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CRIME FILE  
Study Guide

James K. Stewart, Director

NCJRS

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# Drug Testing

ACQUISITIONS

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## Introduction

In the current atmosphere of heightened concern about drug abuse in America, there is growing interest in the use of chemical tests, especially urine tests, for identifying drug users. Public debate, often heated, has focused on the advisability and legality of using urine tests to identify drug use in athletes, celebrities, and employees performing sensitive jobs. However, less attention has been given to the uses of urine testing for persons who have been arrested or are under the supervision of the criminal justice system, despite the high prevalence of drug abuse and associated health problems in criminals.

## Why Identify the Drug Abuser?

**To target active criminals.** Researchers have found that drug-abusing offenders are among the most active criminals. Addicts commit more crimes during periods when they are using drugs frequently than during periods of lesser drug use. The association between high rates of

offending and drug abuse has been found predominantly in persons who use expensive dependence-producing drugs like cocaine and heroin. Less is known about the criminal activities of people who abuse PCP or other nonaddictive illicit drugs. In youths, however, heavy marijuana use is also associated with problem behavior and is often accompanied by the use of other illicit drugs.

There are a number of reasons why drug abuse and crime are associated. Some people are so dependent upon drugs that they are driven to commit income-generating crimes like theft, robbery, drug selling, and prostitution. For other people, drug abuse appears to be merely one of many deviant behaviors they engage in; for still others, crime may be the result of a violent, bizarre reaction to a drug. In planning effective responses for each person, it may be necessary to understand which of the above relations between drug use and crime applies.

**To protect the public from crimes by persons released to the community.** Judges are often faulted when persons they have released pending trial or on probation are found to have committed another crime, especially a violent crime. If persons who are released to the community before trial or under probation or parole supervision were tested for illicit drug use, it might be possible to initiate treatment or urine monitoring for those who test positive. Because of the association between drug use and offending, effective programs for controlling or monitoring drug use may be a means of reducing crimes of released arrestees and offenders.

**To reduce jail or prison crowding.** Jail and prison populations in large cities contain substantial numbers of drug-dependent persons. By identifying drug-dependent persons and placing them in residential treatment programs or urine monitoring programs, we may be able to reduce jail and prison populations and to lessen future drug abuse and crime. One jurisdiction in Indiana is adopting a program in which arrestees charged with minor offenses can be released without bail if they agree to participate in a urine monitoring program. The cost of testing is charged to the defendant but is less than the amount for bail and should

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More than half of the people arrested for serious crimes in recent years in Washington, D.C., and New York City test positive for drug use. Many active offenders use drugs, and high rates of drug use are associated with high rates of offending. Use of drug use tests, especially urinalysis, is becoming widespread but raises difficult legal and policy questions.

result in the early release of more defendants. Judges in Washington, D.C., report that because of their pretrial testing program, they are more likely to release suspected drug users because they know that their drug problems are being addressed.

**To reduce drug abuse and crime.** There is growing evidence that criminal justice referral of offenders to drug abuse treatment programs, often accompanied by urine monitoring, can lead to a longer treatment period and to reductions in both drug abuse and crime. Because younger offenders are less likely than older offenders to inject hard drugs and to use heroin, identification of youthful offenders who are abusing drugs such as marijuana, PCP, or cocaine may hold promise for preventing more extensive drug use.

**To address public health problems.** Abusers of hard drugs, especially persons who inject drugs, are at high risk for health problems. Intravenous drug users are especially at high risk for contracting AIDS by sharing dirty needles that contain blood from infected fellow addicts. Prostitutes are also likely to have serious drug abuse and associated health problems. More than two-thirds of the arrestees in Washington, D.C., and New York City have been found to test positive by urinalysis for one or more drugs. The criminal justice system may have an unusual opportunity to identify persons with health problems.

**To monitor community drug use trends.** As illicit drugs become available in a community, the more deviant persons can be expected to be among those who first use them. Thus, an ongoing urine testing program may provide warning of drug epidemics and information on changing patterns of drug availability. The results from a current urine testing program for arrestees in Washington, D.C., have been useful for tracking the rising trend of heroin use in the 1970's and of cocaine in the 1980's.

## How Do We Identify Drug Users?

A variety of methods are available for identifying drug users in the criminal justice system. Urine testing is the most commonly used method and much of the current policy debate focuses primarily on urine testing. Other forms of drug use testing are now under development—including testing of drug traces in hair samples—that may be less intrusive and, perhaps as a result, less controversial.

**Offenders' self-reports.** Social science research has amply documented that people are willing to disclose sensitive information about their drug use if the information is collected voluntarily, for research purposes only, and if confidentiality is assured. These conditions do not exist for persons detained and processed by the criminal justice system. Many detainees will conceal their recent drug use, even in a voluntary, confidential, research interview. Estimates of recent drug use obtained by self-reports from arrestees generally identify about half as many drug users as urine tests do.

**Criminal justice records.** The criminal justice system maintains extensive files on offenders. However, because much of the information in the files is obtained from the

offender, the records provide only limited information about an offender's involvement with drugs. Furthermore, drug users are arrested for a variety of offenses; relying solely on the filing of a drug-related charge at arrest to identify drug users will also underdetect users.

**Urinalysis tests.** Although urine tests have long been used by the criminal justice system, only with the advent of more accurate and less expensive technology has urine testing become a viable option for screening large numbers of offenders. Primarily because of their low cost (under \$5 for each drug tested) and ease of use, the EMIT™ (enzyme multiplied immune test) tests are the most commonly used urine tests today. These tests depend on a chemical reaction between the specimen and an antibody designed to react to a specific drug. The chemical reaction causes a change in the specimen's transmission of light, which is measured by a machine. If the reading is higher than a given standard, the specimen is positive for the drug. Because the determination of a positive is based on specific numbers, the level of subjectivity required by the EMIT test is less than that required by most other tests.

The growing popularity of the EMIT tests has made them the object of several legal challenges. The primary criticism is that the EMIT tests have too high a rate of false-positive errors. That is, the tests too often falsely indicate the presence of a drug. Much of the debate surrounds the possibility that some common *licit* drugs can cross-react with the test's reagents to produce a positive result. The ingestion of poppy seed bagels has been found to produce a positive test result for opiates, for instance. Furthermore, the EMIT test for opiates will detect prescribed drugs such as codeine as well as heroin (morphine). Sloppy recording procedures by laboratory staff and failure to maintain careful controls over the chain of custody of the specimen can also produce serious test errors.

The future of urine testing in the criminal justice system will probably depend on a satisfactory solution to the problem of false-positive errors. Preliminary Federal guidelines for testing specify that all positive test results from immunoassay tests, like EMIT, should be confirmed by gas chromatography/mass spectroscopy (GC/MS). GC/MS is the most accurate technique available for identifying drugs in the urine, but it costs \$70 to \$100 per specimen. It seems appropriate to require such a procedure when a single test result may end in loss of a person's job or liberty. However, when a test result is used to trigger further investigation to determine if a person is involved in drug use, confirmation by other methods (urine monitoring or diagnostic interview) may be equally acceptable. The courts have yet to decide this issue.

## Who Should Be Tested?

**Arrestees.** By testing arrestees one can screen for drug abusers in the largest and most diverse criminal justice population, in contrast with the much smaller populations reached by programs which test only persons who have been placed on probation or parole. There are, however, special legal concerns regarding testing and monitoring of persons at the pretrial stage, before a determination of guilt or innocence has been made. In some States a judge has statutory authority to decide the defendant's pretrial release status solely on the basis of information regarding the defendant's risk of failure-to-appear in court (FTA). The judge's authority to order urine screening or to set pretrial release conditions aimed at monitoring drug use, or requiring treatment, may depend in these States on the existence

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of a link between drug abuse and FTA. Prior research has suggested such a link, and research being completed in New York City has found that arrestees who tested positive for drugs and admitted current drug dependence, or a need for treatment, were at high risk for FTA.

While a number of jurisdictions are considering implementing pretrial testing programs, Washington, D.C., is the only jurisdiction with an operating program. Judges use urinalysis results and information from a brief cellblock interview about prior drug use to determine conditions of pretrial release. The judge may refer arrestees who test positive to a treatment program or to continued urine monitoring.

**Probationers and parolees.** Probation and parole are suitable times for screening for drug use, primarily because abstinence from illicit drugs is typically a condition of postconviction release. Testing would probably be constructive, however, only in programs with manageable case loads so that the test results can be used as part of a comprehensive program of assessment and treatment. Adequate resources must be available for treatment and monitoring.

**Juveniles.** Adult offenders tend to have begun their illicit drug use as youths. There is hope that by identifying juvenile detainees who use such drugs as marijuana and PCP, and intervening with them, it may be possible to prevent their progression to injection of harder drugs.

**Female detainees.** Much less attention has been given to the drug use and crime of female offenders than of males. This is true in spite of the evidence that female arrestees are more likely than males to test positive for drugs and to have associated health problems. Many female offenders engage in prostitution and inject drugs, making them a high risk group for transmission of the disease AIDS.

## Why Not Test?

It is clear from experience with the Washington testing program that many of the issues and criticisms that have been raised about drug testing in the workplace will be raised about testing offenders. This section reviews briefly some of the more significant legal and practical issues relevant to offender urine testing programs.

**Fourth amendment rights against illegal search and seizure.** Does the government have the right to impose mandatory testing on a person in the absence of individualized suspicion? It is argued that the invasion of privacy, the costs, and the intrusiveness of urine testing are too great to justify the testing of persons at random, when there is no clear suspicion that the person is using drugs. In some instances, mandatory urine testing has been sustained by the courts when unique institutional requirements existed. For example, such tests have been upheld for jockeys, in the context of regulation and reduction of criminal influence in the racetrack industry, as well as for prison inmates to promote security, and in the military.

A Federal appeals court overturned a lower court's decision staying the U.S. Customs Service program from testing employees transferring to sensitive jobs. The appeals court found that the particular method by which the program operated was limited in its intrusiveness and that there was

a strong and legitimate governmental interest in not employing drug users in the positions in question. It is not clear how these legal precedents will apply to programs for screening large numbers of offenders.

Critics of mandatory urine testing argue that the need to watch the person providing the specimen is an unacceptable infringement of privacy. When an employee or offender who has received advance notice is tested, special precautions must be made to ensure that the person does not substitute someone else's urine. When arrestees have no time to plan for the urine test, there may be less need to observe the voiding. Under these circumstances, the test may be no more intrusive than conditions that already exist in using public restrooms or toilet facilities in local jails.

The legality of mandatory testing of offenders will probably depend on the stage at which testing is introduced. Some believe that it is improper to require tests of persons at the pretrial stage when they are presumed to be innocent. Others argue that because an arrest results from probable cause to believe that the person has committed a crime, and because arrestees have reduced fourth amendment rights, it is legal to require testing of arrestees. Probation officers often have the authority to require urine tests to enforce the conditions of probation requiring abstinence from illicit drug use. Similar authority may also apply to parole officers.

**Fourteenth amendment due process rights.** Considerable litigation has occurred over the accuracy of urine tests and whether punitive actions taken against a person on the basis of a single unconfirmed urine test violate the 14th amendment's guarantees of due process. Because of the extensive use of the EMIT test, most of this discussion has concerned the accuracy of that particular test.

It is clear that the acceptability of results of EMIT tests of criminal justice detainees varies from jurisdiction to jurisdiction. Some courts have ruled that a single unconfirmed EMIT result is sufficient for revoking probation or imposing sanctions on prisoners, while other courts have ruled that the test must be confirmed. There is, however, little agreement on the type of confirmatory test required. In some instances, courts have ruled that repeating the EMIT test is sufficient, while other courts have required that an alternative method such as TLC (thin layer chromatography) or GC/MS be used.

When persons are tested repeatedly, other issues become relevant. For example, a contempt of court ruling for a person on pretrial release in Washington, D.C., who tested positive for PCP on 16 tests over a 60-day period was denied when expert witnesses could not specify the length of time that PCP could be detected in urine. Unlike cocaine and opiates, which are eliminated from the body within days after ingestion, PCP and marijuana may be stored and released weeks after use. The Washington judge could not therefore rule out the defendant's claim that all of the positive tests were the result of use of PCP before the pretrial period began. There is a critical need for the creation of a national system for evaluating laboratory proficiency and establishing appropriate guidelines for the use and interpretation of urine tests by the criminal justice system.

**Other relevant issues.** A number of other legal and ethical issues have been raised. Among the most important is whether the testing program could result in additional harm to the offender. Persons arrested for a minor offense might

find themselves in more trouble with the court by participating in a drug testing program (if they repeatedly test positive), than they would have been for the original arrest charge. Penalties could also result from refusal to take a test.

Another important issue is the confidentiality of test result information. For example, is information about drug use at arrest to be made available at the time of sentencing or parole? A person labeled a drug user can suffer adverse consequences from that label for some time after a positive test result is obtained.

Perhaps the greatest danger posed by urine testing programs is the belief that use of the tests will somehow solve the drug abuse problem. Testing will uncover the magnitude of the drug problem in a jurisdiction and identify some of the affected persons. However, in the absence of well-developed plans on how to assess a person's level of drug involvement and how to plan effective responses, the testing program will fail to achieve its goals. A program that does nothing more than increase detentions will only add to jail and prison crowding. Drug abuse treatment facilities in most large cities are filled to capacity and will require new resources if they are to handle an influx of criminal justice referrals. A comprehensive strategy for handling the test results should be in place *before* urine testing is adopted.

## References

- Carver, John A. 1986. "Drugs and Crime: Controlling Use and Reducing Risk Through Testing." *NIJ Reports SNI*: 199 September/October.
- Hawks, Richard L., and C. Nora Chiang, eds. 1986. *Urine Testing for Drugs of Abuse*. Washington, D.C.: U.S. Department of Health and Human Services, National Institute on Drug Abuse.
- Stitzer, Maxine, and Mary E. McCaul. Forthcoming. "Criminal Justice Interventions with Drug and Alcohol Abusers: The Role of Compulsory Treatment." In *Behavioral Approaches to Crime and Delinquency*, edited by Curtis J. Braukman and Edward K. Morris. New York: Plenum Press.
- Wish, Eric D., and Bruce D. Johnson. 1986. "The Impact of Substance Abuse on Criminal Careers." In *Criminal Careers and Career Criminals, Volume II*, edited by Alfred Blumstein, Jacqueline Cohen, Jeffrey A. Roth, and Christy A. Visher. Washington, D.C.: National Academy Press.

## Cases

- National Treasury Employees Union v. William Von Raab, Commissioner*. 41 CrL 2097 (5th Cir. May 6, 1987).
- Peranzo v. Coughlin*, 608 F. Supp. 1504 (S.D.N.Y. 1985).
- Wykoff v. Resig*, 613 F. Supp. 1504 (N.D. Ind. 1985).

## Discussion Questions

1. Should criminal justice system officials be permitted to test arrestees for drug use? Probationers? Parolees?
2. Should testing of arrestees for current drug use be limited to people who have been charged with drug-related crimes? Why or why not?
3. Should testing for drug use be permitted for all arrestees (or probationers or parolees) or only in cases where there is probable cause to believe that the arrestees are current users of illicit drugs?
4. Should the rules governing administration of drug use testing and confirmation of positive results be stricter for arrestees, whose positive result may lead to loss of pretrial freedom, or for employees, whose positive result may lead to loss of a job?
5. If you were chief judge of an urban court, would you establish a program of drug use tests for all arrestees? Why or why not?

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