



Legal Issues in Drug Testing Probation and Parole Clients and Employees

LEGAL ISSUES IN DRUG TESTING PROBATION AND PAROLE CLIENTS AND EMPLOYEES

by

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January 1989

This document was prepared under an award (TA #88C0012) from the National Institute of Corrections, U.S. Department of Justice. Points of view or opinions expressed in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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FOREWORD

In recent years illegal drug use has become a national epidemic. Both the public and private sectors are trying to combat the problem through a variety of means.

It is a known fact that drug users are frequently heavily involved in crime, both for profit and to support their habits. Because drug testing is often a condition of probation or parole--implied or explicit--legal challenges have been brought before the courts. While no constitutional challenge to drug testing probationers and parolees has yet prevailed, practitioners can help safeguard against successful challenges by incorporating certain policies and procedures in their programs.

This report explores the legal issues surrounding drug testing in probation and parole. In addition to the issues related to testing probation and parole clients, it treats the matter of testing probation and parole personnel. There have not yet been any court cases challenging drug testing of probation and parole staff, but analogies can be drawn from cases of other public employees.

The constitutional issues related to drug testing, and cases pending in the U.S. Supreme Court, are discussed in this report. The author makes suggestions on how agencies might structure their drug testing programs to be least vulnerable to legal challenges.

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INTRODUCTION

In the last few years, drug testing has become common in both the private and public sectors due to two factors: (1) a growing awareness that drug abuse is a serious and widespread social problem, and (2) advances in technology that allow tests to be done quickly, inexpensively, and accurately.¹

In the criminal justice system, a third factor has helped to increase use of drug testing. This factor is the drug-crime link discovered in recent years.² The Rand Corporation's survey of jail and prison inmates and subsequent writings on the career criminal and selective incapacitation have received the most widespread publicity.³ These studies support the long-held assumption that career criminals are heavily involved in drug use. One of the studies suggests that crime rates could be lowered by keeping career criminals in prison for longer periods of time.⁴ A major determinant of recidivism is past drug use.

Knowledge that drug users are heavily involved in crime has led to the demand for drug testing in the criminal justice system in an attempt to identify these persons for special treatment. From pretrial to parole, determinations of offenders' risk to the community have increasingly relied on drug tests. Recent headlines like the one that reads, "5,000 parolees will be given drug tests"⁵--attest to a trend toward mass drug testing programs.

While no national figures are available, a recent survey of probation departments in Texas--which has the largest number of probationers of any state--revealed that testing for controlled substances was required of some probationers in 40% of the departments and it was required of some of the probationers in 60% of departments in the state.⁶ The same survey revealed that around 50% of the departments in the state required drug testing once a month; the rest of the departments required testing once every two weeks, once a week, or at the officer's discretion.

This paper explores the legality of drug testing in probation and parole. The paper's main concern is the legality of

testing probationers and parolees. A related question, however, which is of increasing concern in criminal justice, is the legality of testing probation and parole employees. This will also be addressed.

Although probation and parole are separate agencies in most states, and despite the difference in offender status,* probationers and parolees have similar legal status for the purpose of drug testing. Both have been found guilty (with some exceptions in probation where some states use deferred adjudication or deferred sentencing programs) and therefore do not enjoy the same rights as the general population. Probationers and parolees do have basic constitutional rights and therefore are entitled to constitutional protection. To paraphrase the words of the U.S. Supreme Court, parolees do not enjoy the absolute liberty to which every citizen is entitled, but only to conditional liberty dependent upon the observance of special conditions, *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). In short, probationers and parolees enjoy diminished constitutional rights. The question is not whether they have constitutional rights, but rather what rights probationers and parolees retain.

METHODS OF DRUG TESTING

Drug tests may be performed using many forms of biological specimens, such as urine, blood, breath, hair, and saliva. The most often used body fluid in drug testing is urine, and the procedure is urinalysis. An advantage in testing urine is that it can be done less intrusively than blood tests; however, the procedure is more intrusive than testing hair. A disadvantage of urinalysis is that the procedure does not show when the drug was used. Whether the person was under the influence of drugs while working or used drugs at some other time cannot be determined through urinalysis.

. Probation generally denotes that the offender is half-way into the criminal justice system, whereas parole means the offender is half-way out.

Urinalysis has been so popular primarily because it is the form of testing that manufacturing firms have developed and made available commercially. One author has identified the six major types of testing methods.⁷ These tests are: immunoassay tests, thin layer chromatography (TLC), color or spot tests, gas chromatography (GC), high performance liquid chromatography (HPLC), and mass spectrometry tests. None of these tests in and of itself is sufficient proof of drug use, but instead should be used in a screening/confirmation test format. Though some of the tests are used for both purposes, the first three are normally used as screening tests and the last three as confirmatory tests.

Screening Tests

Of the three forms of screening tests, immunoassay tests are the most widely used. Immunoassay tests measure the presence or absence of drugs when antibodies added to the urine form complexes with the drugs or their metabolites, which act as antigens. There are three types of immunoassay tests: radio immunoassay tests (RIA), fluorescein polarization immunoassay tests (FPIA), and enzyme immunoassay tests.

The most widely used RIA is the Abuscreen produced by Roche Diagnostic Systems of Belleville, N.J., and used by the armed forces. RIA measures the free or bound radioactivity after urine and radioactively labeled drugs are mixed with antibodies. The measurement indicates the presence of drugs because both sets of drugs, those in the urine and those radioactively labeled, compete for binding sites on the antibody, and hence can be measured by the amount of radioactivity present after an incubation period.

The FPIA test has been used in drug testing by Abbott Laboratories in its TDxToxicology/Abused Drug Assays. This method employs fluorescent tracers that compete with drugs in the urine to bind with antibodies. The presence of drugs is measured by the polarization of light that occurs when the tracer is unable to locate binding sites.

Of the two popular forms of enzyme immunoassay tests, one--EZ-Screen--tests only for the presence of cannabinoids. It is a

very simple test using a card that turns color when drops of urine are added. This test is produced by Environmental Diagnostics of Burlington, NC, and costs about \$7. The test most commonly used in the criminal justice system is one that measures the enzyme activity of the complexes (enzyme multiplied immunoassay technique--EMIT).⁸

In EMIT, enzyme labeled drugs are injected into the urine along with antibodies. Presence of drugs is measured by the binding of enzymes, which compete with the drugs in the urine for binding sites. If drugs are present, the antibodies bind with them. The reaction is recorded by a photometer.⁹ The test merely notes the presence of various drugs and does not directly measure the amount of drugs present in the urine.

Created by the Syva Company of Palo Alto, CA, the EMIT test is easy to administer and is inexpensive. A small laboratory can be set up within the agency to test the urine samples at a cost of \$3500,¹⁰ or the samples may be sent to a larger laboratory to be tested at a cost of \$5 per test.¹¹ The inexpensiveness of these tests leads most criminal justice agencies to use them, either singly or in two separate tests, as screening and confirmatory tests, although experts and the makers of EMIT suggest confirmation of EMIT tests through other means.

The final two forms of drug screening tests are the thin-layer chromatography (TLC) and the color or spot tests. TLC is a procedure whereby different molecular structures are separated and can then be identified on the basis of the distance the substance travels through a membrane in comparison to a solvent, the Rfvalue. The Rfvalue, color, and appearance after various applications make the identification of many types of drugs possible; however, the accuracy of the technique depends to a large extent on the ability of the technician. It is a subjective method that should never be used without confirmation.

The color or spot tests use a strip of paper that turns color after drops of urine are added if drugs are present. These tests do not indicate which type of drug is present and there are substantial problems with cross reactions, making these forms of tests virtually useless.

Confirmation Tests

A form of confirmation test that is an outgrowth of TLC is gas chromatography (GC). GC is similar to TLC in that it functions by separating components from the mixture. GC separates the substances while they are in gaseous form swept through a column, and the measurement consists of how far up the column the components travel. However, GC should not be relied upon in a qualitative analysis to identify the substances, since many substances may travel the same distance.

High performance liquid chromatography (HPLC) is an outgrowth of GC, but measures the distances that separated liquids, instead of gases as in GC, flow. Its disadvantages are similar to those of GC.

The final form of confirmation test and the only acceptable method, according to a number of experts, is Mass Spectrometry (MS). It is used in conjunction with GC, in which GC separates the mixture into components so that MS can identify them. GUMS operates by separating and fragmenting substances and then recording the responses of this fragmentation. The recording of peaks upon which the substances lose their ionization charge identifies them. Though the method has up to a 99% accuracy rate, a skilled technician must be used in identifying the peaks or erroneous conclusions can be much more common. The elaborate procedures used in GUMS cost \$70 to \$100 per test.¹²

TESTING PROBATIONERS AND PAROLEES

Testing As A Condition Of Probation: Is It Valid?

In the aggregate, decided cases show that there are four general requirements for the validity of probation and parole conditions. These requirements are:

1. The condition must be constitutional;
2. The condition must be clear;
3. The condition must be reasonable; and
4. The condition must be reasonably related to the protection of society and/or the rehabilitation of the individual.¹³

The requirement of constitutionality means that the condition must not be violative of a defendant's diminished constitutional rights. A waiver of constitutional rights obtained where the alternative is incarceration is not always a voluntary waiver, particularly if it involves a fundamental right. The courts are particularly protective of first amendment rights, such as the freedom of religion, the press, speech, and association--these being "preferred" constitutional rights.

The second requirement, clarity of the condition, means that the offender must know what acts are violative of the condition. In *Panko v. McCauley*, 473 F.Supp. 325 (D.C. Wis. 1979), the condition forbidding a probationer from "frequenting" establishments selling alcoholic beverages was rejected because there was no evidence that the probationer understood what the term meant. Unclear conditions are unfair in that they can lead to arbitrary decisions to revoke and are therefore violative of a defendant's right to due process.

The third requirement, reasonableness, mandates that the condition be fair and can be carried out properly. A condition that is bound to fail may be considered unreasonable by the court. In one case, a probationer was ordered to abstain from alcohol for five years. Evidence that he was an alcoholic led the court to deny probation revocation when the condition was violated, the court upholding the claim of unreasonableness because of the probationer's pre-existing condition.

The fourth requirement, that the condition must be reasonably related to the protection of society and/or the rehabilitation of the individual, is broad and constitutes a

convenient justification for the imposition of a condition. Challenges to probation or parole conditions seldom succeed because just about any condition can somehow be claimed by the imposing authority to be reasonably related to the protection of society or the rehabilitation of the offender.

In *United States v. Tonry*, 605 F.Supp. 144 (5th Cir. 1979), a U.S. Court of Appeals set forth the criteria for testing the constitutionality of the conditions of probation. This case has been followed in recent drug testing cases. The Tonry Court wrote:

The conditions must be "reasonably related" to the purposes of the (Federal Probation) Act. Consideration of three factors is required to determine whether a reasonable relationship exists: (1) the purposes sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement.¹⁴

Citing *Tonry*, the U.S. Court of Appeals for the 7th Circuit in *United States v. Williams*, 787 F.2d. 1182 (1986), found that testing a probationer for drugs was reasonable. Williams, who was a repeat offender and had committed an offense while on probation, told the pre-sentence investigator that he was not a drug user. After an initial drug screening resulted in positive findings, he indicated that he had lied. Williams appealed the condition imposed by a court mandating him to submit to drug tests. The Court of Appeals held that the condition was reasonably related to the Probation Act in that Williams only had to submit to tests "given by or at the reasonable direction of his probation officer." Also, he was not required to "submit to urinalysis under unreasonable or arbitrary circumstances or for any purpose unrelated to his own conviction or rehabilitation."

The reason for this conclusion was Williams' repeat offender status and his lengthy and substantial criminal record, which could most likely be partially attributable to drug use. Also, a federal provision gives district courts the authority to require probationers with drug abuse problems to submit to treatment until cured. The fact that he was not charged with a

drug offense did not matter. All that need be shown for the condition to be reasonable is that he had a problem with drug abuse or drug dependency. The Williams case implies that the term "reasonably related to the rehabilitation of the individual" does not necessarily mean that the defendant has been charged with or convicted of a drug offense, but rather that a defendant's status and criminal record could most likely be partially attributed to drug use.

State appellate court decisions are similarly consistent. The Michigan Appellate Court upheld the legality of drug testing as a condition of probation in *People v. Roth*, 397 N.W.2d. 196 (1987). In Illinois, the appellate court allowed the revocation of a probationer who failed to follow the conditions of his probation by refusing to submit to a drug test after returning late from work release, *People v. Holzhauer*, 494 N.E.2d. 272 (1986). The Supreme Court of Georgia ruled that a condition of probation providing that probationers refrain from ingesting controlled substances was reasonable, and a condition requiring that probationers submit to drug tests to enforce the prior condition was also reasonable, *Smith v. State of Georgia*, 298 S.E.2d. 482 (1983). In this case, the court upheld the use of randomly administered tests, finding the statute not to be overly broad. The terms included the conditions that the probationer:

- 1) ...not take into his body any substance prohibited or controlled by any law of the State of Georgia or the United States...,
- 2) [a]void injurious habits--especially alcoholic intoxication and narcotics or other dangerous drugs unless prescribed lawfully; and
- 3) ...from time to time, upon oral or written request by a probation supervisor or any city, county, or state law enforcement officer, produce a breath, spittle, urine, and/or blood specimen for analysis of a substance prohibited or controlled by any law of the State of Georgia or the United States.¹⁵

Two Texas Court of Appeals cases upheld drug testing as a condition of probation: *Clay v. State*, 710 S.W.2d. 119 (1986), and *Macias v. State*, 649 S.W.2d. 150 (1983). In *Clay*, a probationer failed to report to his probation officer on several occasions over a three-month period and, when he did report, refused to submit to a drug test. The court held that the defendant could be required, as a condition of probation, to submit to drug tests at any time directed by his probation officer. In *Macias*, the probationer requested an early discharge. As part of this program, the probationer was to submit to weekly tests and could be discharged from supervision after being drug free for a certain period of time. After testing positive one week and refusing to submit to tests thereafter, his probation was revoked. Using the *Tonry* test, the court found the condition to be reasonably related to the purpose of probation--dissuading the person from using drugs, promoting his rehabilitation and a means of gauging it, and protecting society from continuing unlawful narcotics activities

Most challenges to drug testing in probation or parole arise from the legality of drug testing as a condition imposed by the court or board. A subsidiary issue is this: May drug tests be required by the agency or probation or parole officer even if no such condition has been imposed by the court or board? Based on the few cases decided on this issue, the answer appears to be "yes."

In *United States v. Duff*, 831 F.2d. 176 (1987), the U.S. Court of Appeals for the 9th Circuit addressed the question and ruled that, since the general conditions of probation were that the probationer refrain from violating laws, the use of drug tests to monitor the possible violation of drug laws was valid despite the absence of a court-imposed condition. The court, however, stated that it would have been preferable for the probation officer to obtain a court modification of the conditions before performing the drug test. In this case, the court also upheld that due process did not require prior notice before asking probationers to submit their urine for testing.

In an earlier case, *Macias v. State*, cited above, the Texas Court of Appeals held that even though the original conditions of probation did not mandate drug testing, it was allowable since the original conditions required that the probationer remain drug

free. And in *State v. Robledo*, 596 P.2d. 288 (Ariz. App. 1977), an Arizona Court admitted the results of a urine test as evidence in a revocation proceeding despite absence of a specific drug testing condition of probation, saying that abstinence from drugs was a condition of probation.

Constitutional Issues

While drug testing has generally been upheld as a condition of probation, probationers have often attacked the practice on constitutional grounds. Many of the prior cases, as well as additional cases where the petitioner assumed drug testing to be a valid condition of probation, challenged the taking of urine as violative of five basic constitutional rights: the right against unreasonable search and seizure, the right to due process, the right to confrontation and cross-examination, the right to equal protection, and the right against self-incrimination.

The Right Against Unreasonable Search and Seizure

The Fourth Amendment protects persons from unreasonable searches and seizures. Searches can be made with a warrant based on probable cause, or without a warrant in a number of instances. Persons have certain expectations of privacy and, as long as these expectations are reasonable, they can only be violated when the governmental interest in searching outweighs the individual's expectation of privacy. Body searches are the most intrusive violation of personal privacy and as such enjoy the greatest protection against governmental intrusion.

In general, a search of a probationer "must be reasonable and must be based upon the probation officer's reasonable belief that it is necessary to the performance of her duties," *United States v. Duff*, 831 F.2d. 176 (9th Cir. 1987). Consistent with this standard, the court in *United States v. Duff* ruled that submitting to urinalysis was the least intrusive way of determining if Duff had refrained from drug use. The court in *Duff* did not decide the issue of whether drug testing was a search, but assumed it was a search based on prior decisions.

In *United States v. Williams*, 787 F.2d. 1182 (1986), the U.S. Circuit Court of Appeals also refrained from deciding whether the taking of urine was a search. The court wrote:

Assuming, without deciding (citing 19 cases, not all of which directly apply to the taking of urine), that the taking of a urine sample entails a search or seizure, we hold that the condition imposed here is reasonable and, accordingly, passes muster under the Fourth Amendment.¹⁶

The state appellate courts of Texas and Georgia have also upheld the taking of urine from probationers as not being a violation of the Fourth Amendment protection against unreasonable searches and seizures, *Clay v. State*, 710 S.W.2d. 119 (Tex. App. 1986); *Howard v. State*, 308 S.E.2d. 424 (Ga. App. 1983).

While non-probation cases concerning drug testing have concluded that it is, in fact, a search, most cases involving probationers have simply assumed that the tests are searches. One exception is *Macias v. State*, 649 S.W.2d. 150 (1983), in which the Texas Court of Appeals ruled that it had no doubt that the taking of urine from a probationer was a search. The court relied on *Schmerber v. California*, 384 U.S. 757 (1966), and Texas cases allowing the taking of blood samples in concluding that the taking of urine was constitutional. The court in *Macias* wrote:

The taking of a urine sample is analogous to the taking of a blood sample. Each involves an extraction from a human body. It has been held that the taking of blood constitutes a search and seizure under federal and state constitutional law.¹⁷

The Right to Due Process

A closely related claim made by probationers and parolees concerns their right to due process of law protected by the Fifth and Fourteenth Amendments. These rights are often invoked in reference to procedures employed in testing, rather than to the challenge that they violate an offender's substantive rights. When probationers assert a denial of due process, they are charging that

their liberty has been deprived without reasonable and lawful procedures that must be made available to them.

Test accuracy. As mentioned earlier, EMIT tests are not very accurate when used alone. Experts recommend the use of another type of test to confirm initial positive findings. The costs of many of these confirmation procedures are prohibitive for criminal justice agencies; therefore, even when giving confirmatory tests, agencies often simply use a second EMIT.¹⁸ A major concern in drug testing is whether it meets acceptable scientific standards for use in court. The Frye doctrine in legal proceedings states that, before the results of scientific tests can be admissible as evidence in a trial, the procedures used must be sufficiently established to have gained general acceptance in the particular field to which they belong, *Frye v. United States*, 293 F.2d. 1013 (D.C. Cir. 1923). The question therefore is whether drug tests have gained general acceptance in the scientific community, as determined by the courts, to be admissible as evidence in a legal proceeding.

Note that complete accuracy is hardly attainable in a lot of scientific tests. In a recent case, however, the U.S. Supreme Court said that due process in non-criminal proceedings is not violated if some evidence on the record supports the decision, *Superintendent v. Hill*, 105 S.Ct. 2768 (1985). The standard of proof in revocation cases is not governed by the constitution, but by state law or court decisions. Most state courts adhere to a standard lower than probable cause, some courts validating revocations based on "slight evidence," *Dickerson v. State*, 136 Ga. App. 885 (1975).

In one of the earliest drug testing cases involving probationers, the court ruled that the EMIT test could not be admitted in revocation proceedings, *Isaacks v. State*, 646 S.W.2d. 602 (Tex. App. 1983). The court stated that the test had not attained scientific acceptance and that the government witness did not understand the theory behind the test's performance. The court added that until the machine had been properly tested for reliability and accuracy, the results could not be admitted as evidence.

Despite the ruling in Isaacks, most state cases hold that EMIT results are admissible in revocation proceedings. In *Smith v. State*, 298 S.E.2d. 482 (Ga. App. 1983), the court ruled that the trial court had not erred in allowing the EMIT test into evidence because of the expert testimony in the case attesting to its operation and accuracy. Since the trial court did not exceed its authority in deciding to admit, the test results could be admitted into evidence. In a Second case, *Szile v. Carlson*, No. TCA 84-7196 (N.D. Fla., 1985, unpublished), a Florida court held that the evidence of probation violation using the EMIT test was admissible even if the test is only 80% accurate.¹⁹ In a third probation revocation case, the appellate court held that, even though the EMIT test is not entirely accurate, it could be accepted as "reliable and probative evidence," *State v. Johnson*, 527 A.2d. 250 (Conn. App. 1987). In this case, the defendant's pharmacological expert testified that the EMIT test had a 5% to 10% margin rate of error. The court held that a second EMIT test used as a screening and confirmatory test, though not conclusive, could be used if there is no showing by the defendant of unreasonable abuse of discretion by the probation officer.

Claims by offenders that errors resulted in positive findings have been rejected by courts.' In one parole revocation case, the petitioner claimed to have taken pain killers that resulted in false positive findings. In this case, however, the test found evidence of more than three controlled substances; hence the results were admitted, *Moore v. Commonwealth*, 505 A.2d. 1366 (Pa. Cmwlth. 1986).

It is evident that EMIT results have been admissible for revocation in most courts despite the admitted lack of complete accuracy. The issue of whether a confirmation test is required has not been addressed decisively by the courts either. Most courts that have considered the reliability of unconfirmed tests have held that a positive result alone is insufficient to prove drug use. A minority of courts have held, however, that an EMIT test alone is sufficient for a disciplinary hearing.²⁰

Chain of custody. While challenges based on test inaccuracy have not succeeded, those based on chain of custody have had better results. This challenge addresses the possibility

that test results were invalid because of faulty custodial procedures in the handling of samples. In one case, a state court overturned a revocation because the physical evidence was no longer available, *People v. Moore*, 666 P.2d. 419 (Ca. Sup. 1983). In this case, the County preserved positive samples for 90 days, or longer if a request was made for a particular sample. However, the government failed to show that such requests were routinely made and honored. The court ruled that the government must employ "rigorous and systematic" procedures to preserve the evidence, and that the government had failed to meet this standard. In the absence of a request by the defendant to retain the samples, the court ruled it becomes the affirmative duty of the state to preserve the evidence.

The question of whether a sample has been properly maintained and was not mixed up with another's sample or tampered with in any way has been addressed largely in cases other than probation/parole. However, at least one parole case has dealt with this issue, *Stahl v. Commonwealth*, 525 A.2d. 1272 (Pa. Cmwlth. 1987). In this case, the appellant questioned the reliability of the laboratory tests because of the custodial procedures employed. An officer labeled the samples and placed them in a refrigerator until mailing them to the laboratory. The court ruled that this procedure was proper.

The Right to Confrontation and Cross-Examination

The Fifth Amendment right to confrontation and cross-examination protects persons from the hazards of hearsay evidence. Defendants should be convicted only when they have had a chance to confront and question their accusers. Probation revocation, however, is not a trial and, consequently, probationers are not entitled to the full panoply of constitutional rights guaranteed to presumably innocent defendants.

Standing alone, test results deprive offenders of the right to confrontation and cross-examination. It is hearsay if the person who comes up with the results cannot be in court for cross-examination. The admissibility of hearsay evidence in revocation proceedings has been summed up by the Commonwealth Court of Pennsylvania in *Jefferson v. Commonwealth*, 506 A.2d. 495 (1986). The court wrote:

It has long been settled that hearsay evidence is properly admissible in parole revocation proceedings, subject to a finding of good cause to deny the parolee his due process right to confront and cross-examine adverse witnesses.²¹

In this case, the court ruled that the laboratory reports were reliable and, hence, granted an exception to the hearsay rule for purposes of revocation.

Subsequent cases have been decided in accord with Jefferson. One case upheld the admission of laboratory reports based on the business record exception to the hearsay rule. The court noted that if the reports contained indicia of reliability and regularity (such as letterhead and signature), they could be admitted as evidence, *Damron v. Commonwealth*, 531 A.2d. 592 (Pa. Cmwlth. 1987). If the laboratory report is verified by independent means such as a confession, it is also admissible, *McQueen v. State*, 740 P.2d. 744 (Okla. App. 1987). However, the trial court may not automatically accept laboratory reports absent a showing of good cause for a witness not being present for cross-examination, *Powell v. Commonwealth*, 513 A.2d. 1139 (Pa. Cmwlth. 1986); *Whitmore v. Commonwealth*, 504 A.2d. 401 (Pa. Cmwlth. 1986).

Federal appellate courts have also upheld the use of laboratory reports in probation revocation procedures. In one case, a laboratory report was accompanied by a letter from the laboratory president and was characterized by the court as both "trustworthy and reliable," *United States v. Penn*, 721 F.2d. (11th Cir. 1984). The reliability of the report was also upheld by the court in Penn because such reports were regularly issued to doctors and hospitals who acted in accord with the findings. Additional reasons listed by the court for not reversing the appellant's probation revocation were (1) there was corroborating evidence that the probationer had been using drugs, and (2) good cause asserted by the government for not allowing confrontation and cross-examination outweighed the appellant's right to confront and cross-examine the testers. In order to allow confrontation and cross-examination in this case, it would have

been necessary to obtain the presence and testimony of 20 to 30 persons who performed the tests.

In *United States v. Bell*, 785 F.2d. 604 (8th Cir. 1986), the court, though remanding the case for other reasons, upheld the Penn decision of the 11th Circuit Court of Appeals. Citing the balancing process between the rights of the probationer and the grounds asserted by the government in *United States v. Penn*, the 8th Circuit held that the laboratory reports were admissible. The court reasoned that the reports themselves "bore substantial indicia of reliability" and that the probationer presented no evidence to contradict his drug usage.

The above cases strongly indicate that the use of drug test results does not violate an offender's right to confrontation and cross-examination in that, although the evidence may be hearsay, it is admissible under the various exceptions to the hearsay rule. Such exceptions come under the categories of business records, reliability, and trustworthiness.

The Right to Equal Protection

The Fourteenth Amendment right to equal protection basically means that people cannot be treated differently unless there is sufficient legal justification for the differential treatment. While originally used mainly to proscribe racial discrimination, the equal protection clause has been used by courts to apply to various types of discriminatory treatment outside racial context. Together with the Civil Rights Act of 1964, the equal protection clause has established protected categories of individuals who cannot be treated differently unless legal justification exists.

In the context of drug testing, probationers and parolees might claim that those subjected to drug testing are treated differently from offenders who do not have to undergo such testing and therefore their constitutional right to equal protection is violated. Or, it might be alleged that isolating drug users as the group to be tested, while not probing into other offender tendencies or handicaps--such as AIDS or VD carriers--is a form of discrimination that is impermissible.

The constitutional right to equal protection has not been invoked often in drug testing cases, perhaps because it is generally recognized that the challenge is weak and stands little chance of being upheld. Equal protection has been used with great success by offenders in cases where money makes a difference in whether a person goes to prison. In *Bearden v. Georgia*, 33 CrL 3103 (1983), for example, the court held that a judge cannot properly revoke a defendant's probation for failure to pay a fine and make restitution--in the absence of evidence finding that the probationer was somehow responsible for the failure, or that alternative forms of punishment were not adequate to meet the state's interest in punishment and deterrence. In that case, the only reason probation would have been revoked was that the probationer was too poor to pay the fine and restitution imposed by the court. Such is not the case in drug testing. No monetary issue is involved in drug tests (unless the agency makes the offender pay for the test), and the differential treatment is not based on money, but on drug use. In other words, a probationer or parolee is treated differently (in being subject to a drug test) from the rest of the offender population similarly situated because he or she is using drugs.

This is not an impermissible categorization and should be allowable as long as there is a rational relationship between the measure taken and the objective sought to be accomplished. Drug testing (the measure taken) does probe into and may prevent drug use (the objective sought to be accomplished), hence a rational relationship is easy to establish. While the equal protection clause sometimes demands the establishment of a compelling state interest or legitimate state need before a right can be violated, such is not the case in drug testing because neither a fundamental nor a highly protected right is violated.

The Right Against Self-Incrimination

The Fifth Amendment protects against self-incrimination. In probation, this right has been used in cases where an offender is required to answer a counselor's question, submit to a search by a probation counselor, or provide a juror or prosecutor with information. Whether the right against self-incrimination can be invoked generally depends upon the type of proceeding wherein the

evidence is to be used. If the evidence is to be used in a revocation proceeding, the fifth amendment usually fails; on the other hand, if the claim is raised in a criminal trial, the claim is usually upheld.²²

There is no denying that to require an offender to submit to drug testing is self-incriminatory, but this type of self-incrimination is not what the Constitution prohibits. What is prohibited is not physical self-incrimination, but testimonial self-incrimination. Thus an accused can be compelled to appear in a line-up, give fingerprints, or furnish handwriting exemplars because these are forms of physical self-incrimination. Drug testing is a form of physical self-incrimination and therefore falls outside the purview of constitutional protection. While the results obtained may indicate drug use and therefore incriminate the user, the test itself does not require an offender to verbally admit or confess guilt, the type of self-incrimination protected by the Constitution.

Summary and Suggestions

Probation and parole agencies may require clients to submit their urine for drug testing without violating the constitutional rights of probationers and parolees. As the above discussion of cases indicates, no constitutional challenge to drug testing probationers and parolees has prevailed. This is because convicted offenders enjoy diminished constitutional rights, and whatever constitutional rights remain are balanced against the rehabilitation of the individual and/or the protection of society. While it is best if the drug testing requirement is imposed by the court or parole board, decided cases suggest that drug tests may be required by the agency or the probation or parole officer even if no such condition has been imposed, as long as such is reasonably related to the rehabilitation of the offender or the protection of society. Random testing of offenders has been upheld by the courts, and such programs may be implemented for those under a drug testing condition.

Based on decided cases, jurisdictions and agencies may want to consider the following suggestions when implementing a drug testing program for probationers and parolees:

1. Impose drug testing as a condition of probation or parole only in cases where such a condition is "reasonably related to the rehabilitation of the individual." This does not necessarily mean a conviction for a drug-related offense, but rather that a defendant's status and criminal record could most likely be attributable to drug use. This covers a multitude of offenses (many offenses can reasonably be attributed to or are caused by drug distribution or use), but also excludes others that cannot be linked to drugs.
2. Ascertain whether a confirmation test is required by courts in your jurisdiction--some courts require confirmation of positive results; others do not. In case of doubt and if the issue is unresolved in your jurisdiction, it is advisable to play it safe and confirm test results.
3. Ensure that drug test operators are trained and properly qualified, regardless of whether the testing is done in-house or by an outside public or private laboratory.
4. Employ rigorous chain of custody procedures, such as sealing the samples in tamper-resistant bottles, immediately labeling and having the probationer sign the seals, and making sure that the transfer of samples is properly documented. In essence, the chain of custody rule ensures that the sample given by the individual is the substance tested and that the findings introduced and admitted into evidence were the result of testing the correct sample.
5. Whenever possible, save the sample until the revocation date so it is available to the defendant if he/she wishes to have the test results verified by an independent laboratory.

6. Have a clearly written policy on the use of drug testing and the resulting consequences of positive findings.

TESTING PROBATION AND PAROLE OFFICERS

Drug testing has become widespread in public and private employment in the United States. One source indicates that, in 1987 alone, employers required 4.5 million Americans to submit to urine tests as part of their job requirement. The same source states that the military has conducted over 1 million urine tests each year since 1981 and that President Reagan's executive order in 1986 could add 1.1 million federal workers to the pool of tested Americans.²³

The extent of drug testing involving probation and parole personnel is unknown and there have yet to be any cases challenging such practice. Being government employees, however, probation and parole officers can be compared to other public employees where courts have decided drug testing cases. They are most similar to law enforcement officers, as they are usually imbued with the power to arrest and sometimes are allowed to carry a gun. While an analogy to prison and jail personnel is tempting because they also deal with a mostly convicted clientele, the fact that probation and parole officers interact with clients in the free world makes the comparison with law enforcement officers more valid for the purposes of determining employee rights.

Cases involving drug testing of employees raise essentially the same constitutional issues as those challenging probation and parole client testing. The difference is the scope of the constitutional right involved and the state's justification for curtailing that right. Two of the rights most often invoked by employees are discussed here. These are the right against unreasonable search and seizure and the right to due process. Other constitutional rights that may be infringed are the right to equal protection and the right against self-incrimination; though

sometimes invoked, these rights do not merit discussion in this monograph.

Constitutional Issues

The Right Against Unreasonable Search and Seizure

There has been no U.S. Supreme Court case on the issue of whether urine tests are a form of search and seizure protected under the Fourth Amendment. Most lower courts that have addressed the question, however, have ruled that such testing constitutes search and seizure and, as such, is protected by the Fourth Amendment.²⁴ Some courts have analogized drug testing to the taking of blood. In *Capua v. City of Plainfield*, 643 F.Supp. 1507 (D.N.J. 1986), the court said:

The “taking” of urine has been likened to the involuntary taking of blood which the Supreme Court found to constitute a search and seizure within the Fourth Amendment...Though urine, unlike blood, is routinely discharged from the body so that no actual intrusion is required for its collection, it is normally discharged and disposed of under circumstances that merit protection from arbitrary interference.²⁵

In order for a search to be valid under the Fourth Amendment, it must be “reasonable.” The determination by a court as to the reasonableness of a search, absent a warrant or probable cause, “requires a judicious balancing of the intrusiveness of the search against its promotion of a legitimate governmental interest.” In order to determine if the search was reasonable, courts often focus on whether the individual has a reasonable expectation of privacy and whether the government’s interest in obtaining the sample outweighs the individual’s privacy right, hence making the search “reasonable.”

Right to Privacy. Although a distinct and well-established constitutional right, the right to privacy is often discussed in the context of search and seizure cases. This is because in marginal search and seizure cases, the crucial question

is often whether a person has a reasonable expectation of privacy that the state has an obligation to respect. A recent report²⁶ has identified the privacy rights that public employees legitimately expect. One privacy interest an individual has is to be free from exposure while urinating. In *Capua v. City of Plainfield*, cited above, the court stated that the act of urinating is "traditionally private" and that "urine collection forces those tested to expose parts of their anatomy to the testing official in a manner akin to strip search exposure." This experience, according to the judge, is likely to be "very embarrassing and humiliating." Another judge has said that "one's anatomy is draped with constitutional protections."²⁷

A second privacy interest concerns the urine itself and whether the individual has a reasonable expectation of privacy in his or her discharged bodily fluid. In *Capua*, the court stated that the major reason a person has a privacy interest in his urine is that "urinalysis forces plaintiffs to divulge private, personal medical information unrelated to the government's professed interest in discovering illegal drug abuse." The search could discover such disorders as epilepsy or diabetes, and legally prescribed drugs the person may be taking for emotional or physical reasons. And as stated by the court in *National Employees Treasury Union v. Von Raab*, 816 F.2d. 170, 176 (5th Cir. 1987), "unlike one's hair or handwriting, one's urine is not routinely exposed to the public gaze."

Government's interest. In a recent article, Jerry Higginbotham of the FBI listed seven interests police departments have in testing their employees. These are public safety, public trust, potential for corruption, presentation of credible testimony, morale and safety in the workplace, loss of production, and civil liability.²⁸ While these do not apply with equal cogency to probation and parole officers, most of them apply at least partially. Among the strong justifications from the above list for employee testing in probation and parole are public trust, potential for corruption, presentation of credible testimony, and loss of productivity. An additional, but nonetheless compelling, justification is the expectation that probation and parole officers be law-abiding persons whose behavior ought to serve as a role

model to the client. An officer who uses drugs loses credibility with the client and therefore loses effectiveness.

In most instances where public officials are involved, the courts have ruled that the governmental interest outweighs the individual's privacy interest and, hence, public officials may be tested. When and how the courts may test, however, is a different question. Courts often note the lessened expectation of privacy to which a public official is entitled and the enormity of the governmental interest involved in drug testing. Often the courts find that public employees are not entitled to the same privacy as the average citizen because of their sensitive positions. As the court stated in *Turner v. Fraternal Order of Police*, 500 A.2d. 1005 (D.C. App. 1985):

The police force is a para-military organization dealing hourly with the general public in delicate and often dangerous situations. So we recognize that, as is expected and accepted in the military, police officers may in certain situations enjoy less constitutional protection than the ordinary citizen.²⁹

Level of proof needed to search. Normally, the Fourth Amendment requires a warrant for the search to be carried out. The issuance of a warrant necessarily entails probable cause to believe that the evidence will be found. In drug testing public employees, it is not necessary to meet the requirement of probable cause to search, although some courts have required this standard.³⁰ Most courts allow drug testing on the lesser standard of "reasonable suspicion." While these terms are difficult to define with precision, reasonable suspicion requires a degree of certainty that is lower than probable cause or reasonable grounds, but higher than mere suspicion. In general, scholarly writings have endorsed the standard of reasonable suspicion as sufficient for drug testing.³¹

The "reasonable suspicion" standard applies to employees already on the job. This is because these employees enjoy property interests in that they have a lot to lose if the test is positive. Court decisions have said, however, that reasonable suspicion is not required in the following instances:³²

1. Testing job applicants, trainees, and probationary officers--this is because in these cases employees have no property interests as yet in the job;
2. Routine physicals--no search occurs because the urine sample has already been given as part of the procedure; and
3. When persons apply for transfers to sensitive positions within an agency that are more closely associated with narcotics investigations.

individualized suspicion v. random testing. An issue that has spawned a number of cases is whether the agency can test only specific individuals who are under suspicion or whether the tests can be conducted at random. Although courts are split on the issue, most courts have concluded that individualized suspicion is necessary and that random testing is unconstitutional.³³ For example, in Capua, the court held that individualized suspicion was necessary to conduct urinalysis, upholding the petitioner's claim. The court stated that "the reasonable suspicion standard requires individualized suspicion, specifically directed to the person who is targeted for the search."³⁴ In all police cases where random and mass testing have been challenged, police officers have won.

Federal drug testing program. In September 1986, President Reagan announced a mandatory drug testing program for federal employees. This program allows for the testing of federal employees in "sensitive" positions without individualized suspicion. An attempt by the Federal Bureau of Prisons to begin testing in accordance with this executive order was blocked by a U.S. District Court judge in California.³⁵ The judge stated:

The program would force law-abiding employees of the Bureau...to submit to urinalysis even though not suspected of any drug use nor of any wrongdoing, negligence or dereliction of duty...There are cases in which compulsory drug testing may be justified in the interest of public safety or security or the like. This is not one.³⁶

In a more recent development, a federal judge in Washington, D.C., on July 29, 1988, issued a permanent injunction against the testing program of the U.S. Department of Justice, under which that agency would test 1,800 employees in sensitive law enforcement positions. This program also comes under President Reagan's September 1986 announcement of mandatory drug testing for federal employees. Agreeing that compulsory random testing constitutes unreasonable search and seizure, the judge concluded that such testing cannot be justified because the department does not consider drug use to be widespread in the agency. The federal government had justified the test by asserting a critical interest in the security of sensitive and classified law enforcement information and the integrity and public image of the department.³⁷ This decision, currently on appeal, implies that the sensitive nature of the position is not enough to justify mandatory random testing. It must also be established that the agency considers drug use in that agency to be widespread.

Despite these decisions, however, some courts have held that the governmental interest involved may be so substantial as to not require individualized suspicion to conduct drug testing. In a correctional context, where the correctional officers are in constant contact with prisoners, and institutional security could be threatened because of officers under the influence of drugs or smuggling drugs to inmates, the court upheld the use of systematic random drug tests, adding that prisons are "unique places fraught with serious security dangers," *McDonell v. Hunter*, 809 F.2d. 1302 (8th Cir. 1987).

In sum, decided cases appear to say that individual suspicion is needed prior to testing and that mandatory random testing is not justified unless: (1) the position is deemed sensitive, and (2) the agency considers drug use to be widespread at the agency. Despite this, however, one Court of Appeals has allowed systematic random testing of prison officers because of their constant contact with prisoners and the unique nature of the prison environment.

The Right to Due Process

As stated above, due process means fundamental fairness. It has two aspects: procedural due process and substantive due process. While these two terms are difficult to define, procedural due process generally means adherence to certain prescribed procedures to ensure that the process is fundamentally fair. Substantive due process, on the other hand, means that certain subjects are withdrawn from government control regardless of the procedure used.³⁸

In employee testing, the concern is procedural due process, manifested in such issues as employee notification, chain of custody, test accuracy, and test confidentiality.³⁹ Employee notification stresses the need for clear guidelines concerning how and when testing is to be done. Chain of custody goes into whether the specimen collected is in fact the specimen tested and whose results are later used in evidence. Test accuracy deals with false positives and false negatives and asks whether the results are scientifically reliable to a point where admission into evidence is fair to the individual. Test confidentiality is concerned not just with the improper disclosure of results, but also with whether the test reveals other information (such as medicine being taken) that is unrelated to government interest in drug testing.

All of the above issues require that the testing process be surrounded with safeguards against error and abuse. The concept is best illustrated in two court cases that reached opposite results because of the procedures used.

In Capua, the court disapproved of the practices of the agency and concluded that they violate due process. The court found the following procedures, among others, unacceptable:

1. Not giving notice of intent to begin drug testing;
2. Absence of a policy concerning the procedures and standards in the implementation of drug testing;
3. Failure to protect confidentiality;

4. Lack of verification procedures;
5. Failure to give persons tested a copy of the laboratory report; and
6. Immediate termination of those who tested positive and filing of criminal charges against them.

In contrast, the 5th Circuit Court approved the testing program used in the case of *National Employees Treasury Union v. Von Raab*, 816 F.2d. 170 (5th Cir. 1987). Included in the U.S. Customs drug testing program are the following key due process safeguards:

1. Testing only those persons voluntarily applying for sensitive positions;
2. Giving five days' notice prior to testing;
3. Allowing the employee to withdraw his or her application at any time without any adverse inferences;
4. Giving a form to the employee at the time of the test on which he/she may list any medications taken;
5. Employing strict chain-of-custody procedures, including applying a tamper-proof seal to bottles, having employees initial labels affixed to seals and chain-of-custody forms, and maintaining both a tracking system and chain-of-custody records at the laboratory where samples are sent;
6. Confirming positive EMIT results with a GC/MS test;
7. Allowing employees to designate a laboratory to independently test the original sample in the event of positive results;
8. Implementing a quality-assurance program that involves intermingling control samples with employee specimens to test the rate of false positives; and

9. Using drug tests as an administrative tool only, and never bringing criminal charges.

Though this program may seem overly rigorous, many of these and additional safeguards are necessary if employee drug testing is to be implemented in a probation or parole department. Although the issue of proper procedure to be used has yet to be settled by the U.S. Supreme Court, these two cases imply that the closer an agency's procedure is to the Von Raab model, the better are its chances of surviving a due process challenge.

Cases Pending In The U.S. Supreme Court

A number of the major issues discussed here and on which lower courts have issued various decisions may soon be settled by the U.S. Supreme Court in three cases that have been docketed for consideration during this 1988-1989 term. One of the cases is the National Employees Treasury Union v. Von Raab, referred to above, involving the testing of U.S. Customs employees applying for sensitive positions. Another case involves the testing of railroad employees after certain train accidents and rule violations, Railway Labor Executives' Association v. Burnley, 839 F.2d. 575 (9th Cir. 1988). In Von Raab, the 5th Circuit Court ruled that employees moving into sensitive positions could be tested, given the procedural safeguards offered by the program. In Burnley, the 9th Circuit Court reversed the lower court's decision in holding that employees could not be tested without individualized reasonable suspicion and that an accident did not constitute such suspicion. The third case, Consolidated Rail Corporation v. Railway Labor Executive Association, 846 F.2d. 1187 (1988), adds a different dimension to the issue in that while the Von Raab and Burnley cases involve public employees, the Consolidated Rail case involves employees in the private sector. The question to be decided by the Court is whether a private corporation can unilaterally require its employees to undergo periodic urinalysis for drugs, or if such ought to have been the subject of collective bargaining with the union.

It is difficult to predict how the Supreme Court will decide these three cases. Proponents of drug testing, however, could not

have asked for better test cases. These cases represent drug testing in very limited instances and, at least in Von Raab's case, 'with a plethora of constitutional safeguards. Whichever way the Court decides, the cases will most likely settle a number of constitutional issues, such as those raised in this paper. However, refinement of legal issues, based on the provisions of specific testing programs, will continue to be addressed by lower courts. Employee drug testing is so varied and complex that the legal controversy will require court attention for years to come.

Summary and Suggestions

The safeguards used in employee testing and the instances in which probation and parole officers may be tested vary substantially from those of their clients. A study of existing literature and decided cases suggests ways whereby a drug testing program can be so structured as to minimize vulnerability to a legal challenge. Some of the measures an agency might consider follow.

1. Avoid random mandatory testing of probation and parole personnel. Chances are that such tests will not survive court challenge.
2. If possible, obtain a voluntary consent from the employee prior to drug testing.
3. If the test is to be made without a warrant, have at least a "reasonable suspicion" before testing an employee. The only instances when individualized suspicion is not necessary are: (a) when the test is in conjunction with a routine annual physical examination, or (b) if the persons to be tested are job applicants or probationary officers.
4. Have a written policy that states the procedure to be used in drug testing, and the resulting disciplinary actions that are to be taken in cases of positive results.

5. Give employees a copy of the department's policy on drug testing.
6. Confirm positive EMIT results (if that is the test used) with a reliable confirmation test.
7. Maintain confidentiality of test results. Such results should be made available only to duly authorized persons. Do not go public with the information.
8. Use drug tests only for administrative purposes, not for initiating criminal charges against the employee.
9. Adopt a policy to not terminate an employee immediately when positive findings result; instead, employees should be allowed to participate in a drug treatment program. This benefits employees who are willing to change and obviates lawsuits that usually come with termination.

CONCLUSION

Drug use has become alarmingly pervasive in American society. Recent studies have established a link between drug use and crime. Drug use deterrence and abstinence have therefore become priority goals in criminal justice. To achieve this, many probation and parole agencies have imposed drug testing as a condition of release.

This study concludes that there are no major legal barriers to drug testing probationers and parolees. This is because convicted offenders, although enjoying freedom in the community, have diminished constitutional rights, and whatever rights they have left may be overcome by a strong governmental interest in the rehabilitation of the offender or the protection of society. The legality or constitutionality of drug testing clients should therefore not pose much concern among probation and parole agencies. Nonetheless, it is necessary that drug testing be reasonably related to the crime for which the offender is on probation or parole. Moreover, proper testing procedures must

be followed, the accuracy of the test must be established, and proper chain-of-custody procedures must be employed if a successful legal challenge to drug testing is to be avoided or minimized.

Drug testing probation and parole officers raises the same constitutional issues as those raised in testing probationers and parolees. Court decisions indicate that drug testing may be allowed under narrow and limited conditions. The courts will most likely disallow mandatory testing of probation and parole officers, except if there is at least a reasonable suspicion that the employee uses drugs. Even then, proper safeguards must be employed before an agency can test and later take disciplinary action.

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