Pretrial Drug Testing: Is It Vulnerable to Due Process Challenges?

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This nation may be on the brink of an explosion of programs that use drug testing to determine whether criminal defendants should be jailed or released prior to trial. More than a dozen state and federal courts around the country have already experimented with pretrial drug testing programs modeled after the one operating in the District of Columbia since 1984. Similar programs would be mandated nation-wide by several bills now pending in Congress with strong Bush administration backing.2

* Visiting Professor of Clinical Law, National Law Center, George Washington University. J.D. 1971, National Law Center; B.A. 1968, Marietta College. The author wishes to thank Professors Eric Sirulnik and John Banzhaf for their comments and suggestions on previous drafts. The author also wishes to thank John Carver, Director of the District of Columbia Pretrial Services Agency, for his generous cooperation.

1. The District of Columbia program was the first comprehensive pretrial drug testing program in the United States. JOHN CARVER, U.S. DEP’T OF JUST., DRUGS AND CRIME: CONTROLLING USE AND REDUCING RISK THROUGH TESTING 2 (Sept./Oct. 1986). Similar drug testing programs were established in eight federal district courts in 1989 and 1990, as part of a pilot project undertaken pursuant to the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690. These were the Eastern District of Arkansas, Middle District of Florida, Eastern District of Michigan, District of Minnesota, District of Nevada, Southern District of New York, District of North Dakota, and Western District of Texas. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FINAL REPORT: THE DEMONSTRATION PROGRAM OF MANDATORY DRUG TESTING OF CRIMINAL DEFENDANTS 19 (1991) [hereinafter FINAL REPORT].

At least six county court systems have also experimented with pretrial drug testing: Maricopa County (Phoenix), Arizona; Pima County (Tucson), Arizona; New Castle County (Wilmington), Delaware; Prince George’s County, Maryland; Multnomah County (Portland), Oregon; and Milwaukee County, Wisconsin. See JOHN CLARK, U.S. DEP’T OF JUST., ESTIMATING THE COSTS OF DRUG TESTING FOR A PRETRIAL SERVICES PROGRAM 1 (1989); see also Richard B. Abell, Pretrial Drug Testing: Expanding Rights and Protecting Public Safety, 57 GEO. WASH. L. REV. 943, 946 n.15 (1989); James K. Stewart, Quid Pro Quo: Stay Drug Free and Stay on Release, 57 GEO. WASH. L. REV. 68 (1988).

2. See, e.g., S. 635, 102d Cong., 1st Sess. (1991), introduced by Sen. Thurmond and others, which requires states receiving certain criminal justice funds to
Unfortunately, many of those who lose their liberty as a result of a positive drug test may be victims of a test which falsely reports drug use if the defendant simply consumed one of many common medicines, or if certain basic mistakes or mixups occurred in the court’s drug-detection laboratory. This article suggests that such drug programs can and should be challenged as a clear violation of due process if, as in the District of Columbia, the program fails to use an available and virtually foolproof test to confirm drug use before restricting a defendant’s liberty. This article also suggests that procedures currently in effect in the District fail to provide a constitutionally adequate warning to the defendant of the adverse consequences that a positive drug test can have in the court proceeding before the defendant agrees to submit a urine sample.

Since a positive drug test result can lead to incarceration or other drastic impacts upon a defendant’s liberty, pretrial drug testing procedures should be as reliable and fair as possible. These are core values that due process has long protected when an individual is threatened with a loss of liberty as a result of government action. This article addresses the procedural protections required by due process to insure that drug testing results are accurate and reliable. This analysis requires consideration of doctrines from both criminal and administrative law, two areas that have merged in some significant respects during the past few years.

In *Mathews v. Eldridge*, the Supreme Court fashioned a three-part test for determining the scope of due process protections. This test employs a cost/benefit analysis which balances the burden on the government of providing an additional procedural protection against the anticipated loss to the individual if such protection is not provided, and the increased reliability the additional protection will provide. This test has been applied most commonly to determine whether trial-type hearings or similar procedures are required. However, this test has also been applied to a variety of other implement pretrial drug testing programs in compliance with regulations issued by the Attorney General. *Id.* at § 902. A separate provision mandates post-conviction drug testing of federal defendants. *Id.* at § 901.

situations as well.

This article suggests that the *Mathews v. Eldridge* analysis should be applied, in conjunction with other factors, to evaluate the constitutionality of procedures such as pretrial drug testing. To illustrate the utility of the *Mathews v. Eldridge* approach, this article will apply it to the need for confirmatory testing in the District's drug program, and compare this methodology to the approaches recently taken by the Supreme Court on several related issues, including drug testing of government employees, pretrial preventive detention procedures, and prompt probable cause hearings for persons who have been arrested.

Establishment of pretrial drug testing programs throughout the United States may or may not be a desirable objective. However, if such programs are created, it is vital


6. It is necessary to focus on a specific program because due process analysis is dependent, in part, upon the details of a jurisdiction's bail law, its drug testing procedures, and the ways in which the drug testing results are utilized by judicial officers in the jurisdiction.

7. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). These cases upheld drug testing of certain government employees as reasonable searches and seizures within the Fourth Amendment. In both cases, the Court emphasized that the procedures employed in the drug testing programs made the test results quite reliable. In both cases, the initial immunoassay screen was confirmed by "state-of-the-art equipment and techniques," *Skinner*, 489 U.S. at 610 n.3; *Von Raab*, 489 U.S. at 673 n.2 ("[t]he combination of EMIT and GC/MS tests required by the Service is highly accurate, assuming proper storage, handling, and measurement techniques.").


9. *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975) (Fourth Amendment requires prompt judicial determination of probable cause for any significant pretrial restraint on liberty); *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991) (initial court hearings within 48 hours of arrests are presumed sufficiently prompt within the meaning of *Gerstein*).


In addition to due process concerns about the fairness and reliability of pretrial drug testing, there are also substantial unanswered questions as to whether such programs constitute unreasonable searches and seizures within the meaning of the Fourth Amendment to the United States Constitution. The District of Columbia Circuit at one time ordered a full evidentiary hearing on these Fourth Amendment challenges to the District's drug testing program, but on remand the case was dismissed for want of prosecution. *Berry v. District of Columbia*, 833 F.2d 1031 (D.C. Cir. 1987), *dismissed for want of prosecution*, Civil Act. No. 84-2659 (D.D.C.)
that they be as fair and reliable as possible. The legislatures, and ultimately the courts, will be called upon to insure that drug testing programs in the criminal justice system satisfy due process standards. Pretrial drug testing programs cannot be second-rate, not only because they involve the court's own essential criminal procedures, but also because of the drastic potential consequences of positive test results.\textsuperscript{11}

Part I of this article describes the District's criminal laws and procedures. Part II discusses the scope and operation of the District's drug testing program. Part III sets forth the applicable due process principles and analyzes the \textit{Mathews v. Eldridge} test. Part IV identifies the protected "liberty" interests which trigger due process protections for pretrial drug testing. Part V addresses the need to confirm positive drug tests in different pretrial circumstances. Part VI discusses other due process concerns with the District's program. Finally, Part VII analyzes the usefulness of \textit{Mathews v. Eldridge} in determining the scope of due process protections.

I. D.C. CRIMINAL PROCEDURES

A. The Initial Hearing

Virtually everyone arrested in the District of Columbia is brought before a judicial officer of the D.C. Superior Court for an initial hearing.\textsuperscript{12} The procedure for this initial hearing has

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\textsuperscript{11} Drug testing laboratories that report erroneous positive test results to the court could also be found civilly liable to defendants injured by the erroneous information. In one recently reported case, a private employee fired because of a false positive drug test result received a $4.1 million jury verdict (mostly punitive damages) against the laboratory. See Andrew Blum, \textit{State Drug Test Rules are Varied: Some are Permissive; Others Regulate Strictly}, \textit{Nat'l L.J.}, Dec. 16, 1991, at 1.

\textsuperscript{12} The principal exceptions are persons charged with federal offenses in the United States District Court (which does not have a comprehensive drug testing program), and persons who are released on citation or bond release (for relatively minor offenses) from police precincts.

Due to the District of Columbia's unique status in relationship to the federal government, the United States Attorney for the District of Columbia is responsible for prosecuting cases in both federal and superior court, and must decide in which court charges will be brought. There has been a recent public squabble between the U.S. Attorney and a number of federal judges because the U.S. Attorney has
been codified in the court's Rules of Criminal Procedure, which provide that the arrested person shall be taken "without unnecessary delay" to the court, and that routine booking procedures such as fingerprinting and photographing of the arrestee shall be "performed with reasonable promptness."\textsuperscript{13}

Several important events occur at this initial hearing. Defense counsel enters his or her appearance, the charge against the defendant is read, and further dates are set for the case to return to court.\textsuperscript{14} The court also makes a decision on whether to release the defendant pending trial, and, if so, under what conditions.\textsuperscript{15} If the court imposes any conditions of release which "constitute a significant restraint on pretrial liberty," the court must also determine whether or not there is probable cause to believe the defendant committed the charged offense.\textsuperscript{16}


\textsuperscript{14} The judicial officer will also inform the defendant that he or she is not required to make any statement and that any statement may be used against the defendant. D.C. SUPER. CT. CRIM. R. 5(b). The defendant is also informed of the complaint and any affidavit filed with it, and of the defendant's right to have retained or court-appointed counsel. \textit{Id.}

If the case is charged as a felony (i.e., the maximum penalty exceeds one year), the initial hearing is called the presentment. The defendant will not plead to the complaint which has been filed in court, and only a future preliminary hearing date will be set. If the case is charged as a misdemeanor (i.e., the maximum penalty is one year or less), the initial hearing is called the arraignment. The defendant will plead to the information, and future dates for a status hearing and trial will be selected.

The initial bail hearing is usually presided over by a hearing commissioner, whose authority is analogous to that of a federal magistrate. See D.C. SUPER. CT. CRIM. R. 117. Generally, judges preside at the initial hearing only on Saturdays and holidays.

\textsuperscript{15} A substantial majority of adult arrestees (about 85%) are released pending trial rather than detained at the initial hearing. Of these, more than 80% are released on some form of non-financial conditions (i.e., without being required to post a bail bond). Only persons released without financial conditions are eligible for supervision, which includes urine surveillance, by the Pretrial Services Agency. \textit{Mary Toborg & John Bellassai, Pretrial Urine-Testing in the District of Columbia: The Perspective of Judicial Officers in 1989} 1-2 (1989).

\textsuperscript{16} See supra note 9. The juvenile justice system in the District has analogous
The standards that the judicial officer applies in making the initial bail decision are set forth in the District of Columbia Bail Reform Act. The District of Columbia, like the federal courts and many states, authorizes the judicial officer to consider both the defendant’s risk of flight and risk of safety to the community in setting bail. The statute establishes a presumption in favor of release without conditions on personal recognizance.

The judicial officer also has the authority to hold persons without bond for short periods (three or five days) under certain circumstances, including the “five-day-hold” for narcotic addicts, the “three-day-hold” where the defendant is already on release in a pending case, and a “three-day-hold” for a preventive detention hearing.

The court is also authorized to order detention without bond until trial when defendants are charged with first degree murder or with certain other dangerous or violent offenses.


18. D.C. CODE ANN. § 23-1321(a) (1989). In evaluating these risks, the judicial officer considers the nature and circumstances of the offense charged, the weight of the evidence against the person, family ties to the area, employment, financial resources, character and mental condition, past conduct, length of residence in the community, record of convictions, and any record of appearance or non-appearance at prior court proceedings. D.C. CODE ANN. § 23-1321(b) (1989).

When the judicial officer determines that personal recognizance or an unsecured appearance bond will not reasonably assure the defendant’s appearance at future court hearings, or assure the safety of the community, the bail law expressly requires the court to impose only those conditions that will reasonably assure the defendant’s appearance and community safety. D.C. CODE ANN. § 23-1321(a) (1989). Money bonds can be imposed solely to minimize the risk of flight, not to assure community safety. Id.; Jones v. United States, 347 A.2d 399, 401 (D.C. 1975). Moreover, money bonds can only be set after careful consideration and rejection of the various non-financial conditions of release. D.C. CODE ANN. § 23-1321(a) (1989).
20. Each of these “holds” is discretionary with the court. If the court grants the hold, the defendant is detained without bond for the prescribed number of days, and then a judicial officer will reconsider the bond issue and make a decision on whether to release the defendant. See D.C. CODE ANN. § 23-1322(e) (1989) (probation and parole holds); D.C. CODE ANN. § 23-1323 (hold for narcotic addicts); D.C. CODE ANN. § 23-1322 (hold for pending charge); D.C. CODE ANN. § 23-1322(c) (preventive detention hold).
B. Timing of the Initial Hearing

The timing of the initial hearing is important because it determines the feasibility of conducting initial drug testing and of using confirmatory tests.

The court’s rules provide that the initial hearing shall be conducted “without unnecessary delay.” In practice, the initial hearing is usually held on the next day, within twenty-four hours of arrest. The major exception to this is when the arrest occurs on Saturday. Then, the initial hearing will generally be held within forty-eight hours of arrest, since the court will not sit again until Monday.

In Gerstein v. Pugh, the Supreme Court held that the probable cause determination must be made “promptly” whenever the person arrested is subjected to any significant restraint on his or her pretrial liberty. Subsequently, in the recent case of County of Riverside v. McLaughlin, the Court ruled that there is a presumption that probable cause hearings held within forty-eight hours of arrest are constitutional, and a presumption that probable cause hearings held more than forty-eight hours after arrest are unreasonably delayed, and therefore unconstitutional, under Gerstein. The Court indicated that routine booking procedures may be employed between the arrest and the probable cause hearing, so long as these procedures and “other practical realities” do not unreasonably delay the probable cause hearing. The Court’s language suggests that routine drug testing could be one of those “other practical realities” which could permissibly be accomplished prior to the initial hearing if it did not delay the probable cause determination beyond forty-eight hours. However, the

26. Id. at 1670.
27. See id.:}

In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.

Id.
Court's language appears to make clear that "routine" procedures (like booking or drug testing) cannot constitutionally be utilized if they delay the probable cause determination beyond forty-eight hours.  

C. Sanctions for Non-Compliance

Defendants who are not detained at their initial hearings are released with certain conditions and restrictions placed upon them while the case is pending. For example, the release form that all released defendants are required to sign provides that they shall not commit any new offense while on release. If they do, it could trigger further sanctions.

Many defendants are released on condition that they provide regular (usually once a week) urine samples at the courthouse. The trial judge is kept apprised of whether these defendants appear for the scheduled appointments and whether urine samples submitted by defendants test positive or nega-

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28. See id.: Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance.

Id.

Among the four dissenters in County of Riverside was Justice Scalia, who criticized as "extremely unpersuasive" the reasons given by the county for delaying probable cause hearings, including the "need to take blood and urine samples promptly in drug cases". Id. at 1876 n.3.

29. See D.C. CODE ANN. § 23-1328 (1989) ("release papers" for persons convicted of a new offense while on release in an earlier case). Of course, possession of any illicit drug in the District of Columbia is a criminal offense, D.C. CODE ANN. § 33-541(d) (1989), and this would be a violation of the universally imposed condition of release not to commit any criminal offense.

Possession of any illicit drug (or "controlled substance" as most statutes classify them) is a misdemeanor, punishable by up to one year in jail and a fine of up to $1,000, or both, for a first offense. Id. For the "trafficking" offenses of possession with intent to distribute, distribution, manufacture, etc., the penalty is almost always a felony, with substantial mandatory minimum sentences involved. For instance, there is a mandatory minimum sentence of four to twelve years for first time trafficking offenses involving "street level" amounts of heroin and cocaine base (crack). D.C. CODE ANN. § 33-541(c) (1988).

It is not an offense in the District, or in most other states, to "use" an illicit drug. However, an individual must "possess" a drug (even for a very brief period of time) in order to "use" it. See generally GERALD F. UELMAN & VICTOR G. HADDOX, DRUG ABUSE AND THE LAW SOURCEBOOK §§ 6.1-6.2 (Clark Boardman 1990).
The trial judge has a wide array of sanctions that can be imposed for violating the prohibition on the use of drugs or any other condition of release. One option is to modify the conditions of release, by imposing a new monetary bond, or imposing additional nonfinancial release conditions. To find that a person violated a condition of release, justifying modification of those conditions, requires "clear and convincing" evidence of the violation. In other words, for a drug testing violation there would have to be "clear and convincing" evidence that a positive drug test reflected actual drug use in violation of the court's order.

The most potentially drastic result of a positive drug test is the contempt hearing to determine if the defendant intentionally violated his or her release conditions. This is a criminal proceeding, presided over by the trial judge, who can impose a separate conviction for contempt of court, and a sentence of up to six months imprisonment or a fine of up to $1,000, or both. At this hearing, the defendant has essentially all the due process rights a defendant has at any non-jury criminal trial, including the requirement that allegations against the defendant be proved "beyond a reasonable doubt." Thus, the issue in a contempt hearing is whether the government's drug test proved "beyond a reasonable doubt" that the defendant had used drugs in violation of release conditions.

30. See D.C. CODE ANN. § 23-1329 (1989). Trial judges have imposed a wide variety of non-financial conditions of release on persons who have violated drug testing requirements, including increased frequency of drug testing (e.g., from once to twice a week), third party custody, curfew, or referral for treatment or counseling. See CARVER, supra note 1, at 3-4.


33. Id.; see also D.C. SUPER. CT. CRIM. R. 42(b). This is an out-of-court contempt, which requires an adversarial hearing to resolve, and cannot be dealt with summarily. See D.C. SUPER. CT. CRIM. R. 42(a); In re Oliver, 333 U.S. 257 (1948).

34. These due process rights include the right to notice and counsel, Cooke v. United States, 267 U.S. 517, 537 (1925), to call witnesses in defense, id., and to a public trial before an impartial tribunal, In re Oliver, 333 U.S. at 273-75.


36. This is, of course, the heaviest burden of proof in the American legal system. The criminal contempt proceeding is the most compelling context for requiring confirmation or other procedures to ensure reliability, because of this burden of proof, and for other reasons discussed below.

The use of contempt hearings to deal with positive drug tests was more widespread at the beginning of the District's program than it is today. Toborg and
Other less severe actions can also be taken by the trial judge as the result of a positive drug test, including a stern warning to the defendant, or holding the defendant in custody until court recesses later that same day.\footnote{37}

II. D.C. DRUG TESTING PROGRAM

A. Creation and Operation of the Program

Drug testing of arrestees in the District of Columbia has existed since the early 1970s, but on such an infrequent basis that it had minimal impact on the criminal justice system.\footnote{38} Beginning in March of 1984, a new comprehensive pretrial drug testing program was established for adult arrestees, and extended to cover juveniles in 1986.\footnote{39} This program calls for the testing of arrestees in three situations: (1) routine testing of persons prior to their initial hearing, (2) testing of persons released at the initial hearing, and (3) testing in accordance with special orders of the court, such as when a defendant is late to court.\footnote{40}

The drug testing program is operated by the D.C. Pretrial Services Agency ("PSA"), an independent agency of the D.C. Government.\footnote{41} PSA employees go to the superior court lock-up early each morning to collect urine samples from arrestees.\footnote{42}

\footnote{Bellassai explain this trend: Many judges who back in 1985 reported that they often held contempt hearings for condition violations told the Toborg Associates study team in 1989 that they no longer did so as frequently because of the press of ever-growing court dockets.}

\footnote{Toborg & Bellassai, supra note 15, at 25.}

\footnote{Id.}

\footnote{Carver, supra note 1, at 2.}

\footnote{Toborg & Bellassai, supra note 15, at 1. The D.C. program was promoted and initially funded by the National Institute of Justice of the U.S. Department of Justice. Carver, supra note 1, at 1. The D.C. program tests adults for five categories of drugs: opiates (primarily heroin), cocaine, phencyclidine (PCP), amphetamines, and methadone. Juveniles are tested for similar drugs, except that they are tested for marijuana but not amphetamines. Id. at 7-8.}

\footnote{Carver, supra note 1, at 2. PSA conducts tests on approximately 65,000-70,000 urine samples each year, including adults and juveniles. Conversation with John Carver, Director of the District of Columbia Pretrial Services Agency (1991).}

\footnote{PSA has several responsibilities: It interviews all adult arrestees to determine their eligibility for pretrial release; it makes release recommendations to the judicial officer presiding at the initial hearing; and, it monitors compliance with release conditions for all defendants, except those released on surety bond. D.C. Code Ann. §§ 23-1301 to 23-1302 (1989); Toborg & Bellassai, supra note 15, at 1.}

\footnote{Some defendants refuse to provide a urine sample, some are unable to}
The arrestees are requested to provide urine samples, and told by the PSA representative that the test result will be used only for determining conditions of release and not used as evidence to prove guilt of the underlying charge.43

While a defendant in lock-up has the right to refuse to provide a urine sample, just as the defendant can refuse to be interviewed at all by PSA (to obtain general background information), very few refuse to provide a urine sample.44 In the

provide one, and some are brought in too late in the morning to be tested. Often, the judicial officer will condition release for these defendants upon the subsequent provision of a urine sample. MARY TOBORG & JOHN BELlassAI, PRETRIAL URINE TESTING IN THE DISTRICT OF COLUMBIA: THE VIEWS OF JUDICIAL OFFICERS 4 (1986).

PSA staff wait at the lock-up while the arrestees provide urine samples, and observe the collection process, to prevent tampering or substitution of one person's urine for another. CARVER, supra note 1, at 4. After the sample is provided, the arrestee verifies his or her name and seals the specimen cap. The sample is then taken directly from the cellblock to PSA's on-site laboratory, which is located in the same building as the lock-up.

43. CARVER, supra note 1, at 3: The PSA staff member bases his or her representations on the directives of the agency's Training Manual:

My name is _____ and I work for the Pretrial Services Agency. I am here to collect a urine sample from you. You do not have to give a sample, but if you do, the sample will be tested for drugs and the results given to the judge or hearing commissioner for use at your bail hearing. The test results will be used only to determine conditions of release in your case. They cannot be used to determine whether you are guilty or innocent of today's charges. If you choose not to provide a sample, the Court may order you to provide one if and when you are released.

DISTRICT OF COLUMBIA PRETRIAL SERVICES AGENCY, PRETRIAL SERVICES TRAINING AND PROCEDURE MANUAL 159 (1991). When an arrestee refuses to provide a urine sample, the PSA representative is directed to remind the person that "the information from the test results will only be used to assist in setting release conditions." Id.

This limitation on the use of drug test results is based upon the PSA's enabling statute, which provides that: "Any information contained in the agency's files . . . shall not be admissible on the issue of guilt in any judicial proceeding . . . but such information may be used . . . for the purpose of impeachment in any subsequent proceeding." D.C. CODE ANN. § 23-1303(d) (1989).

Based upon this provision, the District of Columbia Court of Appeals held in Jones v. United States, 548 A.2d 35 (D.C. 1988), that positive drug tests are admissible at trial to impeach a defendant, such as where the defendant testifies that he never used drugs or has no knowledge of them. The government can then call a PSA representative to testify concerning the defendant's positive drug test(s). Id.

While in a narrow sense the positive drug test is not introduced for the purpose of proving that the defendant committed the charged offense, the positive result may be used (with potentially damaging effect) at defendant's trial to undercut the defendant's credibility. This is not explained clearly to defendants prior to being asked to provide a urine sample. The information currently provided by PSA appears to be seriously misleading in this regard. See text accompanying notes 165-66, infra.

44. A much higher percentage of arrestees refused to provide a sample in the
view of the Director of PSA, this occurs because they have been informed by the agency of the limited use that will be made of the test results in the court proceedings.\textsuperscript{45}

The results of the drug test are generally available within one or two hours,\textsuperscript{46} and are communicated to the judicial officer presiding over the initial hearing for consideration in determining conditions of release.\textsuperscript{47}

B. The EMIT Testing System

The Superior Court's drug testing program relies exclusively on the EMIT drug screening test.\textsuperscript{48} The EMIT test is one of federal program involving eight federal judicial districts. The overall refusal rate was 13% in the first year of operation, and 23% in the second year. \textit{Final Report, supra} note 1, at 22. These high refusal rates may reflect the advice of counsel, given to defendants in interviews prior to contact with the PSA representative. See \textit{id.} at 18. In D.C. Superior Court, the PSA representative contacts the defendant prior to the interview with defense counsel. In light of the potential consequences that a positive drug test can have, the best advice to a client may well be to "just say no" to the drug test.

\textsuperscript{45} CARVER, \textit{supra} note 1, at 3.

\textsuperscript{46} PSA conducts initial tests on an average of about 1,300 to 1,500 adult arrestees each month, and about 300 to 400 juveniles. \textit{TOBORG & BELLASSAI, supra} note 15, at 10. Most of the adults test positive for at least one drug. When the program began in March 1984, 59% tested positive, which increased to the peak of 76% in February 1988. \textit{Id.} at 17. This percentage has subsequently declined, and for the period of June 1990 through July 1991, the percentage of adult arrestees testing positive has been in the range of 50 to 58%. \textit{Monthly Memorandum from John Carver to Interested Parties} 1 (July 2, 1991). The rate of drug use for juvenile arrestees is substantially lower: 35% in 1987, 30% in 1988, and 25% in the first half of 1989. \textit{TOBORG & BELLASSAI, supra} note 15, at 8.

\textsuperscript{47} The PSA report to the judicial officer also contains information on the arrestee's residence, family, employment, ties to the community, prior criminal convictions, and pending charges. The PSA representative, or defense counsel, will attempt to contact family or friends of the defendant to verify the information provided.

D.C. Superior Court judicial officers make a "great deal of use" of PSA drug test results, both in making initial release decisions and in monitoring compliance with drug-related conditions of release. This was the conclusion of a survey of 25 judges and commissioners conducted in 1985, one year after the program was established. See \textit{TOBORG & BELLASSAI, supra} note 42, at 5, 8. The same conclusion was reached after a re-survey of the court's judicial officers in 1989. See \textit{TOBORG & BELLASSAI, supra} note 15, at 22-23. According to the 1985 survey, one of the "most striking" results of the PSA drug testing program was the increase in the number of hearings held for violations of conditions of release, a result attributed by the judicial officers to "[t]he availability of hard data from a reliable source, coupled with the immediate availability of PSA staff to testify at violations hearings . . . ." \textit{Id.} at 8.

\textsuperscript{48} The EMIT test, which is an acronym for Enzyme Multiplied Immunoassay Technique, was developed and is now marketed by the Syva Company of Palo Alto, California.
the quickest and cheapest drug tests available today, and it is the most widely used drug screening test in the United States. It does not require sophisticated equipment or laboratory-trained personnel, and can be done on-site where the urine samples are provided.

Each sample that tests positive is re-tested, using the same EMIT test. PSA does not confirm "positive" results with a

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50. The operation of the EMIT system has been described as follows:

Immunassays are based on the principle of competition between labeled and unlabeled antigen (drug) for binding sites on a specific antibody. Antibodies are protein substances with sites on their surfaces to which specific drugs or drug metabolites will bind. These antibodies are formed by inoculating animals with appropriate immunogens.

* * *

In the EMIT assay, the label on the antigen is an enzyme (protein) that produces a chemical reaction for detection of drugs. This detection is based on the competition between unlabeled drug or drug metabolite and labeled drug or drug metabolite for binding sites on the antibody. Urine is mixed with a reagent containing [an enzyme substrate] and antibodies to the drug, as well as a second reagent containing a drug derivative labeled with [the enzyme]. The enzyme-labeled drug when bound to an antibody site is incapable of interacting with the [enzyme] substrate . . . . If the enzyme-labeled drug does not bind to the antibody, then it is free to react with the substrate. The drug in the subject's urine competes for the limited number of antibody binding sites and thereby proportionally increases the total enzyme activity. The enzymatic activity is therefore directly related to the concentration of the drug present in the urine.


51. Urine tests are generally classified as either screening tests or confirmatory tests. A screening test is the initial test used to detect drugs in urine. It is rapid and less expensive, but not as accurate as confirmation tests. See CHRIStY VISHER & KAREN McFADDEN, U.S. DEPT. OF JUST., A COMPARISON OF URINALYSIS TECHNOLOGIES FOR DRUG TESTING IN CRIMINAL JUSTICE 3 (1991).

A confirmation test is a second test used to confirm positive results from an initial screening test. It uses a different methodology, and provides a greater margin of certainty. Id.

The most commonly used screening tests are enzyme multiplied immunoassay (EMIT), radioimmunoassay (RIA), fluorescein immunoassay (TDx), and thin layer chromatography (TLC). Miike & Hewitt, supra note 50, at 644-46.

Confirmation tests include gas chromatography, gas chromatography/mass spectrometry (GC/MS), and high-performance liquid chromatography. The GC/MS test is considered the most reliable state-of-the-art test. Confirmation by GC/MS would result in a better than 99.9% reliability, and would "eliminate virtually all
more specific (or selective) confirmatory test, as is done in the great majority of other drug testing programs. After the sample is re-tested it is disposed of, and is not available if the defendant later seeks re-testing by an alternative methodology.

Unconfirmed EMIT tests can produce erroneous results due to both inherent limitations in the EMIT testing system and operator or equipment error in the use of the system. Inherent limitations in the EMIT testing system result in both "false positive" and "false negative" results. There are several well-known inherent sources of false positive EMIT results. First, substances in the urine sample besides the drug being tested for can "cross-react," or give a positive result, when no drug is present. In addition, even when a drug is present in a defendant's urine, the drug could have been consumed in a legal product, such as cough medicines or even poppy-seeded bagels. In fact, a wide variety of substances have been found to generate positive results for opiates, amphetamines, and other controlled substances. Analogues of PCP, such as TCP,
could cause a false positive EMIT test result.\textsuperscript{56} Another type of error leading to false positive results occurs when urine samples contain an enzyme that can mimic the one used in the EMIT test.\textsuperscript{57}

These sources of error are unavoidable using the EMIT methodology. They cannot be eliminated by flawless operation of the system, or by a second “confirmatory” EMIT test of the same sample, as is now done by PSA. For example, a urine sample containing a cross-reactive substance will always give a positive EMIT result. Moreover, the frequency of these inherent errors is difficult to estimate, for it derives from the randomness of machine error and the idiosyncrasies of the urine content of the tested population.

A second class of error is due not to the inherent unreliability of the EMIT system but to poor operation or deliberate subversion.\textsuperscript{58} For example, false positive results will occur if the equipment is not properly calibrated or carefully cleaned after each test.\textsuperscript{59} In laboratories which use only the EMIT structures. Eli Lilly & Co. v. Generix Drug Sales, Inc., 460 F.2d 1096, 1100 (5th Cir. 1972).


\textsuperscript{58} Robert Blanke makes the following observation:

Errors of omission as well as commission occur in all human activities. Fatigue, poor health, and boredom arising from the tedium of routine tasks all contribute to high error rates. Providing good working conditions, effective rest periods, and rotation of workers through different tasks can help to alleviate these problems . . . .

Inappropriate training or experience for the task being carried out can also lead to errors . . . .

The most difficult errors to control are administrative ones. Labeling errors, spelling errors, transposition of numbers, all can lead to a correct test result being assigned to the wrong subject. In fact, most laboratories have learned by participating in external PT programs that these occur more frequently than errors in testing procedures.

Robert Blanke, Accuracy in Urinalysis, in URINE TESTING FOR DRUGS OF ABUSE, at 50 (Richard Hawks & C. Nora Chiang eds., NIDA Research Monograph No. 73, 1986).

\textsuperscript{59} This might occur if a urine sample which contained PCP or another drug was tested in the EMIT equipment and then not all the residue from that sample was cleaned from the equipment. The next sample tested could have a false positive result because of the drug contained in the prior urine sample.

False positive results are also caused by contamination of samples or equipment, improper calibration, inadequate maintenance of the equipment, temperature variations, or failures in the chain-of-custody system. The very ease of performing these tests belies the care with which they must be done, and the consequent
test, the many mistakes which can result from not carefully following the proper procedures are magnified by the absence of an appropriate confirmation test.

C. Overall Reliability of EMIT

There has been a great deal of controversy over the reliability and accuracy of the EMIT test and the other immunoassays. On one extreme is a recent study comparing the reliability of the EMIT system with three other screening tests. This study found that both false positives and false negatives varied widely for the different testing systems; EMIT's false positive rate went as high as 2.5 percent for cocaine and reliance on persons who are not trained to laboratory standards may lead to an under-appreciation of the danger of cross-reactivity and the importance of other potential threats to the accuracy of the tests. For example, in United States v. Roy, the defense introduced PSA log sheets which reflected sloppy and careless operations of the system in Superior Court:

The defense, however, introduced the log sheets on which the computer values were recorded in the tests run on the defendant's urine from October 18, 1984, through December 19, 1984, a total of sixteen weekly tests. On six of these log sheets, there is no indication in the space provided that the calibration tests were performed. Additionally, defendant points out that on eight log sheets the operator failed to record completely the time when the test was begun and ended. The defendant also points to three log sheets on which no negative calibrations were recorded.

United States v. Roy, 114 Daily Wash. L. Rep. 2481, 2488 (D.C. Sup. Ct. Oct. 6, 1986). There was also the case reported in the press of a defendant who allegedly bribed PSA employees to have his urine test results reported as negative when they were actually positive. See Bribery Accusations Probed in D.C. Drug Screening Unit, Washington Post, July 12, 1988, at B1; Defendant Back in Jail Over Positive Drug Test, Washington Post, July 14, 1988, at B3. PSA employees could also be bribed to report negative test results as positive, if, for example, a competing drug dealer wished to get his competitor off the streets.
2.2 percent for the opiates. 60

Many authorities believe that the estimate of EMIT's accuracy at ninety-seven or ninety-eight percent represents ideal laboratory conditions which are not often met in the "real world." 61 There have been a variety of published studies which have documented false positive error rates for EMIT in prisons and other testing contexts in the range of four percent to thir-

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60. Visher and McFadden document the following false positive rates in their study of EMIT testing. Visher & McFadden, supra note 51, at 3.

<table>
<thead>
<tr>
<th>False Positive Rates* by Drug Type</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Percent Incorrect positives</strong></td>
</tr>
<tr>
<td><strong>Opiates</strong></td>
</tr>
<tr>
<td><strong>Cocaine</strong></td>
</tr>
<tr>
<td><strong>Marijuana</strong></td>
</tr>
<tr>
<td><strong>PCP</strong></td>
</tr>
<tr>
<td><strong>Amphetamines</strong></td>
</tr>
<tr>
<td>RIA</td>
</tr>
<tr>
<td>EMIT</td>
</tr>
<tr>
<td>TDx</td>
</tr>
<tr>
<td>TLC</td>
</tr>
</tbody>
</table>

*Negative by GC/MS but positive by screening test

61. See Zeeze, supra note 10, at §§ 3.01-3.05. The problem of inaccurate testing is not limited to drug tests. Studies have also documented substantial error rates by forensic laboratories which analyze other items such as blood, hair, and paint. See Randolph N. Jonakait, Forensic Science: The Need for Regulation, 4 Harv. J.L. & Tech. 109, 109-24 (1991).
ty-eight percent. 62

62. The following studies involved false positive rates for EMIT. Many of the highest false positive rates were from laboratories which ran only a single EMIT test, and did not repeat the test for positive samples. The complete citations to the studies follow the chart:

<table>
<thead>
<tr>
<th>Date</th>
<th>Study</th>
<th>False Positive %</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>O'Connor and Rejent</td>
<td>15%</td>
</tr>
<tr>
<td>1982</td>
<td>Center for Human Toxicology</td>
<td>11% and 38%</td>
</tr>
<tr>
<td>1982</td>
<td>Whiting and Manders</td>
<td>33%</td>
</tr>
<tr>
<td>1984</td>
<td>Center for Disease Control</td>
<td>4%</td>
</tr>
<tr>
<td>1984</td>
<td>N.J. Dept. of Corrections</td>
<td>25%</td>
</tr>
<tr>
<td>1984</td>
<td>Jones et al.</td>
<td>34%</td>
</tr>
<tr>
<td>1984</td>
<td>Black et al.</td>
<td>28%</td>
</tr>
<tr>
<td>1985</td>
<td>Sutheimer et al.</td>
<td>4.6%</td>
</tr>
<tr>
<td>1985</td>
<td>Frederick et al.</td>
<td>7%</td>
</tr>
<tr>
<td>1986</td>
<td>Fort Meade</td>
<td>4%</td>
</tr>
</tbody>
</table>


62e Morgan, supra note 57, at 305-17.


Studies of the performance of commercial testing laboratories around the country by the Federal Centers for Disease Control demonstrate that, in actual practice, error rates for drug testing can be in the range of twenty to fifty percent, including false negatives and false positives. At least one such laboratory actually reached a one-hundred percent error rate. 63

Clearly, there have been very wide variances in the expertise with which different laboratories perform screening tests. It is also likely that there will be wide variances in the reliability of screening tests as administered in different pretrial testing programs.

III. DUE PROCESS PRINCIPLES

The Fifth Amendment to the United States Constitution provides that: "No person shall . . . be deprived of life, liberty or property, without due process of law." This provision is applicable to both the federal and District of Columbia governments, and the due process clause of the Fourteenth Amendment imposes a similar mandate on the states. 64

One of the central purposes of due process protections is to ensure fair procedures that minimize the risk of arbitrary or

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63. Hugh Hansen et al., Crisis in Drug Testing: Results of CDC Blind Study, 253 J. AMER. MED. ASS'N 2382 (1985). This blind study of thirteen laboratories in the United States which served a total of 262 methadone treatment facilities, found the following false positive results:

<table>
<thead>
<tr>
<th>Drug</th>
<th>False Positive Rate of Up to</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barbiturates</td>
<td>6%</td>
</tr>
<tr>
<td>Amphetamines</td>
<td>37%</td>
</tr>
<tr>
<td>Methadone</td>
<td>66%</td>
</tr>
<tr>
<td>Cocaine</td>
<td>6%</td>
</tr>
<tr>
<td>Codeine</td>
<td>7%</td>
</tr>
<tr>
<td>Morphine</td>
<td>10%</td>
</tr>
</tbody>
</table>

erroneous decisions.65 This has often been referred to as "procedural" due process, as distinguished from so-called "substantive" due process, and it has come to hold a position of great importance in American jurisprudence.66 The goal is to minimize the risk of arbitrary or erroneous decisions to the extent feasible; insuring an error-free process is, of course, impossible.67

Current Supreme Court doctrine applies a two-step analysis to determine the scope of due process protections in a given situation. The first step is to determine whether the individual has a protected interest in the nature of "liberty" or "property" which can be adversely affected by government action. In making this determination, the Court will "look not to the 'weight' but to the nature of the interest at stake."68 As long as the "deprivation is 'not de minimis', its gravity is irrelevant to the question of whether" due process protections apply.69


66. See Salerno, 481 U.S. at 746, 752; McNabb v. United States, 318 U.S. 332, 347 (1944) ("The history of liberty has largely been the history of observance of procedural safeguards."); KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 11:14, at 402-03 (2d ed. 1979).

67. See Speiser v. Randall, 357 U.S. 513, 525-26 (1958) ("There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account."). The Court in Mackey v. Montrym emphasized that: [T]he Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible "property" or "liberty" interest be so comprehensive as to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations.

Mackey v. Montrym, 443 U.S. 1, 13 (1979) (citation omitted).

68. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972); see Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989).

The prior Supreme Court test for determining whether due process protections apply to a given situation was a one-step process which balanced the weight of the individual's interests against the interests of the government. See Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 895 (1961) (no due process protections where government's interests in security of a military base outweighed a civilian restaurant employee's interest in employment at that specific job).

This older one-step balancing process to determine whether due process protections apply is quite similar to the current Supreme Court's balancing test to determine whether a search conducted under "special circumstances" is reasonable within the meaning of the Fourth Amendment. See, e.g., Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (both upholding the drug testing of certain government employees, because the government's interest in the testing of the employees was greater than the employees' privacy interests).

69. Goss v. Lopez, 419 U.S. 565, 576 (1975); Roth, 408 U.S. at 570-71;
If interests in the nature of "liberty" or "property" are found to be involved, the Court must then determine what process is due, i.e., what procedural protections are required under the circumstances. It has often been stated that due process "is flexible and calls for such procedural protections as the particular situation demands." 70

The framework for determining what process is required was set out in Mathews v. Eldridge. 71 It focuses on three factors:

Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function in-


The procedural protections in dispute in due process cases are typically the right to notice of governmental action and to a hearing to present one's side of the controversy before the governmental action is taken. Depending on the circumstances, due process may require that at the hearing the individual has the right to participate orally or in writing, be represented by an attorney, the right to an independent decisionmaker, and/or a statement of reasons for the government's decision. See, e.g., Vitek v. Jones, 445 U.S. 480 (1980) (rights in a hearing to transfer prisoner to a mental hospital); Goldberg v. Kelly, 397 U.S. 254 (1970) (rights in a proceeding to withhold welfare benefits).

The earlier Supreme Court cases did not formulate the issue by focusing so much on the precise degree of procedural protections required by due process, but looked at the issue as more of an "either-or" issue of requiring notice and a hearing before any grievous deprivation of liberty or property. Twining v. New Jersey, 211 U.S. 78, 110-11 (1908); Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445-46 (1915).

One traditional exception to the requirement of a hearing is the so-called "testing exception," which has been codified in the Administrative Procedure Act, 5 U.S.C. § 554(a)(3) (1966 & Supp. 1991). This provision exempts from the general requirement of an on-the-record hearing all "proceedings in which decisions rest solely on inspections, tests, or elections." See Davis, supra note 66, at 445-49; cf. Board of Curators of the Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978) (dismissal of medical student); Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474, 478 n.12 (7th Cir. 1974) (failure on bar examination).

The justification for this exception is that certain issues are best resolved not by holding an evidentiary hearing, but by an examination or inspection by experts in that field. Of course, any action taken by the government on the basis of its examination which adversely effects a protected interest would still have to comply with due process, including the right of an aggrieved party to challenge the fairness or accuracy of the examination. See APA, 5 U.S.C. §§ 558(b), 702 (1966) (judicial review).

volved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\textsuperscript{72}

This test is essentially a type of cost/benefit analysis. It originated and was first applied in the area of administrative law, such as the termination of disability payments involved in \textit{Matheus v. Eldridge}, but it has since been applied by the Supreme Court to a number of proceedings which are part of the criminal justice process, including the bail decision made at the initial hearing,\textsuperscript{73} and to several other proceedings which can be characterized as quasi-criminal in nature.\textsuperscript{74}

There has been substantial scholarly criticism of constitutional balancing tests in general, and of the \textit{Matheus v. Eldridge} test in particular. With respect to constitutional balancing tests generally, it has been argued that such tests lack objectivity, requiring judges to apply their subjective determinations of what "weight" is to be accorded to the different interests involved,\textsuperscript{75} and ultimately resulting in a devaluation of fundamental rights.\textsuperscript{76}

The \textit{Matheus v. Eldridge} test has also been criticized on a number of specific grounds. Several commentators have criticized the test for focusing on only "instrumental" judgments

\textsuperscript{72} Id. at 335.
\textsuperscript{74} For example, many cases have employed the \textit{Matheus v. Eldridge} analysis to determine the scope of due process rights which must be accorded to incarcerated persons. \textit{See}, e.g., Bell v. Wolfish, 441 U.S. 520 (1979) (conditions of confinement imposed upon pretrial detainees); Washington v. Harper, 494 U.S. 210 (1990) (procedures applicable to treatment of mentally ill prisoners with antipsychotic drugs against their will). The \textit{Matheus v. Eldridge} test was also applied to determine what process was due prior to the suspension of a driver's license because of refusal to take a breath-analysis test upon arrest for drunken driving. Mackey v. Montrym, 443 U.S. 1 (1979). An individual has a substantial protected "property" interest in retaining a driver's license. \textit{Id.} at 10-11.
about the accuracy of a proceeding, looking only toward what
the ultimate impact the protection will have on the outcome of
the proceeding.77 In this view, the Mathews v. Eldridge test
reflects the Supreme Court's "almost exclusively instrumental
vision" in deciding the proper role for due process protec-
tions.78 This ignores the importance of the "intrinsic"
due process principles of insuring the opportunity to participate
in governmental actions that adversely affect an individual,
and other values inherent in fair treatment by the govern-
ment.79

A second critique of the Mathews v. Eldridge test is that it
is too blunt an instrument, because it seeks to quantify factors
that cannot be quantified and eliminates from consideration
unquantifiable factors that may be the most important factors
in the core concept of procedural fairness.80 Mathews v.
Eldridge has also been criticized, by then-Associate Justice
Rehnquist, on the general ground, cited above, that it involves
an essentially unprincipled, ad hoc weighing of interests.81

The area of pretrial drug testing offers a useful vantage
point to evaluate these criticisms. Insuring the reliability of
drug testing results under the due process clause would seem
to involve essentially instrumental judgments, which the
Mathews v. Eldridge equation was designed to resolve. This
article considers how useful the equation is in resolving the
scope of due process protections.82

77. Owen M. Fiss, Reason in All its Splendor, 56 Brook. L. Rev. 789, 793-94
78. Laurence H. Tribe, American Constitutional Law § 10-7, at 671 (2d ed.
1988).
79. Id. at 674 (instrumental approach not only overlooks the important human
interest "in receiving decent treatment, but also provides the Court a facile means
to justify the most cursory procedures by altering the relative weights to be
accorded each of the three factors").
80. Professor Mashaw has argued that the Mathews v. Eldridge test "tends, as
cost-benefit analyses typically do, to 'dwarf soft variables' and to ignore complex-
ities and ambiguities." Jerry L. Mashaw, The Supreme Court's Due Process Cal-
culus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in
(Rehnquist, J., dissenting) ("The balance is simply an ad hoc weighing which
depends to a great extent upon how the Court subjectively views the underlying
interests at stake.").
82. See discussion infra part VII.
IV. DUE PROCESS PROTECTIONS APPLY TO PRETRIAL DRUG TESTING

The first question to be addressed is whether due process protections apply at all to pretrial drug testing. Clearly such protections do apply, because pretrial drug testing involves fundamental "liberty" interests.83

The overriding liberty interest involved is that of not being incarcerated as a result of a judicial proceeding. Every individual who tests positive for drugs, prior to the initial hearing, or while on pretrial release, runs the risk of incarceration as a result.

The Supreme Court has often held that incarceration infringes the most fundamental and basic "liberty" interest protected by due process.84 The Court has specifically found that due process protections apply to the decision made at the initial bail hearing to release or detain both adults and juveniles without bond.85 Indeed, even persons on probation and parole have a "liberty" interest in their "conditional freedom" which requires due process protections.86 Persons who have been confined in jail prior to trial also have a continuing "liberty" interest which requires due process protections relating to the conditions of their confinement.87 Protected liberty or property interests have also been found to require due process protections for far less severe sanctions than incarceration.88

Incarceration is the harshest sanction that can be imposed

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83. It would be possible to make an attenuated argument that "property" interests are also involved in the potential loss of pretrial liberty as a result of drug testing. Cf. Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."). However, this would serve little purpose because the "liberty" interest is so clear.
87. Bell v. Wolfish, 441 U.S. 520, 530 (1979) (approving conditions of confinement imposed on federal pretrial detainees, including body-cavity searches, as satisfying due process standards).
88. For example, corporal punishment in public schools implicates a protected liberty interest, Ingraham, 430 U.S. at 672. Even loss of a driver's license implicates a protected property interest requiring due process protections. Mackey v. Montrym, 443 U.S. 1, 10-11 (1979).
on an individual in the District of Columbia. The District does not have laws authorizing capital punishment, and there is no provision in the District's laws for sentencing an individual to prison with aggravating conditions, such as imprisonment at "hard labor." Thus, a period of incarceration is the harshest penalty that can be imposed. Pretrial incarceration is especially onerous, not only because of its drastic impact on the defendant's freedom, but also because it often has a substantial impact on the defendant's ability to assist in his or her defense.

Even if incarceration is not imposed as a result of a positive drug test, the judicial officer at the initial hearing routinely imposes some other substantial restraint on liberty, such as the requirement that the defendant return every week to provide a urine sample at the courthouse. A recent study has shown that if a defendant was reported to have tested positive at the initial hearing, the judicial officer in the District will condition release on compliance with regular drug testing procedures "all" or "almost all" of the time.


90. Defendants incarcerated by a D.C. Superior Court judge can be detained in the jail facility located in the District, in one of several correctional facilities located in nearby Lorton, Virginia, or in local jails in states as far away as Washington State (on a contractual basis). The determination of where each defendant will be placed is generally made by the D.C. Department of Corrections. The determination of when a defendant shall be released on parole is usually made by the D.C. Board of Parole (for sentences longer than 180 days). See D.C. CODE ANN. § 24-208 (1989).

91. The defendant who has been detained pretrial has been "hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." Barker v. Wingo, 407 U.S. 514, 533 (1972); see also Campbell v. McGruder, 580 F.2d 521, 531-32 (D.C. Cir. 1978) (noting the "disturbing evidence" that the defendant at liberty pending trial is more likely to be found not guilty, and if convicted, of not receiving a prison sentence).

92. TOBORG & BELLASSAI, supra note 15, at 22-23. There are limited circumstances where a documented history of positive drug test results could be beneficial to a defendant, such as in qualifying for the so-called "addict exception" at sentencing. This allows the judge to waive stiff mandatory minimum sentences for certain offenses if the defendant was "addicted" to drugs when the offense was committed, and if other conditions are satisfied. See D.C. CODE ANN. § 33-541(c)(2) (1989), and supra note 29. A documented positive test result on the date of arrest (and even thereafter) could substantially assist the defendant in establishing an addiction to drugs.
Another “liberty” interest implicated by drug testing is the stigmatizing consequences such testing can have on an individual’s reputation.93 Two types of stigmatization are involved. First, there is the stigma of being labeled a drug user in an official court file. This court file is a public record available to any person upon request, including prospective employers and government officials who are conducting a check on the defendant, even after the case is concluded.94 This stigmatizing effect of a positive drug test could be eliminated if the test results were not included in the written PSA report but were instead provided to the judicial officer orally by the PSA representative. This is not now done in the District.95 A sec-

However, the defendant has several other ways of documenting an addiction which do not pose the risks created by pretrial drug testing, particularly the punitive sanctions that may be imposed on the addicted defendant pretrial. These include letters or reports from drug programs to which the defendant has been referred, testimony by family members or others associated with the defendant’s addiction, the defendant’s prior criminal arrest records, and the defendant’s own testimony.


94. Most persons would equate a positive drug test result with being a drug user. The PSA report, which is included in the official case jacket in court, specifies that the defendant tested positive or negative for drugs, but it does not specify the specific drug or drugs for which the defendant tested positive.

This lack of specificity as to which drug caused the positive result does not offer any substantial protection to the defendant, because the defendant is still labeled and stigmatized as a user of illegal drugs. Cf. Constantineau, 400 U.S. at 437 (stigmatization occurred when “unsavory label” of being an excessive drinker placed on individual by state officials). But see Hannah v. Larche, 363 U.S. 420, 441-44 (1960) (no violation of liberty interests for stigmatizing consequences of government agency report).

95. Without much difficulty, the PSA representative could orally inform the judicial officer at the initial hearing of the drug test results. This could be done at the bench, in the presence of defense counsel and the prosecutor, as is now done for any record of juvenile adjudications of the defendant known to PSA. Alternatively, the drug test results could be submitted on a supplemental PSA report, which would not become part of the official case file. This system is followed now for informing the trial judge of the results of all drug testing which occurs after the initial hearing. The report is submitted in writing to the trial court, with copies to defense counsel and the prosecutor, but is generally not placed in the official court file, although it may be retained in the judge’s private file on the case in the judge’s chambers. See TOBORG & BELASSAII, supra note 15, at 25.

The Supreme Court has indicated in connection with the stigma that can flow from a juvenile proceeding: “The more comprehensive and effective the procedures used to prevent public disclosure of the finding, the less the danger of stigma.” In re Winship, 397 U.S. 358, 367 n.5 (1970). The same principle would also apply to
ond type of stigmatization is that which results from the incarceration or conviction of a defendant based upon a positive drug test. 96

These stigmatizing effects of drug testing, 97 considered in conjunction with the other "liberty" interests involved, clearly require that due process protections apply to pretrial drug testing programs. The next question is what process is due to insure the reliability of pretrial drug testing.

V. THE NEED TO CONFIRM EMIT TESTS

The principal due process issue raised by the District's pretrial drug testing program is whether a positive result on the EMIT screening test must be confirmed by a more reliable confirmation test. There have been no reported court decisions on this issue, 98 but there have been a large number of cases (and much controversy) concerning the need to confirm initial screening tests such as EMIT in related contexts, including probation revocation, prison disciplinary proceedings, and loss of employment.

An analysis of confirmatory testing should begin, not by addressing the abstract issue of whether confirmation is required of pretrial drug testing, but instead by focusing on four specific circumstances where confirmation may or may not be required, i.e., in contempt proceedings, in hearings to modify conditions of release, at the initial bail hearing, and at sentencing. After each of these situations is analyzed separately, consideration can then be given to the similarities and differences

pretrial drug testing results.
96. In re Gault, 387 U.S. 1, 27 (1967); In re Winship, 397 U.S. at 363.
97. The individual facing the greatest threat of stigmatization is the person facing a show cause hearing for contempt as the result of a positive drug test. Not only does this individual face up to six months incarceration and a fine, but also a permanent record of a conviction for criminal contempt of court. See supra text accompanying notes 33-35. Even though pretrial incarceration in D.C. Superior Court infrequently lasts in excess of six months, the additional sanction of a permanent criminal record would appear to make a contempt conviction the greatest threat to liberty interests posed by pretrial drug testing.
98. In one recent case in the District of Columbia Court of Appeals, the principal issue was whether due process requires confirmation of EMIT tests in contempt proceedings. However, the Court never reached this issue because the United States conceded error on an alternative ground raised in the appeal, and the Court vacated the contempt conviction on this basis. Henderson v. United States, No. 88-155 (D.C. Jan. 18, 1989) (mem.) (granting motion to remand filed by the United States on Jan. 11, 1989). The author of this article was counsel for Mr. Henderson in that case.
in these circumstances, in an attempt to formulate a general rule indicating when confirmation is required by due process.

A. Contempt Proceedings

1. Applying Mathews v. Eldridge

Contempt proceedings provide the most compelling context for confirmation of EMIT tests. Applying the Mathews v. Eldridge equation, the first factor to be considered is the defendant's interests. Here, there can be no question that the defendant's fundamental liberty interests in freedom from incarceration and stigmatization are entitled to great weight.99 The Supreme Court has indicated that the defendant's interest in the accuracy of a criminal proceeding is "almost uniquely compelling."100

On the other side of the equation is the government's interest in minimizing the fiscal burden that confirmation of positive drug tests imposes. In these days when most court systems, including the District's, are operating on tight budgets,101 any additional expenditure of funds is a matter of concern. However, the cost of confirming drug tests used in contempt proceedings is *de minimis* compared to overall pretrial

99. Schall v. Martin, 467 U.S. 253, 265 (1984) ("[T]he juvenile's countervailing interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial."); United States v. Salerno, 481 U.S. 739, 750 (1987) ("On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right.").

While the length of the period of incarceration may effect the weight of defendant's interests, even a "brief" period of incarceration involves "undoubtedly substantial" interests. Schall v. Martin, 467 U.S. at 265; cf. Mackey v. Montrym, 443 U.S. 1, 12 (1979) ("The duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action."). The defendant convicted of criminal contempt for drug use faces a substantial period of incarceration of up to six months. See *supra* note 33 and accompanying text.

The defendant's interest in avoiding the stigma of a permanent conviction record for criminal contempt is similarly compelling.100 Ake v. Oklahoma, 470 U.S. 68, 78 (1985). The Court commented that:

The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis.

*Id.*

100. CARVER, *supra* note 1, at 6.
drug testing costs. It is likely that there will be only a relative handful of contempt proceedings that require confirmatory testing, because Superior Court judges rarely initiate contempt proceedings for violation of conditions of release, preferring the less drastic and procedurally simpler options available to them.\textsuperscript{102} For the small number of show cause hearings initiated on the basis of positive drug tests, the great majority of defendants concede drug use,\textsuperscript{103} thereby eliminating any need to confirm these tests (since the defendants have "confirmed" them).\textsuperscript{104} Indeed, using reliable confirmation tests may actually decrease the number of defendants who contest positive EMIT results, because they know they will be faced with results of tests which are virtually foolproof.

The number of drug tests involved in contested show cause hearings are only a very small fraction of the drug tests administered by PSA,\textsuperscript{105} and the expense of confirming these positive tests with state-of-the-art confirmation tests would not be great.\textsuperscript{106} Such confirmation could be done "without prohibitive

\textsuperscript{102} TOBORG \& BELLASSAI, supra note 15, at 25.
\textsuperscript{103} TOBORG \& BELLASSAI, supra note 42, at 8.
\textsuperscript{104} There is no need to confirm positive drug tests if the defendant admits use and doesn't challenge the accuracy of the result. See In re Johnston, 745 P.2d 864, 865 (Wash. 1987) (en banc); Higgs v. Wilson, 616 F. Supp. 226, 232 (W.D. Ky. 1985), rev'd on other grounds sub nom., Higgs v. Bland, 888 F.2d 443 (6th Cir. 1989).
\textsuperscript{105} The potential financial burden of confirmation testing includes not only the cost of the confirmation test itself, but any additional expense involved in retaining and storing urine samples for possible later re-testing.

Of course, if the defendant assumes the responsibility for paying all the expenses involved in the confirmation test, the government would have little (if any) interest in opposing such confirmation. However, this is not an available alternative in the overwhelming majority of cases in D.C. Superior Court, which involve indigent defendants. In these cases, confirmation must be done at government expense if it is done at all.

\textsuperscript{106} It costs PSA less than $3 to test each sample today; when the District's program began, it cost approximately $7 to test each sample. Conversation with John Carver, Director of the District of Columbia Pretrial Services Agency (1991); CARVER, supra note 1, at 6. Confirmation using the most reliable testing method (GC/MS) costs between $25 and $80, depending on the laboratory involved, and there would likely be a discount on this price based upon a contract with a laboratory for bulk amounts of confirmation tests. See JOHN CLARK, ESTIMATING THE COSTS OF DRUG TESTING FOR A PRETRIAL SERVICES PROGRAM (1989) (cost of GC/MS confirmation was $25 per test for the Multnomah County, Oregon, pretrial drug testing program); Kaye McDonald Sutherland & Coni Rathbone, \textit{Jar Wars: Drug Testing in the Workplace,} 23 WILLAMETTE L. REV. 529, 540 n.99 (1987); Alexander Stille, \textit{DRUG TESTING: The Scene is Set For a Dramatic Legal Collision Between the Rights of Employers and Workers,}\textit{ Nat'l L.J.}, Apr. 7, 1986, at 23; Charles E. Leal, Comment, Admissibility of Biochemical Urinalysis Testing Results
The cost” to the PSA program. 107

The governmental interests balanced as part of the Mathews v. Eldridge equation are only those involved with providing an additional confirmatory test, not interests served by drug testing generally. These general governmental interests would have been considered under the old one-step due process balancing test 108 (and under the current Fourth Amendment balancing test), but the Mathews v. Eldridge test focuses only on the burdens involved with the additional procedural protections in dispute.

Thus, while the government has an obvious and substantial interest in insuring that defendants comply with court-ordered conditions of release, especially those requiring the


The cost of confirming positive results is also very small compared to the total costs involved in a pretrial drug testing program. For example, the pilot demonstration pretrial drug testing program established in eight federal judicial districts in 1989 used an initial immunoassay screening test, and confirmation at an outside laboratory using GC or an equivalent technique if any adverse action was to be taken against a defendant. FINAL REPORT, supra note 1, at 1-2. The costs to set up and operate the immunoassay testing was $845,520, and the cost of confirmation testing was only $21,000 (less than 2.5 percent of the total costs). Id. at 8. This report also contained cost projections for nationwide implementation of pretrial drug testing in all federal district courts. According to one model for such nationwide implementation, the initial costs to set up the program would be $6,865,000, the recurring costs would be $10,801,037, but the cost of laboratory confirmation would be only $90,000 per year. Id. at 63-64. Confirmation costs would thus be less than one percent of all recurring costs.

Similar estimates of costs were made for state pretrial drug testing programs in CLARK, supra. According to one model, the yearly cost for a pretrial testing program was in excess of $818,000, of which only $15,750 was for confirmation of positive drug test results by GC/MS whenever the defendant’s release could be revoked on the basis of a positive drug test. Id. at 14-17. Confirmation costs were less than 2% under this model.

107. Goss v. Lopez, 419 U.S. 565, 580 (1975). The Supreme Court has also used other formulations to indicate the role of costs in determining the scope of constitutional protections. See, e.g., Bounds v. Smith, 430 U.S. 817, 825 (1977) (“[T]he cost of protecting a constitutional right cannot justify its total denial.”); Ingraham v. Wright, 430 U.S. 651, 680 (1977) (“[E]ven if the need for advance procedural safeguards were clear, the question would remain whether the incremental benefit would justify the cost.”). See generally TRIBE, supra note 78, at 715-16.

108. Under the procedure announced in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961), the court would have weighed the importance to the government of having drug testing against the interests of the defendant in not wrongfully having his or her liberty restrained as a result of a testing error. Under the newer procedure, the court is to weigh the burden on the government of providing the additional confirmatory test against the estimated wrongful loss to the individual of his or her liberty resulting from a mistake correctable by the confirmatory test.
defendant not to violate the law while on pretrial release, this interest is not relevant to the question of whether due process requires confirmation of EMIT tests.

The government also has a strong interest in insuring that defendants with pending cases do not use illicit drugs while free on pretrial release because such drug use could affect the defendant's ability to appear in court, or threaten the safety of the community. There is a growing, but still inconclusive, body of empirical data documenting the relationship between pretrial drug use and both failure to appear, and commission of new offenses by defendants while on pretrial release.\textsuperscript{109} While the causal relationships between drug use and failure to appear or commission of new offenses is still subject to vigorous scholarly debate,\textsuperscript{110} the Supreme Court has made it clear that a definitive answer is not necessary before these government interests can be factored into a Fourth Amendment analysis.\textsuperscript{111}

Sufficient data currently exists to enable the government to appropriately assert these interests in the Fourth Amendment context. Indeed, the government's interest in seeking to protect the public health and safety has traditionally been accorded great weight.\textsuperscript{112} These interests are not, however,


\textsuperscript{110} Compare Goldkamp et al., supra note 109, and Rosen & Goldkamp, supra note 10, with Abell, supra note 1, and CARVER, supra note 1.


\textsuperscript{112} Mackey v. Montrym, 443 U.S. 1, 17 (1979) (removing drunken drivers from the highways).

A number of thoughtful commentators have recently challenged the wisdom of using criminal laws to control America's serious drug abuse problem, and have suggested alternative approaches, including legalization and decriminalization of drugs. These commentators include United States District Judge Robert W. Sweet and former Secretary of State George P. Shultz. See DRUG POLICY FOUNDATION, DRUG PROHIBITION AND THE CONSCIENCE OF NATIONS 24-25, 205-08 (Arnold S. Trebach & Kevin B. Zeese eds., 1990). However, as long as criminal laws against illicit drug use remain in effect, the government can certainly assert a substantial interest in their enforcement in appropriate contexts (such as the search and seizure area), but not in support of a policy which unfairly imprisons innocent people.
relevant to the due process concern over confirmation of EMIT tests.

The defendant's appearance in court and the protection of the public are not the only relevant government interests. The government, like the defendant, also has a compelling interest in insuring the accuracy of criminal dispositions. Unlike private litigants, the government's interest in prevailing at trial is "necessarily tempered by its interest in the fair and accurate adjudication of criminal cases."\(^\text{113}\) Moreover, the government has an interest in insuring that the program is perceived as fair, and not an error-prone system resulting in unjustified jailing. These governmental interests further support the need for confirmation testing.

Final factors to be considered in the *Mathews v. Eldridge* equation are the risk of an erroneous determination using only the EMIT test, and the increased reliability that would result from confirmation testing. There is agreement in the scientific community that confirmation of immunoassays like EMIT with GC/MS results in reliability exceeding 99.9 percent, when proper procedures are followed.\(^\text{114}\) In other words, confirmation of positive EMIT results with GC/MS virtually eliminates accuracy concerns. With such confirmation courts can confidently equate positive drug test results with drug usage.

When an EMIT test is unconfirmed, courts do not enjoy such confidence because the margin of error for unconfirmed EMIT tests is subject to frequent dispute. As noted above, some authorities claim that false positive rates for unconfirmed EMIT tests range from two to five percent. Other studies of EMIT testing programs have shown far higher false positive rates.\(^\text{115}\) While the precise rate of false positives in the District's program has apparently never been determined nor

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\(^\text{113}\) Ake v. Oklahoma, 470 U.S. 68, 79 (1985); see also Morrissey v. Brewer, 408 U.S. 471, 484 (1972) (noting the state's interest in "not having parole revoked because of erroneous information").


\(^\text{115}\) See supra note 62, showing false positive rates in published studies of up to 25% by the New Jersey Department of Corrections; 28% in the study by Black et al.; 34% in the study by Jones et al.; and 38% in the Center for Human Toxicology study.
publicly reported,\textsuperscript{116} even assuming a five percent false positive rate, one of every twenty persons convicted of a drug-use violation would have been wrongly convicted. This would constitute a substantial and unnecessary number of persons who have been wrongfully convicted of criminal contempt.

Application of the \textit{Mathews v. Eldridge} test leads to the conclusion that due process requires confirmation of positive EMIT tests in contested contempt proceedings. The defendant's interests clearly outweigh the government's. Moreover, the cost/benefit considerations strongly favor confirmatory testing, which substantially increases reliability (virtual error-free test results) at a relatively nominal expense.

2. Other Important Factors

While the \textit{Mathews v. Eldridge} equation identifies several obviously important factors in determining whether EMIT tests must be confirmed, it ignores other factors essential to resolving the confirmation issue.

a. Burden of Proof. The first factor is the burden of proof involved in the proceeding. In contempt hearings, the government must prove the defendant guilty beyond a reasonable doubt.\textsuperscript{117} Thus, in contested contempt proceedings, the issue is whether unconfirmed EMIT tests are sufficiently reliable to prove drug use beyond a reasonable doubt (the highest standard of proof in American law).

This heavy burden of proof is the principal distinction between the need for confirmation in contempt proceedings and several cases which have not required confirmation of EMIT tests in prison disciplinary proceedings. In prison disciplinary hearings, where due process rights are quite limited,\textsuperscript{118} the

\textsuperscript{116} The sloppy procedures documented in \textit{United States v. Roy} 114 DAILY WASH. L. REP. 2481, 2488 (D.C. Sup. Ct. Oct. 6, 1986), make it questionable whether the District's testing program approaches a 95 percent accuracy rate. See \textit{supra} note 59. The reliability of the District's program probably improved after October 1989, when a toxicological chemist was hired as the full-time Director of the court's drug testing laboratory.

\textsuperscript{117} The reasonable-doubt standard is "a prime instrument for reducing the risk of convictions resting on factual error." In \textit{re Winship}, 397 U.S. 358, 363 (1970). Due process requires the government to introduce reliable evidence proving guilt beyond a reasonable doubt in all criminal proceedings and juvenile adjudications which are analogous to criminal proceedings. \textit{Id.} at 364; see \textit{In re Thompson}, 454 A.2d 1324 (D.C. 1982).

evidentiary requirements of due process are satisfied if there is “any evidence” to support the prison official’s disciplinary determination. Not surprisingly, a number of courts have upheld the use of unconfirmed EMIT tests in prison disciplinary proceedings because these tests provide “some evidence” of drug use. This very low evidentiary standard, however, is diametrically opposite the reasonable-doubt standard involved in

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119. Superintendent v. Hill, 472 U.S. 445 (1985). In Hill the Court noted:

> Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. We decline to adopt a more stringent evidentiary standard as a constitutional requirement (emphasis added).

Id., 472 U.S. at 455-56.


> [The prisoners] refer to a New Jersey Department of Corrections study, cited in Peranzo, 608 F. Supp. at 1511, which found the single EMIT test to be 75 percent accurate. This discrepancy in findings would be troubling in the context of a criminal trial, in which the State bears the burden of proving beyond a reasonable doubt that the defendant has used illegal drugs. In light of the lesser evidentiary standards applicable in prison disciplinary hearings, we deem these differences immaterial.


However, there is limited authority requiring confirmation of EMIT tests by alternative methodologies in prison disciplinary proceedings. See Kane v. Fair, 33 Crim. L. Rep. (CCH) 2492 (Mass. Super. Ct. Aug. 5, 1983), and Johnson v. Walton, No. 561-84 Rm (Rutland Vt. Super. Ct. Feb. 14, 1985). In Kane, the court preliminarily enjoined Massachusetts correctional officials from introducing unconfirmed EMIT tests into evidence in inmate disciplinary hearings. The court focused on the punitive measures that flowed from a positive EMIT test, and the adverse impact such a test could have on an inmate’s chance for parole.

Similarly, in Johnson v. Walton, the court ruled that correctional officials in Vermont violated the due process rights of inmates by using unconfirmed EMIT test results in inmate disciplinary proceedings. The court required EMIT tests to be confirmed by a different and more reliable confirmatory test procedure. Kane v. Fair and Johnson v. Walton are discussed in Higgs v. Wilson, 616 F. Supp. 226, 230-31 (W.D. Ky. 1988), rev'd on other grounds sub nom. Higgs v. Bland, 888 F.2d 443 (6th Cir. 1989); see also In re Johnston, 745 P.2d 864, 869-70 (Wash. 1987) (opinion of Justices Utter and Dore dissenting in part); ZEESE, supra note 10, at § 8.07.
contempt proceedings.\textsuperscript{121}

b. Focus of the Decision. The second factor which merits consideration is that the drug test result is the sole focus of the contempt hearing. It is not just one of many considerations which comprise decisions such as bail and sentencing. Because the drug test result is the only issue in the contempt hearing, it is that much more important that they be accurate and reliable.

c. Nature of the Decision. The third important factor is the nature of the decision involved. The contempt decision is basically a retrospective decision that determines whether a defendant violated release conditions by using drugs. The bail decision, by contrast, is basically a prospective decision which attempts to predict future conduct based upon the drug test result and other factors. The Supreme Court has employed this distinction in its rulings that parole revocation proceedings automatically trigger due process protections, but parole release decisions do not (although specific parole statutes may create such protections).\textsuperscript{122} Because the nature of the decision in criminal contempt proceedings is analogous to that in parole revocation proceedings, due process requires confirmation of EMIT tests in contempt proceedings.

d. Confirmation Required in Other Contexts. The fourth and final factor which should be considered, in addition to the


\textsuperscript{122} In Morrissey v. Brewer, 408 U.S. 471 (1972), the Supreme Court held that the parole-revocation determination must comply with due process standards. The Court noted that the first step in the revocation decision involves "a wholly retrospective factual question," \textit{i.e.}, whether there was a violation of parole. \textit{Id.} at 479. In Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979), the Court held that the parole-release determination does not involve inherent due process rights, but such rights may be created by statute. The Court distinguished \textit{Morrissey} on the ground that parole-release decisions often involve "no more than informed predictions," \textit{Id.} at 10, quoting from Meachum v. Fano, 427 U.S. 215, 225 (1976). The dissenting opinions in \textit{Greenholtz} severely criticized this distinction. See 442 U.S. at 18-20 (Powell, J., concurring and dissenting in part); 442 U.S. at 23-25 (Marshall, Brennan, and Stevens, J.J., dissenting in part).

The \textit{Greenholtz} distinction is similar to the older administrative due process cases that recognized a due process right to a hearing when the issue involved retrospective, adjudicative-type factual questions, but rejected the right to a hearing when the issue involved predictive, legislative-type factual questions. See, e.g., Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); Londoner v. Denver, 210 U.S. 373 (1908).
Mathews v. Eldridge formula, is whether confirmation of EMIT tests is generally required in other contexts. This factor has been an important consideration in several recent due process cases.123

Confirmatory tests are required for the great majority of all drug testing done today. This reflects a consensus of legal, scholarly, and law enforcement authorities that such confirmation is appropriate and necessary before a sanction can be imposed on an individual. At the federal level, the United States Department of Health and Human Services has issued Mandatory Guidelines for Federal Workplace Drug Testing Programs,124 which apply to almost every federal agency, with certain listed exceptions such as the Armed Forces.125 These Guidelines require two levels of testing: First, an initial test using an "immunoassay screen to eliminate 'negative' urine specimens from further consideration",126 and second, a confirmation test using state-of-the-art GC/MS.127 These federal guidelines are an excellent model for courts to consider.128

123. See, e.g., Schall v. Martin, 467 U.S. 253 (1984): "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering . . . ." Id. at 268, quoting from Leland v. Oregon, 343 U.S. 790, 798 (1952). In Ake v. Oklahoma the Court noted the following:

Oklahoma asserts that to provide Ake with psychiatric assistance on the record before us would result in a staggering burden to the State . . . . We are unpersuaded by this assertion. Many States, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to preclude this assistance.


125. Id. at 11979 § 1.1.

126. Id. at 11980 § 1.2.

127. Id. at 11979-80 § 1.2. Section 1.2 provides:

Confirmatory Test. A second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the initial test and which uses a different technique and chemical principle from that of the initial test in order to ensure reliability and accuracy. (At this time gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.)

128. Other key provisions of the Guidelines require protections not now required in the Superior Court's drug detection program. These include retention of positive samples in storage for one year for any necessary re-testing, 53 Fed. Reg. at 11984 § 2.4(b), and quality control procedures, including blind performance testing, 53 Fed. Reg. at 11984-85, § 2.5.
The Armed Forces, though exempt from these Guidelines, have long required confirmation of a positive immunoassay test by another, more reliable testing procedure before an adverse action is taken against a member of the Armed Forces. The Federal Bureau of Prisons also requires validation of a positive immunoassay test by persons serving sentences in contract community treatment centers. Furthermore, the American Probation and Parole Association has recently published guidelines for drug testing that require confirmation of initial screening tests with GC/MS when an individual denies use and the drug test will be used as "the primary evidence in a revocation hearing."

It is also significant that the Drug Enforcement Administration's Mid-Atlantic Laboratory, which tests all the drugs involved in D.C. Superior Court drug cases, always confirms an initial positive drug test result. Given these confirmation procedures, the District of Columbia Court of Appeals has repeatedly recognized the general reliability of the DEA laboratory's test results. The PSA's drug detection programs, which do not require confirmation by a different testing procedure, stand in stark contrast.

Moreover, a number of states have recently passed statutes requiring that employers who test their employees for drug use have a procedure which confirms an initial positive result with a second laboratory test using a different procedure before any disciplinary action is taken. Even in states that have not

129. Kevin B. Zeese, Marijuana Urinalysis Tests, 1 DRUG L. REP. 25 (1983). The Armed Forces perform the largest number of urine tests of any organization in this country. Id.
131. U.S. DEPT. OF JUST., AMERICAN PROBATION AND PAROLE ASSOCIATION'S DRUG TESTING GUIDELINES AND PRACTICES FOR ADULT PROBATION AND PAROLE AGENCIES § 6-7, at 23 (1991). These guidelines also provide that less rigorous confirmation techniques may be acceptable when the test result will be used only to confront the offender, for treatment monitoring, or for minor in-house disciplinary actions. Id. at 21, 23.
132. For example, the DEA laboratory first tests for PCP using the thin-layer chromatography (TLC) test, and then confirms a positive result with mass spectrometry (MS). Similarly, for marijuana the DEA laboratory uses the Duquenois-Levine color test, followed by microscopic examination and confirmation by TLC. See, e.g., the DEA chemist's testimony in trial transcript of October 29, 1984, at 70-77, United States v. Leon Davis, Crim. No. M16240-83 (D.C. Super. Ct. 1984).
134. Shala Mills Bannister, Comment, Drug Testing Legislation: What Are the
yet passed these statutes, there are many state agencies that now require confirmation of immunoassay screening tests with a more reliable testing procedure. Such confirmation is even more appropriate in the criminal justice context.

That confirmation by an alternative test is not financially impractical is underscored by the fact that all federal agencies, the Armed Forces, many states, and even the DEA laboratory for drug cases in Superior Court require it. Confirmation by an alternative test is both recommended by the manufacturer of the EMIT test in the packaging instruction, it is also supported by an overwhelming consensus of the scientific community.


135. For example, the police department of Newark, New Jersey, requires that a positive EMIT test by a recruit be confirmed by GC/MS, Fraternal Order of Police v. City of Newark, 524 A.2d 430, 439 (N.J. Super. Ct. App. Div. 1987); the police and fire departments of East Point, Georgia, require that a police or fire official's positive EMIT tests be confirmed by GC/MS, Smith v. City of E. Point, 359 S.E.2d 692, 693 (Ga. App. Ct. 1987), rev'd on other grounds City of E. Point v. Smith, 365 S.E.2d 432 (Ga. 1988); the public bus system of Palm Springs, California, requires that a positive EMIT test of a bus driver be confirmed by GC/MS or TLC, Amalgamated Transit Union v. Sunline Transit Agency, 663 F. Supp. 1560, 1570 (C.D. Cal. 1987); and, the police department of Washington Township, New Jersey, requires confirmation of a positive EMIT test by TLC, Policemen's Benevolent Ass'n of New Jersey v. Township of Washington, 672 F. Supp. 779, 782 (D.N.J. 1987), rev'd on other grounds 850 F.2d 133 (3d Cir. 1988), cert. denied 490 U.S. 1004 (1989).

136. An individual's interest in maintaining employment is clearly entitled to great weight, and it does not denigrate that interest to recognize that incarceration or other court-imposed penal sanctions impinge upon individual liberty interests which are entitled to even greater weight. See supra cases cited in notes 99-100. Similarly, the stigma resulting from incarceration and the accompanying permanent criminal record for contempt of court because of drug abuse, represents a greater stigma than that associated with loss of employment.

137. Zeese, supra note 10, at 3-36.

138. Perhaps Dr. Hawks of the National Institute on Drug Abuse put it best:

The inherent possibility of error in any assay is a matter of concern which escalates in proportion to the consequences of the positive result. A false positive result occurring once in 100 true positives is insignificant in an incidence survey for research purposes. The one false positive is of great concern, however, if it is a forensic sample from an individual whose freedom, career or civil rights hang in the balance. In forensic science, such occurrences are minimized to levels of little concern by the use of confirmatory methods of analysis. High confidence can be placed on a urine sample which is drug positive by an immunoassay method, such as EMIT, if it is also positive by a method based on completely different principles, such as GC/MS.

Consideration of these additional factors reinforces the conclusion under the *Mathews v. Eldridge* equation that confirmation is required of EMIT tests used in contested contempt proceedings in the District of Columbia.

3. **EMIT Court Decisions**

There have been a number of recent federal and state court decisions addressing the issue of whether EMIT test results must be confirmed before a sanction such as imprisonment, loss of employment, or even suspension from school can be imposed on an individual. These decisions have been inconsistent, although the most persuasive of these cases support the need for such confirmation.

The United States District Court for the District of Columbia has ruled that it is illegal to discharge a school bus attendant on the basis of an unconfirmed EMIT test which purportedly showed marijuana use by the attendant.\(^{139}\) After reviewing at length many scientific authorities and court decisions supporting the need to confirm EMIT tests, the court held that such action was arbitrary and capricious.\(^{140}\) The school board had argued that the EMIT test had, in fact, been confirmed because after the initial EMIT test yielded a positive result, a second EMIT test was conducted on the urine sample.\(^{141}\) This is the same type of "confirmation" as is performed by PSA. The district court emphatically rejected this argument and ordered confirmation by a different and more reliable technique.\(^{142}\)

The school board appealed only the issue of whether a bus attendant could be tested for drugs without probable cause. The District of Columbia Circuit ruled that probable cause was not required, but the court went on to emphasize in *dicta* its agreement with the district court that an unconfirmed EMIT test would not be adequate.\(^{143}\)

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140. *Id.* at 1505-07.
141. *Id.* at 1505.
142. *Id.*
143. The court said the following:

> [T]he School System has conceded that the EMIT test is not a valid measure of whether the subject is in possession of, is using, or is under the influence of illicit drugs at the time of the test. As this test therefore lacks a sufficient nexus to the appellant's legitimate concern that its employees not possess, use or be under the influence of drugs while on duty, it is clear that the School System could not constitutionally test its em-
Another persuasive federal court decision was issued by Chief Judge Waters of the United States District Court for the Western District of Arkansas.144 After analyzing the shortcomings and unreliability of the EMIT test in detail, that court ruled that a public school could not expel students based upon unconfirmed tests.145

These decisions are supported by other recent cases which have indicated in dicta that unconfirmed EMIT tests violate due process.146 There have also been several recent decisions

ployees for drugs in the manner Jones was tested, and our analysis should not be read to suggest the contrary (emphasis in original) (footnote omitted).


145. Id. The court said that:

[T]he test used bears so little relation to the guilt or innocence of any particular student that its use as a determining factor . . . cannot be consistent with constitutional requirements.

* * *

To impose a sanction as severe as expulsion for the mere presence of these urinary metabolites in the body would, in a criminal case, constitute an impermissible punishment . . . . [F]or the reasons discussed above, and because of the described deficiencies of the test, the court concludes that use of the test is not reasonably related to the maintenance of order and security in the schools nor to the preservation of the educational environment and processes.

Id., 653 F. Supp. at 40.

146. The most significant of these cases is National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir.), aff'd on other grounds, 489 U.S. 656 (1989). While the principal issue in this case was the Fourth Amendment challenge to the Customs Service's compulsory urine testing program, the Court of Appeals clearly expressed its view, in dicta, concerning the reliability of unconfirmed EMIT tests:

Initially, all samples are screened by the enzyme-multiplied-immunoassay technique (EMIT). Because EMIT yields a significant rate of positive results even in the absence of drug use, all positive samples are then screened by gas chromatography/mass spectrometry (GC/MS).

* * *

The drug-testing program is not so unreliable as to violate due process of law. While the initial screening test, EMIT, may have too high a rate of false-positive results for the presence of drugs, the union does not dispute the evidence that follow-up test, GC/MS, is almost always accurate, assuming proper storage, handling, and measurement techniques.

Id., 816 F.2d at 181.

In Harmon v. Auger, 768 F.2d 270 (8th Cir. 1985), the lower court had declared unlawful a regulation of the Iowa prison system which provided that a positive result on an EMIT test created an irrebuttable presumption of drug usage by an inmate. The Eighth Circuit ruled that the prisoner must be allowed, as a mat-
upholding the reliability of drug testing procedures only because positive EMIT tests have been confirmed by more reliable tests.\(^\text{147}\)

The reliability of unconfirmed EMIT tests has been the subject of a substantial amount of litigation in the area of prison disciplinary proceedings. Virtually all of these cases have upheld the use of unconfirmed EMIT tests in this context because of the very limited due process rights of prisoners, and the legal standard requiring the court to uphold the disciplinary sanction if there is "any evidence" in the record to support it.\(^\text{148}\) However, even under this very low standard, two lower courts have required confirmation of EMIT tests in prison disciplinary proceedings.\(^\text{149}\)

There have also been several cases holding that unconfirmed EMIT tests can be used in probation revocation proceedings,\(^\text{150}\) and that the EMIT test is sufficiently reliable to be admissible in other court proceedings.\(^\text{151}\)
There is thus judicial authority for a variety of positions on the reliability of the EMIT test and the need to confirm positive results with a confirmatory test. However, the most per-

In United States v. Roy, 113 DAILY WASH. L. REP. 2317 (D.C. Sup. Ct. Sep. 24, 1985), Judge Burgess ruled that the EMIT test was admissible in evidence in a contempt proceeding in D.C. Superior Court. This decision was made in response to a defense motion for judgement of acquittal at the conclusion of the government's case, but before presentation of the defense case. Although the court denied the defense motion at that time, the defense renewed its motion after all the evidence had been introduced, and the court then granted the motion for judgement of acquittal. United States v. Roy, 114 DAILY WASH. L. REP. 2481 (D.C. Sup. Ct. Oct. 6, 1986). The court indicated that there was a great deal of uncertainty in the contempt hearing record on the amount of time that PCP is retained in the body, and as a result the court could not find beyond a reasonable doubt that the defendant had ingested PCP after (rather than before) he had been placed on pretrial release. Id. at 2481, 2491.

The court further stated that it was "not necessary" for it to decide whether a positive EMIT test could "sustain a finding beyond a reasonable doubt that any drug identified by that test was in the body." Id., at 2490. The court's decision contains an excellent analysis of the scientific and legal issues involved in the use of EMIT tests in contempt proceedings.

Several of the cases cited above have made the serious error of basing their rulings on generalized statements as to the accuracy of EMIT tests in the abstract. See, e.g., Harmon v. Auger, 768 F.2d 270, 276 (8th Cir. 1985) (EMIT test results "about 95% accurate"); Peranzo v. Coughlin, 850 F.2d 125 (2d Cir. 1988) (double EMIT test 98% accurate); Jensen v. Lick, 589 F. Supp. 35 (DN.D. 1984) (single EMIT test 97-99% accurate). Putting aside the fact that not even the manufacturer of the EMIT test claims such high accuracy rates for its test, these generalized statements as to the accuracy of the test miss the fundamental point that the accuracy of the test cannot be considered in the abstract, but only in relation to the procedures utilized in the specific drug testing program. If proper procedures are routinely followed, the accuracy rate of the program will be substantially greater than if proper procedures are not routinely followed. The sloppiness of the D.C. Superior Court procedures documented in United States v. Roy, 113 DAILY W. L. REP. 2317, give cause for concern that the accuracy rate of the D.C. pretrial program may be far below the idealized 95-99% accuracy rate referred to in the above cases.

There has also been an attempt to correlate the supposed accuracy rate of the EMIT test with numerical probability rates for the different standards of proof. See Peranzo v. Coughlin, 608 F. Supp. 1504 (S.D.N.Y. 1985): "[T]he probabilities associated with the various standards of proof may be fairly estimated as 50+% for preponderance of the evidence, 70% for clear and convincing evidence, above 80% for clear, unequivocal and convincing evidence, and 95+% for evidence beyond a reasonable doubt." 608 F. Supp. at 1512, citing United States v. Fatico, 458 F. Supp. 388, 403-04 (E.D.N.Y.), aff'd, 603 F.2d 1053 (2d Cir.), cert. denied, 444 U.S. 1073 (1980).

This mode of analysis cannot be dispositive of the due process issue involved in drug testing. Even assuming that the EMIT test was 96% accurate, and proof beyond a reasonable doubt required at least 95% accuracy, this comparison does not even address the central due process issue of whether the cost/benefit analysis of Mathews v. Eldridge requires the expenditure of additional funds for confirmation testing which would raise the reliability of the reported result to over 99.9%.
suasive cases support the considerations discussed above, which overwhelmingly lead to the conclusion that unconfirmed EMIT tests are not sufficiently reliable to satisfy due process standards in the context of a criminal contempt proceeding.

B. Modification of Release Conditions

The decision to modify conditions of pretrial release is similar to the contempt decision, and due process requires confirmation of EMIT tests in this circumstance as well. Modification of release conditions can result in immediate incarceration of the defendant or other significant restraints on the defendant’s liberty. Of course, as in the contempt context, due process does not require confirmation unless the defendant denies drug usage and contests the reliability of the positive test result.

While modification of conditions of release is similar to contempt (and often is considered by the court as an alternative sanction in contempt proceedings), there are also certain differences between the two. One difference is that modification of conditions of release does not result in a separate conviction, nor a permanent criminal record for contempt of court. In general, this makes modification of conditions a less severe sanction than contempt, but it is certainly possible that in specific cases modification of release conditions will result in a longer period of incarceration than a contempt conviction. 153

Another important difference is that the standard of proof for modification of conditions of release ("clear and convincing evidence") 154 is a lower standard than that for contempt. While still a high standard for the government to satisfy, it does impose a lesser burden.

A final difference is that Superior Court judges consider modification of release conditions more frequently than contempt proceedings. 155 Thus, there will be a somewhat greater number of contested cases where confirmation will be neces-

153. The maximum sentence that can be imposed for contempt is imprisonment for six months, see supra text at note 33, but pretrial incarceration lasts an indeterminate period of time until the disposition of the case. D.C. Superior Court judges generally give priority to cases involving incarcerated defendants, and the great majority of these cases are resolved within six months. However, individuals subject to pretrial incarceration infrequently must wait more than six months for the resolution of their case due to the overcrowding of the court's criminal docket.

154. See supra note 31.

155. See supra note 102.
sary, increasing the fiscal burden on the government.

Of course, most of the considerations requiring confirmation in contempt proceedings also apply to modifying conditions of release. The defendant faces similar threats to his or her liberty (including perhaps an even longer period of incarceration), and stigmatization. The balancing of interests involved is essentially the same. While the due process argument for confirmation is less compelling than for contempt proceedings, the balance still favors confirmation for contested hearings to modify release conditions.

C. The Initial Bail Decision

Due process does not require confirmation of positive EMIT tests prior to the use of these test results by the judicial officer in making the initial bail decision. The principal reason for this is the need for a very quick decision, and the apparent impossibility of confirming EMIT tests within the allotted period of time.

In D.C. Superior Court, the initial bail hearing is generally held within 24 hours of arrest. The defendant obviously has a strong interest in a prompt bail decision by the court, and would be prejudiced by any unnecessary delay. Indeed, it would appear unlawful for the District to routinely delay bail hearings for more than 48 hours after arrest in order to conduct initial or confirmatory urine tests.\footnote{156}

While the District's in-house EMIT testing equipment allows arrestee test results to be reported to the judicial officer within a very short period (one to two hours), confirmation tests like GC/MS must be conducted at certified laboratories away from the courthouse. It appears to be impossible to routinely ship urine samples to an outside laboratory and have the tests conducted and reported back to the court within 48 hours of arrest. Thus, the constitutional requirement of an expeditious bail decision would seem to negate the possibility of confirmation prior to the bail decision.\footnote{157}

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156. See \textit{supra} text accompanying notes 26-28.
157. The Supreme Court has long recognized that in cases involving only "property" interests, the need for quick governmental action can justify the temporary postponement of a hearing until after those property interests have been adversely affected. However, this principle has never been applied to liberty interests because, unlike temporary deprivations of property, deprivations of liberty interests are irreparable.

For example, in Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230 (1988), a
Other factors also diminish the need to confirm EMIT tests used in the initial bail determination. The positive drug test result is only one piece of information that is used in the bail decision, and it is unlikely that it will be the most crucial. Other information, such as the defendant's ties to the community and record of appearances in prior court cases, are likely to have greater weight. However, the drug test result can be an important factor in the bail determination, and can even be the factor that tips the balance in favor of incarceration or release in a particular case.

Another relevant consideration is the expense involved. Since more than half of adult arrestees test positive for drugs, confirmation of all positive results would require many thousands of confirmation tests each year. Obviously these tests would create a substantial expense.

The standard for consideration of information at the initial bail hearing is important. Generally, the information provided to the judicial officer at the initial hearing (by the Pretrial Service Agency and defense counsel) is anecdotal and less reliable than evidence that may be introduced in future court hearings, such as in contempt proceedings or at trial. However, a higher standard of reliability should apply to information such as prior convictions or positive drug test results, because they are subject to empirical verification, and are more likely to be considered reliable for that very reason.

For all these reasons, particularly the need for a very quick decision, due process does not require confirmation of EMIT tests prior to the initial bail hearing.

However, all initial positive test results should be confirmed when the defendant is detained or subjected to any
significant limits on his or her pretrial liberty. The most compelling situation obviously involves those persons who are preventively detained, not only because of the applicable "clear and convincing evidence" standard, but also because these persons cannot be released pretrial, and comprise a very small fraction of defendants in Superior Court. In addition, all persons who have been detained in jail under restrictive bail conditions, or released with substantial restrictions on their liberty, should be entitled to confirmation as a matter of due process. No individual should be forced to remain in jail pretrial, or be burdened with other substantial restrictions on pretrial liberty, if the judicial decision was based in part on erroneous information that could be easily corrected. It is important that positive drug test results for such persons be confirmed immediately after the initial hearing, and that the court be informed expeditiously of all false positive results so that the bail status of these individuals can be reconsidered by a judicial officer based upon accurate information.

D. The Sentencing Hearing

Although the sentencing hearing is obviously not a "pretrial" proceeding, it is also useful to consider the need to confirm positive EMIT tests in this context.

Superior Court judges often postpone sentencing for six to seven weeks after conviction so that a presentence report can be prepared. This report typically includes the results of any drug tests taken by the defendant and a section on the defendant's use of drugs based upon an interview with the defendant. Most often, the defendant's self-reported drug use correlates with the results of the drug testing, but when the defendant contests the positive drug test results, confirmation of those results should be required by due process if the court imposes any substantial restrictions on the defendant's liberty.

At the sentencing hearing, like the bail hearing, the drug test results are only one factor among many that will be consid-

159. See generally Williams v. United States, 293 A.2d 484, 487 (D.C. 1972) ("the judge's refusal to obtain a presentencing report" viewed as "highly questionable"); Wilson v. United States, 278 A.2d 461 (D.C. 1971) ("[T]rial judges are not required in every case to obtain a presentencing report.").
erected by the court. In addition, the court can consider information from a variety of sources, even if that information has not been totally verified. One important difference between the two proceedings is that when sentencing proceedings are continued for preparation of a presentence report, there is no need for a very quick decision, and there is sufficient time for confirmation of any positive drug test result. In light of these considerations, and particularly the fact that very few defendants contest the positive drug test results contained in the presentence report, it would appear that due process requires confirmation of contested drug test results which will be used at sentencing.

E. Confirmation of Negative Test Results

In every context considered so far, only positive drug test results had the potential of adversely affecting an individual's liberty interests, and therefore only positive results would have to be confirmed consistent with due process. However, there is one circumstance where due process may require the confirmation of negative drug test results, because they could adversely affect an individual's liberty interests — the sentencing of juvenile offenders in drug cases. The 1989 survey of superior court judges revealed that several judges were likely to impose harsher sentences on juveniles involved in drug offenses who tested negative than on juveniles involved in drug offenses who tested positive because, as one judge indicated, "[t]hose kids are

160. The Supreme Court has stated that the sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 U.S. 443, 446 (1972). However, due process imposes certain limitations on the permissible information which can be considered at sentencing. A sentence is invalid if it is based upon allegations which are "materially untrue," Townsend v. Burke, 334 U.S. 736, 741 (1948), or information which is "inaccurate" or "improper." Dorszynski v. United States, 418 U.S. 424, 431 n.7 (1974). See generally McPhaul v. United States, 452 A.2d 371 (D.C. 1982) ("While the court could properly consider evidence bearing on the severity of the assault in imposing sentence, the implication that appellant was being sentenced for homicide [evidenced by the statement "... as a result of that assault ... a man died within a year"] was inappropriate ... "); see also D.C. SUPER. CT. CRIM. R. 32(B)(3)(A), which requires the sentencing court to "afford the defendant or his counsel an opportunity to comment" on the information contained in the presentence report, and permits the court, in the exercise of its discretion, to permit the defendant "to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report."

161. TOBORG & BELLASSAI, supra note 15.
just doing it for the money." 162

The use of false negative tests in this narrow context presents serious due process concerns, particularly because EMIT and other screening tests may generate a much greater number of false negative results than false positive results. 163 Thus, a juvenile facing sentencing in a drug case who contests any negative drug test result should have the due process right to

162. The report noted the following:

Judges also pointed out that a significant number of juveniles who are charged with drug dealing consistently test negative for drugs. This was contrasted with the situation for adult defendants, where persons charged with drug offenses are usually drug users as well. Several judges commented that they were likely to be harsher on drug-negative than drug-positive juveniles who are found involved on drug dealing charges because as one judge said, "[t]hose kids are just doing it for the money." (emphasis in original.)


163. The Visher and McFadden study documented false positive rates for EMIT of 2.2% for opiates, 2.5% for cocaine, and 2.1% for marijuana, VISHER & McFADDEN, supra note 51, at 3; see also table accompanying note 60. On the other hand, the study documented false negative rates for EMIT of 18% for opiates, 23% for cocaine, and 29% for marijuana. VISHER & McFADDEN, supra note 51, at 4. The following table displays those findings:

<table>
<thead>
<tr>
<th>Drug Type</th>
<th>Percent positives missed by test</th>
</tr>
</thead>
<tbody>
<tr>
<td>Opiates</td>
<td>15</td>
</tr>
<tr>
<td>Cocaine</td>
<td>18</td>
</tr>
<tr>
<td>Marijuana</td>
<td>24</td>
</tr>
<tr>
<td>PCP</td>
<td>37</td>
</tr>
<tr>
<td>Amphetamines</td>
<td>52</td>
</tr>
</tbody>
</table>

*Positive by GC/MS but negative by screening test
have the negative result confirmed.

F. Conclusions as to the Need to Confirm Drug Test Results

This article has considered a variety of contexts in which drug test results can adversely affect an individual involved in a criminal proceeding in D.C. Superior Court. In light of the factors set forth in *Mathews v. Eldridge* and the other factors discussed above, it is possible to prioritize the circumstances where due process requires confirmation of contested drug test results. Obviously, the most compelling argument is for confirmation of drug test results which will be used in criminal contempt proceedings, followed by drug test results which will be used in proceedings to preventively detain an individual or modify conditions of release so as to incarcerate the defendant. Other contexts, such as the sentencing hearing, involve less compelling due process arguments for confirmation, but, on balance, several of these contexts appear also to require confirmation.

Is it possible to enunciate general principles specifying those situations where confirmation is required? In the view of this author, due process requires confirmation of initial screening tests (such as EMIT) before any sanction can be imposed or any substantial adverse action can be taken against a defendant based upon the screening test when the defendant disputes the test result. In those rare situations where the need for immediate action makes prior confirmation impossible (as in the initial bail decision), confirmation should be accomplished as quickly as possible after the court’s decision whenever the court imposes a substantial restraint on the defendant’s liberty.164

These general principles for confirmation of drug test results are not only required by due process analysis, but are also consistent with the great majority of drug testing done today in

164. Among the variety of sanctions which have been imposed in Superior Court for positive drug tests that constitute substantial restraints on liberty are the following: imposing a monetary bond which results in the incarceration of the defendant for any period of time; a curfew or order to “stay away” from an area or from a person; a requirement to come to the courthouse every week to provide a urine sample; and, a court-ordered referral for drug treatment or counselling which requires regular attendance on an in-patient or out-patient basis. Court actions in response to positive drug tests which do not appear to impose significant restraints on liberty include: a stern lecture by the judge from the bench, and an order to maintain telephonic contact with a custodian on a weekly basis.
contexts other than the pretrial context. There appears to be a consensus of legal, scholarly, and law enforcement authorities that confirmation is appropriate and necessary when a sanction can be imposed on an individual as a result of drug testing.

VI. ADDITIONAL DUE PROCESS ISSUES RAISED BY THE DISTRICT'S PROGRAM

In addition to the confirmation issue discussed above, pretrial drug testing raises two other substantial due process concerns. The first area of concern is that persons who are arrested may be given misleading information about the uses of their drug test results in court proceedings. The Pretrial Services Agency Training and Procedure Manual instructs its staff to approach arrestees in the court’s lock-up and request a urine sample, informing the arrestee that the results of the test performed on the sample “will be used only to determine conditions of release in your case. They cannot be used to find you guilty or innocent of today’s charges.” 165 The PSA representative cannot compel the arrestee to submit an initial urine sample but can only obtain the sample with the arrestee’s consent and cooperation. The information provided to the arrestee on the possible uses of the urine test result in the court proceeding thus constitutes critical information for the arrestee to consider in deciding whether or not to provide a urine sample.

The PSA Training Manual directive is seriously misleading in that a positive test result can be introduced at trial to impeach the defendant who testifies. 166 Even though the drug test result cannot be introduced in the government’s case-in-chief, the use for impeachment purposes is potentially quite damaging to a defendant who takes the witness stand at trial and testifies that he or she did not use drugs. Such impeachment could totally destroy the credibility of the defendant.

The Supreme Court has long held that procedural due process requires notice that is “reasonably calculated to appraise” a person of the consequences of governmental action. 167 The Court has also made clear that where the individual interests at stake are substantial, there must be even

165. See supra note 43.
greater certainty that the notice will be effective.\textsuperscript{168}

PSA's current notice to arrestees clearly violates these principles, and must be modified. An accurate and constitutionally acceptable notice would inform the arrestee that the drug test result "will be used by the judicial officer in making a release decision, and can possibly be used against you if you testify at the trial in this case."\textsuperscript{169}

The second due process issue raised by the District's drug testing program is whether urine samples must be preserved by PSA so that they can be provided to defendants upon request for re-testing at an independent laboratory. In general, due process requires the government to preserve and make available to defendants in criminal cases all evidence that may be exculpatory and that "might be expected to play a significant role in the suspect's defense."\textsuperscript{170}

While there is some authority for applying this principle to the drug testing area,\textsuperscript{171} the Supreme Court's decision in \textit{California v. Trombetta},\textsuperscript{172} holding that the government need not preserve breath samples of suspected drunk drivers, would seem to substantially undercut any similar argument for urine samples used in drug testing. The Court's decision in \textit{Trombetta} was based upon three principal rationales. First, given the reliability of the state's breath-analysis procedures, the chances were "extremely low that preserved samples would...


\textsuperscript{169.} In addition to due process concerns, the District's testing program also raises concerns with respect to the Fifth Amendment privilege against self-incrimination. However, this privilege extends only to testimonial evidence, not physical evidence obtained from bodily fluids such as blood and urine. See Schmerber v. California, 384 U.S. 757, 764-65 (1966) (blood test); Rushton v. Nebraska Pub. Power Dist., 653 F. Supp. 1510, 1527-28 (D. Neb. 1987) (urine test), aff'd, 884 F.2d 562, 567 (8th Cir. 1988). Even assuming that this barrier could be overcome, there is a substantial question as to whether the use of drug test results for impeachment purposes would constitute a "substantial hazard" of self-incrimination, which is also required to invoke this Fifth Amendment privilege. See California v. Byers, 402 U.S. 424, 429 (1971).


\textsuperscript{172.} 467 U.S. 479 (1984).
have been exculpatory” and were “much more likely” to provide inculpatory evidence if retested by the defendant.\textsuperscript{173} This rationale would certainly apply to the District’s drug testing program if the District confirmed the EMIT test with a more reliable confirmation test such as GC/MS. Even in the absence of such confirmation, it would be difficult to convince a court that a re-test of EMIT by the defendant would be more likely to provide exculpatory than inculpatory evidence.\textsuperscript{174}

Even if this first rationale could be overcome, the second rationale of the Court’s decision was that the defendant had other reasonably available means of challenging the accuracy of the breath-analysis testing procedures.\textsuperscript{175} This same rationale would also apply to drug testing because the reliability of the procedures employed is subject to similar challenges by the defendant.\textsuperscript{176}

The final rationale of the Court’s decision was that the police had not acted in bad faith in destroying the breath samples but in accord with their normal practice.\textsuperscript{177} Similarly, no bad faith could reasonably be claimed because PSA routinely discards urine samples after its testing has been completed. Thus, for all these reasons, it appears virtually certain that the courts would not recognize a due process requirement to retain urine samples for re-testing by the defendant.

VII. THE MATHEWS V. ELDRIDGE TEST

The final topic discussed in this article is the usefulness of the \textit{Mathews v. Eldridge} equation in determining the scope of due process protections, particularly whether due process requires confirmation of EMIT screening tests. The \textit{Mathews v. Eldridge} test, as noted above, has been the subject of consid-

\textsuperscript{173} Id. at 489-90.
\textsuperscript{174} Several cases involving prison disciplinary proceedings have also ruled that an inmate has no due process right to re-test a challenged urine sample. Spence v. Farrier, 807 F.2d 753, 755-56 (8th Cir. 1986); Hoeppner v. State, 379 N.W.2d 23, 25-26 (Iowa App. 1985) (re-test would not disprove “some evidence” of drug use); Pella v. Adams, 723 F. Supp. 1394 (D. Nev. 1989).
\textsuperscript{175} Trombetta, 467 U.S. at 488-90. These alternatives included cross-examination of the operator of the breath-analysis equipment, and introduction of documentary evidence concerning the reliability of the equipment. \textit{Id}.
\textsuperscript{176} See supra notes 59 & 161.
\textsuperscript{177} 467 U.S. at 488; see also Arizona v. Youngblood, 488 U.S. 51 (1988), where the Court held that in the absence of bad faith on the part of the police, the failure to preserve semen samples or other “potentially useful evidence” does not constitute a denial of due process. \textit{Id}. at 58.
erable scholarly criticism, including criticism that it focuses exclusively on "instrumental" judgments about the accuracy of a proceeding.\textsuperscript{178}

The area of pretrial drug testing offers a useful vantage point to evaluate these criticisms. Insuring the reliability of drug testing results would seem to involve essentially "instrumental" judgments, which the \textit{Mathews v. Eldridge} equation was designed to resolve. How useful is the \textit{Mathews v. Eldridge} test?

The \textit{Mathews v. Eldridge} test clearly focuses on three factors which are important in considering whether or not due process requires confirmation of initial screening tests. The interests of the individual and the government in such confirmation testing are obviously highly relevant considerations, as are the cost/benefit considerations. If a confirmation test offered minimally increased reliability at great expense, it would undercut any due process right to such confirmation. Conversely, if a confirmation test offered substantially increased reliability (here virtual certainty with GC/MS confirmation) at minimal expense, it would substantially strengthen the due process right to such confirmation. It is thus apparent that each of the three \textit{Mathews v. Eldridge} factors reflect important considerations in the due process calculus.

However, the \textit{Mathews v. Eldridge} equation does not encompass other factors that are perhaps even more important in determining whether confirmation procedures are required by due process. The applicable burden of proof is one such factor. In other words, what degree of reliability must the drug test have in the proceeding? This is an important consideration in all drug testing contexts, and it may be the most important consideration in certain contexts, \textit{i.e.}, when the standard of proof is extremely low ("any evidence" of drug use for prison disciplinary proceedings) or very high (proof "beyond a reasonable doubt" in contempt proceedings).

Another important consideration is how quickly the drug test results must be provided to the decisionmaker. This would appear to be the central consideration in the determination that confirmation is not required prior to use of drug test results in the initial bail hearing.

In addition, how central is the drug test result to the spe-
specific decision involved? There is obviously an important distinction between the need to verify a drug test which will be the sole evidence in a proceeding for contempt or to modify conditions of release, and the need to verify a drug test which will be one of many factors in proceedings such as sentencing hearings and initial bail hearings. Closely related is the nature of the proceeding, i.e., whether it is a retrospective decision which seeks to punish for past transgressions (as in a contempt proceeding), or a prospective decision which seeks to predict future conduct (as in the initial bail decision).

A final important consideration is what other jurisdictions require with respect to drug testing, and what the weight of scientific and legal opinion is with respect to confirmation testing. To the extent that confirmation is required in other contexts and is not prohibitively expensive, such confirmation may also be determined to be necessary for pretrial testing.

These additional factors, which were not set forth in *Mathews v. Eldridge*, are important considerations in the due process equation. In certain pretrial contexts, such as the contempt hearing and the initial bail hearing, these additional factors appear to be of greater importance in resolving the due process issue than the factors set forth in *Mathews v. Eldridge*.

This is not to advocate abandonment of the three factors set forth in *Mathews v. Eldridge*. These factors must, however, be supplemented with the additional factors set forth above if there is to be a thorough consideration of the interests involved in confirming drug testing results in the pretrial context. Whether the issue involves the EMIT test or newer technologies that are becoming available, the courts must employ a comprehensive framework for analyzing the extent of due process protections required for pretrial drug testing programs.

**VIII. Conclusion**

Pretrial drug testing programs may expand substantially in state and federal courts in the next few years, based upon the District of Columbia model. There are, however, major flaws in the District’s program, especially the failure to confirm positive EMIT screening tests with more reliable confirmatory

179. Several of these factors were considered by the Supreme Court in other cases involving due process protections, as discussed supra text accompanying notes 122-23.

180. CLARK, supra note 106, at 34 n.12.
tests, and providing persons who are arrested with misleading information on the use of drug test results in their court cases.

In these important respects, the District's program violates fundamental due process principles. The District should modify its procedures to comply with procedural due process guarantees, and persons implementing newer drug testing programs should be careful to insure that their procedures satisfy due process requirements as well. Since important liberty interests are at stake, it is crucial that drug testing programs be based on fair and reliable procedures.