paulino* and *Faith* is misplaced because in those cases, it was the highly intrusive and public nature of the searches that led to the requirement for additional justification. According to the State, the search in the present case is akin to *Partlow* in which we determined that the searching officers' fear that the suspect would dispose of suspected CDS if taken to a more private location presented a sufficient exigency to justify a public reach-in search.

As noted *supra*, the search incident to arrest exception to the warrant requirement is rooted in "an exigency rationale, that is, the safety of the officer and the preservation of

evidence." *Stackhouse*, 298 Md. at 211 (citing *Chimel*, 395 U.S. at 763). Maryland appellate court cases analyzing the lawfulness of sexually invasive searches incident to arrest reflect the principle that "the necessity for such an invasive search must turn upon the exigency of the circumstances and reasonableness." *Paulino*, 399 Md. at 351.

Indeed, in cases in which our courts have determined that a search was minimally invasive or that the suspect's privacy interests were adequately protected by the manner or location of the search, we have upheld sexually invasive searches as reasonable where the only exigency proffered is the preservation of evidence. *See Partlow*, 199 Md. App. at 645-46 (upholding a reach-in search where the search was not as invasive as the one in *Paulino*, officers took some precautions to ensure the suspect's privacy, and the only exigency was that officers "wanted to preserve the evidence, make sure it was not discarded in some way"); *Allen*, 197 Md. App. at 320, 326-27 (upholding two reach-in searches where officers did not testify as to any exigency, but the searches were not as invasive as *Paulino* and the suspects' "private areas were not publicly exposed"). On the other hand, our courts have weighed the lack of a particularized exigency heavily and found sexually invasive searches unreasonable in cases involving highly invasive searches or searches conducted in a highly public location or manner. *See Paulino*, 399 Md. at 360-61; *Faith*, 242 Md. App. at 261-71.[9]

[9] This is aligned with Chief Judge Wells's recent analysis in *Miller v. State*, No. 796, Sept. Term, 2024 (App. Ct. Md. Jan. 6, 2026) (unreported). Although all searches incident to arrest "turn on the exigencies of the circumstances," Chief Judge Wells explained that "[w]e understand our Fourth Amendment jurisprudence to mean that reasonableness and exigency go hand in hand; one affects the other in that the *Bell* reasonableness factors reduce or increase the level of exigency required to sustain a

As the State aptly points out, this distinction is highlighted in *Paulino*. To be sure, the Court in *Paulino* distinguished the facts of the search at issue with the search conducted in the police precinct parking lot upheld as reasonable in *Williams*:

> We contrast the facts of *Williams* to the facts of the present case. The search of Williams was a "reach-in" type of search. Williams's pants were opened, but presumably kept on his waist, while the officer reached into his underwear and retrieved the contraband. In contradistinction, during the search of Paulino, his pants were below his waist, his underwear was "lifted up" and the cheeks of his buttocks were manipulated and exposed. *In our view, the search of Paulino was far more invasive and, as a result, required a higher degree of privacy than the search conducted in* Williams. Moreover, there is no evidence that the search of Paulino was shielded from the view of passers-by or the people present at the scene.

Paulino, 399 Md. at 359-60 (2007) (emphasis added).

This distinction is also aligned with *Turkes*, which Smith cites as an example of exigent circumstances sufficient to justify a public, sexually invasive search such as the one at issue here. Although it is true that we concluded exigent circumstances justified the immediate roadside search of Turkes because law enforcement believed he had a weapon on his person, the intrusion to Turkes' privacy interests was much greater:

---

sexually invasive search incident to arrest." Slip op. at 7-8. The sexually invasive search at issue in *Miller* -- which was also conducted by Officer Huff -- was similar in scope and manner to the search at issue here. *Id.* at 1-4. Miller was searched at approximately 1:00 a.m. on a residential street. *Id.* at 1. Although officers testified that no members of the public were present, and none were seen on the body-worn camera footage, Miller testified that his friend's sister saw him being searched from a distance. *Id.* at 3. In addition to the exigency rationale proffered in the present case, there was evidence that Miller was pulling away during the search. *Id.* at 1-2. Chief Judge Wells compared the search to those in *Partlow* and *Allen* and concluded that the "search was reasonable *as conducted without an additional need for exigency*." *Id.* at 15-16 (emphasis added).

> With respect to the location of search in this case, we note that the search occurred in broad daylight in front of a public apartment complex and several single-family homes that faced the road on which the search occurred. The officers made no attempt to transport [Turkes] to the police station, which was 7-8 blocks away. [Turkes] testified that, during the search, he was seated on the curb, facing the single-family homes and with his back to the apartments. Although he was seated in the space between his own vehicle and [the officer's] vehicle, "[t]here was no blockage" (*i.e.*, he was not shielded from public view).

Turkes, 199 Md. App. at 128. Accordingly, *Turkes* models the premise that exigent circumstances are more heavily weighed when sexually invasive searches are highly intrusive or are conducted in a highly public location or manner.

As to the exigency in the present case, Officer Huff testified that, although Smith was not an escape risk:

> There's been numerous occasions where subjects are able to remove CDS in their crotch area even while being handcuffed behind their back on the way to Central Booking and are able to dispose of, destroy or scatter CDS in the rear of the patrol car. That's why we do a thorough search prior to transporting him to Central Booking.

The circuit court credited Officer Huff's testimony.

This rationale for conducting a reach-in search prior to transporting the suspect is aligned with the rationale advanced by law enforcement in *Partlow*. Indeed, in *Partlow*, law enforcement testified that they could not transport Partlow somewhere private to conduct the search because they "wanted to preserve the evidence, make sure it was not discarded in some way." *Partlow*, 199 Md. App. at 645. On appeal, Partlow argued that the search was not reasonable absent exigent circumstances. *Id.* In rejecting Partlow's

argument and upholding the search, we distinguished *Paulino*, explaining that "the search was not as invasive as the one in *Paulino*," rather the "search was brief" and Partlow "was not disrobed, his private parts were not manipulated, and there were no non-police citizens around to view" the search. *Id.* at 646.

Because, as we shall explain *infra*, the search in the present case was, on balance, reasonable, we conclude that no exigency beyond that which Officer Huff testified to was required. Accordingly, we conclude that in these narrow circumstances, there was sufficient justification for Officer Huff's roadside reach-in search of Smith.[10]

3. *Manner and location of the search*

In evaluating the location and manner of a sexually invasive search, we consider whether the search "could have been viewed by others, and whether it was in fact viewed by others[.]" *Faith*, 242 Md. App. at 262 (citation omitted).

Smith argues that the manner and location of the search were unreasonable. As to the location, Smith contends that the search was conducted on a well-lit public road that the circuit court found to be "high traffic," even at 3:00 a.m., when members of the public were present, as depicted on Officer Huff's body-worn camera footage. Regarding the manner of the search, Smith asserts that his genitals were visible to Officer Huff and were

[10] We note that our conclusion does not mean we agree with the circuit court's broad statement that "it is consistent with sound public policy to do . . . a minimal strip search" of arrestees suspected to be secreting CDS or contraband in their crotch areas prior to transport. Rather, our conclusion is limited to the narrow circumstances of this case. Indeed, determining the reasonableness of a sexually invasive search under *Bell* is a fact intensive inquiry dependent on the facts specific to the case.

likely visible to the two officers surrounding him during the search too. According to Smith, therefore, the location and manner of the search are comparable to the location and manner of the searches in *Paulino* and *Faith*.

The State counters that the search was conducted in a reasonable manner because it was brief -- lasting only a few seconds -- and was no more intrusive than necessary. The State characterizes the location of the search as "beside a patrol car on a sidewalk[11] near a grassy, vacant lot, and across the street from a Sheetz gas station." Further, the State notes that officers surrounded Smith during the search to shield him. The State disputes Smith's contention that members of the public were nearby at the time, explaining that the timestamps on Officer Huff's body-worn camera footage to which Smith cites were both almost a minute after the search concluded.

Regarding the location of the search, the circuit court concluded that the search occurred across the street from a Sheetz that was closed at the time. The circuit court further explained the location as follows:

> On that immediate quadrant there is an open lot and then a house next door as you can see in the video. A business is on the other quadrant. It's a CBD business or something that's not, that's not a residence, a brick building.
>
> It is a high traffic area day and night, even at 3:00 in the morning . . . . It is nominally a public place. Not a private place.

[11] Smith disputes the State's contention that the search occurred on the sidewalk. We agree with Smith that the search did not occur on the sidewalk. To the extent that Smith characterizes the location as being in the middle of the road, however, we disagree. Rather, the search was conducted on the side of the road, in between a police cruiser and the curb.

The circuit court went on to conclude that officers moved Smith to the sidewalk side of the road, adjacent to an open grass lot, to conduct the search and that traffic was "light" with only one vehicle observed in the distance.

Although it is true that the search was conducted on a public road in a high traffic area, that fact alone does not render the location of the search unreasonable. Indeed, given the time at which the search occurred -- around 3:00 a.m. -- we cannot say that the location of the search was akin to the location in *Paulino* or *Faith* as Smith urges. To be sure, unlike *Paulino* and *Faith*, there was no evidence that members of the public saw or could see the search. Smith had no companions in the vehicle like those present in both *Paulino* and *Faith*. There was no testimony that members of the public were present at the scene. Further, the two timestamps from Officer Huff's body-worn camera footage to which Smith cites in support of his argument that members of the public were present are both *after* the CDS was retrieved from Smith's pants and the search had concluded. The location being "well-lit" and the location of the arrest, therefore, are where the similarities between the search at issue here and *Paulino* end.

Faith is similarly distinguishable. In *Faith*, the search was conducted in day light, on the shoulder of Interstate 70, while moderate to heavy traffic was passing by. *Faith*, 242 Md. at 218. Here, the search occurred at nearly 3:00 a.m. with only one vehicle seen passing in the distance. Moreover, although the search was conducted on the side of a public road in a "high traffic area," the record establishes that steps were taken to protect Smith's privacy that are more than what was done to protect either Faith or Paulino's privacy. To be sure, the search was conducted on the side of the road, in between a police

cruiser and the curb. On the other side of the curb was a vacant grassy lot. Although security was on site, the Sheetz across South Cannon Avenue was closed at the time the search was conducted. There was no testimony regarding the distance between the location of the search and the single neighboring house. Under these circumstances, we cannot say that the location of the search at issue was unreasonable.

We are not persuaded by Smith's attempts to distinguish *Partlow* and *Allen*. In both cases, police took steps, like those taken by Officer Huff here, to protect the suspects' privacy. The search in *Partlow* was conducted at a more secluded area of a public road where no members of the public were present. *Partlow*, 199 Md. App. at 645. In *Allen*, officers moved the suspects from public view and conducted the searches alongside parked cars. *Allen*, 197 Md. App. at 312-13.

As to the manner of the search, we are similarly unpersuaded by Smith's arguments. The parties do not dispute that two officers, in addition to Officer Huff, surrounded Smith during the search so as to shield him from public view. Although Smith's genitals were exposed briefly to Officer Huff, and possibly the two officers surrounding Smith, there is no evidence that they were exposed to the public. As explained *supra*, the search was not unnecessarily prolonged and instead only lasted a few seconds. After unbuttoning and pulling out the waistband of Smith's shorts, Officer Huff manipulated the suspected CDS on the outside of Smith's pants before reaching in momentarily to retrieve it. Perhaps the officers could have taken additional steps to protect Smith's privacy. They could have, for example, placed Smith in the back of a police cruiser to conduct the search or opened the back doors of the cruiser to create a make-shift stall. Given the time of day, and the lack

of evidence that members of the public were present, we are satisfied that Officer Huff did not conduct his search in an unreasonably public location or manner.

We are not persuaded by Smith's attempt to distinguish the intrusiveness of the search at issue with the intrusiveness of the searches in *Partlow* and *Allen*[12] based on the private part involved. The private part involved is a distinction without a difference. Indeed, our sexually invasive search cases do not hold that a search limited to the buttocks is necessarily less intrusive than a search that extends to a suspect's genitals. Rather, either type of search could be equally intrusive depending on the surrounding circumstances.

4. *Balancing the* Bell *factors*

We now turn to the balancing of the *Bell* factors and conclude that the sexually invasive search of Smith was reasonable. Contrary to Smith's assertion, the search at issue was a reach-in that was limited in scope. Although it is true that Smith's penis and pubic hair were momentarily exposed, there was no evidence that Officer Huff manipulated Smith's genitals. Indeed, Officer Huff's testimony -- which the circuit court credited -- was that he used one hand to push the suspected CDS up from the outside of Smith's shorts before reaching into Smith's underwear briefly to retrieve the object once it came into view. There was no testimony to the contrary.[13]

[12] We are also unpersuaded by Smith's contention that Allen's buttocks were never exposed. To be sure, upon pulling back Allen's pants, the searching officer "saw a plastic bag 'protruding' from between his buttocks." *Allen*, 197 Md. App. at 312. Allen's buttocks were, therefore, necessarily exposed to the searching officer.

[13] As the circuit court was reciting its findings of fact on the record, Smith interjected to challenge the finding that Officer Huff did not manipulate his genitals. As the circuit

Further, the search was justified. Smith does not dispute that he consented to the initial pat-down and that he was lawfully under arrest for possession of suboxone. Moreover, Smith does not challenge the factual finding that, during the initial pat-down, Officer Huff felt a hard object inconsistent with human anatomy in his crotch area. Nor is it disputed that Officer Huff developed a reasonable suspicion that Smith was secreting a large amount of CDS in his crotch area based on his knowledge, training, and experience. Although there were no particularized exigent circumstances, we are satisfied that in these narrow circumstances where the search was narrow in scope, conducted at nearly 3:00 a.m. with no members of the public present, and conducted in a manner that adequately protected Smith's privacy interests, the generalized exigency proffered by Officer Huff and accepted by the circuit court was sufficient.

The location and manner of the search were similarly reasonable. Although the search was conducted on a public road in a "high traffic" area, the search was conducted in the middle of the night and with no members of the public present. Further, Officer Huff took steps to protect Smith's privacy. Indeed, the search was conducted between a police cruiser and the curb, on the other side of which was a vacant lot, with Smith flanked on either side by another officer. In *Paulino*, the Court held that it was the other passengers' "presence, whether their view was obscured or otherwise, that [made] the search of Paulino unnecessarily within the public view and thus violative of the Fourth Amendment."

court noted, this was not, however, sworn testimony. Indeed, Smith's sworn testimony did not include any statements regarding the scope or manner of Officer Huff's search.

Paulino, 399 Md. at 360. Conversely, no members of the public were present as Smith was searched to render the search "unnecessarily within the public view."

On balance, we conclude that, although intrusive and demeaning like any sexually invasive search, the reach-in search at issue was reasonable and did not violate Smith's rights under the Fourth Amendment. As such, we discern no error in the circuit court's denial of Smith's motion to suppress the CDS recovered from his person.

II. The circuit court's imposition of separate, consecutive sentences for possession with intent to distribute fentanyl and possession of 28 grams or more of a fentanyl mixture was in error.

We now turn to Smith's argument that separate, consecutive sentences for both possession of fentanyl with intent to distribute ("possession with intent to distribute") and possession of 28 grams or more of a fentanyl mixture are improper ("volume possession").[14] Smith was convicted of possession with intent to distribute, in violation of Md. Code (2002, 2021 Repl. Vol.), § 5-602 of the Criminal Law Article ("CR"), and volume possession, in violation of CR § 5-612. The circuit court sentenced Smith to twenty years' imprisonment, with all but eight years suspended, and five years' probation for the former conviction, and to a consecutive term of five years' imprisonment without parole for the latter conviction. Smith argues that this was in error and that, for sentencing purposes, the conviction for his violation of CR § 5-612 merges into the conviction under

[14] Smith concedes that the merger issue was not raised at sentencing but urges that his failure to raise the issue below does not preclude our review. We agree. As Smith aptly notes, "where merger is required under . . . the rule of lenity, the issue of merger is properly before us even in the absence of an objection below." *Kyler v. State*, 218 Md. App. 196, 222 (2014) (citing *Pair v. State*, 202 Md. App. 617, 625 (2011)).

CR § 5-602 under the rule of lenity, citing our holding in *Kyler v. State*, 218 Md. 196 (2014) for support.

The State counters that our holding in *Kyler* was expressly limited by our understanding at the time that, by enacting CR § 5-612, the General Assembly merely created an enhanced penalty, rather than a stand-alone offense. The State contends that this understanding was later rejected by our Court in *Carter v. State*, 236 Md. App. 456 (2018), in which we reasoned that the rule of lenity does not require merger because the relevant statutes are not ambiguous.

Smith responds that the fact that CR § 5-612 is now understood to be a separate crime, rather than a sentencing enhancement, has no effect on the question whether a conviction under CR § 5-612 merges with a conviction under CR § 5-602 for sentencing purposes. Smith reasons that there is no indication that the General Assembly intended separate punishments for possession with intent to distribute under CR § 5-602 and volume possession under CR § 5-612. Further, Smith contends that the State's reliance on *Carter* is misplaced because the question of merger was not before us in that case. We agree with Smith.

"The 'rule of lenity' is a principle of statutory construction" that provides "an alternate basis for merger in cases where the required evidence test is not satisfied, and is applied to resolve ambiguity as to whether the Legislature intended multiple punishments for the same act or transaction." *Marlin v. State*, 192 Md. App. 134, 167 (2010) (citation omitted). We have explained that "[i]t is when we are uncertain whether the legislature intended one or more than one sentence that we make use of . . . the 'rule of lenity.' Under

that rule, if we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we, in effect, give the defendant the benefit of the doubt and hold that the crimes do merge." *Moore v. State*, 198 Md. App. 655, 686 (2011) (quoting *Clark v. State*, 188 Md. App. 185, 207-08 (2009)).

In *Kyler*, we endeavored to determine whether the General Assembly intended a violation of CR § 5-612 to be punished separate and apart from a violation of CR § 5-602. In so doing, we recounted the history of CR § 5-612. Under former § 286 of Article 27 of the Maryland Code,

> possession of a certain quantity of drugs was not intended to result in a sentence additional for possession with intent to distribute. Rather, it was intended to "distinguish the volume drug dealer from the street corner dealer by establishing a mandatory minimum penalty of 5 years in jail for the possession of certain threshold quantities of a controlled dangerous substance."

Kyler, 218 Md. App. at 229 (quoting *State v. Wheeler*, 118 Md. App. 142, 148 (1997). In 2002, the General Assembly created CR § 5-612 as part of the new Criminal Law Article. Subsequently, in 2005,

> the General Assembly revised [CR] § 5-612 and other sentencing enhancing provisions in response to the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), which, as the legislature explained, held that "a sentencing judge's imposition of an enhanced penalty, based on facts that were not admitted by the defendant or found by a jury, violated the defendant's right to a trial by jury." S.B. 429, Fiscal and Policy Note (Feb. 15, 2005). To avoid running afoul of *Blakely*, the Committee to Revise Article 27 recommended "repealing the factual penalty enhancement in the penalty provision and to place the factual circumstance that leads to the increased penalty into the factual

> elements of the underlying offense to be charged as its own, separate, new offense." *Id.*

Kyler, 218 Md. App. at 224 (emphasis omitted).

We concluded that, "[a]lthough the General Assembly subsequently changed [CR] § 5-612 to make it a separate offense from § 5-602, it did so to avoid a constitutional issue." *Id.* at 229. Further, we explained that "[t]here is no language in the amended statute, as there is in [CR] § 5-613, the drug kingpin statute, providing that a conviction under § 5-612 does not merge with other crimes." *Id.* Finally, we noted that CR § 5-612 "continues to refer to the penalty as an '[e]nhanced penalty.'" *Id.* Accordingly, we held that, "[g]iven these circumstances, it appears that the General Assembly did not intend that volume [possession] be punished separately from the offense of possession with intent to distribute. At the very least, the intent is ambiguous." *Id.* We, therefore, applied the rule of lenity to merge the sentences. *Id.*

Subsequently, in *Carter*, we recalibrated our understanding of CR § 5-612. Importantly, we commented "on the potentially unfortunate role of the headings added to—or at least not properly deleted from—the statute by publishers in assembling and reporting their versions of the Maryland Code." *Carter*, 236 Md. App. at 481. Specifically, we explained that

> the version of § 5-612 enacted by the General Assembly in 2005 did not include . . . [the] heading 'Enhanced penalty.' Similarly, the General Assembly's reenactment of that provision in chapter 515 of the 2016 Laws of Maryland also does not include . . . [that phrase]. 2016 Md. Laws ch. 515 § 2. Nonetheless, the printed volumes and online versions of the Maryland Annotated Code compiled by both LexisNexis (2012

> Repl. & 2017 Supp.) and West (2002 & 2017 Supp.) continue[d] to include . . . the heading.

Id.

Although *Carter* rejected our understanding of CR § 5-612 when we decided *Kyler* in so far as we relied on the continued use of the "enhanced penalty" heading, *Carter*'s analysis does not affect the present issue -- whether a sentence under CR § 5-612 merges into a sentence under CR § 5-602 under the rule of lenity -- in the way the State asserts. Indeed, as Smith correctly notes, the merger issue was not before us in *Carter*. Rather, the issue decided in *Carter* was whether CR § 5-612 contains an intent to distribute element. *Id.* at 479-80. In fact, we explained the analytically distinct questions involved in *Carter* and *Kyler*:

> Mr. Carter's reliance on *Kyler* is mistaken, as he improperly conflates two different parts of that opinion. In *Kyler*, we first applied the required evidence test to determine if two offenses—violation of § 5-612(a) and the separate crime of possession with intent to distribute—merged. In the course of determining that they did not, we held that § 5-612(a) does not require proof of an intent to distribute. 218 Md. App. at 226-27, 96 A.3d 881.
>
> Only after reaching that conclusion did we proceed, in applying the rule of lenity, to explore the historical relationship between those two crimes for the purpose of determining whether the General Assembly intended that they be *punished* separately. *Id.* at 227-30, 96 A.3d 881. Our conclusion that the General Assembly did not appear to so intend did not in any way undermine our holding that § 5-612(a) does not require an intent to distribute.

Id. at 480 (footnote omitted).

Our application of the rule of lenity in *Kyler* rested on three grounds. *Kyler*, 218 Md. App. at 229. In *Carter*, our understanding of one of the grounds relied on in *Kyler* was called into question. *Carter*, 236 Md. App. at 481. Although we noted *Kyler*'s misplaced reliance on headings in CR § 5-612 added by publishers, rather than the General Assembly, our holding in *Carter*, however, did nothing to undermine the other two reasons which led us to conclude that whether the legislature intended to punish violations of CR § 5-612 separately was at least ambiguous. The State does not contend that *Carter* -- or any other case -- overruled *Kyler* or displaced the understanding that CR § 5-612 does not include an anti-merger provision or that the General Assembly passed CR § 5-612 to avoid a constitutional issue. Our decision in *Carter*, therefore, did nothing to disrupt our understanding of these two grounds upon which we relied in applying the rule of lenity in *Kyler*. Accordingly, the balance of our lenity analysis in *Kyler* still controls.

We are not persuaded by the State's argument that the rule of lenity does not apply because CR § 5-612 was unambiguously passed as an independent offense. It is true that the rule of lenity only applies when the legislature's intent is ambiguous, but it is not the intent to create a separate offense that matters to our analysis. Rather, our ambiguity analysis when determining whether the rule of lenity applies is centered on "whether the Legislature intended multiple *punishments* for the same act or transaction." *Marlin*, 192 Md. App. at 167 (citation omitted). As explained *supra*, whether the General Assembly intended to *punish* CR § 5-612 separately is still at least ambiguous.

This conclusion is bolstered by *Johnson v. State*, 467 Md. 362 (2020), which Smith cited at oral argument. At issue in *Johnson* was the maximum penalty for a violation of

CR § 5-612. *Id.* at 370. In discussing the development of CR § 5-612, the Court explained that the General Assembly's 2005 amendment to that statute was driven by the constitutional issue created by *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Notably, after discussing the Fiscal and Policy Note to the 2005 amendment to CR § 5-612, which expressly referenced *Blakely* and *Apprendi*, the Court explained that, "[i]n amending the statute, the General Assembly did not seek to change the penalty underlying CR § 5-612." *Id.* at 386-87 (citing Senate Bill 429 Fiscal and Policy Note at 2). The Court's analysis in *Johnson*, therefore, further supports our conclusion that the General Assembly did not intend to CR § 5-612 to be punished separately.

Applying the rule of lenity, therefore, "the lesser penalty merges into the greater penalty." *Kyler*, 218 Md. App. at 229 (citing *Spitzinger v. State*, 340 Md. 114, 125 (1995)). Here, as discussed *supra*, Smith was sentenced to twenty years for the conviction of possession with intent to distribute fentanyl, and five years, consecutive, for the conviction of possession of 28 grams or more of a fentanyl mixture. Accordingly, for sentencing purposes, Smith's conviction for possession of 28 grams or more of a fentanyl mixture merges into his conviction for possession with intent to distribute.

CONCLUSION

For the foregoing reasons, we conclude that the sexually intrusive search of Smith was reasonable. Further, we conclude that the imposition of separate, consecutive, sentences for Smith's conviction of possession with intent to distribute fentanyl and possession of 28 grams or more of a fentanyl mixture was erroneous because, under the rule of lenity, the latter conviction merges with the former for sentencing purposes.

Accordingly, we vacate the sentence imposed pursuant to CR § 5-612 for possession of 28 grams or more of a fentanyl mixture.

SENTENCE IMPOSED PURSUANT TO CR § 5-612 VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY WASHINGTON COUNTY.

Circuit Court for Washington County
Case No. C-21-CR-23-000543

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1753

September Term, 2024

JA-MO KIMU SMITH

v.

STATE OF MARYLAND

Berger,
Kehoe, S.,
Hotten, Michele D.
(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Hotten, Michele D., J.

Filed: June 10, 2026

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Respectfully, I dissent.

Many years ago, a very wise appellate jurist, retired Judge Charles Moylan, during a judicial class on the Fourth Amendment, characterized the following quote from *Katz v. United States*, 389 U.S. 347, 357 (1967) as "[T]he Prime Directive":

> "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a very few specifically established, jealously guarded and well-delineated exceptions."

Judge Moylan summed it up in these words: "You Always Have To Get A Warrant—unless you can't."[1]

Under the totality of the circumstances in the case at bar, the search and seizure were unreasonable, unlawful, invasive and violative of the Fourth Amendment. The search was conducted on a public street, in view of people; Appellant's clothing was manipulated from the waistband down without his consent; his genitalia and pubic hair were exposed and an item retrieved; and his reaction to the invasive search was one of surprise and discomfort. Given the absence of "reasonable articulable suspicion" or exigent circumstances to justify a public sexually invasive search, the search was unconstitutional.

[1] Judge Moylan repeated this maxim in opinions that he authored for this Court. *See, e.g., White v. State*, 248 Md. App. 67, 94, n.4 (2020) ("Essentially, most of the exceptions to the warrant requirement are responses to some form of exigency that makes it unfeasible, if not impossible, for the police to obtain a warrant before searching. Might it be possible to reduce the entire package to the simple commandment, 'YOU ALWAYS HAVE TO GET A WARRANT—*unless you can't*'?") (emphasis in original).

The Fourth Amendment protects individuals from unreasonable searches and seizures. U.S. CONST. AMEND. IV. Determining whether a search was reasonable is a highly fact-dependent inquiry. *Faith v. State*, 242 Md. App. 235, 246 (2019); *Chimel v. California*, 395 U.S. 752, 765 (1969) (finding "the reasonableness of searches' depend upon 'the facts and circumstances—the total atmosphere of the case[.]'") (quotation omitted); *Sibron v. New York*, 392 U.S. 40, 59 (1968) ("The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case."). Since reasonableness is a fact-dependent inquiry, generalized justifications cannot support a warrantless search.

Bell v. Wolfish, 441 U.S. 520, 559 (1979) provides several factors to consider in weighing the propriety of a sexually invasive warrantless search: (1) the scope of the particular intrusion; (2) the manner in which the search was conducted; (3) the justification for initiating the search; and (4) the place in which the search was performed. It is undisputed that moving clothing to inspect a naked body constitutes a "sexually invasive" search. *See Faith*, 242 Md. App. at 236-37 (citing *Bell*, 441 U.S at 559). Given its "terrifying, demeaning, and humiliating" nature, sexually invasive searches are held to a more rigorous standard of reasonableness. *See id.* (quotation omitted).

My departure from the majority's view centers on the application of the *Bell* standard. As explained below, the justification and location of the search were unreasonable, compelling the overall conclusion that the search violated Appellant's Fourth Amendment rights. Additionally, assuming *arguendo*, that the circumstances

provided justification for such a search, the Court in *Faith* observed that this alone will not make the search reasonable:

> "The concern [here] is not with justification at all, but rather with the manner in which even a fully justified further search or examination is carried out. Those modality concerns focus on such things as privacy or unnecessary embarrassment. . . ."

Faith, 242 Md. App. at 238 (quotation omitted).

Regarding the justification for the search, the circuit court found the sexually invasive search was justified, citing exigent circumstances that Appellant intended to alter, destroy, or conceal the contraband. In finding exigency, the circuit court relied exclusively on the generalized assertion from Officer Huff's testimony that it is "not uncommon for suspects—even while handcuffed—to 'dispose of, destroy or scatter [contraband] in the rear of the patrol car.'" The circuit court's reliance on Officer Huff's generalized assertions was legally erroneous because such assertions did not demonstrate urgency to search Appellant at that very moment. *See Paulino v. State*, 399 Md. 341, 351 (2007) (maintaining that "[t]he meaning of exigent circumstances is that the police are confronted with an emergency—*circumstances so imminent that they present an urgent and compelling need for police action*.") (emphasis added).

If the State had established a genuine exigency necessitating a sexually invasive search, at that specific time and location, the search may have satisfied constitutional muster. *See Gorman v. State*, 168 Md. App. 412, 422 (2006) ("Absent exigent circumstances, [the Fourth Amendment] threshold may not reasonably be crossed without a warrant.") (quoting *Payton v. New York*, 445 U.S. 573, 573 (1980)). However, in

Maryland, the exigency exception demands particularized findings rather than generalized assertions. *See, e.g.*, *State v. Carroll*, 383 Md. 438, 460 (2004) ("What is required is that a reviewing court be satisfied that the officers have a reasonable suspicion, *based on particular circumstances*, that an exigency . . . exists in the case under review.") (emphasis added); *Lee v. State*, 139 Md. App. 79, 89 (2001), *aff'd*, 374 Md. 275 (2003) ("[I]n each case, the police must articulate a reasonable suspicion, *based upon particularized facts*, that exigent circumstances exist. . . .") (emphasis added). Indeed, this principle is consistent with the United States Supreme Court's rejection of categorical rules relative to exigent circumstances. *See Missouri v. McNeely*, 569 U.S. 141, 150, 156 (2013) (rejecting a categorical rule that "the natural dissipation of alcohol in the blood" supports a per se finding of exigency, allowing officers to justify a warrantless blood sample). A review of Maryland precedent confirms that the requirement for particularized findings is at its most stringent in the context of sexually invasive searches. *See generally Paulino*, 399 Md. 341; *Faith*, 242 Md. App. 212; *Nieves v. State*, 160 Md. App. 647 (2004); *Miller v. State*, No. 796, Sept. Term, 2024, 2026 WL 34979 (Md. App. Ct. Jan. 6, 2026).

In *Paulino*, police officers conducted a sexually invasive search in public without proper justification. 399 Md. at 360-61. The Supreme Court of Maryland noted that while officers had the authority to initiate a search of the defendant, the underlying probable cause did not provide a "blanket justification" for a sexually invasive public search. *Id.* at 357. The *Paulino* Court found that the search was unreasonable because there was "*no testimony . . . that Paulino was attempting to destroy evidence*," necessitating a search at that "precise moment." *Id.* at 360–61 (emphasis added). The Court further observed that

the officers could have transported Paulino to a more private location rather than search him in a "'well-lit' public car wash." *Id.* Consequently, *Paulino* establishes that generalized concerns over the destruction of evidence are insufficient to support findings of exigency, particularly when performing the sexually invasive search in a private setting is a viable alternative.

In *Faith*, this Court determined a "non-exigent visual inspection of the genital area of a person suspected of concealing CDS occur[ing] in the daylight, while [the suspect] [stands] between two police cruisers with emergency lights flashing, along the shoulder of an interstate highway, as moderate to heavy traffic passe[s]" was unreasonable. 242 Md. App. at 271. In determining there was no exigency to justify the sexually invasive search, this Court highlighted how Faith "made no attempt to flee" and how the "[p]olice did not find anything during the pat-down of Faith's outer garments that might indicate the possible presence of a weapon." *Id.* at 266. This Court also cited how the police officer did not "explain why this search could not wait until Faith, who was already subject to arrest based on the canine alert, was taken to a more private location, or, alternatively, why she did not conduct this search in one of the four vehicles at the scene of this traffic stop." *Id.* at 267. Thus, *Faith* reaffirms the same principle set forth in *Paulino*—that generalized concerns over the destruction of evidence are insufficient to support findings of exigency justifying a public sexually invasive search.

Similarly, in *Nieves v. State*, this Court reaffirmed the principle that warrantless searches are per se unreasonable under the Fourth Amendment unless they fall within a specifically recognized exception. 160 Md. App. at 659. To justify a highly invasive strip

search, we determined an officer must possess reasonable suspicion grounded in "specific objective facts" and rational inferences rather than "inchoate, unspecified suspicions." *Id.* at 666. Applying this standard, we found that the strip search of the defendant was unconstitutional because it was based solely on his prior drug history and his association with a vehicle registered to a suspected narcotics dealer. *Id.* at 668. In reaching this conclusion, we determined neither a defendant's criminal history nor their associations satisfy the requirement for individualized suspicion since the justification did not relate to the "individual" specifically, but rather to a general "category of offenders." *Id.* at 666. As such, *Nieves* stands for the principle that even an individual's mere proximity to suspected criminal activity does not satisfy the requirement for a fact-specific showing of exigency.

Finally, in *Miller v. State*, this Court was tasked with determining whether the circuit court erred in not suppressing the drug evidence seized after officers conducted a sexually invasive public search. 2026 WL 34979, at *1. This Court established that the burden to demonstrate exigency is inversely related to the egregiousness of the search; because the search was less invasive in both scope ("look-in plus reach-in retrieval") and manner (the defendant was "searched on residential streets[,]" "not conducted in the public view") than a public cavity search, the State's threshold for justifying the search at the arrest site was significantly lower.[2] *Id.* at *5-6. Since "the level of exigency required to justify [the

[2] Although *Miller* suggests there is a sliding scale of reasonableness for the *Bell* factors, it is important to highlight that the court in *Faith v. State* originally maintained that "establishing exigency is [not] less important because a look-in search, like a reach-in search, is not as intrusive as a strip search or body cavity search." 242 Md. App. 212, 264 (2019). Since *Miller* is an unreported opinion, I ultimately defer to the Faith court's determination that reasonableness under the other *Bell* factors does not reduce the exigency

defendant's] search was much lower[,]" this Court found that sufficient exigency existed based on the defendant's "resisting or concealing behaviors." *Id.* Accordingly, *Miller* affirms the principle that exigency still requires a specific finding, such as active resistance or concealment efforts, even when the threshold is lowered.

As previously noted, the circuit court failed to render any particularized findings that Appellant was likely to destroy evidence. Instead, it relied on Officer Huff's testimony that it is "not uncommon for suspects—even while handcuffed—to 'dispose of, destroy or scatter [contraband] in the rear of the patrol car.'" As detailed in *Paulino*, *Faith*, *Nieves*, and *Miller*, the mere potential for evidence destruction does not grant officers broad discretion to perform sexually invasive public searches at their whim. This principle is especially significant since evidence destruction remains a possibility in any arrest. Permitting generalized concerns to justify findings of exigency would inevitably invite instances of sexual abuse under the guise of evidence preservation. Given the humiliating nature of sexually invasive searches, our jurisprudence must prioritize Fourth Amendment protections by rejecting generalized justifications in favor of specific, individualized facts. It is important to emphasize that the exigency exception is only a "narrow" justification. *See Paulino*, 399 Md. at 351. Absent a particularized finding, the exigency exception ceases to be "narrow" and instead becomes an unchecked authorization for intrusion.

requirement. *See* Md. Rule 1-104(a)(1) ("An unreported opinion of the Supreme Court or the Appellate Court is not precedent within the rule of stare decisis."). Regardless, even under a lowered standard, my ultimate determination remains unchanged; because the record lacks any justification for a finding of exigency, the search was unreasonable.

In the case at bar, because Appellant was already in custody when the search occurred, the purported exigency that he was likely to destroy evidence was significantly diminished. Although the destruction of contraband remained a theoretical possibility, Appellant's capacity to do so was severely restricted. Setting aside broad generalizations, there is no evidence in the record before us to suggest the officers were unable to wait until Appellant was secured in a private location before performing the sexually invasive search. As such, the officers' justification for conducting the sexually invasive search, under the circumstances presented, was unreasonable.

Moreover, our precedent clarifies that controlled dangerous substances—while consumable—are not considered "highly evanescent" evidence. *See Evans v. State*, 113 Md. App. 347, 368 (1997), *rev'd on other grounds*, 352 Md. 496 (1999); *Faith*, 242 Md. App. at 270 ("We are not persuaded that [the] search was reasonably necessary 'to prevent . . . destruction or disposal of contraband' concealed on [the defendant's] person based on what the State views as 'the inherent exigency attributable to the "easily disposable nature of the drugs[.]"'"). Accordingly, the presence of drugs did not create a per se exigency. For these reasons, the search lacked a reasonable justification.

While our precedent firmly establishes that a sexually invasive public search requires a particularized exigency, the majority relies on *Partlow v. State*, 199 Md. App. 624 (2011), for the opposite proposition. In *Partlow*, this Court held that a sexually invasive search was justified by mere "reasonable suspicion . . . that drugs [were] concealed on the suspect's body." *Id.* at 643–44. There, that suspicion stemmed from an informant's tip that the defendant was selling drugs from his car, combined with a K-9 alert on the vehicle. *Id.*

at 644–45. The *Partlow* court further justified the search by noting generally that "drug traffickers often secrete drugs in body cavities to avoid detection." *Id.* Thus, *Partlow* stands for the rule that reasonable suspicion that a suspect is concealing contraband on their person satisfies the Fourth Amendment for a "reach-in" search incident to arrest, dispensing entirely with the need for a particularized finding of exigency. *See also Allen v. State*, 197 Md. App. 308, 323 (2011).

Partlow represents a sharp and unsupported departure from our established jurisprudence. Ultimately, however, even if *Partlow*'s generalized exigency holding remains good law, the case is readily distinguishable from the case at bar for several reasons.

First, the record contains no evidence that Appellant was a drug trafficker. He was placed under arrest only after admitting to possessing Suboxone. Although not expressed during the search itself, evidence that Appellant held a valid prescription for the medication was subsequently introduced during the suppression hearing. Unlike other illicit narcotics, Suboxone is primarily sought on the illicit market not for recreational use, but as a tool for self-treatment and harm reduction. *See* Howard D. Chilcoat et al., *Buprenorphine in the United States: Motives for abuse, misuse, and diversion*, 104 J. Substance Abuse Treatment 148, 152 (2019) ("The rates of using buprenorphine to get high in the past 3 months and in the past 30 days were 2% and 1%, respectively. Eleven percent of the 273 total respondents who had ever used buprenorphine through either licit or illicit means reported doing so to get high. In contrast, 72% of this subsample reported using buprenorphine to manage withdrawal symptoms."). The majority of individuals who purchase Suboxone without a

prescription do so to stave off painful withdrawal symptoms and to facilitate their recovery from far more lethal substances. *See id.* Consequently, the mere presence of Suboxone does not inherently imply illicit distribution, nor does it justify classifying the possessor as a dangerous drug trafficker capable of triggering the heightened exigency found in *Partlow*.

Moreover, the factual triggers present in *Partlow* are entirely absent here. There was no citizen tip alleging that Appellant was dealing drugs, nor was there a positive K-9 alert. It is important to highlight how even a K-9 alert alone is insufficient to search an individual who is not under arrest. *See Wallace v. State*, 142 Md. App. 673, 705 (2002) (finding a K-9 alert "permitted a search of the vehicle, but, without anything more particular to link any one passenger in the car . . . the search of each individual passenger absent an arrest based upon probable cause was improper."), *aff'd*, 372 Md. 137 (2002). Far from evading law enforcement, Appellant openly admitted to possessing the Suboxone when questioned. Accordingly, the State cannot bootstrap a minor admission of possession into the sweeping "drug trafficker" presumption used to justify the invasive search in *Partlow*.

Second, the presence of a "rock-hard object" between Appellant's legs, even when paired with an admission to possessing Suboxone, does not give rise to an immediate inference that the object is contraband. The physical characteristics of the object found here differ significantly from those in *Partlow*. The object in *Partlow* was highly conspicuous because it was about "the size of a baseball." *Partlow*, 199 Md. App. at 631. In contrast, the object here consisted of merely 40 grams of a powdered substance—a far smaller volume that lacks the immediate profile of concealed contraband. It is well-established that a physical bulge alone is insufficient to justify a search—let alone a sexually invasive

one—given the myriad innocuous reasons for it, such as "wallets, money clips, keys, change, credit cards, cell phones, cigarettes, and the like." *See Ransome v. State*, 373 Md. 99, 107–08, 111 (2003).

Although the officers here claimed to have probable cause for an arrest based on Appellant's Suboxone admission, probable cause to arrest for an item found in a vehicle should not grant law enforcement a blank check to perform a reach-in search of a suspect's underwear for an ambiguous, unidentifiable object. A search incident to arrest is not a broad license for any level of bodily intrusion. While probable cause to arrest may justify a standard search of a suspect's pockets or outer clothing, *see, e.g.*, *Bailey v. State*, 412 Md. 349, 368 (2010) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)), an invasive "reach-in" search into a suspect's underwear represents a degradation of personal dignity that requires independent, particularized justification. Here, that particularized justification is absent because the object found between Appellant's legs was ambiguous.

Third, the search in *Partlow* was far less invasive in both scope and manner. The *Partlow* court emphasized that the defendant's genitals were not exposed because he "was wearing a long coat or shirt that covered his underwear," making the exposure "'not as bad as it initially sounds.'" *Id.* at 645. Here, Appellant's genitals were actively exposed to the public during the search. This heightened level of physical intrusion, paired with the absence of a particularized exigency, renders the search unreasonable.[3]

[3] While I maintain that a showing of reasonableness under the other *Bell* factors cannot diminish the strict requirement of a particularized exigency, the unreasonableness in the search's scope and manner here independently renders it unreasonable.

In addition to the justification for the search, the location where the search was performed was unreasonable. Although the majority indicates that a public location "alone does not render the location of the search unreasonable[,]" I disagree. The *Paulino* court explicitly stated it was the presence of members of the public, "whether their view was obscured or otherwise, that ma[de] the search of Paulino unnecessarily within the public view and thus violative of the Fourth Amendment." 399 Md. at 360. On its face, the humiliation and psychological distress resulting from a sexually invasive search are magnified when performed in view of the public; consequently, the lack of privacy renders the location itself inherently unreasonable from a legal and ethical standpoint. Here, the search of Appellant was conducted in a high-traffic public location facing both a vacant lot and a storefront. The location was thus unreasonable, particularly given the officers' ability to secure Appellant in a non-public environment.

In sum, the sexually invasive public search was unreasonable under the circumstances. The record is devoid of any specific finding that Appellant was likely to destroy or alter the contraband. Furthermore, the public nature of the high-traffic location rendered the location per se unreasonable. Since the State failed to prove a specific threat of evidence destruction that outweighed the humiliation of a public sexually invasive search, Appellant's Fourth Amendment rights were violated, and the evidence seized should have been suppressed.

Accordingly, I dissent.