

**The Bill Blackwood
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**Frequent, Mandatory Drug Testing
For Narcotics Investigators**

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ABSTRACT

Narcotics investigators operate in an environment and under conditions that are unique to those investigations and are very different than most other law enforcement functions. Narcotics investigators have an amount of independent freedom and secrecy, both of which are expected in the performance of their daily operations. They have access to confidential informants, who are connected to the drug trade, and investigators are often asked to emulate drug dealers or drug users. These factors in any other division of law enforcement would be viewed as major indicators of possible corruption or misconduct, but not in narcotics investigations. Police agencies draft policy and procedures to limit their exposure to misconduct or corruption should a narcotics investigator fall to the temptations of the criminal underworld, but they do nothing to ensure or defend the integrity and credibility of the investigator who does the job right. Law enforcement agencies can ensure and defend the credibility and integrity of their drug enforcement personnel, and this should be done by implementing frequent, mandatory drug testing for narcotics investigators.

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INTRODUCTION

Law enforcement, correctly, is under constant scrutiny by the society they police. The American populous places trust in their law enforcement officers and expect that law enforcement officers will uphold the laws of the land and cherish the freedoms of the people they serve. Service and protection is not simply defined, nor universally understood. It is a combination of public opinion, societal righteousness, and tolerance, which is then mixed with, law, moral values, and integrity. The public grants immense authority into the hands of the police, and therefore, law enforcement is held to a higher level of accountability. This accountability is crucial; and it is the very foundation of the criminal justice system. This is especially true for peace officers assigned to narcotics investigations units. Drug enforcement units work in an environment that many police officers often see, but never infiltrate. These units work in a realm of confidential informants, drugs, money, and temptation. This environment creates many opportunities for police misconduct as evidenced by the proliferation of movies and television shows based on this very subject. To combat the sensationalized vision of how narcotics units operate, law enforcement agencies need to provide additional credibility to these units, their peers, and the public. Mandatory, frequent drug testing of officers assigned to narcotics units would accomplish that goal.

In 1989, The U.S. Supreme Court opined in *Treasury Employees v. Von Raab*, that law enforcement agencies could submit their sworn employees to mandatory, random drug testing without reasonable suspicion, if they worked in an environment where public safety concerns outweighed the minor intrusion on the officer's rights. That opinion prompted many federal, state, and local law enforcement agencies to

implement a random, mandatory drug testing program, whereby their employee's names were placed into a pool and a random sampling of the pool was sent for drug screening. This random sampling included narcotics investigators. By 2003, 91% of local police agencies in America reported having involvement with drug enforcement operations, 23% had employees assigned to narcotics task forces, and 18% of the agencies had narcotics investigations units (Hickman & Reaves, 2003). The prevalence of these units and the unique job requirements facilitated both the opportunity for corruption and access to an endless supply of drugs. The opportunity for corruption itself created a stigma toward narcotics investigators, perpetuating the idea that narcotics investigators lacked integrity, were not credible, and should not be trusted. This stigma still surrounds narcotics investigators today.

Frequent, mandatory drug testing for officers whose primary responsibility is to investigate drug related offenses would alleviate many of those concerns. In addition to increased integrity, narcotics investigators would be more accountable for self-reporting of prescription pill usage, accidental exposures, and undercover exposures to controlled substances. This accountability would allow supervisors to make decisions related to the environments and conditions in which the employee is allowed to work as well as any potential problems with addiction or abuse. Another benefit of frequent, mandatory drug testing is the protection it affords narcotics investigators and their agency from false allegations made by confidential informants or unethical lawyers during trial. Narcotics investigators work in specialized units and have unique problems specific to their field; as a result, law enforcement agencies should mandate frequent drug testing of peace officers assigned to work narcotics investigations.

POSITION

Frequent, mandatory drug screening of narcotics investigators would ensure a complete representation of those officers would be tested. Most law enforcement agencies require their sworn personnel to submit to random drug screening. This random sampling of officers is based on a lottery system in which a certain percentage of officers throughout the agency are selected. The percentage of officers tested is determined by the agency's policy and is typically much less than half of the force, annually. An officer, statistically, has less than half a chance of being selected for random drug screening every year, meaning there is a possibility an officer may never be selected for random drug screening (Green-Ceisler, 2002). However, there are police agencies who have taken a more aggressive approach to drug testing. The Boston Police Department, for example, has agreed with its police officer's union to allow Boston police officers to be tested for drug use, annually. The agreed upon policy calls for the mandatory drug screening to be completed within 30 days of the officer's birthday (Smalley, 2006). This is hardly random, but it does facilitate every officer in the department being tested for illegal drug use. As a result of this annual drug testing, the Boston Police Department uncovered 75 officers who tested positive for illicit drugs between the inception of the drug testing program in 1999 and 2006 (Smalley, 2006).

The frequency with which police agencies submit their personnel to drug testing is predicated on departmental policy and/or agreements with police labor unions. Many law enforcement agencies have used a legal standard of requiring "reasonable suspicion" before they would subject an officer to a drug test. The police agency needed to articulate some form of suspicion as to why the officer required a drug test.

The suspicion could be based on physical or mental observations by the officer's supervisor, or information from another officer, or a confidential informant alleging drug use by an officer. The Portland, Oregon police department operated under those restrictions until recently. In February 2011, the Portland City Council passed a random drug testing policy which mandates officers employed at the Portland Police Department can be randomly tested for controlled substances. The city expects to test 55 of its 916 person force each month (Bernstien, 2011). Again, although the testing is random, the frequency of the tests and the percentage of employees to be screened indicate there are no specific stipulations or requirements for officers who work in the field of narcotics investigation, or that every officer will get tested.

The Philadelphia Police Department discovered the importance of drug testing narcotics officers through an internal audit of their narcotics bureau. In 2001, the Integrity and Accountability Office of the Philadelphia Police Department reflected on their drug testing policy in the narcotics bureau. The Integrity and Accountability Office discovered only 199 of the 601 officers assigned to narcotics (33%) were randomly drug tested. Between 1996 and 2001, the Philadelphia Police Department had 13 of their officers assigned to the narcotics bureau who failed their random drug test (Green-Ceisler, 2002). Obviously, one could imagine, just as the Integrity and Accountability Office did, how many other narcotic investigators may have tested positive had all of the officers assigned been tested. As a result, their recommendation was to "Implement a policy mandating unannounced yearly drug screening tests for all narcotics officers and require the use of hair drug screening testing, as opposed to urinalysis testing, which is considerably more effective in detecting drug use over a longer period" (Green-Ceisler,

2002, p. 33). Doing so would only create credibility within the narcotics bureau and facilitate better supervision of its employees.

Maintaining integrity is another reason for law enforcement agencies to implement frequent, mandatory drug testing of narcotic investigators. A recent survey revealed that 56% of the American public rate police officers as having high or very high ethical standards (Martin, 2011). The ethical standards of a police officer are at the crux of their integrity. Ethics dictate how susceptible an officer may or may not be to deviant behavior or corruption. Ethics are the foundation from which to build or maintain Integrity in narcotics law enforcement. Ethics are difficult to measure, yet recognizable when deficient, and this is never truer than in narcotics law enforcement. This is due to the fact that an undercover officer must emulate criminals in their attire, attitude, and nomenclature, as well as working in the criminals' environment. As a result, being a good undercover officer takes a certain type of person: "You must be an impeccable actor, a chameleon who can blend seamlessly into easily combustible situations, coolly stare your target in the eye and lie" (Buckley, 2008, p. 3). Police agencies intentionally and deliberately request narcotics investigator(s) work in these conditions, yet do nothing to ensure the integrity of the investigator. That is not to say there are no checks and balances in narcotics investigations, nor does it mean narcotics investigators are without integrity. This simply means that narcotics investigators are left to fend for themselves when their integrity is questioned.

A common perception about narcotics investigators is one of drug usage. Movies and television shows have sensationalized undercover police officers and their duties. They often depict rogue officers using drugs, shaking down drug dealers, and

committing other crimes. Unfortunately, this stereotype was not based on a possibility or a fabricated concept to sell movie tickets. Corruption in narcotics law enforcement has been a very real part of its history. Fortunately, the majority of narcotics investigators are ethical men and women who have integrity and do their jobs within the confines of the law. It seems, however, that the public seldom hears about narcotics investigators or their units unless controversy is involved. This public is the same men and women who sit on the juries in criminal trials and make decisions of innocents or guilt based on investigator testimony and evidence. If an investigator's testimony in court is not credible, neither is the evidence for which the investigator is testifying. Frequent, mandatory drug testing for narcotics investigators could assist with this perception by adding credibility and integrity to an investigator's testimony by creating proof with the history of negative drug tests. For example, in Texas, a narcotic investigator's drug test analysis can be subject to the Texas Open Records Act, Article 6252-17a (Morales, 1991) and is subject to discovery in court. A consistent, repetitive history of negative drug test results grants credibility to the investigator's integrity exponentially. This is especially true when compared to limited, infrequent test results which allow for speculation and conjecture by both criminal defense attorneys and jury members.

One additional benefit to narcotics investigators and police agencies of frequent, mandatory drug testing would be the accountability created by implementation of that policy. For example, it would become necessary for narcotics investigators to self-report prescription pill usage that may affect their ability to operate safely in an undercover capacity. Having this information will allow supervisors to make better, more informed decisions on the environments and conditions in which to allow the

employee to work. Self-reporting would also allow for recognition or early detection of substance abuse or fitness for duty issues. For example, if a narcotics investigator is under a doctor's care and has been prescribed a medication for a stress-related or anxiety-related disorder, those medicines could affect the investigators ability to perform his duties and compromise the safety of his fellow investigators. A supervisor having this information could make decisions based on safety of the narcotics unit as a whole and could also be aware of potential problems with caseload and types of investigations. Alprazolam, more commonly known as Xanax, is one commonly abused prescription medication and can include intoxication effects consistent with drowsiness and confusion (National Insititue on Drug Abuse, 2011). The medication itself is not illegal to use and is available with a prescription from a medical doctor; however, the accessibility of the drug on the black market is one of the reasons it is so readily abused. A narcotics investigator who is either under a doctor's care or has obtained the drug illegally would need to self-report the usage or run the risk of failing frequent, mandatory drug testing.

An additional form of accountability offered by frequent, mandatory drug testing of narcotics investigators is the necessity it would create for investigators to report accidental exposures and undercover exposures to controlled substances. Often, narcotics investigators are placed in environments where narcotics are being consumed to target suspect(s), perform surveillance, gather intelligence, or purchase drugs. For example, an undercover investigator goes to a suspect's apartment to purchase marijuana. While in the apartment, criminal associates of the suspect are smoking marijuana. The narcotics investigator could leave the apartment and blow-off the

transaction, but most would not. Most narcotics investigators would wait in the apartment until the transaction had concluded. In this example, it is clear that the investigator has been exposed to marijuana. What is not clear is to what extent he was exposed. The investigator could have vicariously ingested marijuana just from being in such close proximity for an extended period of time. Maybe the investigator is aware of the exposure as a result of a contact high, maybe not. Regardless, if the investigator knew he would be taking frequent, mandatory drug tests, he would be more apt to expeditiously explain the potential issue to his supervisor. This is accountability, and every law enforcement agency should implement frequent, mandatory drug testing for narcotics investigators.

COUNTER POSITION

Opponents of frequent, mandatory drug testing often believe that implementing a policy requiring such is prohibited by law. The Texas Attorney General has provided law enforcement with an opinion stating that mandatory drug testing can violate an officer's right to be free from unreasonable searches. In the Opinion (JM-1274), the Attorney General of Texas, takes the stance that although the United States Supreme Court has ruled on the legality of random drug testing; he believes the Texas Constitution provides additional protection, not offered by the U.S. Constitution, for an individual's right to privacy (Mattox, 1990). Under normal circumstances where state law mirrors federal law, the rulings of the U.S. Supreme Court on the constitutionality of an issue would set the precedence for the state courts to follow. In this case, opponents argue that the Texas Constitution provides a greater level of protection

against unreasonable search and seizure, as well as a person's right to privacy. This opinion is incorrect as pointed out by U.S. Supreme Court.

In the case of *Treasury Employees v. Von Raab* (1989), the U.S. Supreme Court decided that drugs were a substantial concern, and law enforcement officers who work in sensitive conditions or environments including drug enforcement operations may be randomly required to take a drug test. The court further stated that a drug test was not a significant intrusion when compared to the potential danger posed to the public of an officer carrying a firearm under the influence of controlled substances. The Court also addressed and eliminated the requirement for "reasonable suspicion" to perform frequent, mandatory drug testing. The question of mandatory drug testing was also addressed in *Skinner v. Railway Labor Executives' Association* (1989) with similar results. Again, the Court's Opinion in this case concluded random, mandatory drug tests were constitutional and upheld random drug testing without complaint or suspicion (*Skinner v. Railway Labor Executives' Association*, 1989). Another argument opponents make about the legality of frequent, mandatory drug testing is the issue of a state's constitution affording additional, more stringent protections against unreasonable search and seizure or right to privacy. That issue was questioned and addressed in a Texas case relating to drug testing students. The Texas Court of Appeals concluded the Texas Constitution afforded no additional protection with regards to the Fourth Amendment to the U.S. Constitution (*Marble Falls Independent School District v. Eddie Shell on Behalf of His Minor Children, Morgan Shell and Alex Shell*, 2003). These cases clearly identify the legal authority to conduct frequent, mandatory drug testing of narcotics investigators and ensures no constraints from state constitutions exists.

However, legal authority is not the sole argument against frequent, mandatory drug testing.

Opponents to frequent, mandatory drug testing of narcotics investigators also believe the cost associated with the testing does not justify the expense when compared to the low volume of positive tests. Currently, the cost of one test can vary between about \$30 and \$100 depending on the type of screening and which drugs are being screened (Bernstien, 2011). Multiply those figures by the number of narcotics investigator in the department and it becomes obvious how the cost could become burdensome to any agency. However, these costs are miniscule in comparison to the cost of a civil lawsuit for wrongful death, brutality, or other civil rights violations being filed on the agency. For example, a police agency study revealed that over an eight year period, their narcotics bureau was involved in 115 civil cases. Many of these were claims of excessive force, false arrest, illegal searches, and fabrication of evidence. The police agency paid out \$7,706,048 in settlements. It was later determined that over half the financial pay-out was a direct reflection of a corrupt narcotics unit (Green-Ceisler, 2002). The cost associated with frequent, mandatory drug testing of narcotics investigators is far cheaper than a seven million dollar settlement. Unfortunately, other agencies have incurred a similar cost.

For example, in 2007, the New Jersey Police Department learned of 248 police and firefighters who were fraudulently acquiring steroids, human growth hormones (HGH), and other testosterone-boosting drugs from a local doctor (Brittan & Mueller, 2012). Each police officer and firefighter used their agency's insurance to supplement the cost of these drugs. The fraudulent purchase and use of these drugs translated

into millions of taxpayer dollars being spent on controlled substances used by police and firefighters. That was not the only cost related to steroids. The City of New Jersey paid-out a half million dollars to a resident after he was beaten by a police officer suffering from "roid rage," which is the colloquial term for extreme anger due to steroid use (Brittan & Mueller, 2012). Again, those financial costs are far more expensive than the cost associated with frequent, mandatory drug testing. If viewed skeptically, the question may remain as to whether extensive testing done consistently over time is still cost prohibitive, even compared to the occasional civil lawsuit payout. While financially this may be true, there are certainly other "costs" to be taken into account; such as the cost to both the individual officer and the department of loss of public trust, loss of integrity and lack of accountability to the citizens whom the department protects and serves. While difficult to calculate, these costs are significant and must be taken into account.

RECOMMENDATION

Every law enforcement agency should mandate frequent drug testing for every investigator assigned to work narcotics investigations. A law enforcement agency should establish a drug testing policy which clearly details that any police officer assigned to work narcotics investigations will be subject to pre-assignment and quarterly drug testing while assigned to that division. The drug screening should randomly alternate between urine analysis and hair follicle testing to ensure a proper history of negative drug use. The policy should detail the self-reporting of accidental or undercover exposures to controlled substances and provide strict guidelines for documenting the event. Also, the policy needs to cover topics such as false positives,

re-tests or secondary tests of positive results, consequences of testing positive, and the drugs for which the agency will test. In addition, the agency should clearly communicate that the testing policy is in no way accusatory or punitive, but merely a method of protection for the investigator, the agency, and the public. Implementing this policy will provide the investigator, their units and the agency with more credibility and integrity, offer more accountability to supervisors, reduce costs associated with failing to test, and facilitate better service to the citizens whom the agency protects.

Although there is some opposition to frequent, mandatory drug testing for narcotics investigators based on the belief that such testing is unlawful, this is simply not the case. The idea that mandatory drug testing is unlawful and it constitutes an unreasonable search or seizure has been addressed by the U.S. Supreme Court, which determined the testing was constitutional and void of “reasonable” or “individualized suspicion.” The case of *Treasury Employees v. Von Raab* (1989) specifically addressed narcotic law enforcement officers and the public’s interest in maintaining those officers free from drug usage. Although the issue of a state(’s) constitution affording more protection than the U.S. Constitution was not specifically addressed in narcotics law enforcement, the Texas Court of Appeals, Third District’s opinion clearly asserts that court’s belief that there is no additional protection against unreasonable search and seizure or rights to privacy (Tex. Ct. App., 2003). Based on these court decisions, there is not any legal prohibition to a frequent, mandatory drug testing policy for narcotics investigators.

The opponent’s views with regards to the costs of testing have also been addressed. Their belief that frequent mandatory drug screening is cost prohibitive might

ring true at face value. However, when the associated costs of failing to have a proper, thorough drug testing policy in place is taken into account, it becomes readily apparent that the cost of frequent, mandatory drug testing of narcotics investigators is miniscule compared to the costs associated with officers abusing controlled substances. An agency with the foresight to recognize the value of a more aggressive drug testing policy will potentially save its cities millions of dollars and the public's respect. A frequent, mandatory drug testing policy for narcotics investigators should be of importance to every law enforcement agency that is committed to disrupting the flow of illegal narcotics into its community, not just for the financial reasons, but for the integrity it will create within its narcotics unit, the accountability it will afford for its supervisors, and the peace of mind it will provide for the public.

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