eliminated. Nevertheless, in answer to your second question, a township may not restrict the duties of the elected constable which have been established by law.

FRANK J. KELLEY,
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CONSTITUTIONAL LAW: Search and seizure.

CORRECTIONAL INSTITUTIONS: Search of resident's room in correctional center.

Prison authorities may search and seize the person, papers, or effects of a prison inmate without warrant since, in view of the need to maintain security and discipline, such conduct is not unreasonable. Despite the fact that a resident at a corrections center enjoys greater liberty than a prisoner incarcerated in a cell-block, he remains in the custody of the Department of Corrections subject to its supervision, surveillance and control. Therefore, correctional agents may subject him, his living quarters, and his personal effects to inspection and search.

Opinion No. 4892 October 28, 1975.

Mr. Perry M. Johnson, Director
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You have asked my opinion on the following questions:

1. When the Corrections Commission designates the location of a corrections center as a correctional facility does such a designation by the Corrections Commission make a resident's room in a corrections center equivalent to a prison cell?

2. Can it be searched for:

A. Contraband to be used in evidence of violation of center rules in an administrative hearing?

B. Evidence of criminal activity to be used in court?

3. Obviously, center workers must routinely inspect the rooms of residents. Does the observation of suspected evidence under such circumstances provide ground for a search warrant if reported to police?

4. What is the situation if the agent were to effect the arrest of the center resident in his room? Is he then entitled to search that room for any evidence necessary to sustain center violation or an action in a criminal court?

You state that utilization of hotels and other places of public accommodation as corrections centers creates many situations in which the resident is accused of wrongdoing and, with respect to which, a search of his room could either clear or implicate him.

Corrections center residents, while not subject to strict prison security, who may move about in free society during the day, are still within the custody of the Department of Corrections and subject to rules and regulations promulgated by the Department.

A consideration of court decisions regarding the constitutional rights of prison inmates vis-a-vis searches and seizures in their cells is therefore of assistance in resolving your questions.

Inmates of prison systems do not have the usual array of federal and state constitutional rights guaranteed to non-incarcerated citizens. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a reaction justified by the considerations underlying the penal system. *Price* v *Johnston,* 334 US 266, 285; 68 S Ct 1049, 1060; 92 L Ed 1356 (1948).

The prison authorities have the right to adopt reasonable restrictions governing the conduct of inmates and the courts will not interfere with prison operations in the absence of constitutional deprivation, *Vida* v *Cage,* 385 F2d 408 (CA 6, 1967); *Johnson* v *Avery,* 382 F2d 353 (CA 6, 1967).

In *McCloskley* v *State,* 337 F2d 72, 74 (CA 4, 1964), the court said:

> "Imprisoned felons and inmates . . . cannot enjoy many of the liberties, the rights and privileges of free men. They cannot go abroad or mount the housetops to speak. They are subject to rigid physical limitations and to disciplinary controls which would find no shred of justification in any other context. Even the disciplinary powers of military authorities are not so absolute.
>
> "Because prison officials must be responsible for the security of the prison and the safety of its population they must have a wide discretion in promulgating rules to govern the prison population and in imposing disciplinary sanctions for their violation. If a tractable inmate is subjected to cruel and unusual punishment or if his exercise of a constitutional right is denied without semblance of justification arising out of the necessity to preserve order and discipline within the prison, he may have a right to judicial review. In the great mass of instances, however, the necessity for effective disciplinary controls is so impelling that judicial review of them is highly impractical and wholly unwarranted. The remedy of the inmate is through administrative review, which ought to be available always."

The Michigan Supreme Court has also held that a prison inmate does not enjoy the full benefit of federal and state procedural safeguards, with the caution, however, that one should not be denied *in toto* his constitutional rights merely because of the need to regulate prison conduct. *Wojnicz* v *Corrections Department,* 32 Mich App 121, 188 NW2d 251 (1971); *Green* v *Department of Corrections,* 386 Mich 459, 192 NW2d 491 (1971).

While it is true that the Fourth Amendment of the United States Constitution provides protection against unreasonable searches, this does not mean that the custodian of a jail cannot search prisoners and their cells without a search warrant.

It is clear that prison security necessitates extreme restrictions on access to and possession of personal property by inmates. The search of an inmate of a penal institution, if not expressly permitted by statute, is authorized by implication as reasonably necessary in the fulfillment of the custodian's duty to maintain prison security, to preserve order and discipline, to insure the safety of the prison population, and to see that the inmates conduct themselves in an orderly manner. See 60 Am Jur 2d, Prisoners, Sections 841-42. Thus an inmate of a penal institution cannot claim constitutional immunity from search and seizure of his person or search of his cell by prison authorities.

A convict loses a great measure of his protection against unreasonable searches and seizures. *Martin* v *United States,* 183 F2d 436 (CA 4, 1950); *United States ex rel Lombardino* v *Heyd,* 318 F Supp 648.650 (ED La, 1970).

The United States Supreme Court said in *Lanza* v *New York,* 370 US 139, 143, 82 S Ct 1218, 1220, 8 L Ed 2d 384, 387-388 (1962):

> ". . . [T]o say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers or his effects, is at best a novel argument. To be sure, the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection. A business office is a protected area, and so may be a store. A hotel room, in the eyes of the Fourth Amendment, may become a person's 'house' and so, of course, may an apartment. An automobile may not be unreasonably searched. Neither may an occupied taxicab. *Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protections, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office or a hotel room. In prison, official surveillance has traditionally been the order of the day.*" [Emphasis supplied.]

The Court, in *Lanza, supra,* approved a prison regulation reproduced in a footnote to the above quoted statement, as follows:

> "All parts of the jail should be frequently searched for contraband. . . . Saws have been secreted in bananas, in the soles of shoes, under peakes of caps, and drugs may be secreted in cap visors, under postage stamps on letters, in cigars and various other ways. . . . Cells should be systematically searched for materials which would serve as a weapon or medium of self-destruction or escape. Razor blades are small and easily concealed."

See also *Butler* v *Bensinger,* 377 F Supp 879, 875 (ND, Ill, 1974), citing *Lanza.*

In *Hayes* v *United States,* 367 F2d 216 (CA 10, 1966), the Tenth Circuit held that search of a prison inmate, who was prosecuted for the murder of a fellow inmate, was not unreasonable where prison officials had knowledge which would have afforded legal grounds to arrest and made search and seizure incident thereto. The Court said, at 221:

> "It is generally understood that a search and seizure may be made in connection with a lawful arrest and questions were asked during

the course of the trial as to whether or not the prisoner had been arrested. In this particular case the prisoner was already in custody and, therefore, no further arrest was necessary. An arrest presumes taking the prisoner into custody and there could be no arrest of a prisoner who is already in custody . . ."

"It appears to the Court that there were reasonable grounds for the search and seizure in question. It appears to us that if the appellant had not already been in custody there would have been reasonable grounds to arrest him and to make the search and seizure as an incident to the arrest. The fact that he was already in custody did not deprive the officers of the right to make the search and seizure."

Recent court decisions have continued to uphold searches of prisoners' cells.

In *United States* v *Hitchcock,* 467 F2d 1107, 1108 (CA 9, 1972), *cert den* 410 US 916, 93 S Ct 973, L Ed 2d 279 (1973). It was held that a warrantless search of a prisoner's cell is reasonable within the meaning of the Fourth Amendment. In *United States* v *Hitchcock, supra,* the court said:

"In *Katz* v *United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the Supreme Court enunciated a new standard for determining the limitations of the Fourth Amendment. Until now, this court has not been faced with the problem of applying this new test to searches involving prison inmates. The protection of the Fourth Amendment no longer depends upon 'constitutionally protected' places. Instead, we must consider 'first that a person have exhibited an actual (subjective) expectation of privacy and second that the expectation be one that society is prepared to recognize as "reasonable." ' " *Katz, supra,* at 361, 88 S.Ct. at 516 (Harlan, J., concurring).

"While Hitchcock plainly had the requisite subjective intent to keep the documents private, we do not think that his expectation was unreasonable. 'But to say that a public jail is the equivalent of a man's "house" . . . is at best a novel argument . . . it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day.' *Lanza* v *New York,* 370 U.S. 139, 143, 82 S.Ct. 1218, 1220, 8 L.Ed.2d 384 (1962). See Price v Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948). We do not feel that it is reasonable for a prisoner to consider his cell private. Therefore, the search did not violate the limitations of the Fourth Amendment."

In *Hoitt* v *Vitek,* 361 F Supp 1238, 1254-1255 (D, N.H., 1973), aff'd 495 F2d 219 (CA 1, 1974), aff'd 497 F2d 598 (CA 1, 1974), the court stated that the cell-block is not a constitutionally protected area, and further noted that the New Hampshire statutes specifically imposed upon the warden of the state prison the duty "to have the custody and superintendence of all persons confined in the prison and of all property belonging thereto."

Even rectal searches of inmates prior to transportation for court appearances have been held not to violate their right to privacy, nor need such

searches be conducted by medical doctors or in complete privacy. *Daugherty* v *Harris,* 476 F2d 292 (CA 10, 1973), *cert den* 414 US 872, 94 S Ct 112, 38 L Ed 2d 91 (1973). In the *Daugherty* case, the court stated, at 294-295:

> "Appellants' assertions must be examined in light of the basic rule that control and management of federal penal institutions lies within the sound discretion of the responsible administrative agency. Judicial relief will only be granted upon a showing that prison officials have exercised their discretionary powers in such a manner as to constitute clear abuse or caprice. *Perez* v *Turner,* 10 Cir., 462 F.2d 1056, 1057; *Evans* v *Moseley,* 10 Cir., 445 F.2d 1084, 1086. The district court based upon the pleadings and after taking judicial notice of facts contained in other files and records of the court and facts subject to judicial knowledge, summarily denied relief. We affirm, rejecting appellants' contentions that the searches are a basic violation of their right to privacy unless special cause is shown in justification and that, in any event, the searches must be conducted by medical doctors and in complete privacy.
>
> Leavenworth is a maximum security institution containing many dangerous inmates and any consideration of the penitentiary's security regulations must be realistic. There are many known incidents of concealed contraband being carried by prison inmates in the rectal cavity. Several serious episodes, including the wounding of a court officer, were attributable to the ability of inmates to smuggle weapons out of prison. Given these circumstances coupled with an increasing need to assure the safety of our law enforcement and court officials this policy of allowing rectal searches must be considered reasonable unless contradicted by a showing of wanton conduct. *Graham* v *Willingham,* 10 Cir., 384 F.2d 367, 368. To hold that known cause comparable to that required for a search warrant in private life must precede such a search would be completely unrealistic. It is usually the totally unexpected that disrupts prison security."

See also *United States* v *Savage,* 482 F2d 1371, 1372-731, (CA 9, 1973), *cert den* 415 US 934, 94 S Ct 1470, 39 L Ed 2490 (1974), in which the court stated that what society recognizes as a reasonable expectation of privacy is restricted when the individual asserting the expectations is incarcerated or in custody.

In *United States* v *Palmateer,* 469 F2d 273 (CA 9, 1972), the Court reiterated its holding in *Hitchcock, supra,* that a warrantless search of a prisoner's cell was reasonable within the meaning of the Fourth Amendment. Furthermore, the court said, the need to maintain security and discipline provides another basis for dispensing with the warrant requirement in such cases.

However, the courts have held that prisoners are entitled to the protection of the Fourth Amendment's proscription of *unreasonable* searches and seizures. *Burns* v *Wilkinson,* 333 F Supp 94 (W.D., Mo., C.D., 1971).

And, in *Palmigiano* v *Travisono,* 317 F Supp 776, 791 (DC, R.I., 1971), the court said:

> "[T]he right to be free from *unreasonable* searches and seizures is one of the rights retained by prisoners subject, of course, to such curtailment as may be made necessary by the purposes of confinement and the requirements of security."

The Michigan Supreme Court has also held that a prison inmate, by reason of his incarceration, is not stripped of all his civil rights and constitutional safeguards against unreasonable search and seizure. *People* v *Carr,* 370 Mich 251, 121 NW 2d 499 (1963).

The many court decisions cited above clearly indicate that a prison is a unique institution, fraught with sensitive security hazards, not the least of these being smuggling of contraband, such as drugs and weapons. Prison authorities must be constantly vigilant for implements which might conceivably be utilized in escape attempts by inmates.

However, despite his greater liberty, a corrections center resident remains in constructive custody of the Department of Corrections subject to its supervision, surveillance and control. Correctional agents may therefore subject him, his living quarters and his personal effects to inspection and search. Neither the Fourth Amendment nor the parallel guarantee in Const. 1963, art 1, Section 11, prohibits that scrutiny.

The propriety of warrantless searches by corrections agents pursuant to proper conditions affixed to the status of corrections center residents is consistent with the United States Supreme Court's refusal to require a warrant in certain types of administrative searches. See *United States* v *Biswell,* 406 US 311, 92 S Ct 1593; 32 L Ed 2d 87 (1972); *Colonnade Catering Corp.* v *United States,* 397 US 72; 90 S Ct 774; 25 L Ed 2d 60 (1970); *Lyman* v *James,* 400 US 309; 91 S Ct 381, 27 L Ed 2d 408 (1971).

It is, therefore, my opinion that corrections agents wishing to search a resident's room are not bound by the Fourth Amendment's probable cause and warrant requirements. Rather, they must satisfy only a reasonableness test that is unique to their special position. Their decision to search may be based upon specific facts though they be less than sufficient to sustain a finding of probable cause.

Further, it is my opinion that contraband seized in such a search may be confiscated, used as the basis for disciplinary action and is admissible in a criminal prosecution. See *United States* v *Miller,* 261 F Supp, 442 (D Del, 1966).

It is further my opinion that the observation of suspected evidence of criminal activity may provide grounds for a search warrant. Corrections agents need not ignore what they see and hear in the performance of their duties.

A caveat is necessary. The United States Supreme Court has held that the general requirement that a search warrant be obtained is not to be dispensed with lightly and that the burden is on those seeking an exemption from the requirement to show the need for the exemption. *Chimel* v *California,* 395 US 752, 89 S Ct 2034, 23 L Ed 2d 685 (1969). While correc-

tions agents may report any incriminating evidence discovered in the performance of their duties to law enforcement officers, the propriety of conducting a warrantless search of the resident's room on the request of law enforcement officials and in concert with them has been cast in doubt. See *Smith* v *Rhay*, 419 F2d 160 (CA 9, 1969); *Corngold* v *United States*, 367 F2d 1 (CA 9, 1966). The Ninth Circuit Court of Appeals has held that in such a case the corrections official is acting, not as the supervising corrections official of the resident, but as the agent of the very authority upon whom the requirement for a search warrant is constitutionally imposed. The better practice in such cases is to obtain a search warrant.

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CONSTITUTION OF MICHIGAN: Article 9, Section 18.

COUNTIES: Financing Public Television.

The constitutional prohibition against the grant of the credit of the state to any person, association, or corporation, public or private, prohibits a county from appropriating its funds to assist in the construction and operation of a public television station operated by a state university.

Opinion No. 4904 November 3, 1975.

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You have requested my opinion concerning the legality of the participation of Montmorency County in the financing of a public television station to be constructed and operated by Central Michigan University. Your question may be stated as follows:

> Does the County Board of Commissioners have the authority under 1946 PA 18, MCLA 388.531 *et seq;* MSA 15.778(1) *et seq*, to legally allocate funds to a public university to assist it in the construction and operation of a public television station?

1946 PA 18, § 1; MCLA 388.531; MSA 15.778(1) provides:

> "The county board of supervisors, through the office of the county commissioner of schools, may establish a program of adult education and may employ the necessary teachers and other personnel, and may purchase such equipment and instructional supplies as shall be required to provide an adequate program for the education of adults residing within the county: Provided, That the board of supervisors of any