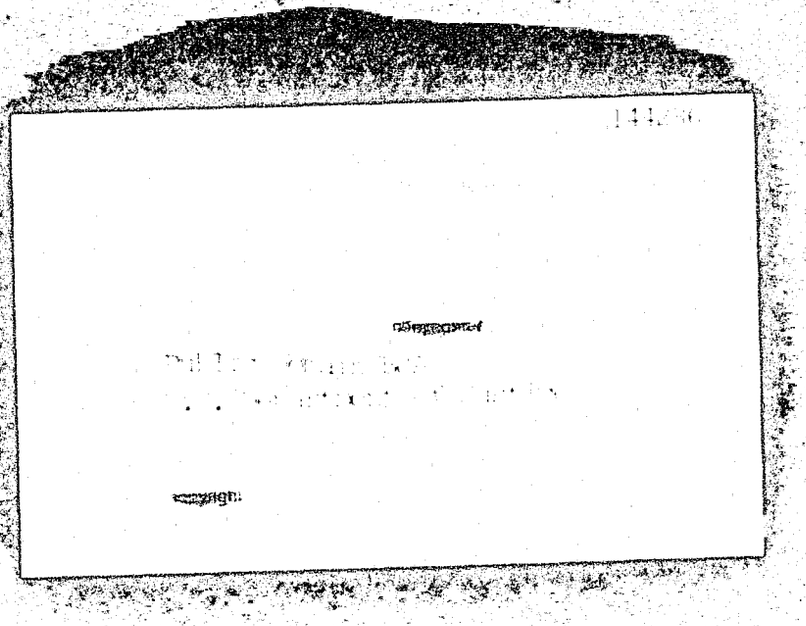
The Council of State Governments

The American Probation and Parole Association



INTRODUCTION

In the final quarter of 1991, the Drug Abuse Warning Network (DAWN) reported a twelve percent increase in total drug-related emergency room visits. The National Institute on Drug Abuse (NIDA) indicated a rise in heroin and cocaine use in their household survey. There is work to be done and many battles yet to be waged on the community corrections front of this drug war.

It is an accepted fact within the criminal justice system that drug addicts participate in more criminal activity when they are under the influence of drugs. Drug use is, in itself, a criminal act. Strict monitoring of drug use is necessary to ensure the success of community-based correctional supervision.

Drug testing, or urinalysis, has proven to be an important tool in monitoring offenders who are supervised in the community. Drug testing of probationers and parolees has often met with legal challenges in the past. These challenges have generally been successfully defeated. In order to anticipate and combat these challenges, it is crucial for professionals to have the most comprehensive and current legal information at their disposal.

Drug testing has generally been upheld by the courts as an appropriate condition of probation/parole, particularly where the underlying offense is related to drug use. Issues which the courts have addressed include the reliability of various testing methods, the requirements for admissibility into evidence of laboratory reports, whether confirmation of

certain types of tests is required, and the requirements for the handling and preservation of urine samples.

This brief is intended to provide an overview of the available drug testing case law as it relates to urinalysis, 4th and 15th amendment issues, and legal challenges. Legal issues include: testing as a condition of probation and parole; confirmation of positive results; chain of custody of specimen; confidentiality; right against unreasonable search and seizure; right to due process; and admissibility of test results. The brief is intended to serve as a resource for attorneys, probation and parole agencies, and community corrections administrators who require legal information about drug testing.

The brief begins with federal cases involving drug testing. This is followed by state cases which are organized alphabetically. You will note that some federal cases have been listed under the state section. This occurs when there are federal cases which involve state laws and state offenders: e.g., a state probationer or parolee bringing action in a federal court regarding a state law.

Efforts have been made to ensure to conduct a thorough and comprehensive review of drug testing case law. All of the available information has been updated and is current at press. This brief cannot, however, serve as a substitute for legal counsel. If agencies are considering implementing or enhancing a drug testing program and require a legal opinion, they should consult an attorney who is familiar with laws regarding drug testing.

DRUG TESTING CASE LAW

FEDERAL CASES[1]

United States v. Oliver, 931 F.2d 463 (8th Cir. 1991)
Facts: Federal defendant in Minnesota argued that the positive results of his drug tests should have been excluded from his supervised release revocation hearing because the tests constituted an unreasonable search and seizure.

Held: Because the defendant admitted at the time of sentencing that he was a drug addict who stole checks to finance his addiction, drug testing as a condition of supervised release was appropriate under the circumstances and did not violate his fourth amendment rights.

United States v. Ramos-Santiago, 925 F.2d 15 (1st Cir.), *cert. denied*, 112 S.Ct. 129 (1991)
Facts: Federal defendant in Puerto Rico tested positive for drug use on 16 different occasions while on supervised release. He objected to revocation, inter alia, on the ground that the district court had failed to direct the probation officer to provide him with a written statement setting forth all of the conditions of supervised release. The conditions of release provided to defendant included that he should "not commit any crimes, federal, state or local" and that he "shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance."

Held: The notice provided to defendant stated that he was not to commit crimes nor was he to use controlled substances. This notice was sufficiently clear and specific to serve as a guide for his expected behavior during supervised release.

United States v. Dillard, 910 F.2d 461 (7th Cir. 1990)
Facts: Federal probationer in Wisconsin violated the conditions of supervised release by, inter alia, violating the condition that he not "commit another federal, state or local crime." His admitted use of cocaine was confirmed by urine testing.

Held: Probationer had to have possessed cocaine unlawfully because knowing use of cocaine requires possession. Thus, probationer committed a crime, possession of cocaine, and thereby violated his conditions of supervised release. Such violation provided a sufficient basis for revocation of the supervised release.

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[1]Decisions of federal courts on drug testing issues involving federal inmates, probationers and parolees are included in this section. Federal cases involving state inmates, probationers and parolees are included in the following section on state cases.

United States v. Kindred, 918 F.2d 485 (5th Cir. 1990)
Facts: Conditions of supervised release required federal defendant in Texas to refrain from the use and possession of illegal drugs. When urine sample tested positive and he admitted drug use, he was required to reside in a drug treatment center. When he was suspended from the treatment center, his supervised release was revoked. The positive urinalysis report was admitted through the testimony of his probation officer.

Held: Urinalysis reports are admissible through the testimony of a probation officer.

United States v. Burton, 866 F.2d 1057 (8th Cir.), *cert. denied*, 490 U.S. 110 (1989)
Facts: At federal defendant's probation revocation hearing in Minnesota, the laboratory report indicating positive results was introduced into evidence without testimony from laboratory personnel. After urine samples were taken from defendant, they remained throughout the day in an unlocked box on the desk of a secretary, who occasionally was away from her desk and office. The samples were stored in a locked refrigerator for two weeks before mailing.

Held: (1) Admission of laboratory reports supported by affidavit from laboratory director bore sufficient indicia of reliability and did not violate probationer's right to confront witnesses; and (2) although lax, the chain of custody of urine samples was adequate because the samples retained identification labels from receipt of samples from probationer to their delivery to laboratory and return of reports.

Adkins v. Martin, 699 F.Supp. 1510 (W.D.Okla. 1988)
Facts: Federal prison inmate in Oklahoma challenged the institutional urinalysis program, alleging a false positive due to medication. Laboratory double tested positive readings of thin layer chromatography or enzyme immunoassay test with gas chromatography test.

Held: The utilization of two separate and independent tests each having a different scientifically accepted methodology satisfies the requirements of due process.

United States v. Duff, 831 F.2d 176 (9th Cir. 1987)
Facts: Although conditions of probation for federal defendant in Hawaii did not expressly authorize drug testing, defendant's probation officer ordered him to submit to drug testing based upon probationer's conduct which suggested drug use. Probation was revoked after three separate samples tested positive.

Held: The probation officer had the power to order defendant to submit to drug testing even though the court had not explicitly imposed such a condition. Urine testing was consistent with the condition of probation requiring defendant to refrain from violating the law and the probation officer had a reasonable suspicion that defendant might be using drugs.

United States v. Bell, 785 F.2d 640 (8th Cir. 1986)
Facts: At federal defendant's probation revocation hearing, laboratory reports indicating positive urine tests were introduced through the probation officer. Defendant argued that his Sixth Amendment right to confront and cross-examine witnesses against him was violated by the introduction of the laboratory reports.

Held: In determining whether "good cause" exists for not allowing confrontation, the court must: (1) assess the government's explanation of why confrontation is undesirable or impractical; and (2) consider the reliability of the evidence which the government offers in place of live testimony. Good cause was present where the laboratory was in California and the revocation hearing was in Arkansas, and the reports were the regular reports of a company whose business it is to conduct such tests.

United States v. Williams, 787 F.2d 1182 (7th Cir. 1986)
Facts: Condition of probation required federal defendant in Illinois to submit to urine tests because a presentence test was positive for illegal substances. Defendant challenged the constitutionality of the drug testing condition, arguing that the taking of a urine sample was an unreasonable search and seizure.

Held: The drug testing condition bears a reasonable relationship to the purposes of the Probation Act and the needs of Defendant and was thus permissible under the Fourth Amendment.

United States v. Penn, 721 F.2d 762 (11th Cir. 1983)
Facts: At federal defendant's probation revocation hearing in Alabama, the probation officer testified that defendant had tested positive for drugs on four separate occasions. The court admitted into evidence the lab reports from a Connecticut laboratory, and a letter from the laboratory summarizing the test results and indicating that at least five different people participated in the analysis of each specimen.

Held: Hearsay statements are admissible in a revocation proceeding where "indicia of reliability" are present and good cause is shown for not allowing confrontation.

Maddox v. United States Parole Comm'n, 702 F.Supp. 706 (N.D. Ill. 1989)
Facts: Parolee was originally paroled without any special conditions. After his parole officer informed the Parole Commission that parolee was using cocaine, the Commission added drug treatment as a condition of parole. Parolee contended in a habeas corpus action that the condition of drug testing was added without proper notice, denying him the right of due process, and the taking of urine samples in the drug treatment program violated his fifth

amendment right against self-incrimination.

Held: (1) Parolee received written notice of the proposed condition at least ten days before its effective date and thus received adequate notice pursuant to statute; (2) the taking of urine samples is not a violation of parolee's constitutional rights.

STATE CASES

ALABAMA

Mallette v. State, 572 So.2d 1316 (Ala.Crim.App. 1990)
Facts: Defendant's conditions of probation included that he should "avoid injurious or vicious habits" and he was advised that this conditioned included the use of illegal drugs. When his urine test was positive for marijuana, he was instructed to arrange for a second test; the confirmatory tests also showed positive. At the revocation hearing, defendant's probation officer testified that defendant violated the terms of his probation by failing to pass two drug tests. No persons who actually performed the tests were called to testify.

Held: Hearsay evidence cannot be the sole basis for revoking probation. Defendant was denied due process of law because he was not allowed to confront and cross-examine "the person who originated the factual information which formed the basis for the revocation."

ARIZONA

State v. Rivera, 569 P.2d 1347 (Ariz. 1977)
Facts: At Defendant's probation revocation hearing, the probation officer testified that Defendant's urine sample had tested positive for morphine use and that Defendant had admitted heroin use. The court admitted the laboratory report showing the positive result into evidence.

Held: The laboratory report is admissible based upon the testimony of the probation officer. The probation officer laid the foundation to show the reliability of the report by testifying about the procedure followed in collecting the sample, sending it to the laboratory, and receiving the report.

State v. Robledo, 569 P.2d 288 (Ariz. Ct. App. 1977)
Facts: Conditions of probation stated that the use of illegal drugs was prohibited. Urine tests revealed that probationer had been using morphine. Probationer argued that where specific authority is not given to probation officer to conduct urine tests, the test reports are inadmissible as the results of an illegal search and seizure.

Held: The conduct of the probation officer was neither unreasonable nor a search and seizure.

CALIFORNIA

People v. Moore, 666 P.2d 419 (Cal. 1983)
Facts: Defendant probationer submitted a urine sample on January 20, 1981 which tested positive. On April 2, 1981, his motion to substitute counsel was granted and the matter was continued until May 4, 1981. On that date the state moved for a continuance and defendant's counsel requested inspection of the urine sample. The testing laboratory, however, only retained samples for 3 months. No request had been made by the probation officer to retain the sample for longer than 3 months.

Held: The probation department, having requested a revocation based upon the test results of a urine sample, had a duty to preserve and disclose the sample even in the absence of a request therefor. Failure to preserve the sample denied Defendant the opportunity to independently examine the sample and therefore deprived him of a fair hearing.

People v. Shimek, 252 Cal. Rptr. 214 (Cal. Ct. App. 1988)
Facts: Defendant was convicted of growing marijuana. Conditions of probation required submission to urine tests by probation officer. Defendant argued that imposition of the condition violated the state health and safety code.

Held: The test condition was reasonably related to the crime of which defendant was convicted and did not violate the health and safety code.

CONNECTICUT

State v. Smith, 540 A.2d 679 (Conn. 1988)
Facts: The trial court entered an order one year after the original sentence modifying probation to include urine testing. Defendant's urine sample tested positive and, at the revocation hearing, he admitted drug use.

Held: Trial court had continuing authority to modify terms of probation one year after sentencing and the modification did not have to be imposed by the sentencing judge.

State v. Johnson, 527 A.2d 250 (Conn. Ct. App. 1987)
Facts: At defendant's probation revocation hearing, his probation officer testified that defendant's urine sample twice tested positive for cocaine metabolites using the EMIT(*) test. Defendant's expert witness, a pharmacologist, testified that the percentage of error in the EMIT(*) test was 5 - 10%, and that dual testing using the same test was not an effective method of confirmation.

Held: The court was not required to accept as conclusive the pharmacologist's testimony on the reliability of the EMIT(*) test. The court did not abuse its discretion in determining from the evidence that defendant violated his probation.

DISTRICT OF COLUMBIA

Jones v. United States, 548 A.2d 35 (D.C. 1988)
Facts: Defendant was convicted of possession of drugs. His urine had tested positive for cocaine the day after his arrest. At trial, a pretrial officer testified that defendant's urine had tested positive, and about the pretrial agency's drug testing procedures, the test itself, and his knowledge of the general accuracy of the test results. On appeal, defendant argued that evidence of the drug test should have been excluded because the EMIT(*) test was not proved generally accepted in the scientific community and because he could not adequately confront the drug test evidence because the pretrial officer lacked the necessary scientific expertise.

Held: (1) Although the record in the present case did not include sufficient testimony on the general acceptance of the EMIT(*) test in the scientific community, the court took judicial notice of another trial court decision in the same jurisdiction and of the opinions of courts in other jurisdictions and held that EMIT(*) test results are presumptively reliable and admissible into evidence. (2) The agency's record reporting the test result falls within the business exception to the hearsay rule because it contains objective facts rather than expressions of opinion and bears sufficient indicia of reliability.

FLORIDA

Williams v. State, 563 So.2d 1129 (Fla. Dist. Ct. App. 1990)
Facts: Defendant's probation was revoked based on finding that he failed to comply with probation conditions that he complete a drug treatment program. The basis of the finding was that defendant failed to remain in his probation officer's office to submit to a urine test.

Held: The court rejected defendant's contention that submitting to a urine test was not a requirement of his probation. The conditions of parole required defendant to submit to inpatient and follow-up drug treatment and to comply with instructions from his probation officer. Requiring submission to a urine test is "follow-up" and "a reasonable part of the

normal supervisory directions given by a probation officer."

GEORGIA

Smith v. State, 298 S.E.2d 482 (Ga. 1983)
Facts: As a condition of probation, Defendant had to refrain from using controlled substances. EMIT(*) test indicated use of drugs. Defendant argued that the requirement that he submit to urine testing was unreasonable and that the EMIT(*) test was unreliable.

Held: (1) Request for urine specimen clearly arose out of Defendant's probationary status and thus was reasonable. (2) Trial court considered expert testimony concerning the operation and accuracy of the EMIT(*) test and that the test results were admissible was supported by the evidence.

Howard v. State, 308 S.E.2d 424 (Ga. Ct. App. 1983)
Facts: Probationer was required to reside in restitution shelter and to abide by its rules and regulations. When he returned to the center intoxicated, blood and urine samples were taken which tested positive.

Held: Results of blood and urine tests were permitted under the center's rules and regulations and thus were admissible.

HAWAII

State v. Morris, 806 P.2d 407 (Haw. 1991)
Facts: Defendant was convicted of burglary and, as a condition of probation, was required to submit to drug testing. On appeal from parole revocation, defendant contended that the condition of drug testing was not reasonably related or reasonably necessary because there was no evidence that the burglary conviction was related to drug use. He further contended that his probation officer had no reasonable suspicion to order him to submit to drug testing and that the probation condition of drug testing violated his right against self-incrimination.

Held: (1) The reasonable relationship of the offense committed to drug use is only one factor the court must consider under the applicable statute. In light of defendant's history of past drug use, the trial court did not improperly impose drug testing as a condition of probation. (2) A probation officer does not have to have reasonable suspicion to order drug testing. (3) Drug testing does not infringe upon the privilege against self-incrimination.

State v. Quelnan, 767 P.2d 243 (Haw. 1989)
Facts: Probationer's January 26, 1988 and February 11, 1988 urine samples tested positive for drugs. On April 4, 1988, defense counsel requested the urine samples for the purpose of

conducting independent testing of the specimens. The samples at that time were in the possession of an independent testing laboratory which retained positive samples for six months. The probation office responded to defense counsel's request by stating that the samples had not been saved. After probation had been revoked, defense counsel learned that the samples had been preserved by the laboratory.

Held: (1) Upon defense counsel's timely request for production, the state should have produced the urine samples in order to give probationer the opportunity to conduct independent testing. (2) Admission of probationer's positive urinalysis results into evidence solely through probation officer's testimony violated probationer's right of confrontation.

IDAHO

Bourgeois v. Murphy, 809 P.2d 472, 480-82 (Idaho 1991)
Facts: Inmate challenged the state's procedure for handling urine samples taken from prison inmates, where the prison authorities made no written documentation of the chain of custody of the urine sample.

Held: The state's procedure for handling urine samples violates a prison inmate's right to due process where the procedure fails to include the critical documentation of the chain of custody of the urine sample. Where there is no documentation of the chain of custody, an inmate is hampered or even obstructed in presenting a defense to the disciplinary charges by challenging the test results.

ILLINOIS

People v. Hood, 562 N.E.2d 394 (Ill. App. Ct. 1990)
Facts: Defendant was given four opportunities in a 24 hour period to produce a urine specimen but failed to do so. His probation was revoked for his refusal to submit to a urine test as provided in the conditions of his probation.

Held: The court rejected defendant's contention that the state had to present medical evidence of defendant's ability to perform the test.

People v. Walker, 517 N.E.2d 679 (Ill. App. Ct. 1987)
Facts: Defendant's probation was revoked after his urine sample tested positive for marijuana use. The sample was analyzed twice using the EMIT(*) test and the results were positive both times. Defendant contended that the EMIT(*) test was unreliable and therefore the evidence was insufficient to support the revocation.

Held: "[W]here the EMIT(*) test procedure is performed twice, it is sufficiently reliable where it is the only evidence of drug use in a probation revocation proceeding."

INDIANA

Wykoff v. Resig, 613 F.Supp. 1504 (N.D.Ind. 1985)
Facts: Indiana state inmate challenged the validity and constitutionality of imposing disciplinary sanctions based upon an EMIT(*) test confirmed with a TLC test. He also contended that the chain of custody in handling the sample was inadequate because three to four hours elapsed from the time he gave the sample until it was transported to the sheriff's office and locked in a refrigerator.

Held: (1) Because positive EMIT(*) test was confirmed by TLC test, the EMIT(*) test was sufficiently reliable. The court held, however, that in the future a positive EMIT(*) test should be confirmed by a second EMIT(*) test or its equivalent. (2) The chain of custody was adequate because although urine samples were left in an unlocked refrigerator for three hours, the door to the room where the refrigerator was located was kept locked and only department personnel had access. The court recommended that urine samples be sealed in the presence of the inmate, that a written record on the location and transportation of samples be kept, and while the samples are in the DOC's possession, they be stored in locked refrigerators with limited access.

Bryce v. State, 545 N.E.2d 1094 (Ind. Ct. App. 1989)
Facts: Defendant/probationer argued that probation revocation on the basis of a positive urine drug test was improper where drug testing was not formally stated as a condition of probation. He further contended that two exhibits offered by the state, photocopies of the results of his drug tests and a report on his tests were hearsay because the exhibits were introduced through a supervisor of the testing laboratory who did not actually perform the test.

Held: (1) The written conditions of probation included drug treatment, and a urine drug test is a reasonable requirement of any reputable drug treatment program; (2) The state's exhibits were hearsay and a proper foundation was not laid for their admission under the business records exception to the hearsay rule. However, because defendant failed to properly object at the revocation hearing, he waived the issue.

Ewing v. State, 310 N.E.2d 571 (Ind. Ct. App. 1974)
Facts: Conditions of probation required probationer to submit to urine testing. Probationer was arrested on a drug related charge when his urine tested positive for morphine.

Held: Goals of probation and the need for individualistic treatment justify the imposition of

urine tests for probationers convicted of certain types of crimes, including drug related offenses.

IOWA

Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986)
Facts: Iowa state inmates brought civil rights action challenging constitutionality of urine testing program. Tests were performed both randomly and on inmates suspected of drug use. The prison used the EMIT(*) test, and positive results were tested twice. Inmates could not call upon expert witnesses and could not have a confirmatory test by another method.

Held: (1) A urinalysis is a search and seizure, but the random testing procedures are reasonable under the Fourth Amendment; (2) Refusal to allow inmates to have independent confirmatory tests and expert witnesses does not violate the right to due process; (3) The EMIT(*) test has been shown to be widely accepted in the scientific community and is thus admissible.

KENTUCKY

Higgs v. Bland, 888 F.2d 443 (6th Cir. 1989)
Facts: Kentucky state inmates appealed from denial of motion for preliminary injunction seeking to enjoin prison officials from taking disciplinary action based on urinalysis tests. Prison procedure required EMIT(*) test, with repeat EMIT(*) system for positive results.

Held: A positive EMIT(*) test result is sufficient evidence to satisfy due process requirements in a prison disciplinary proceeding.

MARYLAND

McDonald v. State, 550 A.2d 696 (Md. 1988)
Facts: (1) At Defendant's probation revocation hearing, two laboratory reports indicating positive urine tests were introduced without requiring the state to produce the technicians who performed the tests. The laboratory department head testified as to normal procedures but he did not perform tests on the samples in question nor did he have specific knowledge of how the samples were processed; (2) There was no testimony as to how the urine samples were obtained, labeled, and stored, or how they were delivered to the laboratory.

Held: (1) State statute provided for the admission of laboratory reports into evidence and permits confrontation of the chemists who conducted the tests. (2) The state failed to establish with the requisite degree of certainty that the urine tested was in fact the urine of defendant.

Wilson v. State, 521 A.2d 1257 (Md. Ct. Spec. App. 1987)
Facts: Probationer's urine sample indicated marijuana use. At the revocation hearing, the court made a finding that it would be cost prohibitive to call a representative of the out-of-state laboratory to testify, and admitted the laboratory report into evidence. The probation officers who testified did not know what kind of urine test was administered nor the effect of probationer's twice-a-day insulin shots on the test results. Probationer argued on appeal that the report was hearsay, that he was denied the right to confront adverse witnesses, and that because there was no evidence of what test was used, reliability was assumed, not proven.

Held: Where no evidence of testing procedure was introduced, and no evidence was presented by the State as to effects of insulin shots, and there was no corroborating evidence, unidentified laboratory report was not sufficiently reliable to justify revocation of probation.

MICHIGAN

People v. Roth, 397 N.W.2d 196 (Mich Ct. App. 1986)
Facts: Probationer argued that condition of probation requiring him to submit to urine tests was unconstitutional.

Held: The condition of probation requiring submission to unannounced urine tests is both lawful and rationally tailored to probationer's rehabilitation.

MONTANA

State v. Sigler, 769 P.2d 703 (Mont. 1989)
Facts: Probationer failed to appear for a urine test as required by conditions of probation. Although probationer had been convicted on drug charges, his probation officer had no specific reason for believing probationer was using drugs when he requested the urine sample. Probationer contended that there was no "articulable reason" for requiring him to submit to the urine test.

Held: Because probationer had failed several prior drug tests and because the probation officer believed the rehabilitation process could not begin until he was sure probationer was free from drugs, there were reasonable grounds to require that probationer submit to urine testing.

NEBRASKA

Tyler v. Barton, 901 F.2d 689 (8th Cir. 1990)
Facts: A parolee from the Nebraska state prison system brought action against his parole

officer, the Omaha Correctional Center, and prison personnel, alleging his constitutional right to privacy was violated when he was required, for drug testing purposes, to urinate in a bottle in the presence of a correctional center employee. Parolee's conditions of parole included submission to drug testing.

Held: Parolee had no clear constitutional right to be free from visual inspection during urine testing for possible drug use.

State v. Finnegan, 439 N.W.2d 496 (Neb. 1989)
Facts: Conditions of probation included random drug testing. The state chemist testified that drug test results indicated that probationer had used marijuana since the date of the probation order.

Held: The testimony of the chemist constituted clear and convincing evidence that probationer used marijuana in violation of the conditions of probation.

NEVADA

Pella v. Adams, 723 F.Supp. 1394 (D. Nev. 1989);
Pella v. Adams, 702 F.Supp. 244 (D. Nev. 1988); and
Pella v. Adams, 638 F.Supp. 94 (D. Nev. 1986)
Facts: Prisoner disciplined for drug use brought civil rights action, attacking the reliability of urine test and competency of the laboratory technician who performed the test. Seeds and a green leafy substance had been found in prisoner's cell.

Held: In 1986, on a motion for summary judgment, the court held that: probable cause was not necessary to require a prisoner to produce a urine sample; the competency of the technician was properly addressed by the disciplinary board and was not reviewable; and because reliability of double EMIT test was questionable, prisoner had raised a valid due process claim. In 1988, the court held that the general accuracy of the double EMIT test satisfied the requirements of due process and that prisoner was entitled to a further hearing on whether the disciplinary board had a valid reason for refusing prisoner's request to have an alternate test performed at his own expense. In 1989, the court held that prison officials had legitimate penal logical interests in denying the request for further tests where such tests would require the use of prison personnel and not every inmate could afford the tests.

Junior v. State, 807 P.2d 205 (Nev. 1991)
Facts: Defendant's conditions of parole required submission to urine tests. His samples tested positive for marijuana and cocaine. He was convicted of being under the influence of a controlled substance based upon the positive tests. Defendant argued that the use of the

results of drug tests obtained pursuant to his parole agreement as the basis for a felony conviction is an unreasonable search and seizure.

Held: The state can base a felony charge against a parolee on the positive results of urine tests that the parolee was compelled to provide pursuant to parole agreement.

NEW YORK

Peranzo v. Coughlin, 850 F.2d 125 (2d Cir. 1988)
Facts: New York state prison inmates brought action challenging the reliability of EMIT(*) test results as evidence of drug use. Evidence was presented that the testing procedure (an initial test and a subsequent confirming test) had a 98% accuracy rate.

Held: The use of the test results may be relied upon as sufficient evidence to warrant prison discipline.

United States v. Medina, 749 F.Supp. 59 (E.D.N.Y. 1990)
Facts: Defendant, a New York state probationer, indicated to the court that he had not used drugs for many months. The court ordered radioimmunoassay (RIA) hair analysis, which reveals drug use over a period of months. Defendant's hair tested positive for cocaine.

Held: Applying the test for the admissibility of scientific evidence established by Frye v. United States, 293 F. 1013 (D.C.Cir. 1923), the court concluded that RIA testing is sufficiently reliable and has attained sufficient acceptance in the scientific community to be admissible as scientific evidence. Because the sample of defendant's hair was properly obtained and tested, the results are admissible.

Soto v. Lord, 693 F.Supp. 8 (S.D.N.Y. 1988)
Facts: Disciplinary sanctions were imposed against New York state prison inmate whose urine tested positive for marijuana use. A single EMIT(*) test was performed on the sample by a private laboratory and the laboratory report was the only evidence. The laboratory report included this statement: "A positive cannabinoid result should be confirmed by an alternative method." The checklist form designed to establish chain of custody had been incompletely filled out and contained erroneous information. Inmate brought civil rights action against prison official.

Held: (1) Assuming that reliance on an unconfirmed EMIT(*) test violates due process, prison official was entitled to qualified immunity because the law requiring use of a confirmatory test was not clearly established. (2) Prison official was not entitled to qualified immunity for failure to establish a chain of custody because his conduct was unreasonable in

relying upon the inaccurate, incomplete checklist.

Storms v. Coughlin, 600 F.Supp. 1214 (S.D.N.Y. 1984)
Facts: New York prison officials instituted a policy of random drug testing of inmates. If an inmate's sample tests positive twice using the EMIT system, the inmate is disciplined. The samples are not preserved. Inmates sought a preliminary injunction.

Held: (1) The urine test constitutes a fourth amendment search; however, the testing is constitutionally permissible if done in a reasonable manner; (2) inmates failed to show sufficient evidence of the unreliability of the EMIT system to justify issuance of a preliminary injunction.

Lahey v. Kelly, 524 N.Y.S.2d 30 (N.Y. 1987)
Facts: Inmates argued that the EMIT(*) drug test was not sufficiently reliable to support the determination that an inmate had used drugs.

Held: Positive EMIT(*) test results, when confirmed by a second EMIT(*) test or its equivalent, are sufficiently reliable to support a determination that an inmate has used illegal drugs.

People ex rel. Wilt v. Meloni, 565 N.Y.S.2d 669 (N.Y. App. Div. 1991)
Facts: Parolee argued that evidence of a certified report of a Syva EMIT positive drug test is not sufficiently reliable, standing alone, to satisfy the Division of Parole's burden to prove by a preponderance of the evidence that a parolee has violated the terms of his parole. He further contended that admission of the report into evidence without a witness from the laboratory violated his sixth amendment right to confrontation.

Held: Evidence of a certified report of a confirmed Syva EMIT test is sufficiently reliable to meet the Division of Parole's burden of proof; the report was compiled under circumstances which made it inherently reliable.

People ex rel. Saafir v. Mantello, 558 N.Y.S.2d 356 (N.Y. App. Div. 1990)
Facts: The only evidence of drug use or possession introduced at petitioner's parole revocation hearing was an uncertified report of drug tests performed by a private laboratory upon petitioner's urine samples.

Held: The hearsay evidence, consisting of the uncertified report, was not sufficiently reliable to satisfy the standard of preponderance of the evidence required to sustain the determination of a parole violation.

Vasquez v. Coughlin, 499 N.Y.S.2d 461 (N.Y. App. Div. 1986)
Facts: Defendant inmate's urine samples tested positive under the EMIT(*) system. He argued that EMIT(*) test results were not reliable enough to constitute substantial evidence.

Held: The reliability of EMIT(*) test results for use in prison disciplinary proceedings has been established by ample scientific evidence.

People ex rel. Jiminez v. Warden, New York City Correctional Institution for Women, 530 N.Y.S.2d 499 (N.Y. Sup.Ct. 1988)
Facts: Parolee filed a habeas corpus petition alleging that there was insufficient evidence to establish a parole violation. She argued that her urine sample was unconstitutionally obtained because the Parole Division lacked reasonable suspicion to believe she was using drugs.

Held: Because parolee had an extensive history of drug abuse and had previously violated her parole on drug related charges, requiring her to submit to a urine test was not an unconstitutional seizure. The Division of Parole was not required to use a less intrusive means to determine drug abuse.

Brown v. Smith, 505 N.Y.S.2d 743 (N.Y. Sup. Ct. 1985)
Facts: Inmates brought action challenging the reliability of dual EMIT(*) tests, the proficiency of the employees assigned to administer the test, and the adequacy of the foundation presented to admit the results into evidence. They presented expert testimony that the EMIT(*) test should be confirmed by an alternate method. Expert testimony conflicted on whether ingestion of drugs such as aspirin might produce false positives.

Held: (1) EMIT(*) testing system was not sufficiently reliable to justify imposition of disciplinary penalty of sole basis of two positive readings; positive reading should be confirmed by alternate test and at least one of the test operators should by interviewed by the hearing officer. (2) Inmates should receive copy of documents to be introduced at hearing and should have opportunity to present questions to be asked the test operator.

NORTH DAKOTA

Jensen v. Lick, 589 F.Supp. 35 (D.N.D. 1984)
Facts: Inmate in North Dakota state penitentiary challenged the constitutionality of random urine screening program. Under the prison's program, testing was random unless an inmate was suspected of drug abuse; the inmate was notified the night before the test; samples were tested using the EMIT(*) system; and repeat tests were made on samples testing positive. Defendant refused to submit to testing and was disciplined for his refusal. He argued on

appeal that the EMIT(*) system was unreliable.

Held: Evidence established that EMIT(*) test was 95% accurate, which the court concluded was "tantamount to almost complete certainty" and was thus sufficiently reliable to support disciplinary action against inmates.

OHIO

City of Columbus v. Lacy, 546 N.E.2d 445 (Ohio App. 1988)
Facts: Probationer produced four positive urine samples in one month. At the revocation hearing, the person who collected the samples was no longer employed; rather, a vice-president of the collection company testified that the samples had been processed pursuant to company procedures. Probationer alleged that the tests results were improperly admitted into evidence.

Held: The vice-president was competent to testify regarding the procedure used by the collection company in collecting, marking and dispatching samples for testing. Because no employee from the drug testing company testified and there was no other evidence establishing trustworthiness of the urinalysis reports, the test results were inadmissible.

OKLAHOMA

McQueen v. State, 740 P.2d 744 (Okla. Crim. App. 1987)
Facts: Defendant's probation was revoked based upon positive laboratory test results and his admission to probation officer of drug use. Defendant argued on appeal that there was insufficient evidence to revoke his probation and that the chain of custody as to the urine samples was inadequate.

Held: Probationer's admissions of drug use were sufficient to establish violations of conditions of probation, even without laboratory analysis or with an inadequate chain of custody.

PENNSYLVANIA

Commonwealth v. Joraskie, 519 A.2d 1010 (Pa. Super. Ct. 1987)
Facts: In a parole revocation hearing, Defendant's parole officer testified to obtaining a sample of Defendant's urine and then produced a urinalysis report prepared by a laboratory, showing the presence of cannabinoids. The person preparing the report did not appear in person or by deposition. Defendant argued that the laboratory report was hearsay evidence

and its admission into evidence violated his rights of confrontation and cross-examination.

Held: In the absence of good cause sufficient to abridge a defendant's rights of confrontation and cross-examination, an order revoking parole may not rest solely on inadmissible hearsay evidence. In the absence of good cause, the presence of the person making the urinalysis and preparing the report was essential.

Montione v. Com., Pa. Bd. of Probation & Parole, 531 A.2d 592 (Pa. Commw. Ct. 1988)
Facts: Conditions of parole required parolee to abstain from possession, sale or use of controlled substances to participate in a drug treatment plan and to submit to urine testing. His urine tested positive for cocaine. His parole was revoked on the basis of his parole officer's testimony and the laboratory report.

Held: Parolee was properly denied the right to confront and cross-examine the laboratory supervisor where the laboratory was approved by the Board, the sample was taken under the supervision of the Board, and the report was on laboratory letterhead and signed by the laboratory's toxicology supervisor.

Ward v. Com., Pa. Bd. of Probation & Parole, 538 A.2d 971
(Pa. Commw. Ct. 1988)
Facts: Parolee challenged on hearsay grounds the admissibility of laboratory reports indicating positive urine tests.

Held: Laboratory reports containing the laboratory letterhead, signed by a doctor, and stamped with the types of drugs found, have sufficient indicia of reliability to support the finding of good cause for not allowing confrontation.

Damron v. Com., Pa. Bd. of Probation & Parole, 531 A.2d 592
(Pa. Commw. Ct. 1987)
Facts: Defendant was found to have violated a condition of his parole to refrain from unlawful possession, use or sale of controlled substances. At the parole revocation hearing, the examiner stated that there was good cause to admit urinalysis reports from a Virginia laboratory into evidence without testimony from anyone from the laboratory as to accuracy and reliability because the persons with such knowledge were beyond the subpoena powers of the Pennsylvania parole board. Defendant argued that the revocation of parole was not based on substantial evidence because the parole board relied upon inadmissible hearsay.

Held: (1) The parole board's good cause ruling was not in error.
(2) The laboratory reports contained the necessary letterhead and signature of the pathologist director so as to qualify them as business records, and, therefore, an exception to the hearsay rule. The laboratory reports constituted substantial evidence sufficient to support revocation of

parole.

Jones v. Com., Pa. Bd. of Probation & Parole, 520 A.2d 1258 (Pa. Commw. Ct. 1987)
Facts: Parolee who was recommitted after positive urine test argued that the laboratory report was inadmissible hearsay evidence. At the revocation hearing, parolee's parole officer first testified that parolee had admitted using marijuana, but the officer recanted later in his testimony. The laboratory report in question did not include the letterhead of the laboratory and was not signed by a laboratory staff member.

Held: The Board erred in admitting the laboratory report into evidence because under Pennsylvania law, hearsay evidence is admissible in revocation proceedings only upon a showing of good cause, and must contain some "indicia of reliability."

Neal v. Com., Pa. Bd. of Probation & Parole, 531 A.2d 119
(Pa. Commw. Ct. 1987)
Facts: At Defendant's parole revocation hearing, the parole officer introduced a computer generated laboratory report that had no signature or letterhead establishing the laboratory's attestation to its work. The parole officer testified that he had received the report in the mail after sending Defendant's urine sample to the laboratory and conferring with laboratory employees by telephone.

Held: Due process does not require that laboratory personnel be produced at the hearing for firsthand authentication where the hearing officer has found good cause for not doing so. There is, however, a need for some indicia of reliability in the form of a responsible person's signature certifying the identity of the report's subject and the correctness of the result.

Stahl v. Com., Pa. Bd. of Probation & Parole, 525 A.2d 1272 (Pa. Commw. Ct. 1987)
Facts: Parolee whose parole was revoked after a positive urine test challenged the custodial procedure followed for the urine sample. The labeled urine sample was left in a prison official's office or in a refrigerator before being mailed to a private laboratory.

Held: All that is required to establish "chain of custody" is that the evidence remain unaltered or untainted during the period in which it changed hands and it is not necessary to preclude possibility of doubt. Urinalysis report was properly admitted despite objection as to lack of safeguards eliminating access by other inmates.

Jefferson v. Com., Pa. Bd. of Probation & Parole, 506 A.2d 495
(Pa. Commw. Ct. 1986)
Facts: Parolee submitted a urine sample which tested positive. At the revocation hearing, the parole officer entered into evidence a laboratory report indicating that the parolee's urine

proved positive. The hearing officer found that there was good cause to admit the report because the Board had a contract with the laboratory to conduct drug screens. Parolee argued on appeal that the laboratory report was inadmissible hearsay.

Held: Under Pennsylvania law, hearsay evidence is admissible in parole revocation proceedings upon a finding of good cause to deny the parolee the right to confront and cross-examine witnesses. The court did not consider the adequacy of the good cause found by the examiner because the question was not properly raised on appeal. Citing a Pennsylvania statute allowing the Board to rely on reports submitted by agents and employees, the court held that the laboratory report was admissible.

Powell v. Com., Pa. Bd. of Probation & Parole, 513 A.2d 1139
(Pa. Commw. Ct. 1986)
Facts: At Defendant's parole revocation hearing, the hearing examiner allowed into evidence an unsigned computer printout from a private laboratory which indicated that Defendant's urine sample tested positive for drugs. The hearing examiner made a "good cause" finding that the persons performing the test did not have to testify in person because the laboratory report indicated that five different people worked on the test at the laboratory. Defendant challenged the adequacy of the finding that there was good cause for not requiring the presence of any witness from the laboratory.

Held: (1) To admit a laboratory report without witness confrontation, the report must contain indicia of reliability and regularity such as letterhead and signature. (2) The hearing examiner cannot rely upon the laboratory report itself to determine whether or not good cause exists.

Whitmore v. Com., Pa. Board of Probation & Parole, 504 A.2d 401
(Pa. Commw. Ct. 1986)
Facts: At Defendant's parole revocation hearing, the only evidence of his drug use was a laboratory report indicating that his urine sample tested positive for illegal substances, and a letter from the state health department stating that the laboratory was approved.

Held: The admission of the report was error because the report was hearsay, no one from the laboratory testified, and the Board did not make a finding that good cause existed for not allowing witness confrontation.

TEXAS

Arguijo v. State, 764 S.W.2d 919 (Tex. Ct. App. 1989)
Facts: Conditions of probation required probationer to abstain from the use of controlled substances. A forensic chemist testified that probationer's urine samples tested positive for a

cocaine metabolite, indicating cocaine use within a week to ten days prior to each sample. The chemist further testified that it was highly unlikely the metabolite came from a source other than cocaine. Probationer argued the evidence failed to establish cocaine use.

Held: The state met its burden of proving violation of a probation condition by a preponderance of the evidence.

Bolieu v. State, 779 S.W.2d 489 (Tex. Ct. App. 1989)
Facts: Conditions of probation required probationer to avoid injurious or vicious habits and to submit to drug testing upon requesting his probation officer. Probationer's urine tested positive for cocaine. An EMIT test was positive but a confirmatory gas chromatography/mass spectrograph test was inconclusive.

Held: The court did not reach the issue of whether a single uncorroborated EMIT test was sufficient to support parole revocation; rather, the court held that a single use of a drug was not a "habit" for the purposes of the condition that probationer avoid injurious or vicious habits.

Myers v. State, 780 S.W.2d 441 (Tex. Ct. App. 1989)
Facts: Defendant's conditions of probation included that he must "avoid injurious and vicious habits." After he tested positive for amphetamine and marijuana use, the state revoked his probation. Defendant admitted marijuana use.

Held: Because the evidence only showed a single use of amphetamines, it was insufficient to show a habit of using amphetamines. There was sufficient evidence to support the finding of habitual use of marijuana because of the positive test and defendant's admission of use.

Brown v. State, 760 S.W.2d 748 (Tex. Ct. App. 1988)
Facts: Probation was revoked for possession of a usable quantity of marijuana when probationer's urine sample tested positive. Probationer contended that he had passively inhaled marijuana smoke. The chemist testified that the level of cannabinoids in probationer's sample was too high for passive inhalation.

Held: Evidence that probationer's urine tested positive for marijuana was sufficient to constitute possession of a usable quantity of marijuana.

Clay v. State, 710 S.W.2d 119 (Tex. Ct. App. 1986)
Facts: As a condition of probation, Defendant was to submit a urine sample to the probation officer upon demand. Defendant failed to submit urine samples on three occasions and his probation was revoked.

Held: The condition of probation that Defendant submit a urine sample at any time requested by the probation officer is reasonably related to the purposes of probation and does not violate Defendant's right against unreasonable search and seizure.

Wilson v. State, 697 S.W.2d 83 (Tex. Ct. App. 1985)
Facts: Probation was revoked on the basis of a single positive EMIT test. The test operator testified that the EMIT system was 95% accurate, but he did not testify that the system was generally accepted in the scientific community.

Held: The state failed to meet its burden of proof to establish that the EMIT system had achieved scientific acceptance as a reliable and accurate method of urine testing.

Isaacks v. State, 646 S.W.2d 602 (Tex. Ct. App. 1983)
Facts: Probationer submitted urine samples which tested positive for controlled substance. At the revocation hearing, EMIT(*) system operator testified that she had been trained to operate the EMIT(*) system machine by the manufacturer and the American Correctional Association. She described the four machines that make up the EMIT(*) system and testified that she tested the machine for accuracy before testing probationer's sample, and that the sample in question tested positive for an active ingredient of controlled substances. The operator acknowledged that she did not have knowledge of the scientific theory enabling the system to detect a controlled substance. Finally, she testified that the EMIT(*) system is scientifically recognized, but she did not say by what persons or organizations.

Held: "For the results of the EMIT(*) system test to be admissible, it must be shown that the machine has attained scientific acceptance, that properly compounded chemicals were used, that the machine has been periodically checked for accuracy by one who understands its scientific theory, and proof must be offered by one qualified to translate and to interpret the result so as to eliminate hearsay."

Macias v. State, 649 S.W.2d 150 (Tex. Ct. App. 1983)
Facts: Defendant, who had been convicted of a drug offense, was required as a condition of probation to submit to weekly urine testing. Probation was revoked because Defendant tested positive and because he failed to submit to testing as scheduled. On appeal, Defendant argued that the mandatory urine test as a condition of probation was a warrantless and unreasonable search in violation of the Fourth Amendment.

Held: The requirement that Defendant submit to weekly urine testing is reasonably related to the purposes of probation because it dissuades him from drug use and allows his probation officer to determine if rehabilitation is occurring. The condition does not constitute an unreasonable search and seizure.

UTAH

State v. Blackwell, 809 P.2d 135 (Utah Ct. App. 1991)
Facts: Conditions of parole required parolee to submit to random drug testing. He was arrested while on parole on drug-related charges and his urine tested positive. Parolee argued that the positive urine test, obtained under the conditions of parole, was improperly used to support a new criminal conviction.

Held: "[A]dmission of defendant's urinalysis results obtained pursuant to a parole agreement in his prosecution for possession of a controlled substance did not violate the fourth or fifth amendment rights retained by defendants, a parolee." Id. at 139. The specimen was obtained as a result of a reasonable suspicion of parole violation, and the specimen was not testimonial in nature.

WASHINGTON

In re Johnston, 745 P.2d 864 (Wash. 1987)
Facts: Prison inmates challenged use of single positive EMIT(*) test result as sole basis for imposition of disciplinary sanctions, arguing such evidence is insufficient to satisfy due process requirements.

Held: (1) The evidentiary requirements of due process are satisfied if there is "some evidence" in the record to support a prison disciplinary proceeding. (2) The "Frye test" (under which evidence derived from a scientific principle or theory is admissible only if the principle has achieved general acceptance in the community) is inapplicable in the context of prison disciplinary proceedings; and (3) A single positive result to an EMIT(*) test is "some evidence" of drug use, and the use of such test as the basis for disciplinary sanctions does not violate due process requirements.

State v. Parramore, 768 P.2d 530 (Wash. Ct. App. 1989)
Facts: Defendant, who had been convicted of selling marijuana, was required as a condition of probation to submit to urine testing.

Held: Condition that defendant who was convicted of selling marijuana submit to urine testing was permissible crime-related prohibition related directly to his conviction.

SUMMARY

ALABAMA - In Alabama, hearsay evidence cannot be the sole basis for revoking probation. The defendant must be allowed to confront and cross-examine the person who actually performed the urine tests.

ARIZONA - Arizona courts have held that drug testing of probationers is neither unreasonable nor a search and seizure. Further, a laboratory report is admissible evidence in Arizona if the probation officer testifies regarding the procedure followed in collecting the sample, sending it to the laboratory, and receiving the report.

CALIFORNIA - Drug testing has been permitted by the California courts where the test condition is reasonably related to the crime committed. Probation and parole departments must preserve samples which test positive in the event any defendant requests the right for an independent examination of the sample.

CONNECTICUT - Under Connecticut case law, the trial court has continuing authority to modify the terms of probation to add drug testing. In Connecticut, dual testing of a single urine sample using the EMIT test has been held sufficient to satisfy the requirements of due process.

DISTRICT OF COLUMBIA - Results of positive EMIT tests are presumptively reliable and admissible into evidence in the District of Columbia. The agency's record reporting the test result is admissible without testimony of laboratory personnel.

FLORIDA - In Florida, implicit in the condition of probation that the defendant complete a drug treatment program is the requirement that defendant submit to urine testing upon request.

GEORGIA - Under Georgia case law, the requirement that a defendant submit to urine testing has been held to be reasonable. The results of positive EMIT tests are admissible in Georgia. The results of urine tests are also admissible where the defendant is required to reside in a restitution center.

HAWAII - Drug testing is a proper condition of probation where defendant has a history of past drug use. Drug testing is also permissible where the offense committed is related to drug use. A probation officer does not have to have reasonable suspicion to order drug testing. Drug testing does not infringe upon the privilege against self incrimination. Under additional Hawaii case law, the State must preserve urine samples in order to give the probationer an opportunity to conduct independent testing. In Hawaii, introduction of the probationer's positive urine test results only through the probation officer's testimony is insufficient.

IDAHO - The Idaho Supreme Court has held that authorities must make written documentation of the chain of custody of a urine sample.

ILLINOIS - In Illinois, probation may be revoked for refusal to submit to a urine test if the Defendant has been given sufficient opportunity to produce a sample. The Illinois courts have held that evidence that a urine sample tested positive twice using the EMIT system is sufficient evidence for a probation revocation.

INDIANA - Indiana courts have upheld the requirement of submission to urine testing as a condition of probation for certain types of crimes, including drug related offenses. Where the written conditions of probation include drug treatment, urine testing is a reasonable requirement. Without ruling on the issue, one Indiana court has suggested that the laboratory personnel who actually performed the urine test must testify. A federal district court in Indiana in a case filed by an Indiana state inmate has held that a positive EMIT test should be confirmed by a second EMIT test or its equivalent. The same court has recommended that urine samples be sealed in the presence of the inmate, that a written record on the location and transportation of samples be kept, and that samples be stored in locked refrigerators with limited access.

IOWA - The United States Court of Appeals for the Eighth Circuit, in a civil rights action brought by Iowa state inmates, has held that random urine testing of inmates is reasonable under the Fourth Amendment and inmates do not have a constitutional right to independent confirmatory tests and expert witnesses. The same court held that EMIT tests results are admissible.

KENTUCKY - The United States Court of Appeals for the Sixth Circuit in an action brought by Kentucky state inmates, held that a positive EMIT test result is sufficient evidence to satisfy due process requirements in a prison disciplinary proceeding.

MARYLAND - In both reported cases in Maryland on the subject of urine tests, the courts found laboratory tests indicating positive urine tests were inadmissible. In one case, there was no testimony as to how the samples were obtained, labeled, and stored, or how they were delivered to the laboratory. In the other case, the probation officer who testified did not know what kind of tests was administered nor could he testify on the effect of the probationer's insulin shots on the test results. Further, a state statute permits confrontation of the chemists who conduct the test. Thus, the Maryland courts have indicated that chain of custody must be established with particularity and unsupported laboratory report is not sufficient evidence to justify revocation of probation.

MICHIGAN - Under Michigan case law, the condition of probation requiring submission to urine testing has been held constitutionally permissible.

MONTANA - Under Montana case law, where the conditions of probation include submission to urine testing, the probation officer need not have a specific reason for requiring submission to urine testing.

NEBRASKA - The United States Court of Appeals for the Eighth Circuit, in an action brought by a Nebraska state parolee, rejected the parole's contention that he had a right to be free from visual inspection during urine testing. The Nebraska Supreme Court has held that the testimony of a chemist that drug test results indicate drug use is sufficient evidence for probation revocation.

NEVADA - In Nevada, when a parole tests positive for drug use, the positive test result can form the basis for a felony charge of being under the influence of a controlled substance. In a federal action brought by a Nevada state prisoner disciplined for drug use, the district court held that the general accuracy of the double EMIT test satisfied the requirements of due process and that prison officials has legitimate penal logical interests in denying an inmate's request for further tests.

NEW YORK - The New York state courts have published a number of opinions addressing drug testing of inmates, probationers and/or parolees. Of these cases, the courts have established that the EMIT test results are sufficiently reliable to constitute substantial evidence and a certified report of a confirmed EMIT test is sufficiently reliable for admission into evidence. In the present setting, one court has held that inmates should receive copies of documents introduced at disciplinary hearings and should have the opportunity to present questions to be asked of the test operator. More recent cases, however, suggest that the test operator need not be present when there is a certified report confirmed EMIT test. In the only published opinion on the issue to date, a federal district court in New York has ruled that Radioimmunoassay (RIA) hair analysis, which reveals drug use over a period of months, has attained sufficient acceptance in the scientific community to be admissible as evidence.

NORTH DAKOTA - In a federal action brought by a North Dakota state inmate, the court held that a confirmed EMIT test result was sufficiently reliable to support disciplinary action.

OHIO - Under Ohio case law, where no employee from a drug testing company testifies and there is no other evidence establishing the reliability of urine test reports, the results are inadmissible.

OKLAHOMA - In the only reported Oklahoma case, the court did not reach the question of admissibility of positive laboratory test results, but instead held that the probationer's admission of drug use was sufficient evidence to revoke his probation.

PENNSYLVANIA - Under Pennsylvania law, hearsay evidence is admissible in parole revocation proceedings upon a finding of good cause to deny the parolee the right to confront and cross examine witnesses. The Pennsylvania courts have issued a number of decisions addressing whether the laboratory report was properly admitted into evidence. Generally, under Pennsylvania case law, positive laboratory test results are admissible without the testimony of laboratory personnel where a laboratory was approved by the board of probation and parole, the sample was taken under the supervision of the board, and the report was on

laboratory letterhead and signed by the laboratory's toxicology supervisor. The requisite finding of "good cause" is satisfied where the board has a contract with the laboratory to conduct drug tests.

TEXAS - Under Texas case law, the condition of probation that the probationer submit a urine sample upon request by the probation officer is reasonably related to the purposes of probation. In earlier cases, a Texas court suggested that the EMIT test had not achieved general acceptance in the scientific community; in a 1989 case, however, the court discussed but did not reach the issue of whether a single uncorroborated EMIT test was sufficient to support parole revocation, suggesting that a confirmed EMIT would be sufficient. A standard condition of probation in Texas requires the probationer to "avoid injurious or vicious habits." Under Texas case law, one positive urine sample is insufficient to show a habit for purposes of parole revocation. Thus, where the conditions of probation require the probationer to avoid injurious or vicious habits, the better approach would be for a parole revocation to be based upon a series of positive test results.

UTAH - Under Utah case law, a positive urine test, obtained under conditions of parole, can be used to support a new criminal conviction for possession of a controlled substance.

WASHINGTON - In the setting of prison inmates, the Washington Supreme Court has held that a single positive EMIT test is sufficient evidence for disciplinary sanctions. Also under Washington case law, imposition of drug testing as a condition of probation has been upheld where the condition is related to the underlying conviction.

FEDERAL - Generally, the federal courts have upheld drug testing as a valid condition of supervised release. Further, the federal courts have consistently permitted the introduction of laboratory reports without requiring the testimony of laboratory personnel, provided the laboratory reports have "indicia of reliability."