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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 26, 1995

The Honorable James R. Metts, Ed.D.
Sheriff, Lexington County
Post Office Box 639
Lexington, South Carolina 29071

Re: Informal Opinion

Dear Sheriff Metts:

You have posed the following issue:

> [o]ur medical services personnel in the jail want to perform certain medical testing on inmates. Most of these inmates would be pre-trial detainees.
>
> In reading Sections 44-29-100 and 44-31-320 of the South Carolina Code of Laws it appears that any inmate may be examined for a sexually transmitted disease. However, it seems to indicate that there must be suspicion of tuberculosis to examine an inmate for it. Please advise as to whether this is your interpretation of the law.

I am enclosing a copy of Op. Atty. Gen. No. 86-66 (1986) which discusses at some length the general issue which you have raised. Therein, we referenced S.C. Code Ann. Sec. 44-29-100 which, at that time, dealt solely with examination for venereal disease, but has now been expanded to provide as follows:

> [a]ny person who is confined or imprisoned in any state, county or city prison of this State may be examined and treated for a sexually transmitted disease by the health

> authorities or their deputies. The state, county and municipal boards of health may take over a portion of any state, county or city prison for use as a board of health hospital. Persons who are confined or imprisoned and who are suffering with a sexually transmitted disease at the time of the expiration of their terms of imprisonment must be isolated and treated at public expense as provided in Section 44-29-90 until, in the judgment of the local health officer, the prisoner may be medically discharged. In lieu of isolation, the person, in the discretion of the board of health, may be required to report for treatment to a licensed physician or submit to treatment provided at public expense by the Department of Health and Environmental Control as provided in § 44-29-90.

In the 1986 opinion we read the former version of Section 44-29-100 as providing the requisite authority to compel a physical examination of prisoners charged with prostitution or solicitation of prostitution. The goal of such a policy was to determine whether this category of pretrial detainees in fact had venereal disease. Even though these prisoners were awaiting bond hearing, it was found that the hearing could be delayed for a 24-hour period so that the physical examination could be conducted prior to their release.

Importantly, we concluded that this procedure accorded with the federal and State Constitution. We noted that such a policy was an appropriate exercise of the police power, designed to protect against the spread of contagious diseases particularly among prisoners. We referenced the 10th Circuit Court of Appeals decision of Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973), which upheld the constitutionality of an ordinance requiring that all prisoners charged with solicitation and prostitution be given the choice between taking penicillin, entitling them to immediate release, or delaying their release up to 48 hours in order to conduct a physical examination for venereal disease. There, the Court summarized its conclusions, thusly:

> [i]nvoluntary detention, for a limited period of time, of a person reasonably suspected of having a venereal disease for the purpose of permitting an examination of the person thus detained to determine the presence of a venereal disease and providing further for the treatment of such disease, if present, has been upheld by numerous state courts when challenged on a wide variety of constitutional grounds as a valid exercise of the police power designed to protect the public health. Cases involving state statutes or municipal ordinances similar to,

> though not necessarily the same as the ordinance here in question, are: Welch v. Shepherd, 165 Kan. 394, 196 P.2d 235 (1948); Ex Parte Fowler, 85 Okl. Cr. 64, 184 P.2d 814 (1947); People v. Strautz, 386 Ill. 360, 54 N.E.2d 441 (1941); Varholy v. Sweat, 153 Fla. 571, 15 So.2d 267 (1943); City of Little Rock v. Smith, 204 Ark. 692, 163 S.W.2d 705 (1942); and Ex Parte Arata, 52 Cal.App. 380, 198 P. 814 (1921).

Op. No. 86-66, supra, quoting 488 F.2d at 1382.

The 1986 opinion remains the opinion of this Office and, as set forth below, can now be expanded upon because of the more medically updated version of Section 44-29-100, enacted in 1988. As noted above, Section 44-29-100 now relates to "sexually transmitted disease" rather than just to venereal disease. Notwithstanding a broadening of the scope of Section 44-29-100, however, the constitutional analysis reflected in the 1986 opinion continues to reflect that utilized by courts since the opinion was written.

Section 24-5-10 provides as follows:

> [t]he sheriff shall have custody of the jail in his county and, if he appoint a jailer to keep it, the sheriff shall be liable for such jailer and the sheriff or jailer shall receive and safely keep in prison any person delivered or committed to either of them, according to law. (emphasis added).

Moreover, it is well-settled that "[p]rison officials are under a duty to protect prisoners from the spread of contagious and communicable diseases, such as AIDS." 72 C.J.S. Prisons § 85.

Dunn v. White, 880 F.2d 1188 (10th Cir. 1989) strongly supports the constitutionality of a program of AIDS testing as well as testing for other sexually transmitted diseases, among prisoners. In Dunn, a prisoner filed a § 1983 action against prison officials alleging that the officials assaulted him and threatened to put him in segregation when he refused to submit to a blood test for AIDS. The prisoner objected, arguing that AIDS testing served no legitimate purpose because, after identifying carriers, the prison neither treated prisoners nor quarantined them from others.

The 10th Circuit disagreed. Relying upon its earlier decision in Reynolds v. McNichols, supra [which we relied upon in the 1986 opinion], and quoting the United States Supreme Court decision, Bell v. Wolfish, 441 U.S. 520, 547, 99 S.Ct. 1861, 1878,

60 L.Ed.2d 447 (1979) -- a case involving pretrial detainees -- the Court in Dunn recognized that "[p]rison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel .... Accordingly we have held that even when an institutional restriction infringes a specific constitutional guarantee, ... the practice must be evaluated in light of the central objective of prison administration, safeguarding institutional security." 880 F.2d at 1191.

Reasoning that a prison or jail was unique, the Court noted:

> [t]he government's interest in the operation of a prison presents "'special needs' beyond law enforcement that may justify departures from the usual warrant and probable-cause requirements." ... [T]his court must therefore balance the intrusiveness of the blood test against the prison's need to administer the test. Although the two sides of the equation are the same as they are in the free world, plaintiff's incarceration changes the relative weight accorded each interest. "... Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational."

The Court found that either in or out of prison the plaintiff possessed only a limited privacy interest in not having his blood tested. Referencing Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), which had upheld a blood test of a drunk driving suspect, the Court found such an intrusion to be minimal. Again relying upon Bell v. Wolfish, the Court found that "plaintiff's privacy expectation in his body is further reduced by his incarceration ...".

On the other hand, said the Court,

> [t]he prison's interest in responding to the threat of AIDS, or any contagious disease occurring in prison is obviously strong. Indeed, in Glick v. Henderson, 855 F.2d 536 (8th Cir. 1988), the Eighth Circuit suggested that in limited circumstances, a prison's failure to protect prisoners from fellow inmates may violate the eight amendment [as cruel and unusual punishment]. See also Lareau v. Marson, 507 F.Supp. 1177, 1194, 1195 n. 22 (D. Conn. 1980) [failure to screen prisoners for communicable disease violates constitutional rights of

> other prisoners], affd. in part, modified in part on other grounds, and remanded, 651 F.2d 96 (2d Cir. 1981).

Based upon that analysis, the Court of Appeals concluded:

> [t]he goal of controlling the spread of venereal disease may justify coerced medical testing in limited circumstances. In accord with this view the district court concluded that the prevention of the spread of AIDS in prison would justify the intrusion of a blood test. We agreed that the district court could take judicial notice of the seriousness and the transmissibility of the disease AIDS. Moreover, although a review of the record does not reveal whether there is currently a widespread AIDS infection among the prisoners, an attempt to ascertain the extent of the problem is certainly a legitimate penological purpose. The prison cannot determine the amount of infection without testing. Thus, even assuming that the spread of AIDS in prison is not any greater than its spread in the general population, this fact would not substantially weaken the prison's strong interest in determining who in the population currently carries AIDS.
>
> For similar reasons, the lack of any indication in the record that AIDS is communicable among prisoners who do nothing but live together does not diminish the prison's interest in testing ... .
>
> In light of the seriousness of the disease and its transmissibility, we conclude that the prison has a substantial interest in pursuing a program to treat those infected with the disease and in taking steps to prevent further transmission. We further conclude that the prison's substantial interest outweighs plaintiff's expectation of privacy.

880 F.2d at 1195-1196. Thus, the Court found that the blood test did not violate the Fourth Amendment, the First Amendment nor the Due Process Clause.

In South Carolina, the General Assembly has declared "sexually transmitted diseases which are included in the annual Department of Health and Environmental Control List of Reportable Diseases" as dangerous to public health, making it unlawful

for anyone infected with these diseases to knowingly expose another to infection. Section 44-29-60. As noted above, Section 44-29-100 now provides that "[a]ny person who is confined or imprisoned in any state, county or city prison of this State may be examined and treated for a sexually transmitted disease by the health authorities or their deputies." This statute does not distinguish between convicted criminals and pretrial detainees. ["confined or imprisoned']. It authorizes not only "treatment" but "examination" as well. When read in conjunction with Section 24-5-10 which requires the sheriff as jailer to "safely keep" prisoners, as well as the Sheriff's duty to protect his prison population from harm, it is clear that the Sheriff as jailer possesses the authority to test inmates and detainees for sexually transmitted diseases.

Moreover, as we recognized in the 1986 opinion, and as was held in Dunn v. White, decided after that opinion was written, such testing has been held to be constitutional as consistent with the duty of jailers and prison officials to protect their prison population and as a measure to protect the public health. As the Court stated in Dunn, "[i]n light of the seriousness of the disease [AIDS and other sexually transmitted diseases] and its transmissibility, ... the prison has a substantial interest in pursuing a program to treat those infected with the disease and in taking steps to prevent further transmission."

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an
Enclosure