

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 CRYSTAL M. FERGUSON, ET AL., :
4 Petitioners :
5 v. : No. 99-936
6 CITY OF CHARLESTON, ET AL. :
7 - - - - -X
8 Washington, D.C.
9 Wednesday, October 4, 2000
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:03 a.m.
13 APPEARANCES:
14 PRISCILLA J. SMITH, ESQ., Baltimore, Maryland; on behalf
15 of the Petitioners.
16 ROBERT H. HOOD, ESQ., Charleston, South Carolina; on
17 behalf of the Respondents.
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in Number 99-936, Crystal Ferguson v. The City of
Charleston.

Ms. Smith.

ORAL ARGUMENT OF PRISCILLA J. SMITH

ON BEHALF OF THE PETITIONERS

MS. SMITH: Mr. Chief Justice, and may it please
the Court:

This case involves pregnant women who sought
medical care at a public hospital and who then were
searched by their doctors for evidence of crimes and
arrested, seven of them right out of their hospital beds.
The special needs exception does not apply to this case to
excuse the lack of warrants for three reasons.

First, unlike every other special needs case,
the threat of law enforcement, the use of arrest as
leverage was the key element of the policy. It was, in
the respondent's own words, what made the policy
effective.

Second, the searches were conducted here in the
context of the private, physician-patient relationship and
thus there was no diminished expectation of privacy,
again, unlike the other special needs cases.

1 And finally, the defendants here skirted the
2 warrant and probable cause requirements without
3 demonstrating impracticability.

4 QUESTION: Ms. Smith, with respect to the first
5 of your reasons you point out that it is quite true, in a
6 sense, that the law enforcement component of the whole
7 scheme was necessary for success. I think success as
8 you're using it is success in getting people into the drug
9 treatment, the counseling program and finishing whatever
10 course of counseling there is, and I understand that.

11 But isn't there a special need, independent of
12 that, in the sense that the treating physicians need to
13 know -- regardless of whether anyone takes counseling or
14 not they simply need to know whether there is drug use
15 involved, because that affects the risks to the mother and
16 the risks to the fetus, and those are the things that they
17 need to provide for.

18 So my question is, even if we assumed there were
19 no law enforcement component and there were no counseling
20 scheme, wouldn't they have a special need to know and, in
21 fact, didn't they demonstrate that before the law
22 enforcement component was even added to the mix?

23 MS. SMITH: If there were no law enforcement
24 scheme there would be a search that was being done, but it
25 would be a search that was only done for medical purposes,

1 Your Honor, and therefore, as it was before the policy
2 was --

3 QUESTION: Right. Right. Yes.

4 MS. SMITH: -- implemented, right, and therefore
5 it would have been consented to, because there was consent
6 to treatment in that context.

7 But as soon as they incorporated a criminal
8 sanction and made the policy what it was, they had to
9 comply with the Fourth Amendment, and what the warrant --

10 QUESTION: Well, they had no -- I'll grant you
11 that the treating physicians had no special need, I guess,
12 to get people into drug treatment programs, necessarily,
13 but they did have a special need to discover the facts
14 and, in fact, to get the evidence that ultimately was
15 turned over to the police. That is correct, isn't it?

16 MS. SMITH: In some cases there may have been a
17 need to do medical testing. In some cases --

18 QUESTION: Well, didn't they do it -- maybe I'm
19 wrong. Didn't they do it routinely?

20 MS. SMITH: They did medical testing prior to
21 the policy for about 3 to 6 months, Your Honor. They had
22 just started to do testing --

23 QUESTION: Okay.

24 MS. SMITH: -- pursuant to a listed protocol.

25 As soon as they adopted the policy they -- 3

1 months later, approximately, they expanded the protocol in
2 order to find more people and really what this policy was
3 about was using arrest as leverage, and they've admitted
4 that in their brief.

5 QUESTION: Suppose they had reasons --

6 MS. SMITH: Yes.

7 QUESTION: -- to have arrests.

8 MS. SMITH: Mm-hmm.

9 QUESTION: They had turned this information over
10 to the Social Services Department --

11 MS. SMITH: Mm-hmm.

12 QUESTION: -- to the people who act as
13 counselors to women who are receiving public assistance.
14 Would that have involved any Fourth Amendment violation in
15 your view?

16 MS. SMITH: I don't believe it would have been a
17 violation, Your Honor, if they were testing for medical
18 purposes and discovered evidence of drug use during
19 pregnancy. At that point they have some level of
20 individualized suspicion and reporting to DSS, as they
21 did, for every other substance, for heroin, for
22 methamphetamines -- they didn't report any of those to the
23 police. Reporting those to DSS may meet some kind of
24 reasonable ground standard.

25 QUESTION: What is DSS, please?

1 MS. SMITH: I'm sorry, Your Honor. It's the
2 Department of Social Services, to the civil child abuse
3 authorities.

4 QUESTION: Why does individualized suspicion
5 help? In cases like Sitz, the roadblock case, one of the
6 rationales for sustaining it is that it's random.

7 MS. SMITH: That's right, Your Honor, but
8 Sitz is --

9 QUESTION: They were work both ways, the
10 randomness and the individualized search, and it seems to
11 me that the policy of testing everyone to see if some need
12 counseling is perhaps more sustainable than the
13 individualized suspicion --

14 MS. SMITH: Well, in fact --

15 QUESTION: -- argument that you're making to
16 us --

17 MS. SMITH: If I understand Your Honor
18 correctly, in Sitz, for example, it's a standardized,
19 nondiscretionary policy, and that I think is what saves
20 it. It's also a minimal intrusion, not a search like we
21 have here, and there's also the diminished expectation of
22 privacy that drivers have, and that this Court has
23 discussed in a number of cases, including Opperman, and in
24 Sitz, whereas in this case we have a discretionary list of
25 criteria where some women who met the criteria were

1 tested. We know in --

2 QUESTION: So it would be more sustainable if
3 they did this for everybody?

4 MS. SMITH: I believe on some levels it would
5 be. On the other hand, this is not like Sitz for the
6 other reasons I mentioned. There's a search, not a --

7 QUESTION: Well I mean, which would you say, the
8 individualized suspicion helps or hurts, because you were
9 arguing a moment ago that individual suspicion makes this
10 more suspect --

11 MS. SMITH: But I don't -- I'm sorry.

12 QUESTION: -- and now you're telling me that it
13 would have been better without it. Well, I need to
14 know --

15 MS. SMITH: I don't believe that there was
16 individualized --

17 QUESTION: -- which is the more appropriate
18 policy for a hospital to use, to do this for everybody, or
19 just with individualized suspicion. Which of the two?

20 MS. SMITH: If there was true individualized
21 suspicion, and a search was done and -- just for civil
22 purposes, Your Honor, that might meet Fourth Amendment
23 standards. The lower courts have held civil searches to a
24 lower level than the probable cause standard.

25 QUESTION: Is DSS civil purposes?

1 MS. SMITH: Yes, Your Honor, I'm sorry. The
2 Department of Social Services is the civil child abuse
3 investigatory agency.

4 QUESTION: Well, let me put another hypothetical
5 to you, then. Many States, maybe most States require
6 physicians who in treating someone, find some indication
7 of criminal activity --

8 MS. SMITH: Mm-hmm.

9 QUESTION: -- you can't get treated for a
10 gunshot wound, for example, without having that being
11 reported, be reported to the police.

12 Now, how does that differ from -- let's assume
13 they're just doing routine urinalyses of pregnant women to
14 be sure that they don't have drugs which would make the
15 delivery more difficult and possibly hurt the child, and
16 they find drugs in someone. Are they allowed to report
17 that to the police?

18 MS. SMITH: If there was a routine program, as
19 Your Honor is presenting it, without a targeted list of
20 criteria, as they had here, a discretionary list of
21 criteria, which is what makes this program so different --

22 QUESTION: I don't understand. Why does that
23 make it different?

24 MS. SMITH: Because when you have a law
25 enforcement --

1 QUESTION: Didn't they do it to everybody?

2 MS. SMITH: No, Your Honor. They didn't search
3 everyone. They looked at a targeted list of criteria that
4 included discretionary elements such as inadequate
5 prenatal care, and there's evidence in the record that
6 some people who had inadequate prenatal care were tested
7 and some people who had inadequate prenatal care weren't
8 tested, precisely because the word inadequate is so --

9 QUESTION: Is there not a routine urine specimen
10 collected for someone in the hospital and tests employed?
11 I mean, that seems rather routine. Is that not done for
12 pregnant women entering a hospital --

13 MS. SMITH: Not --

14 QUESTION: -- in connection with a birth?

15 MS. SMITH: Not in -- not to be tested for
16 drugs, Your Honor. If you mean just in general are urine
17 samples taken, at some point during the course of prenatal
18 care, I believe they are, but not --

19 QUESTION: Yes, and wouldn't that routinely show
20 up something like this, or --

21 MS. SMITH: No.

22 QUESTION: -- do you have to apply special --

23 MS. SMITH: You have to look for it.

24 QUESTION: -- analysis?

25 MS. SMITH: You have to search for it, Your

1 Honor, which is what they did here.

2 QUESTION: And is that not routine in today's
3 world, where drug use is more common, and the doctor might
4 need to know what to look for with the child?

5 MS. SMITH: Absolutely not, Your Honor. It's a
6 special test that would need to be run on top of what's
7 normally done and, in fact --

8 QUESTION: Could a doctor today, when he
9 thinks -- he has a pregnant woman, and he thinks the
10 woman's taking drugs. Doctors won't look at the urine to
11 see if she's taking drugs?

12 MS. SMITH: They might, Your Honor. I
13 understood Justice O'Connor's question to be, just as a
14 routine matter is it always done.

15 QUESTION: Well, I don't know if it's a routine
16 matter or not. Where I'm having the problem is, if you
17 came in and told me, or the other side did, that doctors
18 normally test pregnant women for drugs, that would sound
19 okay to me, and moreover, if you told me no, that's not
20 what they do, they normally don't, but if they think the
21 woman's taking drugs and she's pregnant they do, that
22 would sound all right to me, too. I mean, after all,
23 they're supposed to be looking after the health of the
24 mother and the baby.

25 QUESTION: And I don't know why the latter

1 doesn't make this more defensible than the former.

2 MS. SMITH: Because what happened here was, they
3 incorporated a criminal sanction.

4 QUESTION: Ah, all right.

5 MS. SMITH: The reason they were doing the
6 testing --

7 QUESTION: Now, if it's a criminal sanction that
8 makes the difference --

9 MS. SMITH: Yes, Your Honor.

10 QUESTION: -- which is what I thought the case
11 was about, then I would like to know your response to
12 Justice Scalia's question.

13 MS. SMITH: Could you repeat the question, Your
14 Honor?

15 QUESTION: The question was, as I understood
16 it -- he's better at repeating his question than I, but I
17 thought --

18 (Laughter.)

19 QUESTION: I won't resist the chance.

20 (Laughter.)

21 QUESTION: The question, as I took it, is, it's
22 a normal thing, I believe, in the medical world, at least
23 for psychiatric social workers and for doctors, they're
24 all told that if during a medical examination you discover
25 that the patient is going to hurt some other person by

1 killing, or -- you know, is going to kill the teller,
2 they're planning a robbery, you have an obligation to tell
3 the police.

4 And of course, that's relevant, because the
5 other side is saying that's just what's happening here.
6 We're learning that the woman has put this viable fetus, a
7 person, at risk, all right. These are children about to
8 be born, and they're at serious risk, and so why doesn't
9 this apply.

10 Now that, I think was -- is that fair, that that
11 was roughly the question, and why doesn't that apply?

12 MS. SMITH: That's not the case here, Your
13 Honor, because this is not a case where they were treating
14 people and in the course of medical treatment they came
15 across evidence of a bullet or evidence of drug use. They
16 searched for it. They joined with the police to determine
17 what criteria they were going to use to do the search. It
18 was not a --

19 QUESTION: Well, Ms. Smith --

20 MS. SMITH: Yes.

21 QUESTION: -- the vehicle for the discovery was
22 a urine sample, was it not?

23 MS. SMITH: That's right, Your Honor.

24 QUESTION: And I suppose you have to decide when
25 you have a urine sample you could look for different

1 things in different ways.

2 MS. SMITH: That's right, Your Honor.

3 QUESTION: And you say they have made a special
4 search for this kind of thing.

5 MS. SMITH: Absolutely.

6 QUESTION: To determine anything from a urine
7 sample you have to make a special search, don't you?

8 MS. SMITH: Well, that's true, Your Honor, but
9 the difference here is that the search is done
10 specifically to use arrest, to use the criminal sanction
11 and incorporate that into their treatment.

12 QUESTION: So your complaint is not that it was
13 done for drugs, but that the use of the discovery would be
14 used for arrest.

15 MS. SMITH: That's right, Your Honor. As soon
16 as they started to search, as soon as they became
17 essentially the police, searching for evidence of a crime,
18 in order to use arrest as leverage they took on a new role
19 and they had to -- they became like a police officer
20 searching a suspect.

21 QUESTION: I gathered from some of your previous
22 answers to questions that you're objecting that this test
23 for drugs was something so highly specialized that itself
24 it raised a flag, but it's only that it was used in
25 connection with a desire to bring law enforcement to play

1 that you object to it.

2 MS. SMITH: I don't know if I understand what
3 you're saying, Your Honor. I'm sorry.

4 QUESTION: Well, you know, you take a urine
5 specimen, and I think physicians can look for any number
6 of things in the urine specimen. Each one requires a
7 specific procedure, and I don't think looking for drugs
8 requires any different sort of procedure than to look for
9 any number of other things in the urine sample.

10 MS. SMITH: Well, it requires a separate test,
11 Your Honor.

12 QUESTION: A separate --

13 MS. SMITH: Is that what you mean, or --

14 QUESTION: No. I had thought that you could use
15 a urine sample and test for any number of things with that
16 sample.

17 MS. SMITH: That's true, yes, you can test
18 for --

19 QUESTION: And one of them would be drugs.

20 MS. SMITH: And one of them would be drugs, but
21 it's a specific extra step that's not done unless you meet
22 the criteria, and unless you want to use arrest as
23 leverage.

24 QUESTION: You mean, so far as this procedure
25 was concerned?

1 MS. SMITH: As far as this policy goes.

2 QUESTION: Okay, but those criteria would be the
3 same criteria that would determine whether it was likely
4 that this woman was endangering her health and the health
5 of the child. Are the criteria any different?

6 MS. SMITH: Well, the criteria were changed
7 after the policy was instituted.

8 QUESTION: Well, that doesn't --

9 MS. SMITH: And there's --

10 QUESTION: Are the criteria any different from
11 what would be reasonable criteria to determine whether the
12 woman was at risk because of drug use or was endangering
13 the fetus because of drug use?

14 MS. SMITH: Absolutely. They are not reasonable
15 criteria, Your Honor --

16 QUESTION: Why?

17 MS. SMITH: -- and the experts have testified
18 that criteria like inadequate prenatal care, lay prenatal
19 care, preterm labor, these are medical complications of
20 pregnancy --

21 QUESTION: Why doesn't the --

22 MS. SMITH: -- or they're more apt to be
23 indicators of poverty than they are of drug use.

24 QUESTION: Well, why doesn't that put the woman
25 and the child at greater risk --

1 MS. SMITH: For drug use?

2 QUESTION: -- that there's been inadequate
3 prenatal care? I mean, the drug use would be all the more
4 dangerous for the woman and the child.

5 MS. SMITH: It may have put her at greater risk
6 for other -- not having gotten prenatal care, but it
7 didn't give us any reasonable suspicion, reasonable
8 grounds, probable cause, whatever level of individualized
9 suspicion you're looking for --

10 QUESTION: Ms. Smith, may I go back --

11 QUESTION: May I ask, Ms. Smith, was this the
12 same program instituted at any other hospital?

13 MS. SMITH: I'm sorry, Your Honor.

14 QUESTION: What about the other hospitals in the
15 City of Charleston?

16 MS. SMITH: No other hospitals --

17 QUESTION: Do they follow the same procedures?

18 MS. SMITH: No, Your Honor and, in fact, that's
19 one of the things that shows the discretion. The law
20 enforcement officers in this case went to the one public
21 hospital, joined with doctors at the one public hospital
22 to enforce this policy. They did not enforce this policy
23 at the private hospitals, and they did not --

24 QUESTION: Well, you're saying they didn't have
25 the arrangement with law enforcement at other hospitals.

1 MS. SMITH: That's right.

2 QUESTION: But you're not saying that other
3 hospitals as a matter of course ignored the possibility,
4 if they had reason to suspect it, they ignored the
5 possibility of drug use among pregnant women.

6 MS. SMITH: Nobody at another hospital --

7 QUESTION: We --

8 MS. SMITH: That's right, Your Honor --

9 QUESTION: Yes, okay.

10 MS. SMITH: -- but nobody at another hospital
11 searched their patients in order to use arrest as
12 leverage.

13 QUESTION: Ms. Smith --

14 QUESTION: Well, all right, but it's the arrest
15 as leverage then.

16 MS. SMITH: Mm-hmm.

17 QUESTION: If the doctor -- as I understand it,
18 if the doctor, acting without any prearrangement with the
19 police --

20 MS. SMITH: Mm-hmm.

21 QUESTION: -- had said, I think we have reason
22 to worry about drug use in this patient, test the urine to
23 see if there is an indication of drug use, and the
24 hospital had done so, they had found such an indication, I
25 take it in your judgment there would be no constitutional

1 problem if they then called the police and said, we have
2 evidence that patient X is using drugs.

3 MS. SMITH: And I think the reason why, Your
4 Honor, is because there's probable cause there. There may
5 be a lower level of suspicion, depending on the
6 circumstances, to report to a civil authority like a
7 Department of Social Services.

8 QUESTION: A hospital knows that it's operating
9 in an area where there is a lot of drug use, and it just
10 says, as a matter of sound policy, we're going to test all
11 of the patients who come in. We have a very high
12 percentage. We don't want to take a chance.

13 MS. SMITH: Your Honor, the same reasoning --

14 QUESTION: We're doing urinalyses anyway, we're
15 going to add drug use to the --

16 MS. SMITH: The same reasoning would apply to
17 searches of people's homes. There's a high crime area, we
18 know there's a lot of drug sales that go on here, we don't
19 like the look of these houses, they meet a criteria
20 that --

21 QUESTION: But this is being done for medical
22 purposes. That's why the hospital does it. We're
23 concerned that there is a high incidence of drug use in
24 this community. We know that. Now, you know, it's hard
25 to tell who is and who isn't, but to be sure of being able

1 to treat the woman and the child properly, we're going to
2 give a urinalysis to everyone who comes in for drug use.

3 MS. SMITH: But they can't -- the difference
4 here, Your Honor, is that they set out to target certain
5 people, to test certain people in order to use arrest as
6 leverage, not simply for medical purposes any more, and
7 the criteria, the list of criteria is a discretionary list
8 of criteria that's now being applied in the context of a
9 police search, which is what made Delaware v. Prouse an
10 improper program.

11 QUESTION: What's hard for me is to figure out
12 what you mean by this leverage point. The -- imagine you
13 have a community with a high incidence of tuberculosis.

14 MS. SMITH: Mm-hmm.

15 QUESTION: Is there anything wrong with doctors
16 saying, you know, we're just going to regularly test our
17 pregnant women to see if they have it?

18 MS. SMITH: Without their consent?

19 QUESTION: There -- you feel -- I don't know --
20 the consent's a separate issue here, and I suppose that
21 doctors normally do get consent --

22 MS. SMITH: If they were testing people --

23 QUESTION: -- for the test anyway.

24 MS. SMITH: If they were testing people for
25 medical purposes and they had consent to medical care,

1 then there's not a problem.

2 QUESTION: Fine. All right. Now, suppose that

3 the same -- it's not tuberculosis, but it's simply drug

4 use.

5 MS. SMITH: Right.

6 QUESTION: Okay.

7 MS. SMITH: It's not -- it is a problem, Your

8 Honor, if the purpose of the search --

9 QUESTION: But I'm -- just follow my reasoning.

10 MS. SMITH: Yes, I'm sorry.

11 QUESTION: All we're doing is testing the woman.

12 For tuberculosis it's okay, right, with consent?

13 MS. SMITH: If it's medical treatment, yes.

14 Yes.

15 QUESTION: Same with drug use.

16 MS. SMITH: If it's medical treatment --

17 QUESTION: All right, fine.

18 MS. SMITH: -- and there's consent to do that,

19 yes.

20 QUESTION: Now, if the doctor discovers in the

21 course of a test that the person's about to commit a

22 crime, he can report it to the police, right?

23 MS. SMITH: At that point he has probable cause

24 or individualized suspicion.

25 QUESTION: All right. So if you're that far

1 down the road --

2 MS. SMITH: Uh-huh.

3 QUESTION: -- then you give the test, you
4 discover the result, and now you report it to the police,
5 and you're saying all that's okay, and so if there's
6 something -- if you're saying all that's okay, what's
7 different about this case?

8 MS. SMITH: What's different here is that the
9 search was conducted without probable cause.

10 QUESTION: Those are conclusions, but what I
11 want to know is, what's different from -- what happened in
12 the world that's different from what I just said?

13 MS. SMITH: What s happened --

14 QUESTION: They give the test, they discover
15 there's the drug use, and they report it to the police.

16 MS. SMITH: What happened that's different is
17 that different people are tested, because we have
18 discretionary criteria that are being applied in a law
19 enforcement setting, so we have --

20 QUESTION: Well, let me ask you this with
21 reference to this question of Justice Breyer. I thought,
22 and correct me if I'm wrong, that the district court found
23 the hospital personnel conducted the urine drug screens
24 for medical purposes, wholly independent of an intent to
25 aid law enforcement efforts. Now, has that been

1 determined to be an invalid finding?

2 MS. SMITH: He instructed the jury, Your Honor,
3 that there was a dual purpose to the test, that as soon as
4 there was also a law enforcement search, then the field
5 changed, the search changed, and the Fourth Amendment
6 applied.

7 QUESTION: But was there a finding at the -- by
8 the district court that it was conducted for medical
9 purposes, independent of the intent to aid law
10 enforcement?

11 MS. SMITH: In the context of jury instructions,
12 where he then said these were conducted for both purposes,
13 Your Honor, yes.

14 QUESTION: Did you, or did your counsel at the
15 trial level if it wasn't you, ever ask for a finding by
16 court or jury that any of the criteria used to determine
17 the urine -- that this test would be made of the urine
18 samples was not a criterion that was medically
19 appropriate?

20 MS. SMITH: I don't believe there was a request
21 for a finding, but there certainly was medical testimony
22 on that fact, Your Honor, from Ira Chasnoff, from Dr.
23 Chasnoff.

24 QUESTION: But we don't have any finding on it
25 by court, or by implication of the jury verdict, one way

1 or the other?

2 MS. SMITH: That's right, Your Honor.

3 QUESTION: Okay.

4 MS. SMITH: The jury verdict --

5 QUESTION: Ms. Smith, I wish you would clarify
6 one point --

7 MS. SMITH: Okay.

8 QUESTION: -- because it's gotten terribly
9 confused here.

10 MS. SMITH: Okay.

11 QUESTION: I thought that you said the only
12 thing that's wrong with this program was that it was
13 driven -- it was a means that the police were using to
14 apprehend people engaged in criminal conduct. You said in
15 answer to my question, I thought, if a doctor's just
16 testing for drugs so they'll know how to treat the woman
17 and the child, that's okay. If the doctors took that test
18 and gave it to the Social Service people, that's okay. So
19 all of that is okay, and we shouldn't, I think, go back
20 and qualify that unless you mean to.

21 I thought when you started out you said this was
22 a program driven by the police. It was their way of
23 getting people who had taken drugs. That's one thing.

24 MS. SMITH: Mm-hmm.

25 QUESTION: So I thought you said that's what

1 makes -- infects this whole thing. If you didn't have the
2 police driving it, it would be okay for medical purposes
3 and for social welfare purposes. Now, is that your
4 position?

5 MS. SMITH: That is my position, Your Honor, and
6 I didn't mean to change from that. All I meant to do was
7 clarify why I thought it was okay, and not a Fourth
8 Amendment violation, to then turn it over once you have
9 some evidence and you can meet the standards of the Fourth
10 Amendment. But it s a different --

11 QUESTION: Did the police approach the hospital,
12 or did the hospital approach the police to set this
13 program in --

14 MS. SMITH: The original call that went, Your
15 Honor, was from the hospital to the police, but then it
16 was a very preliminary inquiry, and a task force was
17 formed consisting of members of all the departments, and
18 the task force was actually chaired by law enforcement, by
19 the Chief of Police and by the Solicitor, and the policy
20 as first written was written by law enforcement, by the
21 police.

22 QUESTION: But the initiative came from the
23 hospital.

24 MS. SMITH: The question --

25 QUESTION: The police didn't show up at the

1 hospital one day and say, you know, we'd like to find some
2 way to bust your patients here.

3 MS. SMITH: No. The --

4 QUESTION: It was somehow the doctors who were
5 concerned that there was a problem with drug use by
6 pregnant women.

7 MS. SMITH: The question -- that's right, Your
8 Honor. The question originally came from the hospital to
9 the police, but the answer, the answer of how to cope with
10 this came from the police, and they wrote the policy, and
11 they taught the hospital how to maintain the chain of
12 evidence at the beginning of the search for people who
13 fell within a list of discretionary criteria, and they
14 enforced this policy at this one hospital and not at any
15 other hospital.

16 QUESTION: Okay --

17 QUESTION: Suppose I thought that there were
18 probable --

19 QUESTION: -- could extend the policy to other
20 hospitals?

21 MS. SMITH: I'm sorry, Your Honor.

22 QUESTION: Was there ever any effort made to
23 extend the policy to other hospitals?

24 MS. SMITH: No, Your Honor, there was not.

25 QUESTION: Was there any explanation why not?

1 MS. SMITH: No, Your Honor, there was not.

2 QUESTION: I take it that had there not been the
3 formality of the prearrangement, the agreement with the
4 police, that the result would be different in this case.

5 In other words, if they had made the phone call
6 and the police hadn't said, yeah, the way to do it is to
7 maintain the chain of custody and so on, on your own
8 reasoning there would be no constitutional violation in
9 this case.

10 MS. SMITH: I think that's true, Your Honor, but
11 the purpose of the warrant requirement -- at least for the
12 people who tested positive and they then were reported,
13 but for the people who didn't test positive and who were
14 searched, we don't know who those people were, there was
15 certainly a constitutional violation there, because they
16 were being searched for -- no, I'm sorry, Your Honor, I'm
17 wrong.

18 QUESTION: Okay.

19 MS. SMITH: Because they weren't being searched
20 for law enforcement purposes.

21 QUESTION: So there's -- there --

22 MS. SMITH: You're right.

23 QUESTION: It is simply the agreement, in
24 effect --

25 MS. SMITH: It's the agreement, and --

1 QUESTION: -- that makes the difference between
2 constitutionality and unconstitutionality.

3 MS. SMITH: And it's a list of discretionary
4 criteria being applied by police officers. It's the
5 difference between Delaware v. Prouse and Sitz.

6 QUESTION: No, but I mean, as I understand --
7 maybe I misunderstood your answer to Justice Ginsburg a
8 minute ago. You said in so many words it's the police
9 component of this scheme that taints it, and I understood
10 that to at least imply sort of the same point that I was
11 getting at with my question, that there's no finding here,
12 there's no reason for -- we cannot assume here that the
13 criteria for taking samples or for testing samples were
14 criteria that were not medically appropriate.

15 Maybe not all of them were used before, but we
16 have to -- I think we have to assume, as the case comes to
17 us and as you present your argument, that the reasons the
18 hospital used for determining that a sample would be taken
19 and the criteria for testing that sample for drug presence
20 were medically appropriate criteria.

21 MS. SMITH: Well, there's no finding on that
22 from the district court, and the only testimony shows that
23 it's a list of discretionary criteria that is not liable
24 to really find people who use cocaine --

25 QUESTION: So when you say that in so many words

1 it's the police component of the scheme that taints it,
2 what you mean to say is that part of the very -- the very
3 determination of whether to test or not was modified from
4 a medically appropriate set of criteria to at least a
5 partial law enforcement set of criteria. Is that your
6 argument?

7 MS. SMITH: I think the difference is, Your
8 Honor, that the --

9 QUESTION: No, but wait a minute.

10 MS. SMITH: Yes.

11 QUESTION: I want to understand you. Yes or no,
12 is that your argument?

13 MS. SMITH: I think it's not quite my argument,
14 because the issue I think is that the discretion when it's
15 used by a doctor for medical purposes -- doctors have
16 discretion and that may be appropriate in the context of
17 medicine, but once discretion is used by police officers
18 for a law enforcement purpose, the world changes.

19 QUESTION: You're saying the doctor has become a
20 police agent.

21 MS. SMITH: Absolutely, Your Honor.

22 QUESTION: So that the doctor must be treated as
23 a police officer.

24 MS. SMITH: Absolutely, Your Honor.

25 QUESTION: Okay.

1 MS. SMITH: I'd like to reserve the rest of my
2 time for rebuttal.

3 QUESTION: Very well, Ms. Smith.

4 Mr. Hood, we'll hear from you.

5 ORAL ARGUMENT OF ROBERT H. HOOD

6 ON BEHALF OF THE RESPONDENTS

7 MR. HOOD: Mr. Chief Justice, and may it please
8 the Court:

9 The issue presented is whether urine drug
10 screens for medical purposes were reasonable under the
11 special needs doctrine and as consensual searches.

12 QUESTION: May I just, at that very point, I
13 thought we had to assume for purposes of analyzing this
14 issue that there was no consent.

15 MR. HOOD: Your Honor, we raised the issue of
16 consent at trial. We proved that each and every plaintiff
17 consented. The jury found they consented.

18 QUESTION: The jury found consent.

19 MR. HOOD: Yes, sir.

20 QUESTION: But then in affirming the jury
21 verdict the court of appeals did not reach the issue of
22 consent and said --

23 MR. HOOD: Correct.

24 QUESTION: -- and in fact held that even if
25 there were no consent, these searches were proper under

1 the special needs doctrine, is that not right?

2 MR. HOOD: Yes, Justice Stevens.

3 QUESTION: So don't we have to assume for
4 purposes of analyzing the legal issue that there was no
5 consent, and if there's an issue to be -- if we disagreed
6 with the court of appeals, in other words, we'd send it
7 back to say whether there was evidence supporting the jury
8 verdict.

9 MR. HOOD: Well, sir, I don't agree with that,
10 because I believe under the United States v. New York
11 Telephone Company, decided in 1977, the Court is not
12 limited to affirm on an issue that is not really --

13 QUESTION: Well, no, we could affirm --

14 MR. HOOD: Yes, sir.

15 QUESTION: -- on the ground that there was
16 consent, but the special needs -- and then we wouldn't
17 need to reach the issue of special needs.

18 MR. HOOD: Correct.

19 QUESTION: But if we were to confront the issue
20 of special needs, we do that on the assumption that we
21 don't have to decide whether there was consent or not,
22 which is tantamount as a matter of law to saying we
23 assume, in analyzing this issue, that there was no
24 consent.

25 MR. HOOD: Correct, and that's what the Fourth

1 Circuit did, Your Honor.

2 The policy purpose was to prevent pregnant women
3 from using cocaine.

4 QUESTION: How did that work when the woman in
5 question was no longer pregnant, had given birth to the
6 child, and was taken from the hospital just after birth?
7 You can't prevent anything when a child is born.

8 As I understand it, most of these plaintiffs
9 were women who did not come in for prenatal care, but were
10 tested at the time they came into the hospital to give
11 birth, and then one day after the birth were removed to
12 the jail. Is that not the case, that most of these
13 arrests took place after a child was born?

14 MR. HOOD: No, Your Honor. Most of them were
15 not after birth. Several of the women -- four of them
16 were before the policy became the protocol of Medical
17 University, so what was going on with those four was, they
18 were turned over to substance abuse, or DSS. Because they
19 were tested positive for cocaine, it was child abuse. The
20 protocol went into --

21 QUESTION: I may have misspoken when I said
22 most. Were there women among these plaintiffs who were
23 tested at the time of childbirth and who were sent to jail
24 the day after the child was born?

25 MR. HOOD: Yes, Your Honor, there were.

1 However --

2 QUESTION: So at least as to those women I don't
3 see a protective purpose. Whatever damage was done was
4 done.

5 MR. HOOD: The purpose there, Your Honor, was
6 child abuse. The child had been subjected to cocaine, was
7 born a cocaine baby with brain damage and other damage
8 from the cocaine. The Department of Social Services took
9 over --

10 QUESTION: Was that part of the showing, that
11 these children were, in fact, brain damaged?

12 MR. HOOD: I didn't hear the premise.

13 QUESTION: Was there a determination that the
14 child was, in fact, brain damaged in any of these cases?
15 As I understand it --

16 MR. HOOD: If we didn't have time --

17 QUESTION: -- no one inspected the child.

18 MR. HOOD: -- for the life of the policy, to
19 answer that question, we didn't do the follow-up studies
20 with these individuals, 10 individuals.

21 But of these 10, only five of them were actually
22 under the protocol adopted by the board of trustees of
23 Medical University on November 27, 1989 and each of those
24 five signed a letter, when they tested positive, from the
25 Solicitor that said, I understand that if I test positive

1 again, I will be arrested and I will be prosecuted.

2 They went home. They came back a week, or two,
3 or three later, tested positive again, Justice Ginsburg
4 and yes, they were arrested. They were put in jail, not
5 only for the illegal crime of using cocaine themselves,
6 but for what they were doing to their child, and they knew
7 they were going to be arrested in each instance.

8 QUESTION: But I thought that was irrelevant in
9 the case, because you -- perhaps I have the facts wrong,
10 but I thought they were women who did not come in before,
11 who came in to give birth, tested positive, the only thing
12 that they signed was the kind of consent form that we all
13 file when we go to the hospital for a procedure --

14 MR. HOOD: Well, Your Honor, the -- one or two
15 of the women meet that category, and those women were
16 before the Medical University board adopted this protocol.
17 The protocol was medical. The doctors wrote the protocol.
18 There were nine criteria. The district court found that
19 those criteria were medically valid and good.

20 The district court found that as to consent, we
21 had to make one step further than that Solicitor letter.
22 We had to show that each of those 10 plaintiffs knew that
23 they could be arrested. The jury found that they knew
24 that. That issue was briefed to the Fourth Circuit. The
25 Fourth Circuit went and affirmed the case on special

1 needs.

2 This case is so much stronger than any opinion
3 the United States Supreme Court has written on special
4 needs for two reasons. We have a medical, independent
5 clinical reason to test here. We have child abuse, and a
6 reporting statute that's involved. We're not just
7 stopping someone to see if they're drunk or not. We are
8 trying to stop a woman from doing irreparable, major harm
9 to her child in utero.

10 QUESTION: I still don't see how that works out
11 when the woman has had a child. I can see if you were
12 making an argument about intervening at an early stage in
13 pregnancy to help the woman, but I don't understand that
14 argument at all when the child is already born.

15 MR. HOOD: Well --

16 QUESTION: You say there are no such children
17 except before the protocol was adopted?

18 MR. HOOD: Yes, Your Honor. The -- if you would
19 like, we can go through each one of these individuals, and
20 I'm prepared to do that if you want to, but what I wanted
21 to say about special needs and what the Fourth Circuit did
22 and what this Court's done with special needs is, what
23 we're dealing with here is a tragic crisis in society in
24 1989, a true medical epidemic. In the words of the
25 plaintiffs --

1 QUESTION: But in only one of the city's
2 hospitals, as I understand it.

3 (Laughter.)

4 QUESTION: But in only one of the city's
5 hospitals.

6 MR. HOOD: Your Honor, we only have one teaching
7 hospital in Charleston. It's the Medical University of
8 South Carolina. It's owned by the State.

9 QUESTION: How about other hospitals where
10 pregnant women came to give birth?

11 MR. HOOD: The Solicitor at the time approached
12 the other hospital, large hospital in our community, wrote
13 the hospital. This lawsuit came along and everything was
14 stopped at my request.

15 QUESTION: The Solicitor asked the other
16 hospital --

17 MR. HOOD: If they would consider adopting their
18 board of directors, of trustees would adopt the policy,
19 yes.

20 QUESTION: And they did not, they did not adopt
21 such a policy.

22 MR. HOOD: Correct.

23 QUESTION: Because of the pending lawsuit here.

24 MR. HOOD: Yes, Your Honor.

25 QUESTION: Well, we don't know why. I mean, you

1 can --

2 QUESTION: You said that was the reason.

3 MR. HOOD: I can't -- there's no testimony in
4 the record to answer your question, but --

5 QUESTION: Yes, so you're -- you're making --

6 MR. HOOD: -- if I could be allowed to testify,
7 I believe that's the reason.

8 QUESTION: There's also no testimony in the
9 record that any other hospital was approached.

10 MR. HOOD: Your Honor, there is a reference on
11 page 1128 where there's testimony, Justice Scalia, about
12 David Swacky, the Solicitor at the time, approaching Roper
13 Hospital.

14 QUESTION: And Roper Hospital refusing.

15 MR. HOOD: Not as to what they did, just that
16 they were considering it. Then the lawsuit came along.

17 QUESTION: Did Roper Hospital have any
18 comparable protocol of testing, not of informing the
19 Department or the police, but did they have any comparable
20 protocol for testing pregnant women prior to the time they
21 were approached by the Solicitor?

22 MR. HOOD: Justice Souter, Roper Hospital is a
23 charitable hospital owned by doctors, and there are no
24 other State-owned hospitals in Charleston where --

25 QUESTION: I don't care whether it's State-

1 owned or not. The point I'm trying to get at is the
2 medical appropriateness, or the lack of an indication of
3 medical appropriateness for what was being done here, and
4 my question is, if you know, or if it's in the record, is
5 there any indication that Roper Hospital was following
6 some kind of a protocol for treating for drug use among
7 pregnant patients before they were approached by the
8 Solicitor?

9 MR. HOOD: The answer is yes. Every hospital in
10 South Carolina follows the child abuse statute. The
11 doctors are absolutely required to.

12 QUESTION: Well, the child abuse statute, as I
13 understand it, requires reporting.

14 MR. HOOD: Correct.

15 QUESTION: But does the child abuse statute
16 impose a protocol of medical testing on doctors who treat
17 pregnant women?

18 MR. HOOD: No, it does not.

19 QUESTION: Okay. So what is the indication that
20 at Roper Hospital they were following a protocol of
21 testing urine for drug use when a pregnant woman came in?
22 What's the record tell us?

23 MR. HOOD: There's nothing in this record --

24 QUESTION: Okay.

25 MR. HOOD: -- but every hospital tested urine of

1 every pregnant woman because they need to know what's in
2 her body so they can treat her. They're going to give her
3 anesthesia.

4 QUESTION: All right.

5 QUESTION: For drugs? Do they test it for
6 drugs? I mean, you know, it isn't an omnibus test. You
7 have to decide what you're going to test for. Do they all
8 test for drugs?

9 MR. HOOD: If the doctors suspect the use of
10 drugs in any hospital, hopefully in this country, they
11 test for drugs --

12 QUESTION: Well, I'm --

13 MR. HOOD: -- so they can treat the patient
14 properly.

15 QUESTION: I expect that is so, but the protocol
16 here went far beyond a particularized suspicion as a
17 reason for doing -- running that urine test, and I take it
18 that the answer, and I don't want to spend a lot more time
19 on this, but I take the answer is, the record does not
20 tell us whether Roper Hospital was following any kind of a
21 comparable protocol of testing most urine samples of most
22 women coming in for prenatal care, is that correct?

23 MR. HOOD: Correct, Your Honor.

24 QUESTION: Okay. One last question. You
25 indicated that there were findings or determinations of

1 some sort with respect to the hospital in this case that
2 the criteria were medically appropriate. Where do we find
3 those determinations?

4 MR. HOOD: By the district judge himself.

5 QUESTION: What did -- did he make specific
6 findings of fact?

7 MR. HOOD: Yes, sir. Judge C. Winston, our
8 senior district judge in South Carolina, on page 1415 of
9 the joint appendix states, Medical University adopted
10 these medically valid criteria to avoid the very
11 subjective test about which the plaintiffs complain.

12 Judge Houck, at the conclusion of this 5-week
13 trial, made very -- and it's in those pages, the 1400
14 numbers -- about each and every issue that was raised in
15 this case. He took us one step further on consent than I
16 think this Court requires. He required us to convince the
17 jury that each person understood that their -- if they
18 tested positive, they would be arrested.

19 QUESTION: And that -- but that -- the -- far as
20 the consent is concerned, it was an argument which, as you
21 said, the Eleventh Circuit didn't address, that there was
22 insufficient evidence of that consent, and I looked at the
23 consent form. It doesn't say anything about police.

24 MR. HOOD: The consent form says, I consent to
25 having -- to the testing of drugs, and there are two

1 consent forms, one in the hospital, one in the clinic.
2 They both say the same thing. Every patient signed that.

3 Then, when they suspected under this nine
4 medical diagnoses, these differential diagnoses, that the
5 patient was using cocaine, then a counselor met with the
6 patient, showed her a video, explained to her the
7 consequences, the dire, staggering consequences to her
8 child and herself of using cocaine, basically pled with
9 her to stop doing it, got her to sign this Solicitor
10 letter, and sent her to substance abuse, and if she went,
11 great, and that's what happened to 90 percent of them.

12 QUESTION: What happened to the people who
13 didn't come in for prenatal care, who came in at the time
14 of labor, and -- well, you tell me -- and tested?

15 MR. HOOD: If they tested positive they were
16 given what I just said, and --

17 QUESTION: Well, tell me when they were given
18 that, because it seems it would be rather stressful
19 situation in which to try to get informed consent from
20 someone.

21 MR. HOOD: Well, you have to put it in the
22 context of what was going on. The reason they were told
23 is because it was mandatory. The hospital board of
24 directors adopted a protocol that was mandatory and
25 nondiscretionary, once you met that criteria, those

1 medical criteria.

2 QUESTION: Yes, well, you're stepping over to
3 another question. The one I asked concerned the argument
4 that the Eleventh Amendment didn't address the sufficiency
5 of the evidence of consent, and I was simply suggesting to
6 you that there might be a question of the sufficiency of
7 evidence of consent in the case of women who never came to
8 the hospital for prenatal care, who came in while they
9 were in labor, and what they consented to, what they
10 signed at that point, there might be reason to suspect the
11 legitimacy, the informed nature, the voluntary nature of
12 such consent. That's all I meant to indicate.

13 MR. HOOD: Yes, Your Honor.

14 QUESTION: Mr. Hood, I can't find your --

15 QUESTION: Well, I thought that we established
16 that we take this on the assumption there was no consent.
17 The court of appeals didn't address it, and for purposes
18 of deciding special needs we just assume no consent.
19 Isn't that correct? You already admitted that. Is that
20 right?

21 MR. HOOD: No, Your Honor, I don't concede there
22 was not consent. In fact, I argued --

23 QUESTION: No. No, you misunderstand me.

24 MR. HOOD: I'm sorry.

25 QUESTION: For purposes of deciding the issue on

1 which we granted certiorari, special needs exception --

2 MR. HOOD: Yes, Your Honor.

3 QUESTION: -- we assume for purposes of deciding
4 that there was no consent, because consent was not
5 reviewed by the court of appeals. The court of appeals
6 decision just said this was reasonable under the Fourth
7 Amendment. Is that right? I thought we aired this with
8 Justice Stevens at the outset, and yet we're getting
9 bogged down in consent, and I just want to know where we
10 are.

11 MR. HOOD: Justice O'Connor, in my humble
12 opinion we have to affirm the lower court special needs.
13 We have consent. We have dual purpose but we do not --
14 State actors --

15 QUESTION: I thought that for purposes of
16 deciding the question on which we granted certiorari we
17 simply assume there was no consent. It will go back to
18 the court of appeals, depending on how we resolve it, to
19 determine whether there was consent.

20 Suppose we say it was unreasonable. It would go
21 back, then, for review of consent. I assumed that that
22 was how we were deciding it. I thought that's what you
23 reviewed with Justice Stevens when you began your
24 argument. Am I wrong?

25 MR. HOOD: You're correct, Your Honor, in that

1 certiorari was granted on one issue, and that is correct.

2 QUESTION: Yes, okay, and on that issue what
3 support in our case law do you find that supports a
4 special needs exception where law enforcement is tangled
5 up with the search? Is there any case of ours where we
6 have so held?

7 MR. HOOD: Your Honor, each of the special needs
8 cases apply directly, starting with the opinion of the
9 Court in TLO and Your Honor's own concurring opinion
10 there, with Justice Powell.

11 QUESTION: Yes, well, we reserved the answer to
12 the question in TLO, whether it would be the same answer
13 if law enforcement were involved.

14 MR. HOOD: We then jump to the Griffin case from
15 Wisconsin, the Sitz case, and in those opinions law
16 enforcement was involved, and in our case the role of --

17 QUESTION: Not in the conduct of the search,
18 were they --

19 MR. HOOD: Nor was it in our --

20 QUESTION: -- or in the determination to have
21 it?

22 MR. HOOD: In our case law enforcement was not
23 involved at the time of the search. They had nothing to
24 do with the search.

25 QUESTION: Well, I thought the procedure was

1 developed with the assistance of the police, in part, to
2 ascertain whether there was drug use so that people could
3 be charged.

4 MR. HOOD: That's the other side's argument.
5 That was not the proven facts. The facts --

6 QUESTION: As I'm thinking about this at the
7 moment on this exact point, that if you have an
8 unconsented turning over of private medical information to
9 the police, there must be something special about the
10 circumstance.

11 Now, the AMA, and the most famous case in this
12 area, called Tarisoff, both try to define that
13 circumstance, and that circumstance, as the AMA, or as
14 Tarisoff defined it, involves when a patient threatens to
15 inflict serious bodily harm to herself or a third party
16 and there is a reasonable possibility that the patient
17 will carry out that threat, so I thought that you either
18 have to bring yourself within that exception, or you lose,
19 and what I'm worried about at the moment is how can you
20 bring yourself within that exception when you're faced
21 with all the material in the amicus briefs and all the
22 studies that suggest that this type of program does not
23 help third parties, namely the fetus.

24 Rather, there is a question as to how much
25 cocaine abuse hurts the fetus, particularly compared to

1 the situation where the mother does not request prenatal
2 care, and that this kind of program, because of the later
3 problem, the latter problem, probably hurts more fetuses
4 than it helps.

5 Now, faced with that kind of data, and I see no
6 data on the other side, I don't see how you can bring
7 yourself within the Tarisoff exception, and if you can't
8 do that, I don't see how you win the case. That's my
9 question.

10 MR. HOOD: Your Honor, we come within the
11 requirements that you have outlined.

12 QUESTION: Mm-hmm, all right. You come within
13 Tarisoff. Then you're arguing that you're within
14 Tarisoff. Fine. How do you get there, given this mass of
15 data that -- you know, that they refer to in the amicus
16 briefs, that -- and I've tried to look up a little
17 independently, where I've come to is the conclusion -- I'm
18 not a doctor or an epidemiologist, but it seems to me that
19 the studies on cocaine abuse are pretty inconclusive
20 and -- as to how they affect the fetus, and even if they
21 aren't, they're pretty one-sided, the studies, that this
22 kind of thing hurts the fetus because mothers don't come
23 in.

24 MR. HOOD: If Your Honor has a chance to look at
25 page 314 of the joint appendix, your question will be

1 answered by the plaintiff's lead expert, Dr. Ira Chasnoff,
2 wherein he said there was an urgent need for the medical
3 community to do something. This was a major crisis, an
4 epidemic in the United States, and we tried to down in
5 Charleston, and it worked, and 90 percent of the people
6 that had this awful addiction and were doing what they
7 were doing to their children were helped, and it worked.

8 We got the lawsuit, and we stopped, and here we
9 are.

10 QUESTION: Well, am I supposed --

11 QUESTION: -- the Tarisoff case, there had been
12 no crime committed. In this case there had been a crime
13 committed.

14 MR. HOOD: Correct, Your Honor.

15 QUESTION: Oh, so in other words you think that
16 the Fourth Amendment permits the police to go to a doctor
17 and to ask the doctor to turn unconsented -- unconsented
18 private medical information over to the police about a
19 past crime? In other words, the Fourth Amendment permits
20 doctors to become agents in private -- you know, private
21 patient relationships and suddenly turn over everything to
22 the police, even though no future risk is at stake?

23 MR. HOOD: That's the other difference of our
24 case. It's a child abuse case, where the doctor has to do
25 it. There is no privacy. The doctor is violating the law

1 if he doesn't turn it over.

2 QUESTION: Mr. Hood, don't you have a law --

3 QUESTION: And that's true with gunshot wounds,

4 and it's true with teachers who see children that have

5 been beaten by their parents.

6 MR. HOOD: Yes, Your Honor.

7 QUESTION: And don't you have a law that anyone

8 treated for a gunshot wound by a physician, the fact of

9 that treatment has to be --

10 MR. HOOD: Yes, Your Honor.

11 QUESTION: -- told to the police? Of course.

12 MR. HOOD: Just like if she, if a pregnant

13 woman --

14 QUESTION: It happens all the time that a doctor

15 has to turn somebody in.

16 You gave us a citation earlier for the statement

17 of the district judge to the effect that these protocols

18 were medically necessary. You said pages 14 to 15 of the

19 joint appendix. I can't find it.

20 MR. HOOD: The judge, findings of fact start on

21 page 1408, Justice Scalia.

22 QUESTION: 1408. You said page 14. 1408.

23 MR. HOOD: I apologize. I talk funny. 1408 --

24 (Laughter.)

25 MR. HOOD: The order ends at 1417, Your Honor.

1 QUESTION: It seems there were a lot of doctors,
2 then, violating South Carolina law if only in this one
3 hospital were doctors engaged in this practice, and that's
4 a little odd.

5 They wouldn't need this protocol, and they
6 wouldn't need these meetings with law enforcement people,
7 if the law in fact required when they test, and one of the
8 things they test for is drugs, that they turn over that
9 information, but as far as this record shows it's only
10 this one hospital, and only pursuant to the protocol, so
11 that doesn't fit in with your statement that -- in answer
12 to some questions that yes, the doctors have an obligation
13 to and they do.

14 Is there anything to show that apart from this
15 one hospital and pursuant to this one protocol, that
16 doctors who find pregnant women testing positive for drugs
17 are turning over that information to the police?

18 MR. HOOD: Justice Ginsburg, I believe, and I
19 can't cite a page, that several of the experts that we put
20 on the stand in the 5-week trial said just that. However,
21 you have to look at the patient base that this hospital,
22 the State hospital --

23 QUESTION: Say just that. Just -- I want to be
24 precise about, said just what? They said other hospitals,
25 other obstetrician-gynecologists are turning this

1 information over to the police because that's what a
2 doctor's obligation is?

3 MR. HOOD: Well, it never -- this issue never
4 came up at trial, but -- except to the extent that this
5 was a teaching hospital, and every young physician in the
6 OB department was taught about that.

7 QUESTION: I'm not asking about this hospital.
8 I'm asking about any other place. This place has a
9 protocol that the police have given to this hospital.

10 MR. HOOD: Not the police. I hate to interrupt
11 you, but the police did not do the protocol. The doctors
12 did it.

13 QUESTION: In which the police participated.
14 There were meetings --

15 MR. HOOD: All the police did was say, you've
16 got a duty and a responsibility here, and they --

17 QUESTION: Did they say it to any other
18 obstetrician-gynecologist, as far as the record shows it
19 seems to me you would have certainly put that into the
20 record if it existed, but what comes to us is one
21 hospital, and -- with the nurse who asked if we could
22 get -- can we get the police involved. There's not one
23 shred of any indication that other hospitals -- this is
24 the law. The law requires them to do it.

25 MR. HOOD: Justice Ginsburg, the question that

1 you're asking me was not raised at trial by anyone, nor
2 answered by anyone at trial, but the answer to your
3 question is, we have, like every State, a child abuse
4 statute, and if a doctor in any practice observes child
5 abuse, they have an affirmative duty to report it.

6 QUESTION: Mr. Hood, would you comment on this
7 point? With minor variations, I think we're pretty much
8 agreed that if in the normal course a doctor obtains the
9 evidence that a patient is about to commit some kind of
10 imminent violence or damage to another person, or if a
11 doctor obtains evidence such as gunshot evidence which
12 clearly points to a crime, that the doctor is permitted
13 and obligated to turn that evidence over to the police and
14 the police can use it. Start with that premise.

15 The argument that I want you to comment on is
16 this. That kind of a rule was derived in situations in
17 which the doctors are simply going about their business,
18 acting independently as physicians. In this case,
19 however, the doctors, as a result of their arrangements
20 with the police, had become in effect agents of the
21 police, and they were acting in a dual capacity.

22 They had their medical responsibilities, but
23 they were acting under an agreement with the police to
24 look for certain things and to turn over information if
25 they found it, and the argument is that in that case the

1 police should not be able to use the evidence unless the
2 evidence has been searched for and seized in accordance
3 with the same rules that the police would have to follow
4 if they were doing it in the first place because
5 otherwise, in effect, the co-option of the medical
6 community will eliminate the Fourth Amendment whenever the
7 police can use the doctors. What's your response to that?

8 MR. HOOD: The police were never the agent of
9 the hospital. The police were purely a means or method.

10 QUESTION: Well, let's assume that we found --
11 let's just assume that we found, as a kind of a
12 constitutional fact on this record, that an agency
13 relationship had been established. What is your response
14 to the argument?

15 MR. HOOD: We strenuously objected it was
16 established. If it were established to the satisfaction
17 of anyone, and I don't believe it was at trial or at the
18 Fourth Circuit, then the role of the police, they are not
19 determining who is tested. They are not determining who
20 gets the test results. They are not determining the
21 counseling of the patient. They're not determining
22 whether the patient makes the counseling sessions.
23 They're not determining whether the patient signs a
24 consent form, which every one of them did. They're not
25 determining whether the patient actually makes the

1 substance abuse clinic --

2 QUESTION: I think what you're arguing is that
3 there's no basis for finding that kind of agency here, but
4 if we make the assumption that there is a basis, what is
5 your response to the argument that in that case the
6 criteria for police receipt and use of evidence has got to
7 be the criteria that would apply even if the doctors
8 weren't involved because otherwise the Fourth Amendment
9 gets swallowed up in the agency relationship?

10 MR. HOOD: That the Fourth Amendment doesn't
11 apply, that the Court adopt the case of Atkinson from the
12 Ninth Circuit, wherein it said the dual purpose applies,
13 and if there are two purposes and one's medical and one's
14 not --

15 QUESTION: No, but this --

16 MR. HOOD: -- it's okay.

17 QUESTION: Okay, and so your answer -- I mean, I
18 guess I don't understand the argument. You're saying yes,
19 there's a way to say that the dual relationship doesn't
20 affect it, but is there a good reason for us not to fear
21 that this agency kind of relationship will swallow up the
22 Fourth Amendment standards that otherwise the police would
23 have to satisfy?

24 MR. HOOD: It didn't happen in this protocol, in
25 this policy. It never happened. All they did was to

1 help -- these people helped themselves. Every one of them
2 ended up getting off of cocaine, and it helped.

3 You know, one use of cocaine can kill the baby.

4 QUESTION: Mr. Hood, I guess the finding of fact
5 you're referring to is on page 1410, and I assume that
6 your colleague will address this in rebuttal.

7 The policy, the protocol was applied in all
8 maternity departments at MUSC. Its goal was not to arrest
9 patients, but to facilitate their treatment and protect
10 both the mother and unborn child. That's a finding of
11 fact.

12 MR. HOOD: Yes, Your Honor, that's correct,
13 Justice Scalia. That's what Judge Houck found.

14 Law enforcement was not the purpose of this
15 thing at all. It was purely the tragedy of a medical
16 crisis of these pathetic babies coming into the world and
17 trying to stop it, and trying to help them stop it. They
18 couldn't help themselves, some of them.

19 Thank you.

20 QUESTION: Thank you, Mr. Hood.

21 Ms. Smith, you have about 3 minutes remaining.

22 REBUTTAL ARGUMENT OF PRISCILLA J. SMITH

23 ON BEHALF OF THE PETITIONERS

24 MS. SMITH: Thank you, Your Honor. Three brief
25 points, Your Honor.

1 What distinguishes this policy from a medical
2 protocol is that it was designed by and for law
3 enforcement, and implemented by the hospital for the
4 purposes of crime detection.

5 To say that the medical criteria was medically
6 appropriate, as I said, is different from saying that it
7 establishes probable cause or individualized suspicion, or
8 allows the hospital officials therefore to search, as
9 agents of the police, under a police policy that
10 incorporates criminal sanctions for evidence of a crime,
11 and to turn that right over to the police.

12 And if it was probable cause, if they had
13 probable cause here, why not obtain a warrant? Why not
14 test your criteria with an objective magistrate to ensure
15 that you're not the discretion that's allowed in those
16 criteria is not being abused.

17 That's the purpose of the warrant requirement,
18 is to protect against that kind of abusive discretion, and
19 that's exactly the discretion we see that was used in this
20 policy, where women who met the criteria were not tested,
21 and women who didn't meet the criteria, perhaps, in some
22 cases were. We don't know. We do know that some who met
23 the criteria weren't tested.

24 In terms of the finding of fact, in the title VI
25 opinion the court, in addressing the policy as a whole,

1 talks about the goal of the policy, the ultimate goal of
2 the policy, but when he's looking, when the trial judge
3 looked at the purpose of the search, he recognized the
4 dual nature of that searched -- search, that there was a
5 medical purpose and a law enforcement purpose, and that's
6 what brought this search under the Fourth Amendment, and
7 that's what makes this policy so insidious.

8 What happened here is that
9 the doctors used the promise of confidentiality in the
10 private
11 physician-patient relationship to obtain information from
12 their patients in order to turn it over to the police.

13 That's all they did here, and when they did
14 that, when they took on the mantle of the police, they had
15 to obtain a warrant based on probable cause, and they had
16 to do that for all the reasons this Court enunciated in
17 the special needs doctrine, when it limits that doctrine
18 so that discretion will not invade police actions, so that
19 Delaware v. Prouse is not okay, Sitz is, because of that
20 discretion.

21 And that's why, even if this Court were to apply
22 the balancing test here, we've got a case that's got
23 discretionary criteria, we have a significant intrusion on
24 the body, not a minimal intrusion like we had in Sitz, and
25 we have no diminished expectation of privacy. In fact, we

1 have a heightened expectation of privacy in our
2 doctor-patient relationship, and as the amici point out
3 much better than I could, that's what's at stake in this
4 case.

5 So we ask this Court --

6 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Smith.

7 MS. SMITH: Thank you, Your Honor.

8 CHIEF JUSTICE REHNQUIST: The case is submitted.

9 (Whereupon, at 11:03 a.m., the case in the
10 above-entitled matter was submitted.)

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