Legal Issues in Juvenile Drug Testing

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Juvenile drug testing is a popular and accepted way of controlling juvenile behavior and detecting drug use. Most juvenile justice systems in the country use drug testing when supervising juveniles on probation or keeping them in institutions. Drug testing is not limited to the juvenile justice system; it is also used extensively in adult probation, parole, and in jails and prisons. As in other areas of criminal justice, the underlying assumption in juvenile drug testing is that it is an effective way of monitoring behavior and discouraging the use of drugs and thus enhances rehabilitation.

This article discusses constitutional and legal issues associated with drug testing. Preliminary issues are discussed, and then constitutional and other legal issues are addressed. The article presents recommendations for establishing a legally defensible drug testing program that juvenile probation agencies can adopt and implement.

The constitutional, legal, and other issues identified in this article are not peculiar to juvenile probation. The same issues can be and are raised any time drug testing is used to monitor behavior, be that in probation, parole, prisons, or jails. What is peculiar about juvenile drug testing, however, is that it represents a convergence of the principles of *parens patriae* and diminished rights. Juvenile proceedings are civil or quasi-criminal in nature, but courts have now given juveniles basic due process rights that used to be denied to them because of *parens patriae*. Cases involving juvenile drug testing generally do not make an issue of the differences in juvenile and adult proceedings; neither have they used *parens patriae* to highlight and isolate legal issues from the regular criminal justice process.

A review of case law shows a dearth of cases specifically addressing juvenile drug testing. The issues raised in these cases are basically similar to those in other types of drug testing, hence this discussion reflects an analysis of juvenile drug testing cases and cases in the other areas of criminal justice.

Preliminary Issues

The juvenile justice system in the United States is heavily influenced by basic conceptual frameworks that set it apart from adult justice. First, juvenile justice is based on *parens patriae*, literally meaning "parent of the country."[1] This has led to the family model of juvenile justice processing, as opposed to the "fight model" in adult justice. Central to the family model is the assumption that the offender gets the care, love, and treatment that society gives to family members. A downside of the family model is the absence of due process. Members of one's family are not given constitutional protections when being disciplined or when held accountable for their actions. In exchange, they get love, care, and forgiveness. Moreover, once a juvenile has been disciplined, his or her status in the family is restored and the family is whole again.

Over the years, *parens patriae* has gradually given way to basic due process guarantees, at least in some juvenile proceedings. This erosion started with *in re Gault*,[2] where the United States Supreme Court said that juveniles must be given certain due process rights in adjudication proceedings that can result in deprivation of liberty. Since then, other cases have afforded juveniles rights that used to apply only to adult cases. That erosion continues today through case law and legislative enactments that seek to narrow the gap between adult and juvenile justice.

A second influence in juvenile justice is the concept of diminished rights. Over the years, courts have held that offenders, after conviction or adjudication, suffer a diminution of constitutional rights. While they still enjoy constitutional protection, their status as individuals who have broken the law leaves them with fewer rights than the rest of society. Juveniles adjudicated delinquent retain some constitutional rights, but also lost some. The constitutional rights related to privacy, searches and seizures, and due process are reduced once a juvenile comes under the custody of the state.

A third influence is the desire to rehabilitate the juvenile, the assumption being that the young are more susceptible to rehabilitation. Many crimes committed by the young are related to or involve the use and sale of drugs. Rehabilitation, as a goal of juvenile justice, affords the government greater authority to control the behavior of juveniles, particularly in treatment. Drug testing facilitates rehabilitation in that it identifies drug users and serves as a deterrent to future misconduct involving controlled substances. This gives the government greater authority to drug test based on a "compelling need" justification. Conversely, however, juvenile rehabilitation is considered in many states as a government obligation, either constitutionally or by statute. Whatever may be the basis for rehabilitation, it

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enables the government to wield greater control over the juvenile.

The authority to drug test juveniles may come from a number of sources. Nothing in the Constitution encourages or prohibits drug testing; therefore, the Constitution is not a specific source of authority to drug test. Some federal laws impose limitations on drug testing; particularly the release of information, but specific federal authorization to test does not exist. Most drug tests are therefore based on state law, judicial authorization, or agency policy. Some states specifically authorize drug testing in probation, parole, or institutionalization, but most states do not. In the absence of state law, agency policy may authorize drug testing. Ideally, however, state law should authorize drug testing, although its specifics should be left to the agency.

Constitutional Issues

Drug testing can be challenged as potentially violative of six constitutional rights: the right against unreasonable searches and seizures, the right against self-incrimination, the right to privacy, the right to due process, the right to confrontation and cross-examination, and the right to equal protection. In addition, a few cases have raised the constitutional issue of impermissible delegation of judicial authority and the right against cruel and unusual punishment. Most challenges have failed.

The Fourth Amendment right against unreasonable searches and seizures is often invoked, drug testing being a highly intrusive form of search and seizure. For the challenge to succeed, the offender must prove that drug testing is an unreasonable form of search and seizure. This is difficult because of a juvenile's diminished Fourth Amendment constitutional right. Moreover, searches and seizures are more closely scrutinized by the courts when done by the police or law enforcement rather than by administrative agencies. The police are not involved in juvenile drug testing because it is usually administered and monitored by probation and parole officers. In most cases, drug testing is authorized either by state law, agency policy, or judicial order, and the results are used in an administrative proceeding, not in a criminal trial to prove guilt. Court decisions indicate that the Fourth Amendment rights of probationers and parolees are greatly diminished, particularly in revocation proceedings where such rights are often involved.

Offenders sometimes allege a violation of the right against self-incrimination, saying that the introduction of the results of a drug test in court is self-incriminatory. The Constitution, however, prohibits testimonial, not physical self-incrimination. Drug testing is physical self-incrimination and is analogous to appearing in a police line-up or requiring a suspect to submit to fingerprinting. Given the physical nature of drug testing, the constitutional right against self-incrimination does not protect the offender.

The right to privacy is raised in drug testing cases in the context of who monitors the process of obtaining the sample and how that is done. One court has said "that one's anatomy is draped in constitutional protection." Most jurisdictions, however, provide for same-sex supervision and shun supervision that is demeaning or humiliating. As long as these precautions are observed, challenges based on the right to privacy do not succeed.

The right to due process can be invoked when challenging test accuracy, the allegation being that inaccurate and unreliable test results violate fundamental fairness. These challenges often fail because of improving technology. Some jurisdictions require confirmation if test results are challenged; most courts, however, accept the results of a single drug test as accurate. The possibility of false positives or false negatives looms in drug tests, but is more an issue of sound agency policy than a valid basis for a legal challenge. At least two cases have dealt with the issue of test accuracy: *Peranzo v. Coughlin*[3] and *Jensen v. Lick*.[4] The research presented in the Peranzo case found an overall accuracy of 96 percent on EMIT®, with a survey of 64 laboratories over a four-year period. The accuracy for positive test was 98.7 percent for 730 positive tests. The *Lick* case had a determination of 97-to-99 percent accuracy overall. These accuracy rates, together with other test results, present a formidable barrier for plaintiffs to overcome.

The constitutional right to confrontation and cross-examination arises if the person who tested the sample is not in court to testify and be cross-examined. Most court cases are based on this issue; hence, it deserves extended discussion. While some courts require the courtroom appearance of the technician who conducted the test, most courts hold that the right to cross-examination and confrontation is not violated as long as the reliability of the test is established through some other means. Other courts dispense with confrontation and cross-examination under exceptions to the hearsay testimony rule, holding that the results of drug tests fall under the official records or business records exception to the hearsay rule. In *People ex rel. Brazeau v. McLaughlin*,[5] the court held the toxicology report to be hearsay and admissible. The admissibility of the document was based on a statement signed by the director of the lab attesting to scientific reliability of the GC/MS and EMIT® tests used. A number of courts have held that the appearance in court of the person who made the report is often not required due to the substantial cost of such an appearance, as proof of reliability or a signed statement of reliability of the laboratory report will suffice instead (*State v. Gregory*, *State v. Anderson*, *United States v. Penn*[6]).

Where the laboratory technician was in court for *Carter v. State*,[7] the court reversed judgment against the defendant due to lack of foundation for the scientific testing. The state failed to provide a proper foundation for the drug test when it was shown the laboratory technician could not explain the scientific basis of the testing procedure. The state failed to present a technician with the qualifications needed to establish the proper scientific foundation for the test. In the alternative, if the technician is not present, at least one court has held a positive test result admissible based upon

the testimony of the probation officer.[8] In this case, there was external evidence of illegal activity and the court decided that the rules of evidence do not apply fully to a probation revocation hearing. The non-application of the formal rules of evidence has also been determined on the federal level in *United States v. Grandlund*.[9] It further held that a defendant only has a qualified right to confront and cross-examine witnesses: therefore, a confrontation of a laboratory technician is not guaranteed if a good cause showing can be made to deny it. Other possibilities to refute the evidence presented by the federal government were cited as the rationale for denying confrontation of the laboratory technician in *U.S. v. McCormick*.[10] In sum, constitutional challenges based on the right to confrontation have not fared well in the courts.

Equal protection claims arise in cases where confirmation is at offender's expense and the offender is indigent and cannot pay for confirmation. While this challenge is strong when raised, it can easily be obviated by providing that confirmation will be at agency expense if the offender is indigent.

The Sixth Amendment prohibits the imposition of cruel and unusual punishment. Plaintiffs may assert that drug testing is both cruel and unusual, a futile challenge because the prohibition against cruel and unusual punishment has traditionally been interpreted by the courts to apply only to conditions of confinement or if the punishment imposed is grossly disproportionate to the offense. Neither of these characterizes drug testing; hence no such challenge has succeeded in court.

Other Legal Issues

Other non-constitutional legal issues have arisen, the most frequent being whether the condition of drug testing should be related to the act committed. Although courts are split on this issue, more recent court decisions tend to require relatedness for drug testing to be valid.

Another legal issue is whether an officer can drug test in the absence of specific authorization by law, from the court, or in the absence of agency policy. At least one federal court of appeals has answered in the affirmative. In *U.S. v. Duff*,[11] the ninth circuit federal court of appeals held that the probation officer had the power to order a defendant to submit to drug testing even though the court had not explicitly imposed such a condition. The court said that urine testing was consistent with the condition of probation requiring the defendant to refrain from violating the law and the probation officer had reasonable suspicion that the defendant was using drugs. In *U.S. v. Wright*,[12] the court approved drug testing based on the general conditions of release, under the clause which precludes use of controlled substances.

Judges have exercised wide discretion in determining what conditions are to be imposed in probation. Drug testing comes under this discretion. In most cases, the legislature does not specify the conditions for juvenile probation, leaving that determination to the judge and the juvenile agency.

Will one dirty test suffice to trigger sanctions, including revocation of probation? Most courts say yes. In *United States v. McNickles*[13] and *Stevens v. State*,[14] courts held that a single violation suffices to revoke probation. Some courts require probable cause; others use the lower standard of reasonable suspicion, or mere suspicion. Revocation being a non-criminal proceeding, appellate courts prefer the degree of certainty for revocation to be decided by lower court judges.

Pre-adjudication Testing

Pre-adjudication drug testing is used in some jurisdictions, usually as a condition of release. Legal issues arise because of possible negation of the presumption of innocence and the imposition of a sanction prior to adjudication. This is not a formidable constitutional issue, however, in juvenile court cases, because the U.S. Supreme Court has decided that preventive detention of juveniles (which raises essentially the same issue of presumption of innocence) is constitutional if it promotes a legitimate state interest.[15] Such state interest is not hard for the state to establish in drug testing.

A corollary issue is whether the juvenile can be denied release if he or she refuses to submit to a drug test. Although no case law addresses this issue, the likelihood is that such denial is defensible if detention is authorized for that offense anyway. If it is authorized, then conditional release should also be considered authorized, unless release is specifically precluded by state law. If state law does not authorize detention for that offense, then drug testing can be used only with consent because no viable sanction exists in case of refusal to submit to the test.

Recommendations for Establishing a Legally Defensible Drug Testing Program

For Juvenile Justice

What follows are recommendations agencies may want to use when adopting a legally defensible drug testing program. These recommendations are divided into the following categories: authorizations, when to test, confirmation, chain of custody, confidentiality, court challenges, pre-adjudication drug testing, and other concerns.

Authorization

- Ideally, the authority to drug test should be given by state law, as opposed to authorization given by the judge, parole board, or agency policy. Currently, only a few states have laws on drug testing. Moreover, whatever laws there are deal with drug testing in general and do not particularly address juvenile drug testing.

- In the absence of state law authorizing drug testing, agencies should seek court or board order to authorize testing as a condition of pretrial release, probation, or parole.
- In the absence of state law or court or board order, drug testing should be authorized by agency policy and not left to officer discretion.
- State law that authorizes drug testing should include a provision exempting officers and agencies from liability arising from the imposition and implementation of drug tests. This protects officers from liability under state law, but not from federal cases for civil rights (Section 1983) violations.
- Agencies should have a written set of procedures and guidelines for drug testing. This should state what happens if the offender refuses to submit to the test, how test results will be used, and the likely sanctions if the test is positive. A copy of the procedure should be given to the person to be tested.
- Drug testing procedures and guidelines should be submitted to and reviewed by legal counsel prior to implementation. They must be reviewed periodically. If possible, the legal counsel should be a member of the team drafting the drug testing policy.

When to Test

- The frequency of drug tests should be left to the discretion of the agency and not specified by law or judicial order. Flexibility should be given to the agency; otherwise failure to test as specified by law or judicial order might provide grounds for liability based on negligence.
- An officer should not require drug testing on his or her own. If an officer has reasonable suspicion that an offender who is not required to submit to drug testing is using drugs, the officer should obtain a court or board modification of the conditions allowing the test to be performed. This protects the officer from liability arising from drug tests.
- In addition to scheduled drug tests, drug testing at any time will likely be held valid by the courts if there is individualized reasonable suspicion that the offender is using drugs, as long as there is a court or board order authorizing the test. If such authorization does not exist, it is best to obtain authorization from the judge or board even if reasonable suspicion exists.

Confirmation

- The agency should develop and implement a confirmation policy based on court decisions in that jurisdiction. Courts differ on the need to confirm; some courts do not require confirmation, other courts do. Among courts that require confirmation, some consider a second EMIT® test sufficient for confirmation; others require GC/MS.
- If courts in a particular jurisdiction require confirmation of negative test results when challenged, the decision by the agency to confirm or not to confirm should consider whether the expense of confirmation is worth it for the agency. If confirmation is not cost-effective, the alternative might be to disregard the result, retest the juvenile, and then obtain oral confirmation of the result.
- If confirmation is needed, GC/MS is recommended as the most legally acceptable confirmation procedure.
- Secure an admission of drug use from the offender following an initial screen that reveals a positive result. If the offender admits to the use of illegal drugs following any positive drug test, the officer should obtain a signed, written, admission, preferably in the presence of two witnesses.
- The offender should be given the option to challenge the test result at offender's expense. If the offender is indigent, confirmation should be at agency expense; otherwise equal protection issues might arise.
- Agencies should have a list of approved independent laboratories for offenders electing to challenge positive test results. The list assures that confirmation initiated by offenders is done by a reliable laboratory.
- All specimens that screen positive on an initial screen but fail to be confirmed should be declared negative and treated as specimens that showed negative in the initial screen.
- Specimens should be saved at least up to the time when the opportunity for a legal challenge will have lapsed. The agency may set a specified time for a confirmation challenge. In one case, the court found nothing wrong with keeping the sample for six months.[16]

Chain of Custody

- Rigorous chain of custody procedures should be prescribed and implemented as part of the agency drug testing strategy.
- The agency should develop a chain of custody form to be signed by every individual releasing and accepting the urine specimen.
- Agency policy should require officers to confront the offender with positive drug test results as soon as possible, preferably not later than 72 hours.
- When specimens are received from another office or facility, testing personnel should acknowledge receipt on the chain of custody form and provide the person delivering a copy.
- Testing personnel should inspect each package for evi-

dence of possible tampering and compare information on the accompanying chain of custody form.

- Any evidence of tampering with or discrepancies in the information on specimen bottles or the agency's chain of custody form attached to the shipment should be reported immediately to the submitting office, and should be noted on the chain of custody form which should accompany the specimens while they are at the non-instrument test site.

Confidentiality

- Confidentiality of test results should be observed by the agency. Test results should be disclosed only to those required by law or agency policy to have them.
- In the absence of state law, disclosure should be limited to the following: the offender, third parties to whom the offender, in writing, wants the results disclosed, and persons to whom such information is to be disclosed pursuant to court or board order.
- If no state law or court decision governs the release or non-release of drug test result information, the agency should draft its own policy in compliance with federal confidentiality laws and with whatever limitations the agency wants to impose. Confidentiality, rather than disclosure, should be the general rule.
- Agency policy should require that requests for disclosure of test results, other than those to whom the information should be disclosed by statute or case law, should be made in writing. Requests by telephone for release of information should not be granted.
- There should be proper documentation of the action taken and to whom and when disclosure was made.
- If the agency is using federal funds for testing, the agency should comply with federal rules on confidentiality. These rules include those found in 42 U.S.C. Sec. 290(dd-2) and (ee-3), and 42 CFR Part 2, and administrative rules promulgated by federal agencies in accordance with federal law.[17]
- Questions concerning the disclosure of test results that are not covered by law or agency policy should be referred to the judge or board.
- In case of doubt, drug test results should not be released.

Court Challenges

- The agency should establish policies for handling court challenges to test results. The staff should be prepared to provide evidence to support positive test results.
- If challenges arise about the validity and reliability of test results, the responsibility for providing expert testimony should be with the supplier of the instrument used. Expert testing should be given by the provider with no or minimum cost to the agency. These provisions should be included in the contract with the supplier.
- Staff training should include information and the development of skills needed for court testimony.

Pre-adjudication Drug Testing

- Ideally, drug testing should be imposed as a condition of pre-adjudication release only if:
    1. It is properly authorized, preferably by legislation or, in the absence thereof, by judicial order;
    2. There is justification for it, such as the offender having a history of drug use, it is reasonably related to the alleged act, or for the juvenile's safety or for the safety of others in the institution (if in a detention center);
    3. It is needed to identify users who may have no outward appearance or history of drug use, but there is reasonable suspicion that they have used drugs;
    4. It is linked to a treatment program or case management plan;
    5. Such release enhances the avowed goals of the court and the agency.

It should not be used for punitive purposes because at this stage the juvenile will not as yet have been adjudicated.

- The procedure should be clearly set and made known to the juvenile, including how the results are to be used;
- The policy must be in writing and occasionally reviewed.

Other Concerns

- Every offender should be properly informed about the agency's drug testing policies and procedures.
- Drug test operators, whether in-house or from the outside, should be trained and properly qualified.
- Drug tests should not be unnecessarily humiliating or degrading; neither should they be used to harass the offender.
- Cross-sex supervision of drug tests should be avoided, except in emergency situations.
- Offenders who cannot or would not produce urine samples should be given reasonable time to produce the sample. Failure or refusal to give a sample after reasonable time may be considered a violation of the condition for the offender to submit to a drug test.

Conclusion

Drug testing juveniles is currently a popular form of controlling juvenile behavior and is used in many jurisdictions. It raises constitutional and legal issues, some of which have

been addressed by the courts. Although the United States Supreme Court has not directly addressed the issue of juvenile drug testing, lower courts have resolved basic legal issues. In general, legal challenges to juvenile drug testing have not succeeded because of the *parens patriae* doctrine, drug testing being a valid form of behavior monitoring, and the concept of diminished constitutional rights.

Certain measures can be taken by the agency to enhance the legal defensibility of drug testing programs. Among the most important are proper authorization, preferably by statute, a written and carefully reviewed set of policies and procedures, adherence to prescribed procedures, and careful personnel training. There are no guarantees against court challenges or lawsuits, but adopting legal precautions should minimize legal challenges, protect officers from liability, and improve the chances of a successful defense in case agency policy is challenged.

NOTES

[1] *Black's Law Dictionary*, 6th edition, at 769.

[2]387 U.S. 1 (1967).

[3]608 F. Supp. 1504 (D.C.N.Y. 1985).

[4]589 F.Supp. 39 (1984).

[5]650 N.Y.S. 2d 361 (New York 1996).

[6]946 S.W. 2d 829 (Tennessee 1997), 945 P. 2d 1147 (Washington 1997), 721 F. 2d 762 (11th Cir. 1983).

[7]685 N.E. 2d 1112 (Indiana 1997).

[8]*State v. Fields*, 686 So.2d 107 (Louisiana 1996).

[9]71 F. 3d 507 (5th Cir. 1995).

[10]54 F. 3d 214 (5th Cir. 1995).

[11]831 F.2d 176 (9th Cir. 1987).

[12]86 F. 3d 64 (5th Cir. 1996).

[13]948 F. Supp. 345 (Delaware 1996).

[14]900b S.W. 2d 348 (Texas 1995).

[15]*Schall v. Martin*, 467 U.S. 253 (1984).

[16]*State v. Quelnan*, 767 P. 2d 243 (Hawaii1989).

[17] Federal rules on confidentiality relevant to drug testing and services are long and extremely complex. As culled from other publications, they may be summarized, however, as follows:

"Two Federal laws and a set of Federal regulations guarantee the strict confidentiality of persons (including youths) receiving alcohol and drug services. (The legal citations for these laws and regulations are 42 U.S.C. sec.290 dd-3 and ee-3; CFR Part 2.) The laws and regulations are designed to protect client's privacy rights and thereby to attract people to treatment.

"The Federal confidentiality laws and regulations protect any information about youth if the youth has applied for or received any alcohol or other drug-related services–including diagnosis, treatment, or referral for treatment–from a covered program. The restrictions on disclosure apply to any information, whether or not recorded, that would identify the youth as an alcohol or drug user, either directly or by implication.

"The Federal regulations apply only to programs that are federally assisted, but this included indirect forms of Federal aid such as tax-exempt status, or State or local government funding that originated with the Federal Government. Virtually all programs in public schools, and many private school programs, meet this requirement."

Exceptions according to the publication are: Consent, Internal Program Communications, Qualified Service Organization agreements, Communications that do not disclose patient-identifying information, child abuse and neglect reporting, court-ordered disclosures, patient crimes on program premises or against program personnel, and research, audit, or evaluation.

Source: *Legal Issues for Alcohol and Other Drug Use Prevention and Treatment Programs Serving High-Risk Youth*, OSAP Technical Report–2, U.S. Department of Health and Human Services, 1992, pp. Ivff.

Another publication summarized federal law as follows:

"These laws and regulations prohibit disclosure of information regarding patients who have applied for or received any alcohol or drug abuse-related services, including assessments, diagnosis, counseling, group counseling, treatment, or referral for treatment, from a covered program. The restrictions on disclosure apply to any information that would identify a patient as an alcohol or drug abuser, either directly or by implication. They apply to patients who undertake treatment as a form of alternative processing, patients who are civilly or involuntarily committed, minor patients, and former patients. They apply even if the person making the inquiry already has the information, has other ways of getting it, enjoys official status, is authorized by State law, or comes armed with a subpoena or search warrant.

"Any person that specializes, in whole or in part in providing treatment, counseling, and/or assessment and referral services for patients with alcohol or drug problems must comply with Federal confidentiality regulations (sec. 2.12 (3)). Although the Federal regulations apply only to programs that receive Federal assistance, this category includes organizations that receive indirect forms of Federal aid such as tax-exempt status, or State or local funding coming (in whole or in part) from the Federal government.

Source: *Treatment Drug Courts: Integrating Substance Abuse Treatment With Legal Case Processing: Treatment Improvement Protocol Series 23*, U.S. Department of Health and Human Services, 1996, p. 49.