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October 15, 1987

The Honorable Joyce C. Hearn  
Member, House of Representatives  
1300 Berkley Road  
Columbia, South Carolina 29205

Dear Representative Hearn:

Your letter dated September 30, 1987, to Attorney General Medlock has been referred to me for response. In your letter, you requested an opinion "as to the constitutionality of AIDS testing for county employees and county prisoners, especially those involved in prostitution."

According to the United States Public Health Service, Acquired Immune Deficiency Syndrome [AIDS] is the nation's number one health priority.<sup>1</sup> Note, The Constitutional Rights of AIDS Carriers, 99 Harv. L. Rev. 1274 (1986).

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<sup>1</sup> In a speech to the American Foundation for AIDS Research Award Dinner on May 31, 1987, President Reagan called for mandatory AIDS testing for immigrants and all federal prisoners. In addition, President Reagan urged states to offer routine testing for those who seek marriage licenses, for those who visit sexually transmitted disease or drug abuse clinics, and for state and local prisoners. Address by President Reagan, American Foundation for AIDS Research Award Dinner (May 31, 1987). A bill was introduced in the South Carolina House of Representatives during the 1986-87 legislative session to amend S.C. Code Ann. §44-29-145 (1976) so as to make it unlawful for anyone knowingly infected with AIDS to knowingly expose another person to AIDS through exchange of blood products or body fluids. H. 2807, 106th Gen. Ass., 2d Reg. Sess., S.C. (1987).

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Since its identification in approximately 1981, AIDS has thrust a myriad of complex questions and issues upon the scientific, medical, and legal communities. See, e.g., Aiken, AIDS-Pushing The Limits of Scientific and Legal Thought, 1986 Jurimetrics J. 3. Generally, an analysis of the legal issues related to AIDS is predicated upon an understanding of medical facts about AIDS. Id. See also Leonard, AIDS and Employment Law Revisited, 14 Hofstra L. Rev. 11 (1985). Consequently, the continued evolution of medical facts about AIDS may impact upon the legal analysis of related issues.

One legal periodical provides:

AIDS is defined by the Centers for Disease Control (CDC) as an acquired immune deficiency syndrome in association with evidence of exposure to the Human T-cell lymphotropic retrovirus type III (HTLV-III) in a person who is not otherwise at risk for developing an immune deficiency syndrome. This definition excludes any immune deficiencies accompanying malignancies or immune deficiencies which are induced by immunosuppressive medications (such as those given to organ transplant recipients).

Certain disease symptoms must be documented in order to support a diagnosis of AIDS. These symptoms include: opportunistic infection (infection with an organism that does not usually cause disease); Kaposi's sarcoma (a malignant skin lesion that is normally not found in young individuals); non-Hodgkin's lymphoma of high grade pathogenicity, or, in children under age thirteen, a lymphocytic (white blood cell) infiltrative process in the lung.

The CDC case definition was established primarily for an epidemiologic survey. However, physicians recognize many patients as being HTLV-III infected who do not fit the CDC criteria for AIDS, and who, therefore, are not included in published statistical and demographic CDC reports. As a result, the original case definition of AIDS is modified as the disease is better understood and as new clinical patterns evolve.

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For the nonepidemiologist, it is helpful to think of AIDS as a spectrum of HTLV-III disease ranging from HTLV-III infection in a healthy person, to recurrent nonopportunistic infections, to full blown AIDS as it is currently defined. Any disease associated with HTLV-III infection that does not fall far enough into the spectrum to be classified as AIDS is called AIDS-related complex (ARC). [Footnotes omitted.]

Sicklick & Rubinstein, A Medical Review of AIDS, 14 Hofstra L. Rev. 5, 5-6 (1985).<sup>2</sup> See also Dist. 27 Community School Bd. v. Bd. of Educ. of the City of New York, 130 Misc. 2d 398, 502 N.Y.S.2d 325 (1986) (containing a general discussion of AIDS). According to another legal periodical:

The virus, which is bloodborne (specifically in white blood cells known as T-4 helper lymphocytes), is transmitted through the exchange of blood or semen during sexual intercourse, or by the use of tainted blood or blood products, including blood transfusions, shared intravenous needles, blood clotting medications, and prenatal or natal exposure. No other mode of transmittal from person to person has been documented, although HIV has been found in saliva, urine, and tears of some infected persons. HIV is not spread through casual physical contact, and does not live outside the body long enough in sufficient quantity to be spread by food, drinking fountains, utensils, or toilet facilities. [Footnotes omitted.]

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<sup>2</sup> The Centers for Disease Control recently altered its definition of AIDS which "adds a number of cases that previously were diagnosed only 'presumptively,' without laboratory confirmation." This new definition relaxed "the requirements doctors must satisfy before reporting a suspected case of acquired immune deficiency syndrome as a genuine case of AIDS." The Atlanta Constitution, September 1, 1987, §1, at 25-A; The State (South Carolina), September 1, 1987, §1, at 2-A.

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Leonard, AIDS and Employment Law Revisited, 14 Hofstra L. Rev. 11, 17 (1985).<sup>3</sup>

Because your letter does not indicate whether the AIDS testing would be mandatory or voluntary or the specific purpose of the AIDS testing or how the results of the AIDS testing will be used, a definitive response to the question you have raised is not possible. Moreover, while this Office may comment upon the constitutionality of legislation, it is solely within the province of the courts to declare legislation unconstitutional. S.C. Att'y Gen. Ops., Jan. 7, 1986; February 7, 1985. Nevertheless, mandatory blood testing for AIDS, in general, raises several legal issues, including potential constitutional challenges.

As one legal periodical has stated:

Public apprehension that AIDS will continue to spread throughout the population is legitimate. Concern that efforts to control its transmission may infringe the civil rights of AIDS carriers and members of high-risk groups is, however, equally well-justified. AIDS regulation affects the rights of these individuals to liberty, privacy, property, free association, and free expression. When constitutionally challenged, such regulation should be subject to a series of inquiries. First, the purpose of the regulation should be evaluated under the proper standard of scrutiny to see if the state interest at stake is compelling, important, or legitimate. If the regulation meets the purpose test, then the relationship between the state's objective and the means employed to achieve it should be considered.

Note, The Constitutional Rights of Aids Carriers, 99 Harv. L. Rev. 1274, 1279-80 (1986).

Mandatory blood testing for AIDS may prompt a constitutional challenge, pursuant to the Fourth Amendment of the United States Constitution, based upon infringement of the individual's

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<sup>3</sup> Since the publication of this article, federal health officials revealed three cases in which health care workers became infected with the AIDS virus after their skin was briefly exposed to blood from infected patients -- the first documented spread of the AIDS virus to health workers that did not involve direct injection of infected blood into the body or prolonged exposure to body fluids. N.Y. Times, May 20, 1987, at A1, col. 3.

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protected privacy "interest in avoiding disclosure of personal matters." See Whalen v. Roe, 429 U.S. 589, 599 (1977). Accord Note, The Constitutional Rights of AIDS Carriers, 99 Harv. L. Rev. 1274, 1287-1289 (1986). Although the actual blood test may involve a minor personal intrusion, the results of the blood test for AIDS could have a "devastating impact on an individual's life." Id. According to one Florida court: "AIDS is the modern day equivalent of leprosy, AIDS, or a suspicion of AIDS, can lead to discrimination in employment, education, housing and even medical treatment. If the [blood] donor's names were disclosed... they would be subject to this discrimination and embarrassment...." South Fla. Blood Serv. Inc. v. Rasmussen, 467 So. 2d 798, 802 (Fla. Dist. Ct. App. 1985). Currently available blood tests have also been criticized for their lack of precision in diagnosing the disease. See, e.g., Note, The Constitutional Rights of Aids Carriers, 99 Harv. L. Rev. 1274, 1287 (1986); Sicklick & Rubinstein, A Medical Review of Aids, 14 Hofstra L. Rev. 5, 9-10 (1985). A judicial analysis of such a constitutional challenge would necessarily depend on the particular facts and circumstances surrounding the mandatory blood<sup>4</sup> testing, including how the results of the blood tests are used.

In addition to such constitutional challenges, persons with AIDS may argue, depending on how the blood test results are used, that they are covered under §504 of the 1973 Vocational Rehabilitation Act, which provides:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

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<sup>4</sup> In Barlow v. Superior Court, County of San Diego, 190 Cal. App. 3d 1652, 236 Cal. Rptr. 134 (1987), the court considered a writ of mandate proceedings concerning the testing for AIDS in the blood of a defendant charged with biting police officers and resisting arrest. Relying mainly upon its analysis of the defendant's challenge pursuant to the Fourth Amendment, the court concluded that a warrant authorizing the drawing of the blood was issued without probable cause that the tests would disclose evidence a crime was committed and directed the lower court to issue an order denying the testing of the defendant's blood for AIDS antibodies.

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29 U.S.C. §794 (1987 Supp.). The United States Supreme Court has not yet decided whether AIDS as a contagious disease constitutes a handicap within the provisions of the Vocational Rehabilitation Act of 1973. But cf. School Board of Nassau County, Florida v. Arline, \_\_\_ U.S. \_\_\_, 107 S. Ct. 1123 (1987) (A person afflicted with the contagious disease of tuberculosis may be a "handicapped individual" within the meaning of §504.) with Memorandum of the U.S. Dep't of Justice (Jun. 20, 1986) (The disabling effects of AIDS qualify as a handicap under §504 of the Vocational Rehabilitation Act of 1973, but the ability - real or perceived - to transmit the illness is not protected as a handicap under the law.). Assuming arguendo that AIDS victims are covered under the Vocational Rehabilitation Act of 1973, the success of a claim pursuant to that Act would depend upon the particular facts and circumstances involved. Various remedies as well as attorney's fees are available to persons aggrieved under the Vocational Rehabilitation Act of 1973. 29 U.S.C. §794 (a) (1982).

Similarly, the South Carolina General Assembly has enacted statutes to govern the rights of physically disabled persons. S.C. Code Ann. §43-33-10 through §43-33-580 (1976). Contained in the Bill of Rights for Handicapped Persons, §43-33-520 provides:

The opportunity to obtain employment, housing, full and equal use of public accommodations, public services, and to make use of educational facilities without discrimination because of a handicap is guaranteed by this article and is a civil right.

Injunctive relief or civil damages is available for handicapped persons who are discriminated against. S.C. Code Ann. §43-33-540 (1976). Apparently, no South Carolina courts have addressed whether AIDS is a handicap within the meaning of this statute. Thus, the success of a challenge by an AIDS victim pursuant to the South Carolina statute is unclear. Of course, the particular facts and circumstances involved, including how the blood test results were used,<sup>5</sup> would be critical to a judicial analysis of such a challenge.

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<sup>5</sup> Two states -- Florida and Massachusetts -- have determined that AIDS constitutes a protected handicap under their state statutes prohibiting discrimination against handicapped individuals. See Shuttleworth v. Broward Co., USDC S. Fla. (1985); Cronan v. New England Telephone Co., Mass. Super. Ct. (Aug. 15, 1986).

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Due to the recency of the identification of AIDS, a dearth of judicial decisions is available to offer guidance concerning the myriad legal issues generated by this disease. Thus, deliberate analysis of current medical facts about the disease and analogous legal reasoning is essential for considering a response to the questions and issues raised. Whether or not the AIDS testing is mandatory or voluntary and the intended purpose and use connected with mandatory blood testing for AIDS, e.g., whether to assist in diagnosis or treatment, to protect the public health, or to deny medical services,<sup>6</sup> would be considered by a court in its analysis of a legal challenge to AIDS testing. Thus, the particular facts and circumstances involved are necessary for a definitive legal analysis of AIDS testing.

In addition to the complex and indeterminate legal issues, your inquiry also raises various policy considerations. As part of its responsibility for guiding the development of state agency policies in health-related matters, the South Carolina Department of Health and Environmental Control ["SCDHEC"] arranged a meeting for all Department/Agency heads on September 22, 1987, to discuss coordinated AIDS policies within South Carolina state government. The State (South Carolina), September 10, 1987, §3, at 1-C. Also, the South Carolina General Assembly has established an Ad Hoc Legislative Panel on AIDS, chaired by Senator Nell Smith, to study the legislative, legal, and health-related issues raised by the disease. Although this Panel has not yet completed its study, I understand this Panel is a potential resource to assist in analyzing various AIDS issues. I also understand that the Governor's Office has a staff member in the Office of Executive Policy and Programs who is responsible for considering various AIDS issues. These various entities are potential resources available to assist in addressing the policy considerations and other issues raised by AIDS. Obviously, the best approach to the plethora of issues raised by AIDS is an informed, uniform, and consistent approach.

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<sup>6</sup> On June 18, 1987, at a House Select Committee on Children, Youth and Families hearing on teenagers and AIDS, United States Surgeon General C. Everett Koop said that AIDS testing for surgery patients soon may be routine because doctors and nurses in the operating room are exposed to pin pricks, knife cuts, and other incidents that could endanger them. The State (South Carolina), June 19, 1987, §1, at 2-A. On Tuesday, June 23, 1987, the American Medical Association called for mandatory AIDS-virus tests of immigrants and prison inmates, but not for everyone seeking a marriage license or entering a hospital, and for routine AIDS-virus testing of patients at sexually transmitted-disease clinics and drug-abuse clinics, unless subjects raise specific objections. The State (South Carolina), June 24, 1987, §1, at 8-A.

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In summary, concerning the issue posed, ultimate state policy will be inextricably bound to the law on the subject, and the law has not yet developed sufficiently to permit this office to render a definitive legal opinion as is requested. We recommend that you consult your attorneys and that you communicate with DHEC and/or other agencies specified on page seven of this opinion for needed assistance and coordination. Ultimately, it will be necessary that our courts decide the complex issues that you and other agencies are raising by way of opinion requests.

If I can be of further assistance, please do not hesitate to contact me.

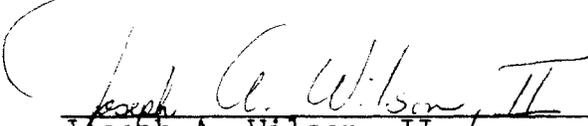
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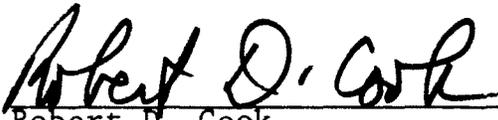
*Samuel L. Wilkins*

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