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Opinion No. 12-45

Limitations on Drug Testing as a Condition of Receiving Public Assistance

QUESTIONS

1. What, if any, federal or Tennessee constitutional limitations would apply to Senate Bill 2580/House Bill 2725, 107th General Assembly, 2nd Sess. (2012), as amended, ("SB2580"), which would require the Tennessee Department of Human Services ("TDHS") to implement a program of substance abuse testing for certain applicants or recipients of the federal Tennessee Assistance for Needy Families ("TANF") program?

2. Would SB2580, as amended, require a program of substance abuse testing for both applicants and recipients of TANF meeting certain defined conditions, or would its substance abuse testing be program limited only to TANF applicants meeting such conditions?

OPINIONS

1. As this Office has previously opined in Op. Tenn. Att'y Gen. 07-84 (June 1, 2007) and Op. Tenn. Att'y Gen. 12-41 (March 20, 2012), drug testing of TANF applicants and recipients without some quantum of individualized suspicion constitutes an unconstitutional search and seizure under the Fourth Amendment of the United States Constitution. To the extent that SB2580, as amended, would require drug testing in circumstances that lack an individualized suspicion that the applicant or recipient is using illegal drugs, such testing would likely be found unconstitutional.

2. Amendments 2 and 3 to SB2580 apply to both applicants and recipients of TANF benefits who have certain defined characteristics.

ANALYSIS

1. This opinion request seeks further guidance on any constitutional limitations on proposed SB2580. The focus of the request centers upon Amendments 2 and 3 to SB2580. As originally filed, SB2580 required, to the extent not prohibited by federal law, drug testing of all applicants for TANF and disallowed eligibility for one year after any positive drug test. SB2580 in this regard provided in pertinent part:

> (a) To the extent not prohibited by federal law, the department of human services shall implement a program of substance abuse testing for each adult

> applicant who is otherwise eligible for temporary assistance for needy families referred to in this part as (TANF), [sic], or a successor program. The department shall require a [sic] the results of a recent urine drug test be submitted by each individual who applies for TANF. The cost of drug testing is the responsibility of the individual tested.
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> ….
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> (f) An individual who tests positive for controlled substances as a result of a drug test required under this section is ineligible to receive TANF for one (1) year from the date of the positive drug test unless the individual meets the requirements of subsection (j).

SB2580, §3.

Amendments 2 and 3 to SB2580 both expand and restrict the categories of persons subject to drug testing under SB2580. The amendments expand SB2580 by requiring drug testing of both applicants and recipients; they restrict SB2580 by requiring drug testing only of applicants and recipients who meet certain defined criteria. Both amendments also retain SB2580's caveat that no drug testing of any individual is allowed to the extent such testing is prohibited by federal law.

Amendment 2 deletes the first sentence of Section 3(a) and substitutes the following:

> To the extent not prohibited by federal law, the department of human services shall implement a program of substance abuse testing for each adult applicant or recipient who has been arrested for or convicted of a violation of the Tennessee Drug Control Act, compiled at title 39, chapter 17, part 4, within the previous five (5) years and who is otherwise eligible for temporary assistance for needy families referred to in this part as (TANF), or a successor program.

SB2580, Amend. 2. Amendment 3 adds the following new subsection (a)(2) to Section 3:

> (2) In addition to testing required by subdivision (a)(1), to the extent not prohibited by federal law, if the department has reason to believe that an individual who applies for or who receives Temporary Assistance for Needy Families (TANF) has used illegal drugs, then the department shall institute and require a suspicion-based urine drug test program consistent with this part to screen each such individual.

SB2580, Amend. 3.[1]

[1] Amendment 1 to SB2580 defines the drugs sought to be identified by testing, assures that children of parents deemed ineligible by testing continue to receive benefits, and exempts from testing individuals who successfully passed a drug test under the Drug Free Workplace Act within 45 days of applying for benefits. SB2580, Amend. 1.

SB2580 seeks to utilize drug testing to ensure that those receiving TANF public benefits are not using illegal drugs. As one court addressing a similar statute has observed, such legislation attempts to reach the laudable goal of removing substance abuse as a barrier to employment, given the federal mandate of TANF to move welfare recipients to work. *Marchwinski v. Howard,* 113 F.Supp.2d 1134, 1140 (E.D. Mich. 2000), *aff'd en banc,* 60 Fed. Appx. 601 (6th Cir. 2003). Other jurisdictions have struggled with how best to address this issue, as evidenced by a recent publication of the United States Department of Health and Human Services ("HHS") that catalogues and reviews the numerous proposals designed to drug test public welfare recipients. ASPE Issue Brief, *Drug Testing Welfare Recipients: Recent Proposals and Continuing Controversies,* Office of the Assistant Secretary for Planning and Evaluation, Office of Human Services Policy-United States Department of Health and Human Services (October 2011).[2]

As stated in this Office's prior opinions, the Sixth Circuit Court of Appeals has held that the drug testing of TANF applicants and recipients without some quantum of individualized suspicion constitutes an unconstitutional search and seizure under the Fourth Amendment of the United States Constitution. *Marchwinski v. Howard,* 60 Fed. Appx. 601 (6th Cir. 2003), *aff'g en banc,* 113 F.Supp.2d 1134 (E.D. Mich. 2000) (affirmed on rehearing by an evenly divided *en banc* panel). Tennessee is part of the Sixth Circuit; thus the Sixth Circuit's decision on this interpretation of federal law is binding on Tennessee federal courts. *Denning v. Metropolitan Government of Nashville,* 564 F.Supp.2d 805, 813 (M.D. Tenn. 2008), *aff'd,* 330 Fed. Appx. 500 (6th Cir. 2009).

The *Marchwinski* decision arose from a pilot program operated by Michigan's Family Independence Program ("FIP"). *Marchwinkski,* 113 F.Supp.2d at 1135-36. The pilot program required substance abuse testing and treatment for FIP applicants in certain regions of the State of Michigan. *Id.* at 1136. At the time of the *Marchwinski* decision, Michigan was the only state to implement drug testing for TANF recipients and to sanction those recipients who test positive, as permitted by 21 U.S.C. 862b. *Id.* Persons testing positive were required to have a substance abuse assessment and, if the assessment resulted in a referral for treatment, to comply with the treatment plan. *Id.* Failure or refusal to submit a specimen for testing, complete an assessment, or comply with a treatment plan resulted, with certain exceptions, in the denial, reduction, or termination of benefits. *Id.* at 1136-37.

Michigan argued that substance abuse was a major barrier to employment properly addressed through its abuse testing requirement. *Id.* at 1140. The *Marchwinkski* court determined that Michigan's rationale was not sufficient to warrant departure from the rule that where public safety is not genuinely in jeopardy, the Fourth Amendment precludes suspicionless searches. *Id.* (*citing Chandler v. Miller,* 520 U.S. 305 (1997)) (rejecting Georgia's requirement that all candidates for state office to pass a drug test)).

Michigan further argued that a correlation between drug abuse and child neglect justified the State's drug testing in order to guarantee the safety of minor FIP recipients. *Marchwinski,*

[2] This report is available at http://aspe.hs.gov/hsp/11/DrugTesting/ib.pdf.

113 F.Supp.2d at 1142. However, the *Marchwinski* court rejected this argument, finding that TANF was primarily created to end government dependence, was not created to address child abuse or neglect, and invoked no public safety concern sufficient to justify Michigan's suspicionless drug testing. 113 F.Supp.2d at 1141.

Therefore, the *Marchwinski* court determined the Michigan drug testing program departed from the requirement that some quantum of individualized suspicion be established for constitutional search and seizure under the Fourth Amendment of the United States Constitution. *Id.* at 1139. The fact that Michigan's program was a pilot program was not relevant to the *Marchwinski* decision. The court concluded that, where public safety is not genuinely in jeopardy, the Fourth Amendment prohibits government sponsored suspicionless searches. The court feared that to hold otherwise would allow the state or federal government to conduct suspicionless warrentless searches of persons receiving any government benefit in order to deprive any person using illegal drugs of the benefit. As the *Marchwinski* opinion observed:

> If the State is allowed to drug test FIP recipients in order to ameliorate child abuse and neglect by virtue of its financial assistance on behalf of minor children, that excuse could be used for testing the parents of all children who receive Medicaid, State Emergency Relief, educational grants or loans, public education or any other benefit from the State. In all cases in which the State offers a benefit on behalf of minor children, the State could claim that it has a broad interest in the care of those children which overcomes the privacy rights of the parents. Indeed, the query posed by Justice Marshall in his dissent in *Wyman v. James,* 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971), is a pertinent inquiry to make here:
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> > Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children? Such a categorical approach to an entire class of citizens would be dangerously at odds with the tenets of our democracy.
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> > *Id.* at 342, 91 S.Ct. 381.
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> Upholding this FIP suspicionless drug testing would set a dangerous precedent.

Marchwinski, 113 F.Supp.2d at 1142. In so holding, *Marchwinski* did not condone the illegal use of drugs; instead *Marchwinski* determined that all citizens are protected against random suspicionless drug testing by the government under the Fourth Amendment.

Applying the principles enunciated in *Marchwinski* to Amendment 2 of SB2580, a court would likely require that TDHS establish some quantum of suspicion before TDHS can drug test

an adult TANF applicant or recipient, including those who has been arrested or convicted of a violation of the Tennessee Drug Control Act within the previous five years.[3] Under both federal and Tennessee law, a "reasonable suspicion" standard would exist when the events would cause an objectively reasonable officer (or in this case a TDHS administrative official) to suspect criminal activity by the individual. *Terry v. Ohio,* 392 U.S. 1, 21 (1968); *State v. Levitt,* 73 S.W.3d 159, 172 (Tenn. Crim. App. 2001). Reasonable suspicion is necessarily "an objective standard, and must be determined from the totality of the circumstances."[4] *State v. Levitt,* 73 S.W.3d at 172 (citing *United States v. Cortez,* 449 U.S. 411, 417-18 (1981)). If a search is contested, the State will have the burden of proof establishing reasonable suspicion by a preponderance of the evidence. *State v. Day,* 263 S.W.3d 891, 905 (Tenn. 2008). Based on these criteria, it is likely that a drug conviction several years past, an arrest that never led to conviction, or other circumstances that might require drug testing under Amendment 2 in the absence of a reasonable suspicion of current illegal activity would be found insufficient to withstand constitutional scrutiny.

Amendment 3, in contrast, appears to track the *Marchwinski* standard and is similar to a recent statute enacted in the State of Missouri. Missouri's statute on drug testing of TANF applicants, codified at Mo. Rev. Stat. § 208.027, was enacted on July 12, 2011, to be effective ninety days after adjournment of the Missouri Legislature. Mo. House Bill No. 73, 96th Gen. Assembly, 2nd Sess. (2011). This statute provides in pertinent part:

> The department of social services shall develop a program to *screen each applicant or recipient* who is otherwise eligible for temporary assistance for needy families benefits under this chapter, *and then test* using a urine dipstick five panel test, *each one who the department has reasonable cause to believe, based on the screening, engages in illegal use of controlled substances.*

Mo. Rev. Stat. §208.027, § 1 (emphasis added).

Thus, unlike the original version of SB2580 considered in Opinion 12-41, the Missouri statute only requires drug testing "when the department has reasonable cause to believe, based on the screening, that an applicant engages in the illegal use of controlled substances." *Id.* Upon passage, one commentator noted that "[f]oes of the bill argued that the bill was possibly unconstitutional - though its use of a „reasonable suspicion' standard may make that argument more difficult - that the program will be costly, and that it's an attack on society's most vulnerable." Philip Smith, *Missouri Welfare Drug Test Bill Heads for Governor's Desk,* Drug War Chronicle, Issue #683 (May 10, 2011). This Office is not aware of any legal challenge to the Missouri statute. As noted in Opinion 12-41, a Florida statute requiring suspicionless drug

[3] Under federal law any person convicted of a felony drug offense is not eligible for TANF, unless the administering state acts to allow eligibility. 21 U.S.C. § 862a. Tennessee has allowed eligibility to such persons under limited circumstances. *See* Tenn. Code Ann. §71-3-154(k)(2).

[4] In this regard, the Tennessee Supreme Court has found that the warrantless search of a parolee's residence, made pursuant to the individual's status as a parolee and as a written condition of parole of which the searching officer and parolee were aware, was reasonable even if not supported by reasonable suspicion. *State v. Turner,* 297 S.W.3d 155, 169 (Tenn. 2009).

testing of all TANF applicants has recently been determined unconstitutional. *LeBron v. Wilkins,* Case No. 6:11-cv-01473-Orl-35DAB, 2011 WL 5040993 at *7-17 (M.D. Fla. Oct. 24, 2011).

Nonetheless, though Amendment 3 on its face appears likely to meet the *Marchwinski* standard, there exist practical considerations that may make implementation of Amendment 3 more difficult. The primary challenge will be for TDHS to accurately determine when objective circumstances create a reasonable suspicion of illegal drug use permitting a warrantless drug test. Making the wrong decision could subject TDHS and the State to liability in civil litigation. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Investigation,* 403 U.S. 388, 395-97 (1971); *United States v. Vite-Espinoza,* 342 F.3d 462, 471 (6th Cir. 2003).

Finally, the State cannot generally require a person to consent to a drug test as a condition for obtaining benefits under TANF. While no person is required to apply for TANF benefits, a state's "exaction of consent to an otherwise unconstitutional search in exchange for TANF benefits would violate the doctrine of unconstitutional conditions." *Lebron,* 2011 WL 5040993 at *9 (citing *Perry v. Sindermann,* 408 U.S. 593, 597 (1972)).

2. In response to the second question posed, Amendments 2 and 3 clearly state TDHS must drug test both TANF applicants and recipients who meet defined criteria. *See Graham v. Caples,* 325 S.W.3d 88, 92 (Tenn. 2010) (stating the rule of statutory construction that, if the language of a statute is not ambiguous, courts should simply apply its plain meaning). Moreover, because these Amendments specifically refer to the persons to be tested and were subsequently added to SB2580, they would control over any conflicting provisions that remained in the original bill. *See Washington v. Robertson County,* 29 S.W.3d 466, 475 (Tenn. 2000) (holding that a specific statutory provision will control over a general statutory provision); *Bible & Godwin Const. Co., Inc. v. Faener Corp.,* 504 S.W.2d 370, 372 (Tenn. 1974) (stating that, where there exists an irreconcilable conflict between two sections of a statute, the last one mentioned will control). Given the apparent inconsistency between Amendments 2 and 3 and certain remaining sections of the original bill (*e.g.* SB2580 § 3(a) second sentence, (d), (e), (g), (h)(1), (h)(4); § 6; and § 9) the General Assembly may want to reconcile such inconsistencies should SB2580 move forward.

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