



## **CLINICAL DRUG TESTING OF PREGNANT WOMEN AND NEWBORNS**

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Pregnant and postpartum women and their newborn babies are typically drug tested in medical settings without their knowledge or explicit, informed consent. Positive toxicology results are too often reported to government officials and used to support criminal and civil child abuse or neglect prosecutions. As the U.S. Department of Justice has explained, “A positive test result, even when confirmed, only indicates that a particular substance is present in the test subject’s tissue. It does not indicate abuse or addiction, recency, frequency, or amount of use; or impairment.”<sup>1</sup>

Thus, while such medical test results should never be used to prosecute women or accuse them of bad parenting, it is particularly concerning that the test results may not even be accurate or reliable. Yet clinical drug testing, without specific informed consent, is used as an excuse to intrude into people’s lives with grave consequences, including criminal proceedings and family separation.<sup>2</sup> It is important to know the facts about clinical drug testing.

### **Clinical Drug Test Results Are Not Reliable & Are Not Forensic Evidence.**

- ❖ A clinical drug test is an initial screening test done in a healthcare setting, and is meant to evaluate a patient’s health and to design an appropriate treatment plan.<sup>3</sup>
- ❖ The most common clinical test is a urine test.<sup>4</sup> A clinical drug test is qualitative, meaning it establishes that a chemical compound is present in the bodily fluid.<sup>5</sup> If a clinical drug test is positive, it creates a *presumption* that a drug is present.<sup>6</sup> It does not *prove* that the drug is present.
- ❖ To determine whether the positive clinical result is accurate, a forensic test *must* be done to confirm the result.<sup>7</sup>
- ❖ A forensic drug test is a more rigorous drug test, which is why it meets evidentiary and testing requirements and protocols.<sup>8</sup> It is a quantitative test, meaning it indicates how much of the chemical compound is present.<sup>9</sup> Such tests, however, are also more expensive which is why healthcare providers often start with a clinical drug test.

### **Clinical Drug Test Results Often Show False Positives.**

- ❖ A positive clinical test does not prove the patient was using a particular substance because many clinical test results are wrong and imprecise.<sup>10</sup> A false positive may occur in two situations: when the chemical compound is not present at all (in other words the result is just wrong),<sup>11</sup> or when the chemical compound is present but comes from a lawful source, like medication,<sup>12, 13</sup> but in any event the test result does not distinguish

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between a positive for criminalized opioids, such as heroin, and non-criminalized opioids such as prescribed pain killers and the treatment medications methadone and buprenorphine. The test results are therefore not reliable and should not be treated as concrete proof that one used a particular substance, without at least confirmatory testing.

### **Drug Tests May Be Conducted Improperly or Produce Inaccurate Results.**<sup>14</sup>

- ❖ Examples from across the U.S. and abroad demonstrate the risks of contamination in laboratories and the resulting errors in test results and reporting.<sup>15,16</sup> For example, between 2005 and 2015, the Motherisk Laboratory at the Hospital for Sick Children in Toronto tested more than 24,000 hair samples for drugs and alcohol, from over 16,000 different individuals, for child protection purposes. The results were introduced as evidence in court and resulted in both temporary and permanent loss of custody of children. An independent review in 2015 found this testing was “inadequate and unreliable” for use in child protection and criminal proceedings.”<sup>17</sup> In Houston, Texas, a leaky roof damaged specimens held in a police lab, and a state audit revealed serious contamination and employees lacking key qualifications and training required to conduct and interpret drug and DNA test results. The lab was shut down and several people convicted of crimes were exonerated.<sup>18</sup>

### **“Secret” Drug Testing Undermines the Doctor-Patient Relationship.**

- ❖ The use of drug testing without informed consent (especially without the patient’s knowledge), and the practice of reporting the results to government officials, violates physicians’ ethical responsibility<sup>19</sup> and can deter women from obtaining prenatal and other healthcare during pregnancy. For women who are pregnant and actually have a substance use disorder, it can deter them from seeking treatment.
- ❖ That’s why major medical and public health associations, including the American Medical Association, the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, and the American Society of Addiction Medicine oppose prosecution of pregnant women based on drug use.<sup>20</sup>
- ❖ The U.S. Supreme Court has ruled that it is unconstitutional to use the results of drug testing obtained in the guise of medical care for law enforcement purposes without informed specific consent to a search for evidence of a crime.<sup>21</sup>

### **Drug Testing Practices Further Discrimination and Racial Profiling.**

- ❖ Current drug testing policies and practices disproportionately burden women of color. Despite the fact that drug use by Black and white women occurs at approximately the same rate in the U.S.<sup>22</sup>, numerous studies and investigative news reports find that Black mothers and infants born to Black mothers are more likely than those born to white mothers to have been screened or tested for criminalized drugs.<sup>23</sup> As leading researchers in one study concluded, “providers seemed to have used race as a factor in deciding whether to screen an infant for maternal illicit drug use.”<sup>24</sup>

## NOTES

<sup>1</sup> U.S. Department of Justice, A National Report from the Bureau of Justice Statistics (Dec. 1992), NCJ-133652 at 119.

<sup>2</sup> Moeller et al., *Urine Drug Screening: Practical Guide for Clinicians*, 45 Mayo Clinic Proceedings 66, 66 (2008) (“misinterpretation of drug tests can have serious consequences, such as unjust termination from a job, risk of prison sentence, . . . and possibly inappropriate medical treatment in emergencies.”); Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, <https://www.propublica.org/article/when-the-womb-is-a-crime-scene>; Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. Rev. (2016), available at: <https://academicworks.cuny.edu/clr/vol20/iss1/14>.

<sup>3</sup> U.S. Dept. of Health and Human Services, *Clinical Drug Testing in Primary Care*, Substance Abuse and Mental Health Services Administration 2012. HHS Publication (SMA) 12-4668 at 5, available at <https://store.samhsa.gov/system/files/sma12-4668.pdf>.

<sup>4</sup> Moeller et al., note 2 above at 66 (“Immunoassays, which use antibodies to detect the presence of specific drugs or metabolites, are the most common method for the initial screening process.”).

<sup>5</sup> *Clinical Drug Testing in Primary Care* (note 3 above) at 9.

<sup>6</sup> *Clinical Drug Testing in Primary Care* (note 3 above) at 9, 29.

<sup>7</sup> Moeller et al., *Urine Drug Screening: Practical Guide for Clinicians*, note 2 above (“A confirmatory test (e.g. GC-MS) is required before decisions can be made on the basis of UDSs” and “[t]he main disadvantage of immunoassays is obtaining false-positive results when detection of a drug in the same class requires a second test for confirmation.”). Even in the 1970’s, the National Bureau of Standards said clinical drug tests “should not be used as the sole evidence for the identification of a narcotic or drug of abuse.” Ryan Gabrielson & Topher Sanders, *Busted*, PROPUBLICA (July 7, 2016) <https://www.propublica.org/article/common-roadside-drug-test-routinely-produces-false-positives>).

<sup>8</sup> Susan E. Lang, *Report of the Motherisk Hair Analysis Independent Review* (Dec. 15, 2015) <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lang/>.

<sup>9</sup> O’Donnell, J. T., & O’Donnell, J. J., III. (2016). *O’Donnell’s Drug Injury* (4th ed.). Retrieved from <https://www.lawyersandjudges.com/>.

<sup>10</sup> Arthur L. Kellermann et al., *Utilization and Yield of Drug Screening in the Emergency Department*, 6 Am. J. of Emergency Med. 14, 19 (1987) (“these investigators have reported false-negative rates for urine screening of 30% and higher.”). See also Hugh J. Hansen et al., *Crisis in Drug Testing: Results of CDC Blind Study*, 253 J. OF THE AM. MED. ASS’N. 2382 (1985).

<sup>11</sup> Ryan Gabrielson & Topher Sanders, *Busted*, note 7 above (“Data from the Florida Department of Law Enforcement lab system show that 21 percent of evidence that the police listed as methamphetamine after identifying it was not methamphetamine, and half of those false positives were not any kind of illegal drug at all.”). Even a seemingly small false positive rate can affect many people. “By our estimate . . . every year at least 100,000 people nationwide [in Canada] plead guilty to drug-possession charges that rely on field-test results as evidence.” *Id.* Even if the false or innocent positive rate is one percent, that is still 1000 people who are affected.

<sup>12</sup> Robert L. DuPont et al., *Drug Testing: A White Paper of the American Society of Addiction Medicine*, 1, 6 (Oct. 26, 2013).

<sup>13</sup> Brahm, et al., *Commonly Prescribed Medications and Potential False-Positive Urine Drug Screens*, 67 Am. J. Health-Sys Pharm 1344, 1349 (Aug. 15, 2010) (“A number of routinely prescribed medications have been associated with triggering false-positive UDS results.”). Another example is Venlafaxine, an anti-depressant, which can lead to a triggering result for PCP. Moeller et al., *Urine Drug Screening: Practical Guide for Clinicians*, note 2 above at 72-73.

<sup>14</sup> For example, “[n]o central agency regulates the manufacture or sale of” the roadside tests that police use to make drug arrests. Roadside tests are designed to be easy to use and will change color to indicate the presence of a chemical compound, but it is hard to determine a color late at night with police lights flashing. Ryan Gabrielson & Topher Sanders, *Busted*, note 7 above.

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<sup>15</sup> *Mass. Lab Mishandling May Mean 1,140 Inmates Convicted Using Tainted Evidence, Report Says*, CBS Boston, (Sept. 25, 2012) <https://www.cbsnews.com/news/mass-lab-mishandling-may-mean-1140-inmates-convicted-using-tainted-evidence-report-says/>.

<sup>16</sup> Justin Zaremba, *Lab Tech Allegedly Faked Result in Drug Case; 7,827 Criminal Cases Now in Question*, NewJersey.com (Mar. 2, 2016) [http://www.nj.com/passaic-county/index.ssf/2016/03/state\\_police\\_lab\\_tech\\_allegedly\\_faked\\_results\\_in\\_p.html](http://www.nj.com/passaic-county/index.ssf/2016/03/state_police_lab_tech_allegedly_faked_results_in_p.html).

<sup>17</sup> Susan E. Lang, *Report of the Motherisk Hair Analysis Independent Review* (Dec. 15, 2015), available at <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lang/>; The Honourable Judith C. Beaman, Commissioner, *Harmful Impacts: The Reliance on Hair Testing in Child Protection Report of the Motherisk Commission* (Feb 2018).

<sup>18</sup> Paul C. Giannelli, *Houston! We Have a Problem!*, 21 Crim. J., 40 (2006) (on file with NAPW).

<sup>19</sup> American College of Obstetricians and Gynecologists, Committee Opinion 633, *Alcohol Abuse and Other Substance Use Disorders: Ethical Issues in Obstetric and Gynecologic Practice* (June 2015).

<sup>20</sup> *Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women*, National Advocates for Pregnant Women (June 2018), available at <http://advocatesforpregnantwomen.org/Medical%20and%20Public%20Health%20Group%20Statements%20revised%20June%202018.pdf>.

<sup>21</sup> *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Id. on remand*, 308 F.3d 380 (4<sup>th</sup> Cir. 2002)

<sup>22</sup> U.S. Dept. of Health & Human Services, Results from the 2013 National Survey on Drug Use and Health Summary of National Findings (2014), <https://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf>.

<sup>23</sup> Chasnoff, Ira J., Harvey J. Landress, and Mark E. Barrett. 1990. "The Prevalence of Illicit-Drug Or Alcohol use during Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida." *New England Journal of Medicine* 322 (17): 1202-1206. doi:10.1056/NEJM199004263221706; Ellsworth, Marc A., Timothy P. Stevens, and Carl T. D'Angio. 2010. "Infant Race Affects Application of Clinical Guidelines when Screening for Drugs of Abuse in Newborns." *Pediatrics* 125 (6): e1379-85. doi:10.1542/peds.2008-3525; Race Tilt in Foster Care Hit; Hospital Staff More Likely to Screen Minority Mothers, Daily News of Los Angeles (June 29, 2008), available at <http://advocatesforpregnantwomen.org/LA%20daily%20news%20series.pdf>; Roberts, Sarah C., and Amani Nuru-Jeter. 2010. "Women's Perspectives on Screening for Alcohol and Drug use in Prenatal Care." *Women's Health Issues* 20 (3): 193-200. doi:10.1016/j.whi.2010.02.0031; Rotzoll, Brenda W. "Black Newborns Likelier to be Drug-Tested: Study." *Chicago Sun-Times*, March 16, 2001; Anderson, Troy. "Race Tilt in Foster Care Hit; Hospital Staff More Likely to Screen Minority Mothers." *L.A. Daily News*, June 30, 2008.

<sup>24</sup> Emma Ketteringham et al., *Healthy Mothers, Healthy Babies*, 20 CUNY L. Rev. 77, fn. 53 (2016), referencing Marc A. Ellsworth et al., *Infant Race Affects Application of Clinical Guidelines When Screening for Drugs of Abuse in Newborns*, 125 *Pediatrics* 1379 (2010). See also Sarah CM Roberts, E Zahnd, C Sufirin, and MA Armstrong, *Does adopting a prenatal substance use protocol reduce racial disparities in CPS reporting related to maternal drug use?* 35 *Journal of Perinatology* 146 (2015).