9-2000

Section 1: Ferguson v. City of Charleston

Institute of Bill of Rights Law, William & Mary Law School

Ferguson v. City of Charleston, South Carolina

Drug Testing Pregnant Women: Is it Constitutional?

Meredith Lugo*

Can pregnant women be prosecuted in the state of South Carolina on the basis of a drug test administered by their physician during a routine visit? The Supreme Court will answer this question, which implicates both privacy and Fourth Amendment concerns, when it decides *Ferguson v. City of Charleston* next term.

In the fall of 1989 the Medical University of South Carolina, in conjunction with the local prosecuting attorney and chief of police, instituted a policy of testing pregnant women who came to the hospital for pre-natal care to detect the presence of cocaine in their bodies when certain indicia of its use were present. Under South Carolina law a viable fetus is considered a person, and therefore a woman who ingests cocaine after her twenty-fourth week of pregnancy is guilty of distributing a controlled substance to a minor. Positive test results were sent to the police unless the woman agreed to undergo treatment.

Drug tests have previously been held by the Supreme Court to be searches within the meaning of the Fourth Amendment. (*Skinner v. Railway Labor Executives' Assn.*, 1989). The reasonableness requirement of the Fourth Amendment generally prohibits warrantless searches (no warrant was obtained before the drug tests at issue here were conducted). However, the Supreme Court has recognized a "special needs" exception to this prohibition when special governmental needs, beyond those of law enforcement, are involved. To qualify as such an exception, a search must be motivated by concerns other than crime detection and designed for purposes other than that of law enforcement (*National Treasury Employees Union v. Von Raab*, 1989; *Chandler v. Miller*, 1997). In these instances the court must balance the governmental interest, the degree to which the intrusion advances this interest, and the magnitude of the intrusion upon the individual affected. A panel majority of the Fourth Circuit held that the government's special needs justified such an exception here; the dissent disagreed. It is now up to the Supreme Court to resolve the conflict.

Judge William Wilkins, writing for the panel majority, contended that the policy was prompted by, and formulated in response to, the rising use of cocaine by pregnant women and the health hazards and drain on public resources associated with such use. The dissenting judge, in contrast, characterized the program differently. Judge Catherine Blake in dissent, in contrast, characterized the program differently. Because the focus of the program was the arrest and prosecution of women who tested positive, she asserted, it could not properly be considered a special needs exception under Supreme Court precedent. Significantly for Judge Blake, in all other cases in which the Supreme Court has considered whether challenged drug tests fit into the special needs exception, a condition of the searches was that the results were *not* handed over to law enforcement (*Von Raab*, 1989; *Skinner*, 1989; *Vernonia Sch. Dist. v. Acton*, 1995). Judge Blake also disagreed with the majority's conclusion that the tests involved only a minimal degree of intrusion because urinalysis is a routine part of a medical exam, and the women had agreed to be examined. She emphasized that the women were unaware that their test results would be seen not just by hospital personnel but by law enforcement as well.

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There is no question that maternal drug use poses dangers to both mother and child, as well as society as a whole. The Supreme Court must determine whether South Carolina's method is a permissible means of dealing with the admittedly serious problem, or an unconstitutional abridgement of the women's Fourth Amendment rights.

99-936 Ferguson v. Charleston, S.C.

Ruling below (4th Cir., 186 F.3d 469, 68 U.S.L.W. 1056):

State hospital's policy of testing pregnant women who show signs of drug addiction for cocaine use and turning positive results over to law enforcement authorities for prosecution does not violate Fourth Amendment, Title VI of 1964 Civil Rights Act, or constitutional right to privacy.

Question presented: Was "special needs" exception to Fourth Amendment's warrant and probable cause requirements properly applied to discretionary drug testing program targeting hospital patients that was created and implemented with police and prosecutors primarily for law enforcement purposes?

Crystal M. FERGUSON, et al., Plaintiffs-Appellants
v.
CITY OF CHARLESTON, South Carolina, et al., Defendants-Appellees

United States Court of Appeals
for the Fourth Circuit

Decided July 13, 1999

WILKINS, Circuit Judge:

This litigation involves constitutional, statutory, and common-law challenges to a policy instituted by the Medical University of South Carolina (MUSC) in consultation with the Solicitor of the Ninth Judicial Circuit of South Carolina; the City of Charleston, South Carolina Police Department (CCPD); and various social services agencies. The policy was intended to encourage pregnant women whose urine tested positive for cocaine use to obtain substance abuse counseling. Appellants, ten women who were tested pursuant to the policy, brought this action claiming, inter alia, that the testing of their urine for evidence of cocaine use constituted a warrantless search in violation of the Fourth Amendment; ***. The district court entered judgment for Appellees *** on each of these claims at various stages of the litigation. For the reasons set forth below, we affirm.

I.

In the fall of 1989, MUSC instituted a policy providing for the testing of the urine of pregnant women suspected of cocaine use and for the reporting, under certain circumstances, of test results to law enforcement officials. The impetus behind the policy came from Nurse Shirley Brown, a case manager in the obstetrics department at MUSC. Brown was concerned about a perceived rise in cocaine use among pregnant women and the consequences for the health of the users' children. Brown spoke with the General Counsel for MUSC who in turn contacted the Ninth Circuit Solicitor (chief prosecuting attorney) concerning the development of a policy to address the problem. Eventually, a task force was formed that included Nurse Brown, the Solicitor, the Chief of CCPD, and doctors from various departments involved in perinatal care at MUSC. During the course of task force meetings, the Solicitor informed the participants that because a viable fetus was a "person" under South Carolina law, a woman who ingested cocaine after the 24th week of pregnancy was guilty of the crime of distributing a controlled substance to a person under the age of eighteen ***.

Pursuant to the policy formulated by the task force and implemented in late October or early November 1989, urine drug screens to detect evidence of cocaine use were given to all MUSC maternity patients when certain indicia of cocaine use were present: (1) separation of the placenta from the uterine wall; (2) intrauterine fetal death; (3) no prenatal care; (4) late prenatal care (beginning after 24 weeks); (5) incomplete prenatal care (fewer than five visits); (6) preterm labor without an obvious cause; (7) a history of cocaine use; (8) unexplained birth defects; or (9) intrauterine growth retardation without an obvious cause. When a patient tested positive, the test result was reported to CCPD or a representative of the Solicitor's Office and the patient was arrested for distributing cocaine to a minor. In early 1990, the policy was amended so that a patient who tested positive for cocaine use was given a choice between being arrested and receiving drug treatment. Positive test results of a patient who elected drug treatment were not forwarded

to CCPD, and the patient was not arrested, unless she tested positive for cocaine use a second time or failed to comply with treatment obligations. A patient who was arrested could avoid prosecution by completing a drug treatment program. Upon successful completion of such a program, the charges would be dismissed.[3]

Implementation of the policy by MUSC involved substantial record keeping and educational efforts. A maternity patient whose urine tested positive for cocaine use was shown an educational video concerning the harmful effects of cocaine use during pregnancy and was given letters from the Solicitor's Office and the hospital staff relating to the policy. In addition, MUSC personnel advised the patient of the need to obtain substance abuse counseling and scheduled an initial appointment for such counseling. The patient then was given a document noting the date and time of the appointment. Additionally, MUSC maintained records on patients whose urine tested positive for cocaine use as a means of tracking them to ensure that they complied with the requirements of the policy.

Appellants, all of whom were subjected to the policy, brought this action asserting, as pertinent here *** violation of their Fourth Amendment right to be free of unreasonable searches and seizures; *** The jury returned a verdict in favor of Appellees on the Fourth Amendment claim. ***

On appeal, Appellants challenge the submission of the Fourth Amendment claim to the jury and the sufficiency of the evidence supporting the verdict ***.

At trial, Appellants contended that the urine drug screens constituted searches within the meaning of the Fourth Amendment. They further claimed that because they did not consent to the screens, the tests violated the Fourth Amendment.[5] The district court ruled that the urine screens fell within the ambit of the Fourth Amendment and submitted the question of whether Appellants had consented to the searches to the jury, which found in favor of Appellees. Appellants now maintain that the district court erred in submitting the issue of consent to the jury and, alternatively, that the verdict is not supported by the evidence. We find it unnecessary to address these contentions because we affirm on the basis that the searches were reasonable as special needs searches.

The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, provides in pertinent part that "the right of the people to be secure in their persons ... against unreasonable searches and seizures[ ] shall not be violated." *** Simply put, this amendment guarantees that governmental intrusions into privacy by means of searches or seizures must be reasonable. Typically, this reasonableness requirement acts as a constraint on governmental authority to undertake a search or seizure in the absence of individualized suspicion. *** Generally, a search performed without a warrant is unreasonable

[3] The dissent repeatedly characterizes Appellees' actions in implementing the policy as animated by a vindictive purpose to prosecute women who used cocaine during pregnancy. The record simply does not support this. Although the very real possibility of arrest was employed as an incentive for women to comply with treatment obligations, the record is abundantly clear that Appellees were motivated by a desire to protect the health of children born at MUSC, and that the policy was formulated and implemented with this goal in mind. Indeed, the district court so found. *** And, the evidence in the record more than amply supports this finding. *** Indeed, while some of the Appellants were arrested, not one of them was prosecuted; this fact belies the dissent's assertion that a purpose of the policy was to convict and punish women who used cocaine during pregnancy.

[5] MUSC personnel did not obtain warrants before conducting the urine drug screens.

per se unless it fits within a narrowly defined exception to the warrant requirement. *** Nevertheless, "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *** Rather, there are situations in which "a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement." *** In such cases, "it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *** This balancing requires consideration of the governmental interest prompting the invasion; the effectiveness of the intrusion, i.e., the degree to which the intrusion reasonably is thought to advance the governmental interest; and the magnitude of the intrusion upon the individuals affected, from both a subjective and objective standpoint. ***

The parties evidently have agreed throughout this litigation that MUSC is a state hospital and that MUSC employees therefore are government actors. And, the district court found as a fact that MUSC personnel conducted the urine drug screens for medical purposes wholly independent of an intent to aid law enforcement efforts.[7] Accordingly, the question presented is whether a balancing of MUSC's interest in protecting the health of children whose mothers use cocaine during pregnancy, the effectiveness of the policy to identify and treat women who use cocaine during pregnancy, and the degree of intrusion experienced by women whose urine was tested for evidence of cocaine use results in a conclusion that the searches violated the Fourth Amendment.

A.

The first factor to be considered is the governmental need. The Fourth Amendment does not require a governmental need that is compelling in an absolute sense. *** Instead, the interest must be "important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy." *** The hazard giving rise to the alleged special need must be a concrete danger, not merely a hypothetical one. See *Chandler* ***; *Vernonia*, (explaining that a sharp rise in drug

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[7] The district court declined to hold the searches at issue here reasonable under a special needs analysis because law enforcement officers were involved in the formulation of the policy. However, the involvement of law enforcement officers does not make a special needs analysis inappropriate. ***

The dissent makes the related argument that the use of evidence obtained during the searches to support the arrest of some patients precludes application of the special needs balancing test. We disagree with this proposition, as does the Supreme Court. *See Griffin v. Wisconsin* *** (determining that warrantless search based on reasonable grounds was justified by the special needs of the Wisconsin probation system even though evidence gathered during the search was employed to support a criminal conviction); *see also Sitz* *** (noting that suspicionless stop at sobriety checkpoint resulted in arrest for driving under the influence). The dissent's attempt to distinguish *Sitz* is unpersuasive. It is true that the decision of the Court "address[ed] only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers." *** However, the fact that the initial suspicionless searches led ultimately to an arrest cannot have escaped the attention of the Court. If, as the dissent contends, the intent to use information obtained during a suspicionless seizure to further investigate and ultimately arrest an individual rendered the special needs analysis inappropriate, *Sitz* would have been decided differently.

use by student athletes supported school officials' assertion that random drug testing without individualized suspicion was warranted).

The policy at issue here was developed after medical personnel at MUSC noticed an alarming increase in the number of pregnancies affected by cocaine use. Maternal cocaine use is associated with a number of pregnancy complications, including low birth weight, premature labor, birth defects, and neurobehavioral problems. Even a single use of cocaine during pregnancy may result in separation of the placenta from the uterine wall -- a condition that may threaten the life of the mother and the fetus -- or a stroke in the fetus. Moreover, costs related to caring for infants exposed to cocaine in utero are substantial, as evidenced by the testimony of an expert for Appellants who testified that he had estimated in the late 1980s that such expenses nationwide might exceed three billion dollars annually over the next ten years. In light of the documented health hazards of maternal cocaine use and the resulting drain on public resources, MUSC officials unquestionably possessed a substantial interest in taking steps to reduce cocaine use by pregnant women. Cf. *Vernonia*, (concluding that interest in deterring drug use by schoolchildren was important in light of severe effects of drug use on adolescents).

B.

The second factor, the effectiveness of the search, focuses on "the degree to which [it] advances the public interest." *Sitz* *** In analyzing this factor, however, our review must leave "the decision as to which among reasonable alternative ... techniques should be employed to deal with a serious public danger" to "the governmental officials who have a unique understanding of, and a responsibility for, limited public resources." ***

Here, there can be little doubt that testing the urine of maternity patients when certain indicia of possible cocaine use were present was an effective way to identify and treat maternal cocaine use while conserving the limited resources of a public hospital. Indeed, prenatal testing was the only effective means available to accomplish the primary policy goal of persuading women to stop using cocaine during their pregnancies in order to reduce health effects on children exposed to cocaine in utero.

Appellants argue, however, that the policy was ineffective because it was both underinclusive and overinclusive. The policy was underinclusive, Appellants claim, because it did not address use of other drugs -- such as alcohol and nicotine -- that may pose risks to a developing fetus. And, Appellants maintain that the policy was overinclusive because women were tested on the basis of having received inadequate prenatal care, a factor that Appellants contend is more accurately associated with poverty than with cocaine use.

Neither of these assertions, even if true, has any bearing on the effectiveness of the means adopted to achieve the goal of identifying and treating maternal cocaine use among MUSC patients. The first fails because it addresses only the wisdom of the policy itself. And, the second fails because the fact that the criteria for testing under the policy did not necessarily correlate with cocaine use in all patients did not render those criteria ineffective. Accordingly, we conclude that the method chosen by MUSC officials was an effective one.[8]

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[8] The dissent maintains that the urine screens were not an effective means of identifying cocaine use by pregnant women because some patients were arrested after giving birth, when "any adverse effect of maternal cocaine use on the developing fetus had already occurred." *** In applying the special needs balancing test, however, the proper focus is not on whether any arrests under the policy were an effective means of advancing the identified government interest, but rather on the effectiveness of the urine screens. Urine screens conducted up to the time of birth unquestionably were effective

C.

Finally, the degree of intrusion, both objective and subjective, suffered by Appellants was minimal. The objective intrusion suffered by an individual is "measured by the duration of the seizure and the intensity of the investigation." *** The subjective level of intrusion is measured by the extent to which the method chosen minimizes or enhances fear and surprise on the part of those searched or detained. ***

Generally, the privacy interests implicated by the collection and testing of urine are not minimal. *** The context in which the searches at issue here occurred, however, indicates that they were only minimally intrusive. In the first place, the collection and testing of urine was conducted in the course of medical treatment to which Appellants had consented. The giving of a urine sample is a normal, routine, and expected part of a medical examination. *** Therefore, on an objective level, the duration and intensity of the search indicate that the Fourth Amendment intrusion was minimal at best. *** With respect to the subjective level of intrusion, we note that urine drug screens were conducted whenever one of the criteria for testing was met; a treating physician had no discretion to decline to order a urine test under the policy. *** This fact, combined with the routine nature of urine testing in medical examinations, indicates that the searches were minimally intrusive on a subjective level.

D.

In sum, the rising use of cocaine by pregnant women among MUSC's patient base and the public health problems associated with maternal cocaine use created a special need beyond normal law enforcement goals; the method chosen to address that need -- testing the urine of pregnant women when indicia of possible cocaine use were present -- effectively advanced the public interest; and the intrusion suffered by Appellants was minimal. Therefore, a balancing of these factors clearly demonstrates that the searches conducted were reasonable and thus not violative of the Fourth Amendment.

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In sum, we reject Appellants' challenges to the judgments in favor of Appellees. Accordingly, we affirm.

AFFIRMED

BLAKE, District Judge, dissenting in part:

The majority has concluded that the warrantless testing of urine for evidence of cocaine use which resulted in the arrest of nine of the 10 plaintiffs in this case constituted a reasonable search under the "special needs" exception to the warrant requirement of the Fourth Amendment. On this point, respectfully, I dissent. *** Accordingly, I would reverse the district court's decisions concerning the appellants' Fourth Amendment *** claims and remand for consideration of appropriate relief.

I.

Some additional factual background is necessary to explain my position on the Fourth Amendment issue. Preliminarily, assuming that concern for the health of fetuses being carried by pregnant women using crack cocaine was a motivating force in the development of the MUSC policy, it nevertheless is clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers, either before or after they had given birth to the children presumably

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to determine whether a woman had used cocaine during her pregnancy and thus whether her child required treatment for prenatal exposure to cocaine.

affected by the cocaine use.[1] The prosecutorial purpose of the policy and the substantial involvement of law enforcement officials from the very beginning of its implementation are both illustrated by a letter sent by MUSC General Counsel Joseph C. Good to Charles Condon, Charleston City Solicitor, on August 23, 1989. In the letter, Mr. Good wrote:

I read with great interest in Saturday's newspaper accounts of our good friend, the Solicitor for the Thirteenth Judicial Circuit, prosecuting mothers who gave birth to children who tested positive for drugs. ...

Please advise us if your office is anticipating future criminal action and what if anything our Medical Center needs to do to assist you in this matter.

*** In addition, operational guidelines issued by Captain Roberts of the Charleston police force on October 12, 1989, with copies to Solicitor Condon and to MUSC nurse Shirley Brown (one of the instigators of the MUSC program), refer to the positive drug tests as "probable cause" for arrest of the mother, on charges of possession only if the pregnancy is 27 weeks or less, and on charges of both possession and distribution to persons under 18 if the pregnancy is 28 weeks or more. *** Further, a letter from Mr. Good to a Senior Assistant Attorney General on December 19, 1989, explaining the MUSC program, states that it was developed by MUSC "at the suggestion of law enforcement and the solicitor's office. . . ." *** These are merely a few examples of the evidence in the record that supports a finding of both prosecutorial intent on the part of MUSC and substantial involvement of law enforcement officials in developing the program.

[1] As set forth in greater detail below, seven of the plaintiffs were arrested after the birth of their children.

Following is a short summary of the circumstances under which the plaintiffs in this case were tested and arrested:

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In none of these cases was a warrant obtained before the urine testing was done or before the results were turned over to the police and the plaintiffs were arrested. Furthermore, the consent forms signed by the plaintiffs did not advise them that their drug test results would be disclosed to the police. The majority excuses the lack of a warrant, or indeed any determination of probable cause, by relying on the "special needs" exception to the ordinary Fourth Amendment requirement that a warrant be obtained.

II.

The Supreme Court has held that:

where a Fourth Amendment intrusion serves special govern mental needs, *beyond the normal need for law enforcement*, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

National Treasury Employees Union v. Von Raab, (emphasis added). Similarly, the Court has instructed that:

When such "special needs" -- *concerns other than crime detection* -- are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.

Chandler v. Miller, (emphasis added). Several aspects of the "special needs" exception require careful analysis in the context of this case.

First, as the emphasized portions of the above quotations make clear, the "special needs" exception does not apply where the

governmental intrusion is intended to be used for law enforcement purposes. In *Von Raab*, the issue was whether "it violates the Fourth Amendment for the United States Customs Service to require a urinalysis test from employees who seek transfer or promotion to certain positions." *** The Supreme Court in that case held that the Fourth Amendment permitted the suspicionless testing of employees who applied for positions directly involving the use of firearms or the interdiction of illegal drugs. *** In reaching this conclusion, the Court applied a "special needs" analysis, balancing the individuals' privacy interests against the non-law enforcement governmental interests served by the urinalysis policy. Significantly, in deciding to apply the "special needs" balancing test to the facts before it, the Court emphasized that "it is clear that the Customs Service's drug testing program is not designed to serve the ordinary needs of law enforcement. Test results *may not be used in a criminal prosecution* of the employee without the employee's consent." *** In fact, in none of the cases relied on by the majority, other than the sobriety checkpoint and probation supervision cases which will be addressed below, were the results of the drug tests or other searches intended for use in a criminal prosecution. *** In sharp contrast, nine out of ten of the plaintiffs in this case were arrested based on the test results, and one avoided arrest only by committing herself to a psychiatric unit. Under these circumstances, I believe the "special needs" exception does not apply.

The majority cites *Michigan Department of State Police v. Sitz*, and *Griffin v. Wisconsin* for the proposition that the defendants' intention to use the results of the drug tests as probable cause to arrest the plaintiffs in this case does not preclude application of the special needs balancing test. In *Sitz*, however, the Supreme Court was careful to explain that the special needs exception applied only to the suspicionless "seizure," that is, the initial stop of each motorist and the associated preliminary questioning and observation, *** which the Court characterized as only a "slight" intrusion. *** The Court specifically noted that the "detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard." The *Sitz* balancing test, which justifies the relatively slight intrusion of a checkpoint seizure, does not serve also to justify searches of the motorists' persons or effects without consent or probable cause. *** *Griffin* also is readily distinguishable. In that case, the Supreme Court upheld the validity of a warrantless search conducted by a state probation officer at the home of a criminal defendant on probation under a regulation which permitted such searches as long as the probation officer had "reasonable grounds" to believe the probationer possessed contraband forbidden under the conditions of his probation. The Court noted that probation was a form of criminal sanction imposed after a finding of guilt *** and supervision of probationers was a "'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." ***

Accordingly, I believe the majority reads *Sitz* and *Griffin* too broadly in suggesting that the special needs exception can justify a suspicionless search of a member of the public intended to produce evidence for use in a criminal arrest.

In this case, the MUSC policy was intended from its inception to result in the arrest and possible prosecution of pregnant women who were patients at the state hospital. In all the other special needs cases cited by the majority, arrest was at most an incidental possibility and not a direct result of the warrantless Fourth Amendment intrusion sought to be justified. It is simply inconsistent with the record in this case to identify the drug testing imposed by MUSC as not serving normal law enforcement needs. I would find that the avowed and actual purpose of arresting patients who tested positive for cocaine, as well as the extensive

involvement of law enforcement officials in designing and implementing the policy, preclude application of the special needs analysis in this case.

Even if I assume, however, that a special needs balancing test should be applied, and further assume that the governmental interest identified by the majority -- i.e., the adverse effect of maternal cocaine use on the health of children exposed to cocaine in utero -- is substantial, I believe that the policy fails the test of "effectiveness," i.e., "the degree to which the search advances the public interest." See *Sitz*, ***. It is undisputed that seven of the plaintiffs were arrested after giving birth (indeed, several were taken into custody at the hospital wearing only their hospital gowns), rather than during the prenatal period.[4] By that time, any adverse effect of maternal cocaine use on the developing fetus had already occurred, and the arrest could only have had a punitive rather than a preventive purpose.

Nor is it correct to say that the degree of intrusion on the mother's privacy was "minimal" simply because the test occurred in the context of a hospital examination. Unlike the policy in *Von Raab*, under the MUSC policy the test results are reported not simply to a licensed physician, but to law enforcement officials with no medical reason for receiving the information. Cf. *Von Raab* (noting as one of the procedures that minimized the intrusiveness of the drug screening program that "an employee need not disclose personal medical information to the Government unless his test result is positive, and even then any such information is reported to a licensed physician").

[4] Moreover, several of the plaintiffs who were not arrested until after giving birth had tested positive for cocaine multiple times during the prenatal period when, according to the purported purpose of the policy, intervention was crucial.

For all the above reasons, I agree with the trial court that the drug testing policy applied to the plaintiffs in this case violated the Fourth Amendment, in the absence of valid consent.

The district court also properly found that the various consent forms signed by the plaintiffs, which did not advise them that the drug test results would be disclosed to the police, did not alone establish valid consent. Accordingly, the court submitted this case to the jury on the issue of consent, and the jury returned a verdict in favor of the defendants. The plaintiffs moved for judgment under Fed. R. Civ. P. 50(b), and the court denied the motion.

I disagree that the evidence presented at trial was sufficient to sustain the jury's verdict. When considering a Rule 50(b) motion for judgment as a matter of law, the district court must view the evidence in the light most favorable to the non-moving party and then determine whether a reasonable jury could draw only one conclusion from the evidence. *** We review the district court's ruling on a Rule 50(b) motion by applying the same standards de novo. *** In addition to the consent forms, the defendants presented other evidence, such as letters that either accompanied the forms or were distributed after a positive test result, and a public service announcement issued by the Solicitor's Office in 1990. The public service announcement indicated that pregnant women who tested positive for drug use could be subject to prosecution; however, it was seen by only two of the plaintiffs. *** The plaintiffs' presumed familiarity with this information, even when combined with a general knowledge that use of cocaine is illegal, is not sufficient to establish the plaintiffs' voluntary and knowing consent to the possible use against them in a criminal case of drug test results taken in the course of their pregnancy and labor. *** I also question whether consent can be voluntary, in a constitutional sense, when given by an indigent, uninsured woman in labor, who is dependent on medical care provided by the state's public

hospital. If the special needs exception had been held not to apply, a more thorough analysis of this issue would have been necessary.

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IV.

In summary, I would reverse the district court on the Fourth Amendment *** claims, and remand for consideration of appropriate relief. On th[is] *** issue[ ], respectfully, I dissent.

HOSPITAL'S AID IN ARRESTS FACES COURT

Justices to Hear Arguments in Case of South Carolina Facility That Gave Police the Names of Mothers who Took Drugs

Los Angeles Times

Tuesday, February 29, 2000

David G. Savage

Again testing the frontiers in the war on drugs, the Supreme Court agreed Monday to decide whether public hospitals and police can work together to arrest pregnant women who have used cocaine.

South Carolina is the only state that charges mothers with child abuse if their babies are born with traces of illegal drugs in their blood.

To enforce the policy, nurses and doctors at a public hospital in Charleston, S.C., volunteered in 1989 to give police the names of women who tested positive for cocaine.

"Most of us assume there is a special confidentiality when you go to a doctor or a hospital. These women went to the hospital for medical care. Instead, they got arrested," said Lynn Paltrow, a lawyer for the Women's Law Project in Philadelphia, which sued on behalf of the women. The group accused the hospital and city prosecutors of conducting illegal searches in violation of the 4th Amendment.

Paltrow said the policy was directed almost entirely at poor, black women. Of 30 women who were arrested, 29 of them were African American, she said. The one white woman arrested gave birth to a mixed-race child--a fact that was noted by the nurses, she said.

In its defense, the hospital said it undertook the drug testing policy to combat the epidemic of so-called crack babies.

"This was a pathetic situation. These babies were being born exposed to cocaine. This was a medically driven policy to deal with a medical crisis," said Robert H. Hood, a Charleston lawyer who represented the Medical University of South Carolina.

During the first year of the policy, women who tested positive were arrested and sometimes put in shackles immediately after giving birth. In later years, they were given the choice of drug treatment or arrest.

In 1993, after the lawsuit was filed, the hospital stopped turning over drug test results to police, but prosecutors maintain that the joint effort was legal. Last year, the U.S. 4th Circuit Court of Appeals agreed and threw out the women's claim for damages.

Normally, police cannot search an individual for evidence unless they have a warrant and "probable cause" to believe a crime has been committed. The 4th Amendment has long been understood as forbidding mass searches and roundups by police.

But amid the war on drugs, that rule has been relaxed, or even discarded, some legal experts say. In 1989, the Supreme Court for the first time upheld the use of mass drug tests for special public employees, such as customs agents who carry guns.

Since then, broad-scale searches have been upheld by lower courts, and the requirement of "individualized suspicion" has faded.

But the Supreme Court may be ready to reconsider that trend in the term that begins in October.

Only last week, the justices announced that they will consider the constitutionality of

"narcotics checkpoints." City officials in Indianapolis set up these roadblocks and used drug-sniffing dogs to detect illegal drugs.

In the South Carolina case, the women's lawyers said the "very integrity of the 4th Amendment" is at stake if the government can use routine medical tests as basis for bringing criminal charges.

A coalition of health care groups, including the California Medical Assn., also urged the court to hear the case (Ferguson vs. City of Charleston, 99-936).

"The trust inherent in the doctor-patient relationship was manipulated by law enforcement authorities to obtain bodily fluids from indigent pregnant women for use as incriminating evidence," the medical groups said.

If such a policy is constitutional, they said, the privacy protection of the 4th Amendment will mean little.

PROGRAM OF DRUG-TESTING PREGNANT WOMEN DRAWS A REVIEW BY THE SUPREME COURT

The New York Times

Tuesday, February 29, 2000

Linda Greenhouse

The Supreme Court agreed today to decide whether a South Carolina public hospital conducted unconstitutional searches when it tested pregnant women's urine for drugs so it could report illegal drug use to the police.

The case is an appeal on behalf of 10 women who were arrested as a result of the policy, some while they were still weak and bleeding from childbirth, and who later sued. It presents the Supreme Court a narrow but important aspect of a legal and public policy debate that began in the peak years of the crack epidemic of the 1980's: the extent to which a state may intervene to protect fetal health, and the circumstances under which pregnant women may be held criminally responsible for behavior that endangers their fetuses.

A federal appeals court ruled last year that while the urinalysis was a search, it was not unconstitutional because it was justified by "a special need beyond normal law-enforcement goals," namely protecting the health and safety of fetuses and newborn babies.

In their appeal, lawyers for the women are arguing that this conclusion amounts to a drastic expansion of what the Supreme Court has previously treated as a "special-needs exception" to the Fourth Amendment's prohibition against unreasonable searches.

"Nearly every application of the criminal law serves some health or safety purpose" and so could be placed outside the protection of the Fourth Amendment under this approach, the women's brief said.

The appeal is supported by a coalition of public health groups, which told the justices that women who need prenatal care the most will be deterred from seeking it if their drug abuse is treated not as a medical problem but as a criminal one.

None of the women who filed the lawsuit were actually prosecuted, and the particular program they are challenging ended in the mid-1990's, after suits were filed and the United States Department of Health and Human Services began an investigation.

However, Lynn Paltrow, one of the plaintiffs' lawyers and director of National Advocates for Pregnant Women, a program of the Women's Law Project in Philadelphia, said today that drug testing of pregnant women remained widespread in South Carolina under the State Supreme Court's interpretation of the state child endangerment law as applying not only to children but also to viable fetuses. The United States Supreme Court refused two years ago to review that state court interpretation.

"No other state has gone as far as South Carolina," Ms. Paltrow said in an interview, adding: "No other state has made it a crime to be pregnant and addicted. These women had a health problem and needed medical care, but they were taken to jail."

The lead plaintiff in the case, Crystal M. Ferguson, tested positive for cocaine during a prenatal visit to the hospital at the Medical University of South Carolina, in Charleston, in June 1991. She agreed to attend a drug abuse counseling program, but tested positive again

when she gave birth in August. She was arrested three days later.

According to the city's statistics, 30 women were arrested under the program. Charges against all but two were dropped when the women entered treatment. Some of the women were taken from their hospital rooms in handcuffs or leg shackles. The plaintiffs are seeking damages and an injunction against future drug testing.

Analytically, the case is quite similar to a Fourth Amendment case the Supreme Court accepted for review last week, on whether police checkpoints that subject motorists to drug-detecting dogs are constitutional. The lower court in that case, Indianapolis v. Edmond, rejected the government's argument that the need to detect and deter drug trafficking was a "special need" that justified the warrantless searches.

In the new case, Ferguson v. City of Charleston, No. 99-936, the city asserts that the hospital adopted its policy, in cooperation with the police and the local prosecutor's office, in 1989 in the face of "an epidemic of cocaine use" among its maternity patients.

"The clinical necessity for the drug screens, the health problems associated with maternal cocaine use and the astronomical economic costs of caring for infants suffering from the effects of cocaine use by their mothers all created special needs beyond normal law-enforcement goals," the city maintains.

That was the analysis endorsed in a 2-to-1 decision by the United States Court of Appeals for the Fourth Circuit, in Richmond, which affirmed a jury's verdict in favor of the hospital.

The hospital did not test all its patients, instead singling out those it regarded as most likely to be using drugs. The criteria included having received no prenatal care, or care that was late or incomplete; displaying certain physical symptoms; unexplained preterm labor, and known drug or alcohol abuse in the past. Many of the public hospital's patients are poor and black; of the 10 plaintiffs, nine are black and one is white.

As the crack epidemic hit its peak, states adopted varying approaches to the issue of drug use by pregnant women. Because a number of state courts ruled, unlike the South Carolina Supreme Court, that a fetus could not be considered a child for purposes of prosecuting pregnant women under child abuse laws, some prosecutors argued that mothers delivered illegal drugs to their newborn babies through the umbilical cord during the brief moments between birth and the cutting of the cord.

A woman was convicted in Florida under this theory in 1989, but the Florida Supreme Court overturned the conviction three years later, ruling unanimously that when the State Legislature made "delivery" of illegal drugs a crime, it did not contemplate a prosecution of this sort.