

LEGAL BULLETIN 6.4

Urinalysis Drug Testing

Set 6: Due Process in Prison
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Drug testing through the analysis of urine samples has become an established part of prison life. The collection and testing of urine is a limited intrusion upon a person's expectation of privacy, and is therefore a search under the Fourth Amendment of the U.S Constitution. Despite this, random urine testing has been upheld so long as the procedures for picking inmates are "truly random." In other words, the prison cannot pick an inmate to take a drug test without a reason unless that inmate has been selected by random testing procedures.

Prisons may also test for cause as long as the request is reasonable. In other words, if a prison has reason to believe that a particular inmate has been using drugs or alcohol, the inmate can be ordered to take a urine test. Refusal to take a urine test can result in the same liability as if the inmate had tested positive for drug use. The tests applied are almost, but not completely, reliable, so there is a possibility that a person who is not a drug user might be unjustly accused. Unfortunately that claim is not easily proved at the disciplinary hearing or in court. This bulletin will discuss the testing routine, the laboratory tests, and some court cases that tell you what your rights are as to drug testing by urinalysis.

TEST PROCEDURES

There are different testing procedures that a prison can use to test a prisoner's urine for the presence of drugs. Urine testing procedures are commonly categorized as either screening tests or confirmatory tests. Screening tests are designed to isolate those individuals who might have used drugs from those who definitely are not under suspicion. Therefore, an effective screening device will be highly sensitive in order to minimize false negatives, while sacrificing specificity. Confirmatory tests, a second layer of testing which occur when a specimen tests positive on the initial test, are more specific. A "negative" test result for drug use indicates that the person being tested has not used the drug being tested; alternatively, a "positive" test result constitutes evidence of drug use by that person. A "false positive" is essentially a false accusation that the drug the urine test indicates is present actually is not present.

Some jurisdictions require that a chain of custody be kept on all drug tests performed. Chain of custody begins with the collection of the urine and continues through the final reporting of the test results to the inmate. At each stage, the chain of custody provides documentation that standard operating procedures were followed and that the security of the sample was not breached. At each stage, the chain of custody must be signed and dated by the person handling the sample with a brief explanation of what was done with the sample. Any breach in the chain of custody raises serious questions about the validity of the test results.

These tests differ in the amount of money it costs to use them and in how accurate they are. Most of the types of tests used are briefly described below. The most commonly used test by prisons is the EMIT test, which is discussed first. The information presented below was found through several different sources, including web pages on the internet, reference books in the library, and cases.

EMIT TEST

EMIT is an acronym for enzyme multiple immunoassay technique. An EMIT test does not measure the amount of drugs in the urine directly, but instead measures the reaction of an enzyme to a class of drugs. Thus the reliability of the test to detect the presence of a specific drug is not very good. This is because substances that have similar chemical structures will cross-react and give a “false positive” reaction. Some literature suggests that many other legal and over-the-counter drugs may yield positive reactions for certain classes of drugs. However, other literature suggests that this problem has been fixed in the EMIT test.

The EMIT test consists of mixing a urine sample with an antibody solution. The reactions which result produce a substance which can be compared to known values through a device known as a photometer. Within 90 seconds the photometer prints on the result card whether the sample is positive or negative for the drug in question. If the initial EMIT test turns up negative, no further action is taken.

Certain types of medication may cause a false positive result in a urinalysis test. This means that you could test positive for using a prohibited substance even if you have not done so. Some prison systems make it a policy to ask a prisoner who is selected to undergo a urinalysis test whether or not that prisoner has been taking any sort of medication. If you are not asked if you are taking medication, it is a good idea to mention it if you are. The following is a list of possible drugs that may cause a ‘false negative’ result on an EMIT test:

<u>Generic Drug</u>	<u>Brand Name</u>	<u>Illicit Drug Falsely Detected</u>
Ibuprofen	Advil, Datriil, Motrin, Rufen	Marijuana
Fenoprofen	Nalfon	Marijuana, Amphetamines Barbituates, Benzodiazepines Methaqualone
Naproxen	Anaprox, Apo-Naproxen Naprosyn, Navonaprox	Marijuana
Ephedrine	Acet-AM, Amesec Bronkaid, Bronkotabs Estasule Minus, Ephedrol Morax, Nyquil Quadrinal, Quelidrine Quelichine, Quibron Plus, Tedral	Amphetamines Heroin, Opiates

<u>Generic Drug</u>	<u>Brand Name</u>	<u>Illicit Drug Falsely Detected</u>
Phenylproma- nolamine	Alka-Seltzer Plus	Morphine
	Allerest	
	Caldecon, Coffee-Break	
	Contac, Control	
	Dietac, Dimetapp	
	4-Way Nasal Spray	
	Naldecon	
	Sinarest, Sine-Off	
	Sine-Off, Sinubid	
	Triaminicin, Triminicol	
Tussagesic		
Codeine	Acetaminoph w/ codeine	Morphine
	A.P.C. w/ codeine	
	Ascriptin w/ codeine	
	Empirin w/ codeine	
	Fiorinal w/ codeine	
Dextro- methorphan	Dristan Cough Formula	Heroin
	Formula 44-D	
	Hold Cough Suppressant	Morphine
	Nyquil	
	Robitussin-DM, Romilar	
	St. Joseph's Cough Syrup	
	Silexin	
	Trucal, Tussaminic	
Vicks Cough Syrup		

RIA TEST (also known as Abuscreen)

RIA stands for radio immunoassay test. The test is an immunoassay, just like the EMIT test. The tests are applied the same way, but the RIA uses radioactive iodine as the detection mechanism rather than an enzyme used in the EMIT test. The RIA test is applied the same way as the EMIT. RIA tests are a little more sensitive than the EMIT and more complex, requiring extensive training to operate it. The RIA is better able to handle a large volume of samples. The most notable user of the RIA test is the U.S. Government, in particular, the Armed Services. The EMIT test is more common because RIA produces radioactive waste, which is difficult to deal with.

THIN-LAYER CHROMATOGRAPHY (TLC)

TLC is a form of chromatography. Chromatography is a method of separation of molecular mixtures that are present in the sample. TLC involves adding solvent to urine to

extract drugs and then comparing color spots on a TLC standard plate. TLC testing is based on the differences in the movement of various substances through a porous supporting medium. The degree of movement and the color are characteristics of certain drugs. This test is not widely used because the results depend to a great extent on the skill and ability of the test operator.

GAS CHROMATOGRAPHY

This test uses a separation technique to divide the urine extracts into component parts. An inert gas carries the urine through separating columns. The samples are broken down by their boiling temperatures and by their attraction to either the liquid or gaseous phases. A substance with an attraction to the liquid phase will take longer to travel through the column than other components. Compounds are identified by their separation time, called retention time.

MASS SPECTROMETRY TEST

This test is more expensive and sophisticated than the EMIT test. It is also considered the most accurate. The urine is injected into a machine and the urine is separated as it travels from the injection port to the detector. As the sample emerges it is ionized by electron bombardment. The compound is then broken up into molecular fragments. The fragmentation pattern is considered to be the “molecular fingerprint” of a specific compound. The resulting product is read by a mass spectrometer. The results are produced on a computer print out.

The mass spectrometry is typically used to confirm positive EMIT results. Mass spectrometry will indicate precisely what chemical is present. When used in conjunction with gas chromatography properly, the test is a near perfect method for identification, approaching 99% accuracy. This is necessary because the EMIT will only indicate whether something similar to what’s being tested is found. Mass spectrometry is difficult and more costly, which is why the EMIT is given first.

FLOURESCCEIN POLARIZATION IMMUNOASSAY TEST (FPIA)

The test uses cross-reacting antibodies to detect drugs in a class of drugs being tested for. The tracer is measured by fluorescence. Blue light excites the tracer or fluorophone, raises it to an excited energy state, and emits a green light of a different energy level and wavelength. The fluorescent tracer competes for antibody binding sites with the unlabeled drug particles in the sample. The tests are designed to use urine as the biological fluid specimen.

E-Z SCREEN

The E-Z screen is a cannabinoid enzyme immunoassay test. It is a small test that produces results within five minutes. Drops of urine are placed on a small, credit card-sized card and color changes to indicate whether the sample contains levels of cannabis metabolites (marijuana). At this time the E-Z screen test is only available for cannabis (marijuana), but tests for other drugs are being developed.

IMMUNOCHROMATOGRAPHIC ASSAY (Drug Check Cup)

This test is similar to E-Z screen in method. This test also provides results within five minutes. Unlike E-Z screen, however, this test screens for traces of five different substances present in at least the following amounts:

Marijuana	50 ng/ml
Cocaine/ Benzoyllecgonine	300 ng/ml
Opiates/ Morphine	300 ng/ml
Phencyclidine	25 ng/ml
Amphetamine	1000 ng/ml

Note: this test comes with the following advisement from its manufacturer:

“The test provides only preliminary data which should be confirmed by other methods such as gas chromatography/mass spectrometry (GC/MS. Clinical considerations and professional judgment should be applied to any drug of abuse test result, particularly when preliminary positive results are indicated.”

ROCHE TESTCUP

This is a common on-site test where the specimen is collected in and tested by a single device. Five minutes after the specimen is placed in the TesTcup, a multi-sensitive device on the side conveys a positive or negative determination for a number of substances, depending on the type of TesTcup used (see below).

TesTcup	Amphetamines, Cocaine, Morphine, THC
TesTcup 5	Amphetamines, Cocaine, Morphine, THC, PCP
TesTcup Pro 5	Benzodiazepines, Cocaine, Methamphetamines, Morphine, THC
TesTcup 5 ₀₁	Amphetamines, Cocaine, Methamphetamines, Morphine

TEST - STIK / STATUS STIK

Each sample is tested using a strip of paper treated with a series of reactive chemicals. Each chemical detects the presence or absence of a certain narcotic in the urine and displays their results by a change in color. Test – stiks vary by brand and type, but most commonly detect the presence of THC, cocaine, amphetamines, PCP, and opiates.

DETECTION TIME OF CERTAIN DRUGS

While researching the information for this Legal Bulletin, we came across several lists which purport to predict how long certain drugs stay in one’s system. The following chart was not developed by LPP and is reproduced from another source (Internet website). The LPP cannot and does not vouch for its accuracy.

<u>Drug</u>	<u>Approximate Detection Time in Urine Using EMIT</u>
Amphetamines (crystal, crank)	2-4 days
Barbituates: (sedatives)	
Short-acting (red devils)	1 day
Long-acting	2-3 weeks
Benzodiazepines (valium)	3-7 days
Cannabinoids (marijuana)	3-30 days
Clenbuterol	2-4 days
Cocaine	2-4 days
Codeine	2-4 days
Euphorics	1-3 days; detectable by GC/MS and RIA; not detectable by EMIT
LSD	1-4 days
Methadone	3-5 days
Methaqualone (qualudes)	14 days
Opiates (morphine, heroin)	2-4 days
Peptide Hormones	Undetectable
Phencyclidine (PCP)	2-4 days
Phenobarbital	10-20 days
Propoxyphene	6 hours-2 days
Steroids (anabolic):	
Oral	14 days; detectable by HPLC, RIA and GC/MS; not detectable by EMIT
Injection	1 month

There is a similar chart that the Federal Bureau of Prisons includes in its Program Statement 6060.08, "Urine Surveillance and Narcotic Detection." I have reprinted it below. Again, the LPP cannot vouch for its accuracy.

<u>Drug</u>	<u>Approximate Detection Time in Urine Using EMIT</u>
Amphetamines	3 days
Methamphetamines	3 days
Cocaine	3 days
Cocaine Metabolite	3 days
Methadone	5 days
Methadone Metabolite	5 days
Morphine	6 days
Codeine	6 days
Opiates	6 days
Meperidine (Demorol)	6 days
Pentazocine (Talwin)	6 days
Propoxyphene (Darvon)	6 days

Barbituates	11 days
Phencyclidine	11 days
Phenobarbital	14 days
THC	30 days

4th AMENDMENT CHALLENGES TO URINALYSIS PROCEDURES IN PRISON

The Fourth Amendment was originally interpreted primarily to protect people from unreasonable search and seizures. There is no doubt that a drug test is a search. Courts that have faced the issue of drug-testing have unanimously held that forced drug-testing through urinalysis by a governmental entity constitutes a search and seizure within the meaning of the Fourth Amendment. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989); National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987). The protection is not absolute, however, for the Fourth Amendment only safeguards an individual's *reasonable* expectation of privacy. Whether or not the Fourth Amendment applies depends on whether the person can claim a justifiable, reasonable, or a legitimate expectation of privacy that has been invaded by government action. Hudson v. Palmer, 468 U.S. 517, 525 (1984).

Certainly, individuals have a reasonable expectation of privacy in their urinary function. See Forbes v. Trigg, 976 F.2d 308 (7th Cir. 1992) (prisoners retain protected privacy rights in their bodies). Inmates enjoy a legitimate expectation of privacy not only in the passing of urine, but also in the information that the urine contains. Many drug-testing programs call for direct observation of the individuals submitting to the test. An examination of one's urine may disclose numerous private medical facts other than whether the individual has taken illegal drugs, such as whether the individual is under treatment for depression or is epileptic or diabetic, or has a venereal disease, sickle cell anemia or schizophrenia, or in the case of a female, whether she is pregnant.

The fact that urinalysis tests are constitutionally protected searches, however, is not the end of the inquiry. Although a urinalysis is a search and seizure involving legitimate privacy interests, a search is only forbidden if it is unreasonable. Carroll v. United States, 267 U.S. 132 (1925). Whether or not something is a reasonable search in prison requires balancing the significant and legitimate security interests of the prison against the inmate's privacy interest. Bell v. Wolfish, 441 U.S. 520 (1979). In general, warrantless urinalysis testing of prison inmates has been considered reasonable even in the absence of probable cause or reasonable suspicion that the individuals tested have used drugs. Lomax v. McCaughtry, 731 F.Supp. 1388 (E.D. Wis. 1990); Ramey v. Hawk, 730 F.Supp. 1366 (E.D. N.C. 1989); Pella v. Adams, 638 F. Supp. 94 (D. Nev. 1986). See also Bell v. Wolfish, 441 U.S. 520 (Supreme Court held that visual body cavity searches could be conducted without probable cause or reasonable suspicion). Prisoners are entitled to some constitutional protection, but courts in drug-testing cases have held that the government's interest in security and safety outweighs a prisoner's diminished privacy expectations, and therefore the drug testing is not an unreasonable search. Storms v. Coughlin, 600 F. Supp. 1214 (S.D. N.Y. 1984).

Prisons can require prisoners to provide urine samples for drug testing for either of two reasons:

(1) if there is **reasonable cause** to believe the prisoner may have been exposed to drugs. For example, see Lomax v. McCaughtry, 731 F.Supp. 1388 (E.D. Wis. 1990) (information from confidential informant established reasonable suspicion to conduct drug test); Grochulski v. Kuhlman, 575 N.Y.S.2d 722 (NY App. Div. 1991) (court upheld regulation that permitted prison to conduct urinalysis based on information from unconfirmed sources).

(2) if the prison has a **random testing program** that is designed to prevent harassment or selective enforcement. Courts have generally upheld random drug testing programs. See Lucero v. Gunter, 17 F.3d 1347 (10th Cir. 1994) (random urine collection and testing of prisoners is a reasonable means of combating the unauthorized use of narcotics); Forbes v. Trigg, 976 F.2d 308 (7th Cir. 1992) (court upheld a program of testing all inmates in a particular job); Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986); Ramey v. Hawk, 730 F.Supp. 1366 (E.D. N.C. 1989); Storms v. Coughlin, 600 F.Supp. 1214 (S.D. N.Y. 1984). However, the program must be truly random. Below are examples of testing procedures that courts have upheld as truly random:

- Lucero v. Gunter, 17 F.3d 1347 (10th Cir. 1994) – the Department of Corrections selects inmates for testing pursuant to a computer guided random selection procedure which produces a list of inmates. Once a list is formulated, shift commanders make sure that the selected inmates complete the tests.
- Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986) – inmates chosen are tested by unit managers who randomly pull cards from an index card file.

However, courts have held that an unnecessary lack of privacy in taking urine samples is unreasonable. See Sepulveda v. Ramirez, 967 F.2d 1413 (9th Cir. 1992) and Storms v. Coughlin, 600 F.Supp. 1214 (S.D. N.Y. 1984) (the search should be no more degrading that is reasonably necessary to satisfy the prison's legitimate security interests).

DUE PROCESS CHALLENGES TO URINALYSIS PROCEDURES IN PRISON

The extensive use of urinalysis, particularly EMIT, by correctional authorities to detect drug use among inmates has been challenged on constitutional grounds. The unreliability of EMIT has been an issue in numerous constitutional challenges where the results of these tests have been used as the basis for disciplinary sanctions on prisoners thereby infringing their liberty interests. The most effective challenges have relied on the right to due process of law. Due process is a fundamental right listed in both the Fifth Amendment (relating to federal government action) and the Fourteenth Amendment (relating to state government action) of the U.S. Constitution. The concept of due process is based on notions of fairness in decision-making processes when the government is one of the interested parties. For a plaintiff to legitimately trigger the procedures of the due process clause, he must show a government deprivation of a constitutionally recognized interest in life, liberty or property.

Due process challenges have arisen in both state and federal courts with varying results. So far, both state and federal courts have failed to reach an agreement regarding the proper role of

EMIT in the prison disciplinary process and their treatment of prisoners' due process challenges to EMIT.

CASE EXAMPLES

The following are cases, both state and federal, from across the country. The cases are organized by Federal Court of Appeals Circuits and the states that are within those circuits. It should be noted that when this bulletin was first prepared in 1997, unpublished court cases were included in the case list. When the bulletin was updated in 2002, only published court decisions were included.

First Circuit

(Maine, New Hampshire, Massachusetts, Rhode Island, Puerto Rico)

Miller v. Moran, 1992 U.S. Dist. Lexis 7586 (D. R.I. 1992) (unpublished)

The court held that EMIT confirmatory tests were reliable enough to deny use of alternative methods of drug testing.

Kane v. Fair, Civ. No. 136229 (Mass. Super. Ct. 1983) (unpublished)

Plaintiffs sought an injunction on the use of unconfirmed EMIT results of drug use in any disciplinary proceeding. The trial court held that no positive EMIT test result may be introduced as evidence in any disciplinary hearing unless accompanied by evidence that the positive result was confirmed by an alternative method of analysis. The court also held that no sanction may be imposed on account of any previously conducted Disciplinary Board findings based upon unconfirmed EMIT test results.

Second Circuit

(Connecticut, New York, Vermont)

Cunningham v. Goord, 274 A.D.2d 814, 711 N.Y.S. 2d 571 (N.Y. 2000)

The court held that an inmate's refusal to provide a urine sample rendered him liable for the same penalty as would have been imposed for a positive urine test result.

Roman v. Coughlin, 609 N.Y.S.2d 732 (N.Y. App. Div. 1994)

Prisoner could not be disciplined for violating a rule requiring that he submit to a urinalysis drug test when he was not informed, as state law provided, of the penalties which could accompany refusal.

McCormack v. Cheers, 818 F.Supp. 584 (S.D. N.Y. 1993)

Court held that the hearing officer should not have relied on a letter from Syva Company regarding the accuracy of the EMIT test when finding the inmate guilty. If the hearing officer had only relied on double EMIT testing procedures, due process would have been satisfied. However, the letter should not have been considered as evidence.

Davis v. McClellan, 608 N.Y.S.2d 741 (N.Y. App. Div. 1994)

Discipline of New York inmate for testing positive for drug use overturned when record failed to show any testimony regarding the testing procedures used.

Harrison v. Selsky, 604 N.Y.S.2d 615 (N.Y. App. Div. 1993)

Positive drug test, confirmed by a second positive test, was substantial evidence that the prisoner violated rule against using controlled substances; hearing officer properly denied prisoner's request for yet another drug test, since it could not exonerate past drug use.

Simpkins v. Riley, 598 N.Y.S.2d 352 (N.Y. App. Div. 1993)

Discipline of New York prisoner for twice testing positive for cocaine on drug test had to be annulled when no effort was made to comply with state regulation requiring that a second confirming test be conducted by a "different trained individual" if available.

Smith v. Coughlin, 594 N.Y.S.2d 95 (N.Y. App. Div. 1993)

Prisoner who tested positive for opiates and cocaine could not challenge discipline based on theory that consumption of poppy seeds resulted in a false positive for opiates, since the positive drug test for cocaine, standing alone, was sufficient to support the discipline imposed.

Rodriguez v. Scully, 568 N.Y.S.2d 211 (N.Y. App. Div. 1991)

Positive results of two EMIT drug tests were "substantial evidence" to support the determination that the inmate tested used cocaine.

Sweet v. Coughlin, 558 N.Y.S.2d 198 (N.Y. App. Div. 1990)

Storing inmate's urine sample in refrigerator for two days did not invalidate the drug test and the results of the "control" tests need not be produced at disciplinary hearing.

Peranzo v. Coughlin, 675 F.Supp. 102 (S.D. N.Y. 1987), aff'd 850 F.2d 125 (2d Cir. 1988)

Double EMIT testing held sufficient to satisfy due process. Court relied on an American Association of Bioanalysis study which found that 98% of the 730 positive EMIT tests performed by New York's Department of Corrections were accurate indications of drug use.

Storms v. Coughlin, 600 F.Supp. 1214 (S.D. N.Y. 1984)

Plaintiffs asserted that the possibility they would be disciplined solely on the basis of an unconfirmed EMIT test violated their constitutional right to due process. The judge refused to grant a preliminary injunction since none of the plaintiffs had been disciplined because of the positive results. The judge did not determine the merits of the case. However, he did state that conduct of possession, as opposed to random testing, plus positive drug results would persuasively indicate drug use.

Lahey v. Kelly, 518 N.E.2d 924 (N.Y. 1987)

Relied exclusively on other judicial decisions to establish required general acceptance of EMIT system.

Vasquez v. Coughlin, 499 N.Y.S.2d 461 (N.Y. App. Div. 1986)

Relied on other judicial decisions to establish general acceptance of EMIT.

Johnson v. Walton, No. 56 1-84 Rm. (Rutland Superior Court, Vermont, Feb. 14, 1985) (unpublished)

The Vermont court held that an EMIT test used alone was not scientifically reliable. The court found that although the confirmed method called mass-spectroscopy is 100% reliable and thus optimal, an EMIT test confirmed by a method called Thin Layer Chromatography (TLC) will indicate presence of a drug with scientific certainty that goes beyond a reasonable doubt. The court required the confirmation of an EMIT test by either mass-spectroscopy or TLC. Lastly, the court held that the chance of false positives in unconfirmed test results and the concomitant loss of liberty violates a prisoner's minimum fundamental fairness and due process rights.

Third Circuit

(New Jersey, Pennsylvania, Delaware, Virgin Islands)

Thompson v. Owens, 889 F.2d 500 (3rd Cir. 1989)

Prisoner could be disciplined for drug use on the basis of drug test even with incomplete chain of custody on urine sample.

Frankenberry v. Williams, 677 F.Supp. 793 (M.D. Pa. 1988), affirmed 806 F.2d 1074 (3d Cir. 1988).

Due process is satisfied by an EMIT test confirmed by a high performance thin layer chromatography (TLC).

Fourth Circuit

(District of Columbia, Maryland, Virginia, West Virginia, North Carolina, South Carolina)

Jones v. United States, 548 A.2d 35 (D.C. 1998)

This is a criminal case. The court held that the EMIT system has reached the level of general acceptance in the scientific community to be used as evidence. The court concluded that the EMIT test results are presumptively reliable and thus generally admissible into evidence in every case.

Ramey v. Hawk, 730 F.Supp. 1366 (E.D. N.C. 1989)

Court held that federal urinalysis policy does not violate due process.

Wilson v. State, 521 A.2d 1257 (Md. 1987)

The court was not prepared to say that the EMIT test was not reliable in every case (since other courts have held it to be reliable). The court did not know what urinalysis test was used on the probationer in this situation, thus the case was sent back to the trial court to figure out what test was used. The state could not revoke probation based on an unconfirmed lab test admitted into evidence without proof of its reliability.

Fifth Circuit

(Texas, Louisiana, Mississippi)

Wilson v. State, 697 S.W.2d 83 (Tex. Ct. App. 1985)

The court concluded that the government failed to establish the scientific acceptance of its equipment and the test results of the EMIT test. The court stressed that there is no proof that the EMIT system was either accepted or rejected anywhere else. The court sent the case back to the trial court to establish the acceptance of the EMIT system.

Sixth Circuit
(Ohio, Kentucky, Michigan, Tennessee)

Byerly v. Ashley, 825 S.W.2d 286 (Ky. Ct. App. 1991)

Inmate should not be punished for positive results on urinalysis drug test when chain of custody of urine sample was not established once the sample reached the testing laboratory.

Higgs v. Bland, 888 F. 2d 443 (6th Cir. 1989)

EMIT test provided sufficient evidence in support of disciplinary sanctions for prisoner drug use to satisfy due process requirements.

Seventh Circuit
(Wisconsin, Illinois, Indiana)

Webb v. Anderson, 224 F.3d 649 (7th Cir. 2000)

Prisoner claimed that prison officials failed to maintain an adequate chain of custody of his urine specimen. Court held that the omissions in the chain of custody form and toxicology report were not so serious as to preclude reliance upon them by the hearing examiner. Court held that there was no due process violation.

Wade v. Farley, 869 F. Supp. 1365 (N.D. Ind. 1994)

No due process violation when the prison officials provided the inmate with a copy of the drug test results at the misconduct hearing even though it was for a limited time. Inmate argued that the prison officials needed probable cause to require him to submit to the urine test. The court held that the prison had probable cause, but noted that other courts have held that probable cause is not needed to require an inmate to submit to a urine test. The basis for the test was reasonableness.

Forbes v. Trigg, 976 F.2d 308 (7th Cir. 1992)

The court held that the prison was not required to publish testing procedures, but that the prison had to use scientifically sound procedures. An inmate could not refuse to be tested because he did not see the testing protocol. A sign, posted ten feet away from inmate's workstation, was sufficient notice of urine testing of inmates in the building.

Lomax v. McCaughtry, 731 F.Supp. 1388 (E.D. Wis. 1990) – no constitutional violation of prisoners' rights. Prison conducted urine test after receiving information from a reliable confidential informant that the prisoners were using narcotics.

Rucker v. Johnson, 724 F. Supp. 568 (N.D. Ill. 1989)

Provision of the substance of a document (the results of the urinalysis test) will satisfy the requirement that a document be provided. Failure to provide the inmate with evidence that proves his innocence does not violate due process unless that evidence is material.

Wycoff v. Resig, 613 F. Supp. 1504 (N.D. Ind. 1985)

The court held that a positive EMIT test confirmed by a TLC test is sufficient even though Gas Chromatography or Gas Chromatography/Mass Spectroscopy might be the best methods with which to confirm an EMIT test. The court further held that all positive EMIT tests in the future should be confirmed by a second EMIT test or its equivalent.

People v. Walker, 517 N.E.2d 679 (Ill. App. Ct. 1987)

This case addressed the use of double EMIT test results as the sole evidence in a probation revocation hearing.

Eighth Circuit

(Arkansas, Iowa, Minnesota, Missouri, Nebraska, N. Dakota, S. Dakota)

LuGrain v. State, 479 N.W.2d 312 (Iowa 1991)

Iowa prisoners could be found guilty of drug possession for violation of a rule requiring them to provide a urine sample within two hours of a request.

Harrison v. Dahm, 911 F.2d 37 (8th Cir. 1990)

The court held that it is not a due process violation to fail to administer a second confirmatory test. The reason for this holding was that Spence v. Farrier did not require a second test and that the medical technician testified that the machine was calibrated twice as high as some labs.

Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986)

The court held that the EMIT test, as used at the Iowa State Penitentiary with a confirmatory second test, contains a sufficient indication of reliability to provide some evidence of drug use.

Waterman v. Iowa, 387 N.W.2d 776 (Iowa 1986)

The court held that the failure to provide a copy of EMIT test results used by the disciplinary committee did not violate due process when it was not requested by the prisoner and some evidence supported the committee's decision.

Harmon v. Auger, 768 F.2d 270 (8th Cir. 1985)

The court held that the EMIT test results are 95% accurate and form a sufficient basis for disciplinary action.

Jensen v. Lick, 589 F. Supp. 35 (D. N.D. 1984)

The court held that prison officials could impose sanctions on prisoners based on an unconfirmed EMIT test. Cited a Center for Disease Control (CDC) study which found EMIT to be 97% - 99% accurate.

Ninth Circuit

(Arizona, California, Hawaii, Idaho, Nevada, Oregon, Washington, Alaska)

Thompson v. Souza, 111 F.3d 694 (9th Cir. 1997)

Prisoner forced to take urine test while prison official watched. Court held that there was no constitutional violation because prisoner was not harassed and because prison had security interests in keeping drugs away from dangerous prisoners.

Koenig v. Vannelli, 971 F.2d 422 (9th Cir. 1992)

An inmate tested positive for marijuana use on an EMIT test. The test was repeated and the result was again positive. The inmate requested a GC/MS test at his own expense. The court held that an inmate who tested positive for marijuana on an immunoassay drug test was not entitled to a GC/MS drug test at his own expense by an independent laboratory.

Sepulveda v. Ramirez, 967 F.2d 1413 (9th Cir. 1992)

Court held that an unnecessary lack of privacy in taking urine samples is unreasonable.

Bourgeois v. Murphy, 809 P.2d 472 (Idaho 1991)

Discipline of a prisoner based on a single, unconfirmed positive drug test was overturned based on inadequate procedures for guaranteeing chain of custody of urine samples.

Ferguson v. Department of Corrections, 816 P.2d 134 (Alaska 1991)

Removing an inmate from work program after a single unconfirmed positive EMIT urine test violated the inmate's due process rights.

Pella v. Adams, 702 F.Supp. 244 (D. Nev. 1988)

Inmate was given an EMIT test. He tested positive for marijuana. The test was repeated and tested positive again. Expert testified that the accuracy rate of the EMIT test is considerably over 90%. The court held that an EMIT test, confirmed by a second EMIT test, is sufficiently reliable so as not to violate a prison inmate's due process rights. However, the prison must show a valid reason for denying an inmate an opportunity to have his urine tested by a more effective test at his own expense.

In re Johnston, 109 Wash. 2d. 493, 745 P.2d 864 (Wash. 1987)

A positive test result from a single EMIT test constitutes sufficient evidence to uphold a prison disciplinary committee's imposition of sanctions against the inmate.

Tenth Circuit

(Wyoming, Utah, Colorado, Kansas, Oklahoma, New Mexico)

Lucero v. Gunter, 52 F.3d 874 (10th Cir. 1995)

Requiring a prisoner to submit to drug testing did not violate his Fourth Amendment right when he was randomly selected for testing.

McDiffett v. Stotts, 902 F.Supp. 1419 (D. Kan. 1995)

A drug testing program which targeted "high risk" prisoners with a history of drug abuse or who were suspected of drug use did not violate the prisoner's Fourth Amendment rights despite its lack of randomness.

Scaife v. Wilson, 861 F. Supp. 1027 (D. Kan. 1994)

Prison's random drug testing program did not violate prisoner's right to due process.

Adkins v. Martin, 699 F. Supp. 1510 (W.D. Okl. 1988)

The court held that the testing procedures used by the contract facility to conduct the test, including the use of two separate and independent tests, each having a different scientifically accepted methodology, eliminates for constitutional purposes any false positives as a result of kidney ailments or medication for those ailments.

Eleventh Circuit **(Alabama, Florida, Georgia)**

Martin v. State, 616 S.2d 384 (Alaska Ct. App. 1993)

Failure to show chain of custody of urine sample which tested positive for drug use entitled prisoner to a new disciplinary hearing.

Smith v. State, 250 Ga. 438, 298 S.E.2d 482 (Ga. 1983)

Plaintiff's probation was revoked on the basis of an unconfirmed EMIT test. The Supreme Court of Georgia held that the device used to detect the presence of marijuana in one's system was reliable and that the results of a urinalysis test based on such evidence were admissible.

Hunt v. State, 173 Ga. App. 638, 327 S.E.2d 500 (Ga. Ct. App. 1985)

Inmate's probation was revoked on the basis of a positive EMIT test. Inmate moved for a continuance on the ground that he wished to have an independent expert evaluate the test results. The motion was denied because inmate waited six weeks to file the motion. In affirming the denial of inmate's motion, the Court of Appeals noted that the two Georgia courts did not discuss the constitutional implication of sanctions imposed on the basis of the unconfirmed EMIT test.

URINALYSIS TESTING IN PRISONS ACROSS THE COUNTRY

Below is a list of urinalysis testing procedures of the Department of Corrections of various states throughout the country (all information updated 12/01 unless otherwise noted):

Arkansas* – Uses the Roche testcup and dip sticks for the testing of inmates, confirmation tests are not performed.

California – Tests are performed either onsite by trained personnel or offsite in a contracted laboratory. Onsite, the Roche Testcup 5 is used. Lab testing is done initially using the immunoassay process. If a positive result is obtained, a thin layer chromatography is used to confirm the presence of opiates, cocaine, and THC while a Gas Chromatography test is used to confirm positive results for amphetamine/methamphetamine, PCP, and ethanol.

Colorado – Drug testing is limited to either immunoassay or Gas Chromatography/Mass Spectrometry (GC/MS) analysis. Alcohol testing may occur through either urine or breath analysis.

Connecticut – An initial on-site test is performed by the prison officials. In the case of a positive result, confirmation GC/MS tests are done at an outside lab.

Florida – Initial on-site test followed by a GC/MS lab confirmation test for all “non-negative” results.

Hawaii* – Uses the Syva/Behring (ETS Plus) EMIT system as well as a NIDA (National Institute of Drug Abuse) Certified Laboratory to screen positive urine using the GC/MS for confirmations.

Idaho – Initial screen is done with an on-site test kit. Positive results are confirmed using either GC/MS, TLC, HPLC, or “an instrument that is at least as sensitive as the initial screening instrument.”

Illinois – Drug Check Cup #5 is used, a type of immunochromatographic test.

Indiana – Initial test performed using the EMIT method. Confirmation test is done using the gas chromatography/mass spectrometry (GC/MS) test.

Iowa* – Uses the EMIT test. If the first test is positive, a second test is done on the same sample.

Kentucky* – The Roche ONTRAK system is used. Positive results are sent to the central lab or a contract lab in certain parts of the state for confirmation. The central lab uses the Abbot system. The second test is performed on the original sample.

Louisiana* – Urinalysis procedures can be found at Department Regulation No. C-02-007, Inmate Drug/Alcohol Testing Program. According to the regulation, Louisiana uses (for drug testing) the OnTrak test, the AccuSign DOA series test kits and Pharmscreen for internal testing. Urine samples may also be sent to state contract laboratory facilities, hospital laboratory facilities and treatment centers with laboratory facilities utilizing Beckman CX7 when conducted by appropriately trained and/or certified staff.

Maryland* – Uses the EMIT test. If the first test is positive, a confirmation test is done on the same sample with a second EMIT test.

Massachusetts* – Uses the Roche OnTrak slide and test cup for drug screens, by the immunoassay methodology. If the results are negative, but based on available information, illegal drug use is suspected, the prison may request that the sample be tested again. All positive screens are confirmed using GC/MS.

Michigan – Typically, EMIT tests are initially performed. In the case of a positive result, the outcome is confirmed by means of a Gas Chromatography (GC) test. The use of on-site, instant test kits is approved, but usually reserved for times when an immediate result is required.

Minnesota – Roche Testcup and test-stik type tests are approved for use by the department of corrections. Additional testing is done by Medtox, an outside contractor, that uses its own testing procedures, independent from the DOC.

Missouri* – Uses the Roche On-Line Kit (KIMS); an antigen/antibody inhibition procedure based on kinetic interaction of molecules in solution. If positive, a second test is conducted using Thin-Layer Chromatography.

Montana – If the first test is positive, a second test is performed on a new sample from the same specimen.

New Hampshire* – New Hampshire does an initial EMIT. If the result is positive, a second confirmatory test is done. If the drug suspected is marijuana or cocaine, the second test is an ETS test. An ETS test uses the same technology as the EMIT test but it is a different instrument. A different technician runs the test. If the suspected drug is an opiate, PCP or amphetamines, the second test is a GC/MS.

New Jersey* – Uses the EMIT test. Out of approximately 10,000 samples that are screened each month, about 15% are positive. The positive results are confirmed by using the GC/MS.

New York – One of two forms of EMIT tests are used on-site: either EMIT or EMIT ETS.

North Carolina – All laboratories screen samples using an EMIT test. Positives are screened twice. A third party confirmation test, using Gas Chromatography/Mass Spectroscopy (GC/MS) is offered.

North Dakota – Initial test-stik procedure is performed in the presence of the inmate. If positive, a second test-stik is done. If this second test is positive, the sample is sent to a lab for further confirmation.

Ohio – All samples are screened using EIA (Enzyme Immunoassay test or EZ test). All positive results are tested twice for confirmation.

Oklahoma – Tests used include test-stiks and the Roche Testcup 5. Upon obtaining a positive result, a confirmation test is done using the same technology and in the presence of the inmate/offender if possible.

Oregon – Initial automated screening is performed using an EMIT test. In the case of a positive result, or if additional testing is required, then the sample is sent to a lab for GC/MS testing.

Rhode Island* – Uses the EMIT test for initial screening. A second EMIT test is used to confirm positive results.

South Dakota* – Uses the EMIT test. If the first test is positive, a confirmation test is conducted by GC/MS.

Tennessee – Initial screen is done with an on-site EMIT test kit. In the case of a positive result, the remainder of the specimen is sent to a lab for confirmation using an EMIT test with GC/MS.

Utah* – Uses the EMIT system.

Washington – All testing is done by a certified substance abuse testing facility in Washington state. Positive results are subsequently confirmed. The standard drug tests and authorized limits for all offenders are as follows:

Amphetamines/Methamphetamines 1,000 ng/ml

THC (Marijuana) 50 ng/ml

Cocaine Metabolite 300 ng/ml

Opiates 300 ng/ml

Additional tests may be ordered if there is a suspicion of other drug use:

Barbiturates 200 ng/ml

Benzodiazepines 100 ng/ml

Methadone 300 ng/ml

Propoxyphene 300 ng/ml

Ethanol 20 ng/ml

“Other”

West Virginia – Screenings are done using the SYVA 30 R Biochemical System (EMIT type test) and the instacheck field test kit.

Wisconsin* – Uses the FPIA test. If the first test is positive, a confirmation test is performed using the GC/MS.

*Last updated 1997

URINALYSIS TESTING OF FEDERAL INMATES

If you are a federal inmate, you should refer to Program Statement 6060.08, “Urine Surveillance and Narcotic Identification.” This Program Statement was written by the Federal Bureau of Prisons and establishes the program for urine testing in all federal prisons. At the date of this bulletin, the Program Statement was last updated in 1999.

PS 6060.08 states that 5% of each institution’s total inmate population shall be randomly tested every month. However, exactly 10% shall be randomly tested every month in all U.S. Penitentiaries, with the exception of ADX-FLO-MAX, Florence, Colorado and the U.S. Penitentiary Marion, Illinois, which shall follow the 5% random testing monthly. In addition, 3% of inmates in Minimum Security Institutions are to be tested. The Program Statement also sets forth testing for inmates involved with community activities, inmates suspected of using drugs, disruptive group members, and inmates with a history of drug abuse. In addition, inmates who have been found to have committed any of the following acts will be tested monthly for 24 months: Refusing to Provide a Urine Sample, Introduction of Drugs or Drug Paraphernalia, Use of Drugs or Related Paraphernalia, or Possession of Drugs or Related Paraphernalia.

The problem of shy bladders is somewhat addressed in the “Procedures” section of the Program Statement. It states that the Captain or Lieutenant may extend the time for giving a urine sample if warranted by specific situations (such as documented medical or psychological problems or dehydration).

The Program Statement also states that a second confirmatory test is done on a positive result before it is reported to the institution. Retesting at the inmate’s expense is not permitted.

The Program Statement provides that urinalysis shall be performed exclusively by a laboratory approved by the Central Office. Certain types of drugs are listed for which the lab is supposed to test. They are:

1. Morphine,
2. Methadone (& metabolite),
3. Codeine,
4. Other Opiates,
5. Barbituates,
6. Amphetamines,
7. Cocaine (& metabolite),
8. Phencyclidine (PCP),
9. THC (marijuana).

WHAT CAN YOU DO

In most cases where a prisoner finds he has a “false positive” test result which shows drug use, he will not be able to win his case in court, even though he is clean. However, if you believe that you have a strong case and can prove one of the errors described in this bulletin, and want to challenge your drug charge in court, take these steps.

1. File and follow up on all informal and formal grievances and administrative remedies. You have to exhaust your administrative remedies before a court may hear your claim. Do not omit this step. This step is required by the Prison Litigation Reform Act if you are to file a civil rights lawsuit.
2. Make careful records of what happened, of names of officers and witnesses, dates, and anything important regarding the testing procedures; send a copy of your records out for safekeeping.
3. Try to obtain an attorney. If you cannot, send for our Legal Bulletin 1.1, “Civil Actions” or another prisoners’ legal guide. Study them.
4. Decide what kind of claim to file:
 - a) If you have been subject to unreasonable search and seizure, as explained above, you may possibly have a Fourth Amendment claim.

- b) If the use of a single test or careless procedures have caused you to be unjustly charged, you may have a Fifth/Fourteenth Amendment claim for lack of due process.
 - c) If you decide to claim that you have been subject to disciplinary segregation or lost “good time” unjustly, you may have a habeas action, claiming that you lost liberty without cause. However, you should be aware that a recent United States Supreme Court case greatly limits this option. Sandin v. Connor held that a prisoner does not have a liberty interest in remaining out of disciplinary custody and in general population. Therefore, courts will be more and more reluctant to review cases that challenge a prison’s decision to confine a prisoner to disciplinary custody. All a prison needs is “some evidence” of guilt to sanction a prisoner. As the cases above discussed, a “hot” urine is “some evidence” of guilt, even if it was a “false positive.”
5. Write to the U.S. District Court, which serves you, and ask for forms for the legal action you have chosen:
- a) For claims of denial of constitutional rights, as in 4(a), ask for § 1983 forms if you are a state prisoner. Ask for § 1331 forms if you are a federal prisoner.
 - b) For habeas forms, as in 4(b), ask for a habeas claim. In either case you will receive “fill in the blank” forms, including “in forma pauperis” forms, which are not too difficult to complete.