SPECIAL NEEDS EXCEPTION 2001:
UNITED STATES SUPREME COURT LIMITS POLICE MEDDLING IN MEDICAL CARE

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by **Elliott B. Oppenheim, MD/JD/LLM Health Law**

coMEDco, Inc.™ *406-273-4212*
POB 1174 *e-mail: coMEDcoINK@aol.com*
Lolo, MT 59847 *website: http://www.comedco.com*

THE AUTHOR IS CEO AND PRESIDENT OF ***COMEDCO, INC.***™ , A NATIONAL MEDICAL-LEGAL CONSULTING FIRM. DR. OPPENHEIM PRACTICED FAMILY AND EMERGENCY MEDICINE FOR NEARLY TWENTY YEARS THEN OBTAINED A JD FROM DETROIT COLLEGE OF LAW AT MICHIGAN STATE UNIVERSITY AND AN LL.M. HEALTH LAW FROM LOYOLA UNIVERSITY CHICAGO, SCHOOL OF LAW, INSTITUTE OF HEALTH LAW. HE CONSULTS AND WRITES IN THE AREA OF HEALTH LAW. HIS TREATISE, **THE MEDICAL RECORD AS EVIDENCE** (LEXIS 1998) MAY BE OBTAINED FROM LEXIS LAW PUBLISHING: 800-643-1280 / 800-562-1197; ITEM # 66063.
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Introduction:

How far may the state intrude into medical privacy? Suppose the police actually participate in medical care decisions in order to subsequently prosecute the patient? Does that go too far? For the criminal defense Bar and for those who engage in any medically related litigation, these important questions have been defined by the United States Supreme Court's landmark decision, *Ferguson v. City of Charleston*.[1]

Briefly, medical privilege[2] prevents the government from wholesale accessing of medical records. On the other hand, privilege is a sword, not a shield and wrongdoers will

not be able to hide behind the medical privilege to cover up their conduct.[3] The *Ferguson* case found the police intertwined in actual medical care while the prosecutor stood off to the sidelines with an awaiting grand jury to indict mothers in the labor and delivery process who allegedly would injure their infants by using cocaine.

THE CASE:

The United States Supreme Court held that medical staff require a search warrant when they believe that a pregnant patient suffers from cocaine addiction and that addiction endangers the unborn child's life. The State violates constitutional principles of unreasonable search and seizure when medical staff obtain blood or urine samples without the patient's consent and then disclose confidential information to the police.[4] Justice Stevens delivered the Court's opinion and the facts in this case merit review since this case will influence numerous decisions concerning police conduct surrounding medical care and medical record releases.

The medical staff at Medical University of South Carolina (MUSC), a state run public hospital, were concerned about an apparent increase in cocaine use by women in their prenatal course of medical care.[5] In 1989, MUSC initiated drug screening in maternity patients who were suspected of using cocaine. When a patient tested positive, she was then referred to the county substance abuse commission where they would then receive counseling and treatment. The testing proceeded without a specific patient consent.[6]

About four months later, a nurse and case manager responded to a news broadcast "reporting that the police in Greenville, South Carolina, were arresting pregnant users of cocaine on the theory that such use harmed the fetus and was therefore child abuse."[7] The

nurse, through MUSC's general counsel, contacted the local prosecutor in order to offer the Center's cooperation in prosecuting mothers who tested positive for cocaine at birth.[8] The prosecutor developed a policy, organized meetings with participating staff, and created a "task force" which consisted of MUSC representatives, the police, "the County Substance Abuse Commission and the Department of Social Services. Their deliberations led to MUSC's adoption of a 12-page document entitled "POLICY M-7," dealing with the subject of "Management of Drug Abuse During Pregnancy."[9]

The policy set forth the procedure to be followed by hospital staff member in order to "identify/assist pregnant patients suspected of drug abuse."[10] The first section was titled the "Identification of Drug Abusers," and set up a procedure to test for cocaine through a urine drug screen when a patient met any of the "one or more of nine criteria."[11] Among other procedures, the Policy set up a chain of custody so that the results would be usable to prosecute the cocaine positive patients / suspects. The Policy set up a mechanism for "for education and referral to a substance abuse clinic for patients who tested positive."[12] Most important in the Policy was that, "it added the threat of law enforcement intervention that "provided the necessary ' leverage' to make the policy effective."[13] Justice Stevens noted "[t]hat threat was … essential to the program's success in getting women into treatment and keeping them there."[14] According to the policy, when a patient presented who was positive, she was to then be arrested "promptly." [15]

Over the course of a couple of years these policies and procedures were fine-tuned.[16] At later stages of pregnancy, the severity of criminal charges escalated: 28 weeks or more, the woman would be charged "possession and distribution to a person under the

age of 18," the fetus; "[i]f she delivered "while testing positive for illegal drugs," she was also to be charged with unlawful neglect of a child."[17]

Further, under the policy, the police were instructed to interrogate the arrestee in order "to ascertain the identity of the subject who provided illegal drugs to the suspect."[18] Other than the provisions describing the substance abuse treatment to be offered to women who tested positive, the policy made no mention of any change in the prenatal care of such patients, nor did it prescribe any special treatment for the newborns.[19]

Ten women who were arrested under this policy sued MUSC. Four women were arrested after testing positive for cocaine and during the initial implementation of the policy but they were not offered drug treatment as an alternative to arrest.[20] The other six women were arrested after the policy was modified where they either failed to comply with terms of the drug treatment program or where they tested positive in a second test.[21] Within the policy, women were not provided informed consent to testing.[22]

The petitioners challenged the validity of the policy including "that warrantless and nonconsensual drug tests conducted for criminal investigatory purposes were unconstitutional searches."[23] The respondents, including the city of Charleston, law enforcement officials who helped develop and enforce the policy, and representatives of MUSC, defended their conduct on two bases: "(1) that, as a matter of fact, petitioners had consented to the searches; and (2) that, as a matter of law, the searches were reasonable, even absent consent, because they were justified by special non-law-enforcement purposes."[24]

The trial court, in a jury trial, found for the respondents,[25] finding that the plaintiffs had consented to the taking of the samples, to the cocaine testing, and to the

possible disclosure of the tests to the police.[26] The women appealed, arguing that the evidence was insufficient to support the jury's finding. The Court of Appeals for the Fourth Circuit affirmed but disagreed with the District Court holding that "the searches were reasonable as a matter of law under our line of cases recognizing that "special needs" The term "special needs" first appeared in Justice Blackmun's opinion concurring in the judgment in the famous case *New Jersey v. T. L. O.*.[27] Justice Blackmun, in a concurrence, agreed with the Court that there are limited exceptions to the probable-cause requirement, in which reasonableness is determined by "a careful balancing of governmental and private interests," but concluded that such a test should only be applied "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable . . . ."[28] may, in certain exceptional circumstances, justify a search policy designed to serve non-law-enforcement ends."[29]

The majority applied the balancing test used in *Treasury Employees v. Von Raab Treasury Employees v. Von Raab*,[30] and in *Vernonia School Dist. 47J v. Acton*.[31] They reasoned that "the interest in curtailing the pregnancy complications and medical costs associated with maternal cocaine use outweighed … a minimal intrusion on the privacy of the patients."[32]

In its reversal of the trial court and the appellate court, the United States Supreme Court examined the special needs exception to the Fourth Amendment and concluded that police and medical personnel conducted the *Ferguson* searches without informed consent. The analysis was terse and to the point. MUSC is a state hospital and its staff are government actors.[33] Further, the urine testings were "indisputably" searches within the

purview of the Fourth Amendment.[34] None of the nine criteria provided probable cause to believe that these mothers were using cocaine, "or even a reasonable suspicion" for use.[35] The Supreme Court noted that urine testing by state agents is "routinely" viewed as a search within the meaning of the Fourth Amendment even though the results were not reported to the police.[36]

The respondents did not argue, however, that the tests were not searches, but, rather, that the searches were justified by consent and / or by the special needs exception.[37] In addition, the respondents argued that the policy would be valid if the tests were on a random basis. *Ferguson* differs from the other four cases in which the United States Supreme Court considered the issue "whether comparable drug tests fit within the closely guarded category of constitutionally permissible suspicionless searches."[38]
In each case, the Court employed the balancing test which weighed the state's intrusion on the individual's privacy interest against the government's special needs which supported the intrusion. It was in *Ferguson* that the Court found the intrusion "far more substantial" than in the former cases.[39] In *Chandler v. Miller*[40] the Court struck down the statute as unreasonable which permitted drug testing for political candidates. The statute did not support any compelling state interest.

Justice Stevens analyzed and distinguished among the cases. In the previous four cases, there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties. The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such

results to third parties. The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without the patient's express consent.[41] The American Medical Association and the American Public Health Association supplied amici briefs.

Note that there are some circumstances in which state hospital employees are under a statutory duty to report to law enforcement officials evidence of criminal conduct when that evidence is obtained in the course of routine treatment. This includes instances of child abuse or neglect.[42]

COMMENTARY AND ANALYSIS:

Intrusions such as found in *Ferguson* may deter patients from receiving medical care[43] and the Court has previously recognized this chilling effect in *Whalen v. Roe*.[44] What differentiates the other cases from this one was the presence here of police coercion of patients into drug and substance abuse treatment. This fact distinguishes this case from circumstances in which physicians or psychologists, in the course of ordinary medical procedures aimed at helping the patient herself, come across information that under rules of law or ethics is subject to reporting requirements; which no party challenged in the case at bar.[45]

The opinion distinguished Ferguson from other "special needs" cases since "[i]n other special needs cases, [the Court] … tolerated suspension of the Fourth Amendment's warrant or probable cause requirement … because there was no law enforcement purpose behind the searches in those cases, and there was little, if any, entanglement with law enforcement."[46]

While the respondents argued that their intrusion was intended as beneficent, to protect both maternal and child welfare, the policy "plainly reveals that the purpose actually served by the MUSC searches "is ultimately indistinguishable from the general interest in crime control."[47] For instance, consider having a policeman stationed in the operating room by the prosecuting attorney insist that the surgeon, without a medical indication, remove a bullet fragment to meet police needs.

What appeared to be the most offensive conduct to the Supreme Court by the *Ferguson* defendants was that through the development and implementation of the policy, MUSC involved the prosecutors and police in its day-to-day administration.[48] Where did medical care begin and leave off when the police dabbled in and actually directed the medical care? Police and prosecutors decided who would receive the reports of positive drug screens and what information would be included with those reports. Law enforcement officials also helped to determine the procedures to be followed when performing the screens. In the course of the policy's administration, they had access to [the nurse's] … medical files on the women who tested positive, routinely attended the substance abuse team's meetings, and regularly received copies of team documents discussing the women's progress. Police took pains to coordinate the timing and circumstances of the arrests with MUSC staff, and, in particular, with the program nurse. The police organized a meeting with the staff of the police and hospital laboratory staffs, as well as Nurse Brown, in which the police went over the concept of a chain of custody system with the MUSC staff.[49]

From the defendants' viewpoint, the program's goal was to "get women … into substance abuse treatment and off drugs, the immediate objective of the searches was to

generate evidence for law enforcement purposes in order to reach that goal."[50] The threat of law enforcement inserted into the medical care may have been intended as a means to and end, reasoned the Court, but the "direct and primary" purpose of the MUSC policy was to "ensure the use of those means."[51] The threat of arrest and prosecution for drug offenses was far too coercive in this case, concluded the Court.[52] There is a great societal danger, as well, supported by the *amici* briefs. Women who use drugs are directly discouraged from seeking medical attention and prenatal care.[53]

Under *Miranda,* state hospital employees have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients for the specific purpose of incriminating those patients, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require.[54]

In a concurring opinion, Justice Kennedy addressed police meddling in medical care. Every patient who received positive results was given a letter of explanation of the policy which originated from the solicitor's office, not from the hospital. In the letter, the patients were then told that everyone who tested positive was told a second positive test or failure to undergo substance abuse treatment would result in arrest and prosecution.[55] The court viewed this meddling in medical care "as an institutional arm of law enforcement for purposes of the policy."[56]

The Court analyzed and reasoned that while the policy may well have served legitimate needs unrelated to law enforcement, it had as well a penal character with a far

greater connection to law enforcement than other searches sustained under the "special needs" rationale.[57]

Justice Kennedy considered, additionally, "the use of handcuffs, arrests, prosecutions, and police assistance in designing and implementing the testing and rehabilitation policy cannot be sustained under our previous cases concerning mandatory testing."[58] He then distinguished the important *quid pro quo* which is the general feature of the special needs exception: the person searched has consented to the search as a condition of employment. "The consent, and the circumstances upon which it was given, bear upon the reasonableness of the whole special needs program."[59]

The dissent position was written Justice Scalia and was joined in by Chief Justice Rehnquist and Justice Thomas. They centered their position not so much on the consent to drug testing, but on the hospital's reporting the positive results to the police.[60] Here, the dissent opinion did not view the obtaining of a urine sample as a search since the Fourth Amendment prohibits only searches of "persons, houses, papers, and effects."[61] They found it "entirely unrealistic to regard urine as one of the "effects" of the person who has passed it since, when provided, it was abandoned. Further they noted that in no case was the urine obtained by force,[62] and that "information obtained through violation of a relationship of trust is obtained consensually, and is hence not a search."[63] In the dissent view, if coercion were applied to obtain the urine, the coercion was not applied by the government but by medical personnel.[64] To invalidate this sort of conduct would invalidate many of the statutes which require physician reporting of gunshot wounds or spousal abuse, the dissenters concluded.[65] Further, the dissenters viewed the threat of arrest as benign.[66]

CONCLUSION:

For the criminal defense Bar, the general rule is that the police, as investigators may be entitled to medical records when they seek to investigate crime. The *Ferguson* rule prevents searches of the person by way of nonconsensual drug testing and access to medical records. Further, in the hospital setting, the prosecutor may not be actively involved in social programs which are, by their nature, intended to cast a dragnet through active patient care in order to net suspects who would then be prosecuted for perceived violation of law. Never forget, however, that various statutes, present at the federal and state levels, *require* mandatory reporting of instances of suspected child abuse and of other medical conditions which are associated with either crime[67] or which raise issues of public health, safety, and welfare.[68]

Abbreviated CV

ELLIOTT BERNARD OPPENHEIM, MD/JD/ LL.M. HEALTH LAW

Former Physician in ***Family Practice**/ Emergency Medicine***

Formerly **Board Certified in Family Practice by the AMERICAN BOARD OF FAMILY PRACTICE

Education

1965 **Pennsbury High School**, Yardley, Pennsylvania

1969 **B.A**. **Occidental College**, Los Angeles, California 9/65-6/69

1973 **M.D**. **University of California, Irvine, School of Medicine**
Irvine, California 9/69-6/73 [with Clinical Clerkships at Oxford University (thoracic surgery) Harvard University (general surgery), Stanford University (cardiovascular surgery)]

1995 **J.D.** **Detroit College of Law,** Detroit, Michigan 8/92-6/95
Jurisprudence Prize in Constitutional Law

1993-summer school **University of Washington, School of Law-**
Seattle, Washington

1995-summer school **Wayne State University, School of Law-**
Detroit, Michigan

1996 **LL.M. HEALTH LAW** **Loyola University School of Law**,
Chicago, Illinois

- *Thesis*: ***BEFORE AND AFTER:*** **Spoliation of Evidence in Medical Negligence Litigation**
- **Supervising Editor- Journal of the National Association of Administrative Law Judges**
- Note, *Calvin v. Chater: The Right to Subpoena the Physician in SSA Cases; Conflict in the Circuits over the Interpretation of 20 C.F.R. 404.950(d)(1),* 15 J. NAT. ASSOC. ADMIN. L. JUDGES 143 (1996).

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MEDICINE !

Family Practice and Emergency Medicine- 18 years active practice (1974-1992); *formerly* BOARD CERTIFIED **American Board of Family Practice**, Diplomate No. 18445; ACLS, APLS, ATLS Certifications; Former Member ACEP, AAFP, AMA. Formerly licensed in California and Washington.

9 SIGNIFICANT MEDICAL-LEGAL CONSULTATION PROJECTS!

1. *State v. Johnson*, No. 97-1-01564-9 SEA, SUP. CT. WA. (King Co., Wa.) (1997) - criminal defense of plastic surgeon charged with multiple felony counts of inappropriate conduct with patients. Convicted on only one misdemeanor count. (in consultation with Ms. Julie Spector, Attorney at Law of Seattle, WA).
2. *Cherukuri v. Shalala, 1999 WL 257693 (6th Cir. 1999)*- achieved dismissal of charges in defense of physician accused of violation of EMTALA. The doctor was fined $100,000! (in consultation with Mr. Chad Perry, Attorney at Law, Paintsville, KY) before the Departmental Appeals Board, Washington, DC - wrote both EMTALA appeal before DAB and the brief for United States Court of Appeals for the Sixth Circuit).
3. *Annon. v. Annon.*, Dallas, TX (confidentiality agreement): $3.85 million recovered in medical negligence case concerning brain injury. Permissible details upon request. (in consultation with Ms. Alicia Slaughter, Attorney at Law, Dallas, TX).
4. *State v. Hudson*, Sedgewick Co. Dist. Ct. No. 00CR1399 (Wichita, KS) (2001) – criminal defense of man charged with child abuse / first-degree murder- acquittal on all charges. (in consultation with Mr. L.J.Leatherman, Topeka, KS).

9 Recent Medical or Law Publications!

- *The Law and Ethics of Web Prescribing*, HIPPOCRATES, 44 (September 2000).
- *The Weighted Analysis of Medical Malpractice Cases*, 46(3) MED. TRIAL TECH. Q. 263 (2000).
- *New Rules on Electronic Records: HIPAA's Proposed Patient -Privacy Standards Focus on Principles*, HIPPOCRATES 22 (January 2000).
- *Staying out of Court: Cost-Free ways to Risk-Proof your* Practice, HIPPOCRATES 26 (December 1999).
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- The *Medical Record: A New Mexico Lawyer's Litigation Guide*, 4(2) BAR J. (NM) 15 (Summer 1998)
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- *A Review of the Emergency Medical Treatment and Active Labor Act*, 85 ILL.BAR J. 212 (1997).
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- Note, *Calvin v. Chater: The Right to Subpoena the Physician in SSA Cases; Conflict in the Circuits over the Interpretation of 20 C.F.R. 404.950(d)(1)*, 15 J. NAT. ASSOC. ADMIN. L. JUDGES 143 (1996).
- Honorable Mention- National Writing Contest of International Association of Defense Counsel (1995) for *Physicians Against Their own Patients: What Happened to the Privilege?* 63(2) DEF. COUNSEL J. 254 (1996).
- *The Trial Lawyer's EMTALA Manual*, 11(4) PROF. NEG. L.REP. 73 (1996).
- *EXAMINING MEDICAL RECORDS: How to Know What is Said When you Read What the Doctor Wrote*, 82 ABA J. 88 (1996).

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PRESENTATIONS / TALKS:

- Brain Fingerprinting: Is it *Daubert*-Proof? 02 May 2001 – Harvard Medical School, Department of Psychiatry, Forensic Research Group; Cambridge, MA.

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***EMTALA: *Its First Decade - A Retrospective Analysis of 42 U.S.C. § 1395dd* ©** (Terra Firma, Santa Fe, NM 1996) (ISBN# 1-930263-00-7) 65 pages, 250 footnotes.

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*Books/ Treatises

THE MEDICAL RECORD AS EVIDENCE, 900 pages, (Lexis Law Pub. Co., Charlottesville, VA 1998) (ISBN# 1-55834-889-1) *The definitive work in the field of medical evidence*. To order direct from Lexis Law Publishing: 800-562-1197; item # 66063

MEDICAL RECORD ANALYSIS: chapter in medical negligence treatise (5 volumes) for Lexis Law Publishing ; 250 pages; available late 2001.

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[1] Ferguson v. City of Charleston, 2001 U.S. LEXIS 2460, *6 (2001).

[2] Under the Federal Rules of Evidence, Fed.R.Evid. 501, there is no physician-patient privilege and state law determines the privilege. (See, Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). This is the seminal case which stands for the premise that state courts shall use state laws unless there is a federal pre-emption and then, they would apply federal law). *See also*, ELLIOTT B. OPPENHEIM, THE MEDICAL RECORD AS EVIDENCE § 5-6 (a) (LEXIS 1998). [hereinafter OPPENHEIM]

[3] OPPENHEIM, at 631.

[4] Ferguson, 2001 U.S. LEXIS 2460, *6.

[5] *Id.* at *7.

[6] *Id.*

[7] *Id.* at *8.

[8] *Id.*

[9] *Id.*

[10] *Id.* at *9-*10.

[11] *Id.* at 10.

[12] *Id.*

[13] *Id.*

[14] *Id.* The nine criteria for testing included:"1. No prenatal care; 2. Late prenatal care after 24 weeks gestation; 3. Incomplete prenatal care; 4. Abruptio placentae; 5.Intrauterine fetal death; 6. Preterm labor ' of no obvious cause'; 7. IUGR [intrauterine growth retardation] ' of no obvious cause'; 8. Previously known drug or alcohol abuse; 9. Unexplained congenital anomalies. *Id.* at *10, n.4.

[15] *Id*. at *11.
[16] *Id*. at *11.
[17] *Id*. at *12.
[18] *Id*.
[19] *Id*.
[20] *Id*. at **12-**13.
[21] *Id*. at *13.
[22] *Id*. at *18.
[23] *Id*. at *13.
[24] *Id*.
[25] *Id*. at ***13-*14.**
[26] *Id*. at *14.
[27] *New Jersey v. T. L. O.*, 469 U.S. 325, 351 (1985).
[28] Ferguson, 2001 U.S. LEXIS 2460, *17 n.7.
[29] *Id*. at *15.
[30] 489 U.S. 656 (1989).
[31] 515 U.S. 646 (1995).
[32] Ferguson, 2001 U.S. LEXIS 2460, *16-17.
[33] *Id*. at *18. (citing New Jersey v. T. L. O., 469 U.S. 325, 335-337 (1985)).
[34] *Id*. (citing Skinner v. Railway Labor Executives' Assn.,489 U.S. 602, 617 (1989)).
[35] Ferguson, 2001 U.S. LEXIS 2460, *18 n. 9.
[36] *Id.* at *19. (citing Chandler v. Miller, 520 U.S. 305, 137 (1997) ; Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995) ; Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 617 (1989) ; Treasury Employees v. Von Raab, 489 U.S. 656 (1989).
[37] Ferguson, 2001 U.S. LEXIS 2460, *20.
[38] Ferguson, 2001 U.S. LEXIS 2460, *20-21. (citing Chandler v. Miller, 520 U.S. 305, 309 (1997)).
[39] *Id*. at *21-*****22.
[40] 520 U.S. 305 (1997).
[41] Ferguson, 2001 U.S. LEXIS 2460, *22.
[42] *Id*. at *23 n. 13.

[43] Ferguson, 2001 U.S. LEXIS 2460, *23.

[44] 429 U.S. 589, 599-600 (1977).
[45] *Id*. at *24.
[46] *Id*. at *26. [citations omitted].
[47] *Id*. at *27.
[48] *Id*. at *28.
[49] *Id*. at ***28-***29. (2001).
[50] *Id*. at *29.
[51] *Id*. at ***29-****30.
[52] *Id*. at *30.
[53] *Id*. at *32 n. 23.
[54] *Id*. at *32. (citing Miranda v. Arizona, 384 U.S. 436 (1966)).
[55] *Id*. at *39.
[56] *Id*.
[57] *Id*. at *38-*39.

[58] *Id*. at *42.
[59] *Id*. at *43.
[60] *Id*. at *45,
[61] *Id*. at *45.
[62] *Id*. at *46.
[63] *Id*. at *51.

[64] *Id*. at *53.
[65] *Id.*
[66] *Id.*
[67] Gunshot or stab wounds; evidence of battery.
[68] Infectious diseases such as salmonella and various sexually transmitted diseases.