STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

June 21, 1977

ATTORNEY GENERAL OPINION NO. 77-205

Mr. Robert R. Raines
Secretary of Corrections
818 Kansas Avenue
Topeka, Kansas

RE: State Departments - Department of Corrections - Authority To Conduct Rectal Examinations Of Inmates For Contraband

SYNOPSIS: The Department of Corrections may require inmates to submit to a rectal examination after meetings with visitors and in other similar circumstances in the absence of probable cause provided the searches are not performed in a wanton or brutal manner.

RE: State Departments - Department of Corrections - Authority To Take Blood Specimens From Inmates Suspected Of Having Ingested Drugs Or Alcohol

SYNOPSIS: The Department of Corrections may require an inmate to submit to a blood test provided that some basis for suspicion exists that the person examined has ingested drugs or alcohol and provided that the test itself is in accordance with proper medical procedures.

RE: State Departments - Department of Corrections - Circumstances In Which Bodily Intrusions Greater Than Blood Tests May Be Conducted

SYNOPSIS: Bodily intrusion searches involving procedures more complicated and sophisticated than those utilized in blood tests may generally be conducted only after a warrant premised upon probable cause has issued and only when the intrusion is relatively minor and involves no more than a negligible risk of injury to the inmate.

* * *

Dear Secretary Raines:

You inquire generally concerning the validity and permissible scope of bodily intrusion searches of inmates conducted by personnel of a penal institution. Specifically, you query whether the institution may require an inmate to provide a blood or urine specimen or to submit to a strip search, including a rectal examination, in the absence of probable cause as that term is commonly understood under the Fourth Amendment.

As indicated by your letter, the necessity for such searches frequently arises after inmates have completed visitation periods with friends or relatives and then reenter the security area of the institution. During such visits, it is not uncommon for an inmate to receive drugs or other items of contraband from his visitors and to subsequently either consume the substance or attempt to conceal it upon his person prior to reentry.

I.

An analysis of relevant judicial decisions reveals their unanimity in the proposition that bodily intrusion searches of inmates are constitutionally permissible and need not be premised upon a prior showing of probable cause. In validating these searches, the courts have recognized the compelling public interest in preserving the security and order of a penal institution through the eradication of contraband therein. This underlying rationale was concisely verbalized by the Court in *Gettleman v. Werner*, 377 F. Supp. 445 (W. D. Pa. 1974):

> "A Penitentiary is a unique institution fraught with sensitive security hazards, not the least of these being smuggling of contraband such as drugs, money, knives, etc. The state has a high security interest in eliminating smuggling into and out of penitentiaries. In this respect, prison guards must have discretion to act quickly and decisively, and other reasonable procedures in everyday disciplinary problems should not be employed to handcuff prison guards in following the orders and directives designed to eliminate smuggling.
>
> * * * * *
>
> The inherent characteristics of a prison society, including guards, teachers, visitors, and officials, are such that guards must make prompt decisions as search problems confront

> them. The governmental interest in preventing and detecting smuggling outweighs the individual interest in perfect justice." 377 F. Supp. at 451-452.[1]

The Tenth Circuit Court of Appeals specifically addressed the question of the constitutional validity of strip searches, including anal examinations, in *Daugherty v. Harris*, 476 F.2d 292 (1973) and held that such searches were a necessary concomitant of prison life and need not be conditioned upon the existence of probable cause. Therein the Court considered the propriety of a policy in effect at the United States Penitentiary in Leavenworth which required all inmates to submit to a complete bodily examination by institutional personnel prior to and upon their return from any court appearances. Several inmates challenged the searches contending that they impermissibly infringed the constitutional guarantees of privacy and prohibitions against unreasonable searches and seizures since no showing of cause was required precedent thereto. After noting the security problems that had resulted from the concealment of contraband, including weapons, upon the persons of inmates, the Court expressly rejected the special cause argument in the following terms:

> "Given these circumstances coupled with an increasing need to assure the safety of our law enforcement and court officials, this policy of allowing rectal searches must be considered reasonable unless contradicted by a showing of wanton conduct. To hold that known cause comparable to that required for a search warrant in private life must precede such a search would be completely unrealistic. It is usually the totally unexpected that disrupts prison security." 476 F.2d at 294-295 (Citations omitted).

---

[1]Although the United States Supreme Court has not had occasion to address the specific question of strip searches within penal institutions, it has indicated that a prisoner possesses at most a minimal expectation of privacy in the general conduct of his affairs within a penitentiary, commenting in *Lanza v. State of New York*, 370 U.S. 139, 143, 82 S.Ct. 1218, 1221, 8 L.Ed.2d 384 (1962): "[I]t is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day."

In the recent decision of *Hodges v. Klein,* 412 F. Supp. 896 (D.N.J. 1976), the Court was also confronted with the issue of the constitutional validity of strip searches and anal examinations within the prison environment. The policy of the Trenton State Prison at issue in the case required all inmates to undergo anal examinations whenever entering or leaving the institution and following contact visits with friends or relatives. Relying upon the Tenth Circuit's decision in *Daugherty, supra,* the Court weighed the privacy interest of the inmates against the state's need to prevent the introduction of contraband into the institution and concluded that the policy was constitutionally reasonable. A similar result was reached by the Court in *Bijeol v. Benson,* 404 F. Supp. 595 (S.D. Ind. 1975). See also *Giampetruzzi v. Malcolm,* 406 F. Supp. 836 (S.D.N.Y. 1975).

Individually and collectively, these decisions unequivocally reject the notion that cause must exist as a condition precedent to a strip search and rectal examination of an inmate after contact with visitors or before or after leaving the institution. However, while recognizing the necessity for these searches under the foregoing circumstances, the Courts also have recognized that the Constitution imposes a limitation upon the actual manner in which the inspections are conducted by prohibiting searches performed in such a wanton manner as to shock the conscience or be intolerable to fundamental fairness.

In this regard, the decisions prohibit conduct such as the utilization of undue or clearly excessive force by law enforcement personnel in an effort to discover evidence of illegality. Thus, in the seminal decision of the United States Supreme Court in *Rochin v. People of California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), the Court voided the conviction of a defendant from whom morphine tablets had been extracted by police officers following a course of conduct which included choking and the administration of stomach pumping. In contradistinction to *Rochin,* the Court in *People v. Dawson,* 127 Cal.App.2d 375, 273 P.2d 938 (1954) held that no brutality was demonstrated by the conduct of an officer who retrieved heroin capsules by placing his arm around the suspect's neck and ordering him to spit them out. Similarly, in *People v. Miller,* 248 Cal.App.2d 731, 56 Cal. Rptr. 865 (1967), the Court held that an officer did not violate due process by applying a hold below a suspect's chin which prevented him from swallowing a packet of heroin and which did not have the effect of choking him.

One further observation should be made at this juncture respecting the procedures to be followed in conducting rectal searches of inmates. While a mere visual examination of the rectal area for contraband would not require medical training and could therefore be conducted by correctional officers, actual probing of the rectum itself should only be conducted by medical personnel familiar with the procedure in order to prevent the possibility of injury. However, it is not necessary that the procedure be performed by a physician.[2] *Daugherty v. Harris, supra.*

II

You next inquire whether a blood test may be taken from an inmate when some basis for suspicion exists, albeit less than probable cause, that the inmate has ingested drugs or alcohol. You indicate that it is not infrequent that an inmate will be observed in an apparent state of altered consciousness after conversing with visitors, thus forming the basis for belief that he has received and taken drugs or intoxicants during the meeting. You further indicate that inmates inevitably refuse to submit to a blood test when requested by institutional personnel. Thus, the question arises whether the Department of Corrections may require a blood test under these circumstances in the absence of an inmate's consent.

The administration of a blood test does constitute a search and as such must satisfy the constitutional criterion of reasonableness under the circumstances. Although the probable cause standard comprises the constitutional prerequisite for the administration of a blood test upon a suspect outside the prison environment, *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the compelling state interest in preserving security within its prison system and in insuring the well-being of both inmates and staff alike permits the conducting of such tests by institutional personnel upon a factual showing less stringent than that of probable cause.

The specific question presented herein was recently addressed and resolved by the Court in *Ferguson v. Cardwell*, 392 F. Supp. 750 (D. Ariz. 1975). Therein it was contended that the Fourth and Fourteenth Amendments prevented prison officials from taking blood samples from inmates suspected of using drugs without

---

[2]A vaginal search of a female prisoner suspected of concealing drugs is permissible under the circumstances discussed heretofore concerning rectal examinations. In the absence of exigent circumstances, the examination should be performed by a female. The search should be performed by medical personnel knowledgeable of the appropriate medical procedures.

first securing a search warrant founded upon probable cause. Reasoning that the imposition of such a requirement would seriously impair the duty of prison officials to responsibly manage the prison system, the Court held that the performance of such tests in the absence of probable cause satisfied constitutional standards provided some basis for suspicion existed in a particular case and provided that the tests were conducted by qualified medical personnel under sanitary conditions. Since the taking of a blood sample is among the most routine and unhazardous of medical procedures, it is not constitutionally necessary that the test be performed by a physician but only that it be performed by medical personnel familiar with the procedure working under sanitary conditions.[3] *Ferguson, supra; People v. Haeussler,* 41 Cal.2d 252, 260 P.2d 8 (1953). Thus, the fact that an inmate may have refused consent to a search is irrelevant.

III

Additionally, inquiry is made whether medical procedures more complicated and involving greater bodily intrusions than those discussed heretofore are constitutionally permissible under appropriate circumstances. Although there exists unfortunately little judicial precedent addressing this question, the Supreme Court's decision in *Schmerber v. California, supra,* provides at least some guidance in resolving this issue. *Schmerber* indicates that regardless of the degree of cause supporting a bodily intrusion search, any attempt to extract evidence residing within the body of a suspect must be in accordance with medical procedures that will not jeopardize the safety of the suspect.

Schmerber, supra, and its predecessor, *Breithaupt v. Abram,* 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957), both sanctioned the taking of blood tests as constitutionally reasonable conduct provided that the tests observed appropriate medical and sanitary conditions but neither addressed the question of what procedures involving more significant bodily intrusions would be permissible if performed in accordance with prevailing medical practices. However, the recent decision of the United States Court of Appeals for the District of Columbia in *United States v. Crowder,* 543 F.2d 312 (1976), *cert. denied* ___ U.S. ___, 97 S.Ct. 788 (1977), is of substantial assistance in reaching an answer to this most difficult question.

---

[3] Other tests commonly utilized to determine the presence of alcohol or drugs within the body such as the examination of urine specimens or the use of a breathalyzer do not involve bodily intrusions and could also be performed by correctional personnel without a prior showing of probable cause.

Therein the Court was confronted with a Fourth Amendment challenge by a criminal defendant to a court ordered surgical procedure resulting in the removal of a bullet from his right forearm. The defendant had been arrested upon probable cause for murder and the police had received information from an accomplice that the defendant had been shot twice during the crime. Naturally desirous to determine from whence the bullets originated, the United States sought a court order authorizing surgical removal of the bullet in the right arm. The application set forth the underlying circumstances of the crime and included a physician's affidavit that the forearm bullet was merely lying superficially under the skin and that its removal would not impose any risk of injury to the defendant. The affidavit indicated however that removal of a bullet lodged in the leg would possible disable the suspect and therefore should not be removed. After an adversary hearing was conducted in the presence of the defendant and counsel, the Court ordered the surgical removal of the forearm bullet. The operation resulted in no injury to the defendant and the bullet was ultimately introduced as evidence at the defendant's murder trial.

Upholding the validity of the search against constitutional assault, the Court commenced its analysis with the proposition that "'the Fourth Amendment's proper function is to constrain intrusions which are not justified in the circumstances, or which are made in an improper manner.'" 543 F.2d at 316, citing *Schmerber v. California*, 384 U.S. at 768, 86 S.Ct. at 1834. Of determinative significance in the view of the Court were the factors that the Court held an adversary hearing prior to the operation, the evidence sought was relevant and could have been obtained in no other way, probable cause existed for the procedure, and that the operation was minor and was performed by a surgeon taking all necessary precautionary measures. The Court also summarily disposed of the defendant's secondary contention that the procedure was so offensive to human dignity as to shock the conscience under the test of *Rochin, supra*.

This decision, which we believe to have properly stated the law, indicates that minor *surgical* or other similar procedures to retrieve evidence from a suspect are constitutionally reasonable insofar as they are predicated upon a prior judicial determination of probable cause in the absence of exigent circumstances and a finding that the prospective operation would not jeopardize

the physical safety of the suspect.[4] The latter requirement is most important since efforts to obtain even highly relevant evidence are constitutionally impermissible if the bodily intrusion necessary to obtain it would pose more than a negligible degree of medical risk to the safety of the suspect.

Although the cited decisions unequivocally authorize bodily intrusion searches of inmates to prevent the introduction of contraband into the prisons and to insure the security and well-being of those housed therein, a practical problem arises when an inmate physically resists the legitimate attempts of institutional personnel to conduct such a search. As indicated previously, notwithstanding the fact that a search may be legally justified and may lead to the discovery of highly probative evidence, undue force may not be employed in an attempt to extract the evidence. However, there exists no constitutional right to destroy or dispose of evidence, and reasonable efforts to prevent the swallowing or destruction of evidence may be attempted where excessive force is not utilized. *People v. Miller, supra; People v. Bass,* 214 Cal.App.2d 742, 29 Cal. Rptr. 778 (1963).

As interpreted by *Rochin,* the Constitution exalts the bodily integrity of a suspect over the needs of law enforcement under circumstances where excessive force must be employed and the decision specifically contemplates that circumstances will exist where even valuable evidence will be lost as a result. Since the constitutional criterion of reasonableness in a particular case will necessarily vary according to the circumstances and is hardly susceptible of prediction with sliderule accuracy, the articulation of specific standards of conduct with which to guide institutional personnel confronting such situations is virtually impossible. It can merely be said that while the Constitution does not prohibit the use of reasonable physical means to effectuate a search, it does prohibit conduct so brutal or excessive as to shock the conscience.

Because of this constitutional limitation upon the physical means by which evidence may be obtained, the Department should consider the adoption of disciplinary rules establishing appropriate penalties for refusal to submit to a search in order to deter a

---

[4] In situations where medical personnel believe an inmate's life to be in jeopardy as a result of his suspected ingestion of contraband, emergency medical procedures may lawfully be initiated in order to diagnose and treat him. *People v. Jones,* 20 Cal. App.3d 201, 97 Cal.Rptr. 492 (1971).

resort by inmates to violent resistance as a device to immunize the discovery of evidence demonstrating the possession or use of contraband. In order to effectively implement departmental policy against the use of contraband within the state's penal institutions, the penalties for refusal could legitimately be made to approximate or equal those for the actual use of contraband itself. Or, as an alternative approach, an inmate's refusal to submit to a search could be introduced as evidence against him in a disciplinary proceeding charging the possession or use of contraband itself. While this item of evidence standing alone would be insufficient to establish a conviction, it could legitimately be considered as a probative factor indicating guilt of the actual use of contraband. *Palmigiano v. Baxter*, 425 U.S. 308, 316-320, 96 S.Ct. 1551, 1556-1559, 47 L.Ed.2d 810 (1976).

Very truly yours,

CURT T. SCHNEIDER
Attorney General

CTS:RMT:en