

5-1-1991

## Survey of Current and prior Pretrial Drug Testing Sites

Cynthia Durrant Jensen

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### Recommended Citation

Cynthia Durrant Jensen, *Survey of Current and prior Pretrial Drug Testing Sites*, 5 BYU J. Pub. L. 451 (1991).  
Available at: <https://digitalcommons.law.byu.edu/jpl/vol5/iss2/7>

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# Survey of Current and Prior Pretrial Drug Testing Sites

## I. INTRODUCTION

The national campaign to educate society about the corrosive effects of drug abuse has united the nation. In a recent national poll, 96 percent of American voters ranked the drug problem highest on a list of actions President Bush should focus on.<sup>1</sup> One of the most dangerous aspects of drug abuse is its strong link to crime.<sup>2</sup> "[T]he National Academy of Sciences Panel on Criminal Careers concluded that hard drug use among offenders is significantly associated with a high rate of criminal activity."<sup>3</sup> Accidents directly attributable to drug abuse cost the nation over \$40 billion per year, draining public resources and wasting human lives.<sup>4</sup>

With the number of drug-related arrests increasing exponentially in recent years, courts are increasingly interested in information about arrestee's drug use to aid in making pretrial release decisions. In response to this interest, the National Institute of Justice (NIJ) has implemented urine testing programs "to identify those drug abusing defendants who pose the greatest threat to community safety, and to monitor their behavior and control their drug abuse while under the court's jurisdiction in a way that reduces the risk associated with drug abusers."<sup>5</sup>

The pilot drug testing program began in 1984, in the District of Columbia (D.C.). Based on the positive results of the D.C. program, the Bureau of Justice Assistance (BJA) has

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1. *Most People in Survey Believe; Work on Drugs, Arms, Environment, Deficit Most Uniformly Supported*, WASH. POST, Nov. 12, 1988, at A10.

2. Douglas A. Smith et al., *Drug Use and Pretrial Misconduct in New York City*, 5 J. QUANTITATIVE CRIMINOLOGY 101-125 (1989); George Speckart & M. Douglas Anglin, *Narcotics Use and Crime: An Overview of Recent Research Advances*, 13 CONTEMP. DRUG PROBLEMS 741 (1986); J. BALL ET AL., *THE DRUGS-CRIME CONNECTIONS, THE CRIMINALITY OF HEROIN ADDICTS WHEN ADDICTED AND WHEN OFF OPIATES* (1981).

3. Smith et al., *supra* note 2, at 101.

4. JOHN A. CARVER, U.S. DEPT. OF JUSTICE, *DRUGS AND CRIME: CONTROLLING USE AND REDUCING RISK THROUGH TESTING* (1986).

5. *Id.*

funded pretrial urine-testing programs in six other jurisdictions as part of its mandate under the Anti-Drug Abuse Act of 1986. These jurisdictions include: (1) Phoenix, Arizona; (2) Tucson, Arizona; (3) Wilmington, Delaware; (4) Prince Georges County, Maryland; (5) Portland, Oregon and (6) Milwaukee, Wisconsin.<sup>6</sup>

In the federal system and in most state courts, the judge or judicial officer deciding whether to release a defendant prior to trial must consider two factors: the risk of flight and the risk to community safety.<sup>7</sup> The focus of the pretrial release program is twofold: to help the judge in his mandate to increase the probability that the defendant will appear for his court appearances and to promote safety for the public, as well as to help the defendant overcome his drug problem. Research has proven that releasing defendants on the condition of monitoring pretrial drug usage (1) reduces a defendant's usage of drugs and reduces crime, (2) conserves jail space for defendants charged with more serious offenses, and (3) provides standardized drug testing results for use by the judge in sentencing. The traditional program of releasing a defendant if he can make bail helps neither society's crime problem nor the defendant's drug problem. The bail system makes jails places for the poor not for the repeat criminal offenders.

All of the federally funded jurisdictions began by modeling their pretrial drug testing programs after the District of Columbia. The program includes: (1) testing defendants shortly after arrest, and (2) periodic testing of selected defendants who are awaiting trial. Pretrial Drug Service programs use state-of-the-art technology to quickly produce highly accurate drug tests. Statistical analysis of the test results from each site

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6. The Bureau of Justice Assistance (BJA) federal grants are for one year, to be renewed up to three years depending upon the jurisdiction's performance. After the third year, federal funding expires and the sites must appropriate local funding to either: (1) continue the two-fold operations; (2) narrow testing to after release; (3) only test in response to a judge's order; or (4) terminate testing altogether. Five of the seven jurisdictions which have received federal funding for their pretrial drug testing programs are still operating. The District of Columbia (D.C.) and Prince Georges County, Maryland are continuing the two-fold operations with local funding. Milwaukee County, Wisconsin; Portland, Oregon; Los Angeles County, California; and Tucson, Arizona have narrowed their operations primarily to monitoring defendants after release, funding the programs fully or partially with federal grants. Delaware and Maricopa county (Phoenix), Arizona had to terminate testing because of limited funds and administrative difficulties in implementation.

7. CARVER, *supra* note 4, at 3.

helped the jurisdictions to adapt D.C.'s research to their unique circumstances. Research studies over the last five years have aided the programs in knowing which arrestees to test, what drugs to test for, how frequently to test, and what sanctions should be imposed when arrestees test positive.

This comment examines the similarities and differences of the current and former pretrial drug testing programs. The first section presents the basic elements of each program. The second section discusses the differences in the programs. The last section reviews the trends in pretrial drug testing.

## II. ELEMENTS OF CURRENT AND PRIOR DRUG TESTING PROGRAMS

With respect to each program, this section reviews eight basic questions: (1) when the program began; (2) how was it funded; (3) which arrestees (felony, misdemeanor or both) are tested for drugs prior to trial; (4) what drugs are tested for; (5) what methodology is used to test and retest urine specimens; (6) how are the test results reported (oral or written) to the judge; (7) is drug monitoring ordered as a condition of release random or scheduled; and (8) what are the consequences if monitored defendants test positive, violating their condition of release?

### A. *District of Columbia*<sup>8</sup>

The pretrial service agency in D.C. began in 1963 with funding from a grant by the Ford Foundation. In 1984, the agency received a grant from the NIJ to implement a drug testing program to research the correlation between drugs, crime and the effect of pretrial drug monitoring.

Everyone arrested, either for a felony or misdemeanor, is tested at the jail, generally within a few hours, before they see a judicial officer. An adult's urine is simultaneously tested for five drugs,<sup>9</sup> while juvenile's urine is only tested for four drugs.<sup>10</sup> The enzyme-multiplied immunoassay test (EMIT) is

8. Unless otherwise noted, all information in this section is from a telephone interview with John A. Carver, Director of the D.C. Pretrial Services Agency (Nov. 12, 1990).

9. Adult arrestees' urine is tested for traces of the following five drugs: cocaine, opiates (heroin), PCP, methadone and amphetamines.

10. Juvenile arrestees' urine is tested for traces of the following four drugs: cocaine, opiates, PCP and marijuana.

the standard methodology used to test all specimens and to retest those that tested positive.<sup>11</sup> If the positive is disputed, the agency may retest with a different technology.<sup>12</sup>

Before being tested, arrestees must sign a consent form. The pretrial services staff explains to each defendant that they are asking for a urine sample to test for drugs and that the results will only be used to help determine the defendant's conditions of release not as evidence of guilt in his or her trial.<sup>13</sup> Although defendants have a right to refuse to give a urine sample, in practice most comply.<sup>14</sup> Refusal or inability to provide a sample usually results in release being conditioned on submitting a sample with the agency.<sup>15</sup>

The results of the drug test are recorded on a report which is given to the judge at the arraignment hearing. Because the report will eventually become part of the public record, the agency, to safeguard confidentiality, does not record which drug(s) the arrestees tested positive for. The record only reflects whether drug use was "indicated," "not indicated" or "undetermined."

Judges have a mandate to consider an arrestees likelihood to appear for court and the degree of risk involved in an arrestees release. Because of the correlation between drug use and both the failure to appear and the likelihood of rearrest, judges routinely stipulate that defendants who initially test positive for one or more drugs participate in drug monitoring.<sup>16</sup>

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11. Research indicates that the enzyme-multiplied immunoassay test (EMIT) system has an accuracy rate of ninety-seven to ninety-nine percent when used in conjunction with confirming tests. Courts have found the EMIT tests presumptively reliable and properly admissible into evidence. See James K. Stewart, *Quid Pro Quo: Stay Drug-Free and Stay on Release*, 57 GEO. WASH. L. REV. 68, 73 (1988).

12. The EMIT system is used at all sites for testing and for retesting, unless the test is being used to revoke a defendant's release, in which case they use gas chromatography/mass spectrometry (GC/MS). The EMIT technique costs approximately \$7 compared to GC/MS which costs \$80. In California a positive test can be used as a violation of probation, in which case the positive must be retested using GC/MS.

13. D.C. PRETRIAL SERVICES AGENCY TRAINING & PROCEDURAL MANUAL 125 (Oct. 1985). All pre-trial programs have the same procedure of obtaining written consent after explaining the limited use of the results.

14. CARVER, *supra* note 4, at 3.

15. *Id.*

16. Initial urinalysis testing showed drug use to be far higher than the self-reported data indicated. "Statistics show almost three-fourths of adult arrestees and almost one-third of juveniles have drugs in their system when first tested—far more than acknowledge to pretrial services interviewers that they are users." David S. Broder, *D.C. Pretrial Agency Is a Small but Vital Cog in Wheels of Justice*,

As a result of the large numbers of arrestees to be tested, adults are put on scheduled testing, once a week. John Carver, director of the D.C. Pretrial Services Agency, said it is a logistical problem to get most defendants to show up for random testing.<sup>17</sup> Juveniles are easier to contact, therefore, they are subject to random testing.

Theoretically, arrestees could plan their drug use around their weekly test because of retention rates. However, those arrestees that are in control enough to circumvent the testing are probably not the ones that are a threat to society.<sup>18</sup> Research has shown that the most dysfunctional and dangerous defendants test positive even with the scheduled system.<sup>19</sup>

The agency provides an updated report at each defendant's status hearing. If the defendant is not showing up for testing or is continually testing positive, the judge may either intensify the testing or treatment, sanction the defendant, revoke the defendant's conditional release and set a bond, or revoke his or her bond and incarcerate. The court will usually allow eight negatives before the defendant is dropped from drug testing unless the judge specifies otherwise.

The District of Columbia's program is unique in that it serves both the superior court system of D.C. and the federal court system. Another unique feature is that D.C. has a statute that bars the release of the test results for anything except setting release conditions or sentencing. Most other jurisdictions only have a memorandum of understanding that prohibits positive drug test results from being used in guilt proceed-

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WASH. POST, May 28, 1989, at C1, C4.

17. Many of the defendants do not have phones to be contacted. If the agency leaves a message with the defendant's family or friends the defendant may purposely not show up and use as an excuse that he did not receive the message. Excuses are difficult if not impossible to prove. Telephone interview with John A. Carver, Director of the D.C. Pretrial Services Agency (Nov. 12, 1990).

18. *Id.*

19. MARY A. TOBORG ET AL., U.S. DEPT. OF JUSTICE, ASSESSMENT OF PRETRIAL URINE TESTING IN THE DISTRICT OF COLUMBIA (1989).

ings.<sup>20</sup>

### B. Milwaukee, Wisconsin<sup>21</sup>

The Wisconsin program received its first federal grant from the BJA in April 1988 and began its Drug Testing Technology Transfer Program (DTTT) in January 1989.<sup>22</sup> Similar to D.C., the DTTT began its research and testing with two components: (1) initial testing to help in setting release conditions and (2) drug monitoring to control the risk of continual drug use as well as signal to the judge whether or not the defendant is a good candidate for probation.

All felony defendants and serious misdemeanor defendants<sup>23</sup> were tested, generally within twenty-four hours, prior to the initial appearance. Using EMIT, DTTT tests for cocaine, amphetamines, opiates, benzodiazepines (tranquilizers) and marijuana. Results of the test were verbally reported to the judge along with a recommendation for release<sup>24</sup>. Similar to the D.C. program, the judge was not specifically told what drugs the defendant tested positive for, but only whether the drug test was positive.

In April 1991, when federal funding expired, the program had to scale down because of limited local funds. The program directors decided to stop testing in the lock-up (component one) to save money.<sup>25</sup> The limited funds and new technology are

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20. D.C. CODE ANN. § 1303 (1981). The statute safeguards confidentiality by limiting the test results use to setting and enforcing release conditions. If an agency keeps a record of drug test results a lot of people want to use them. For example, a prosecutor may want to use the results for a future charge, an attorney may want to use the results to discredit a criminal's testimony, or an ex-spouse may want to use the results in a divorce or custody proceeding.

21. Unless otherwise noted, all information in this section is from a telephone interview with Bob Sayner, Assistant Executive Director of Wisconsin Correctional Services (Oct. 20, 1990).

22. The Wisconsin Correctional Service (WCS) together with representatives from the agencies that operate and assist the program, prepared the policies and procedures manual. *Id.*

23. A serious misdemeanor is defined as one involving offenses against persons, weapons charges and possession of drugs. MILWAUKEE COUNTY DRUG TESTING TECHNOLOGY TRANSFER PROGRAM PROCEDURAL MANUAL (DRAFT) 1 (1990).

24. Based on the test results and other drug use indicators, the bail evaluation report may recommend supervised pretrial release and/or monitoring by urinalysis as release conditions. If an arrestee's initial test is positive, he admits using drugs within the past six weeks, he is currently charged with delivery of a controlled substance or has a prior history of drug abuse then the WCS will recommend urine surveillance. *Id.* at 3.

25. Telephone interview with Marilyn Walczak, Director of Bail Evaluation

now only used to keep track of those arrestees that pretrial services are responsible for monitoring pending trial.<sup>26</sup>

Drug monitoring is randomly administered, twice a week for felony defendants and once a week for misdemeanor defendants unless the judge orders otherwise. DTTT gets around the logistical problems of random testing by giving the defendants bus tickets and requiring them to call in each day to see when they need to report for testing.

A summary of each defendant's release performance is provided to the court to document compliance with release conditions. Testing and treatment is intensified if a defendant consistently tests positive or fails to comply with any of the other conditions of release.<sup>27</sup> Bob Sayner, the Assistant Executive Director of WCS, is against reincarceration solely based on a defendant testing positive. It is Sayner's opinion that if the defendant is showing up for testing and trying to be cooperative, the fact that he is having a difficult time overcoming his addiction is not enough to send him back to jail. Sayner believes that a defendant can test positive many times and then one day win the battle and stop.

### C. Maricopa County, Arizona (Phoenix)<sup>28</sup>

Maricopa County's pretrial service agency is part of the Superior Court system in Arizona. The agency obtained their first federal grant in July 1988 and began testing four months later.<sup>29</sup> In Mid-February 1992, the third and last year of federal funding expired and Maricopa County terminated all pretrial drug testing because the government did

(March 30, 1992).

26. *Id.*

27. If a defendant drops two consecutive "dirty urines" the DTTT tries to get him or her into an out-patient drug rehabilitation program. If the defendant continues to test dirty then the DTTT pushes to get the defendant into an in-patient program. The latter is difficult because most defendants that are addicted are also indigents and uninsured. This group is not a high priority for state money; pregnant women and juveniles have a higher preference. However, the DTTT is persistent in calling each day to check when there are openings for their clients.

28. Unless otherwise noted, all information in this section is from a telephone interview with Tom Morrison, Director of Pretrial Services in Initial Appearance (Oct. 23, 1990).

29. The planning committee which organized the program to obtain the grant included the Directors of Pre-Trial Services and the Criminal Court Administrator. *Id.*

not appropriate the necessary funds.<sup>30</sup>

In phase one, felons were asked to voluntarily provide urine samples at the jail. The specimens were sent by courier to a lab to be tested for amphetamines, cocaine, opiates, barbituates and PCP and the test results were returned by courier. Although the courier would stop by the jail every few hours to pick up samples and return results, pretrial services was not getting a high percentage of results back before to the defendant's initial appearance.<sup>31</sup> This defeated the purpose of testing because the test results were to aid the judge in determining release conditions.

Initial drug test results received before the defendant's initial appearance, were reported on confidential agency records and were given to the judge. As is common, the record only indicated whether the defendant tested positive or negative for the five commonly tested drugs. A pre-trial agency worker who knew the actual results of the test would attend the hearings to provide further information to the judge if requested.

If the judge decided to release the defendant, not uncommon because of overcrowded jails, and the defendant initially tested positive, the judge would often set a condition that the defendant remain drug free and require scheduled testing to monitor the defendant's compliance. Such testing was arranged twice a week so that defendants are unable to plan their drug use around the testing.

Defendants on drug monitoring who continued to test positive received escalated warnings: one positive test resulted in a verbal warning; two consecutive positive tests resulted in a written warning; and three consecutive positive tests or five non-consecutive positive tests could result in the defendant having his release revoked.

The second phase cured the problematic delay of having to depend on a courier to deliver the defendants' test results by installing computers in the jails. This modification provided for the agency to have on-line access to the lab results.

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30. Phone conversation with Terri Jackson, Director of Pretrial Services Supervised Release (March 29, 1992).

31. Arizona has a statute which requires that everyone arrested, felon or misdemeanor, go before a judge for an "initial appearance" within twenty-four hours.

The third phase of the program terminated initial drug testing because only 45% of all defendants tested positive. To save money Phoenix began using an "assessment profile" to identify defendants that need drug monitoring, rather than initial drug testing. If the defendant met this profile then pretrial services recommended monitoring. Eliminating the testing of all felons prior to their initial appearance saved thousands of dollars. The risk in this modified program was whether the profile, which considered factors similar to those used in setting bail, would adequately identify the dangerous drug users. The agency decided that the possibility of releasing some drug abusers without monitoring did not outweigh the cost and administrative hassle of initially testing all felons.

In the third phase if a defendant tested negative four consecutive times, the defendant was dropped from scheduled testing, however, he or she would still be subject to random testing.<sup>32</sup> This change saved the state money and saved the defendant from the hassle of providing a sample twice a week.

#### *D. Multnomah County, Oregon (Portland)*<sup>33</sup>

Portland received a grant from the federal government for pretrial testing and monitoring in July 1987 and began operations in January 1988.<sup>34</sup> The county division administered pretrial drug testing from January 1988 through July 1989. In July 1989, the division stopped initial drug testing in jail and began monitoring defendants only after their release. Drug testing stopped altogether in June 1990 when the three years of federal grant money ended. The division then applied for and was awarded funds to continue the program.<sup>35</sup> Portland is now in its fourth year of testing and its federal grant money will expire February 28, 1993. The county had not finalized its budget for the fiscal year run-

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32. Statistics indicate that after four negative tests there is only a five percent probability that the defendant will test positive again. Morrison, *supra* note 25.

33. Unless otherwise noted, all information in this section is from telephone interviews with Cary Harkaway, Division Manager of Diagnostic and Program Development (Oct. 24, 1990 & April 1, 1992).

34. The committee that helped plan the drug testing included the: state courts, community corrections department, sheriff, district attorney's office, laboratories and pre-trial service agency itself. *Id.*

35. The agency was awarded a "Do Grant."

ning from July 1992-93 so the division does not know whether it will be supported by county funding after February of 1993 or whether the resources will not be available again, forcing testing to stop.

For the first two years all felons and misdemeanors were tested for opiates, cocaine and amphetamines within a few hours of arrest. The third year only felons were tested. The samples were taken at the jail and sent to a lab where the EMIT test results were immediately input on the computer system which the division had access to. The test results, positive or negative, were provided in writing to the arraignment court, making drug use part of the public record.

Generally, the division monitored those defendants who were released prior to trial, with the condition of drug monitoring, once a week using random drug tests.<sup>36</sup> For the first year and a half of the program, defendants were on a color code system. Defendants were assigned a color and had to call in each day and hear a taped message that would inform them which color had to go to the lab that day to be tested. The next year and a half, defendants would call their caseworker to find out whether they should come to the agency to be tested that day. The later system worked better because case workers had more control over defendants to cause them to show up. However, it was expensive.

The division created a new system the fourth year combining the prior two systems. To be cost efficient, each defendant is assigned a number (1-6) and required to call each day to see if their number has been chosen that day to be tested, similar to the color code system. The caseworker need only contact the defendant if he or she did not show up for testing. There is little tolerance for no-shows. After two no-shows the defendant will have a hearing and may get jail time or a revocation of his or her release.

After the third or fourth consecutive positive test result, the case worker will schedule a "show cause hearing" in which the defendant will report on his or her progress. The judge has discretion to intensify the testing, recommend

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36. Drug monitoring is determined by the agency, not by judges.

The Chief Criminal Judge in Portland made a blanket order that everyone who meets the pretrial service agency's requirements is subject to drug monitoring as a condition of his release.

treatment, put the defendant in jail for two to five days or any combination. Generally, the defendant's release will not be revoked if he or she is appearing for testing and meeting the other conditions. On the other hand, if the defendant continues to test clean, testing will decrease from weekly to by-weekly until the defendant can be free from testing, opening up a slot for another client.<sup>37</sup>

Beginning in 1991, the division changed its policy from pre-arraignment testing of felons to only testing those felons who meet certain "risk" criteria that are either released to pretrial services or on probation.<sup>38</sup> Cary Harkaway, Division Manager of the program, believes pre-arraignment drug testing is good for some communities but he believes that it is not cost effective for Portland. This belief is backed with research reporting that only six percent of the defendants who tested positive on their initial drug test were regular drug users.

The 1991 program is set up to focus agency resources on those with the greatest need for monitoring. The primary goal of the program is to effectively identify felons with a serious substance abuse problem and provide intervention through counseling or more intensive treatment to help them avoid a revocation of their release. The division does not want to test more people than it can effectively sanction or treat. Admittedly, this program may not identify all drug users, but the city can't treat all drug users either.

#### *E. Prince Georges County, Maryland*<sup>39</sup>

Maryland obtained federal funding in April 1988 and began pretrial drug testing in July of the same year. Maryland is now in its first year of local funding. Al Hall, the director of the department of corrections, reports positive results with Maryland's program and has continued pretrial drug testing at the same level as it did during the three year pilot program that was funded with Federal grants.

Only arrestees that do not make bond must be tested for drugs. Testing is generally performed within twelve hours

37. The Division has also allocated resources for spot check drug testing.

38. Currently, 85% of testing is post-trial with only 50 slots available for pre-trial testing.

39. The information for this section, unless otherwise noted, is from a telephone interview with Al Hall, Director of Pretrial Services (Oct. 25, 1990).

after the arrest. An arrestee is brought before a commissioner<sup>40</sup> who notifies the defendant of the charges, reviews the defendant's rights and decides to set bond or incarcerate. Defendants, who fail to make bond, are sent to the Department of Corrections (DOC). The DOC then tests all defendants for drugs and recommends release conditions based on the defendant's test results and other factors.

Originally, defendants were tested for cocaine, PCP, opiates, marijuana and methadone. Methadone was dropped within two weeks because no defendant tested positive for it. Amphetamines were then added, but were also quickly dropped for the same reason. For cost efficiency, testing for marijuana was also dropped after the first year. Every defendant that tested positive for marijuana also tested positive for another drug. Presently, defendants are tested for cocaine<sup>41</sup>, PCP and opiates. The DOC has been using the Abbott-ABX unit for testing but is changing over to EMIT to reduce cost. Positive results from the initial test are not confirmed. The rationale is that the initial test is only a preliminary test to help the judge set release conditions. A positive initial test will only cause the judge to recommend drug monitoring but will not prohibit the defendant from being released.

If the defendant tests positive on release pending trial he has three options. He may either admit that the test is correct, deny that it is correct or refuse to comment. A positive test must be confirmed if the defendant does not admit that he has used drugs. Confirmed positive tests are reported to the judge if the defendant is charged with a violent crime or after the third violation if the defendant is charged with a non-violent crime.

The DOCs drug monitoring records are kept confidential by a computer security system. Test results are only released to the judge if the defendant violates his release conditions by testing positive one to three times, as discussed above. It is then up to the judge's discretion whether the test results indicating the defendant's drug usage is put in the defendant's public file.

Maryland has four levels of supervision. All defendants

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40. The commissioner is considered a judicial officer but generally has no legal background. *Id.*

41. 96% of defendants test positive for cocaine. *Id.*

begin on level one, which can monitor an unlimited number of defendants, and are tested once a week on specific days.<sup>42</sup> If a defendant continues to test positive then he is moved to level two and testing is increased to two or three times weekly. If the defendant still does not control his drug problem or otherwise violates his release conditions, he is moved up to level three or four, if there are open slots, in which he either receives daily visits from his case worker or has an electronic tracing device placed on him for continual monitoring. If there are no openings in level three or four and the defendant continues to test positive, the judge may reincarcerate for three to five days and then reissue a new contract of conditions. If the defendant violates the new conditions he will be reincarcerated until trial.

#### *F. Los Angeles County, California (L.A.)*<sup>43</sup>

Los Angeles County began pretrial drug testing of felons in April 1990, on a phase in basis.<sup>44</sup> The program is funded with \$500,000 in federal grants and \$300,000 in county money.

Prior to their bail hearing, approximately six days after they are arrested, most defendants are released to the pre-trial services agency. The agency assesses whether the felon is a likely drug user requiring drug monitoring based on his prior criminal history, the crime charged and other available information. Then, if testing is recommended, the agency performs a risk assessment on the defendant to determine how often testing should occur.<sup>45</sup> Selected defendants are tested for five drugs: cocaine, opiates, PCP, barbiturates and

42. Because of the physical location of the jail, Maryland gives the defendants specific days that they must come in to be tested. Although Prince Georges County, Maryland is a major metropolitan area, the jail is in a rural area which is difficult to get to. Defendants must arrange rides or take public transportation, therefore, they are given adequate notice to get there. *Id.*

43. Unless otherwise noted, the information for this section is from a telephone interview with Terry Clark, Assistant Director Pretrial Services Division (Oct. 23, 1990).

44. The committee which participated in fashioning the drug testing procedures included the Presiding Judge for the Los Angeles Municipal Court, the Chairman of the Presiding Judges Association, the Area Commissioner for the Sheriffs Department, the Director for Bureau of Central Operations for the District Attorneys Office, the Chief Probation Officer for the Probation Department, the Chief Medical Examiner for the Coroners Office, the Director of Criminal Court Operations and the Assistant Director for Pre-trial Services. *Id.*

45. The court has given pretrial services blanket authority to test felons according to the agency's risk assessment.

amphetamines. The method of testing used is Radio-Immunoassay (RIA). Positive tests are confirmed upon request using gas chromatography/mass spectrometry (GC/MS).

Pretrial services uses the color code system to randomly monitor the selected felons. The frequency of testing is determined by whether the positives are escalating or decreasing. If the defendant continues to test "dirty," the frequency is escalated; if the defendant continues to test clean, the frequency is decreased. Defendants who test positive are given a verbal warning after the first positive, followed by a written warning for a second positive test result. A third positive test result requires the defendants to go for treatment and after four consecutive positive tests, their release may be revoked.

Progress reports for each defendant on the pretrial release program are submitted to the court at each court appearance. The reports do not become part of the public record but are placed in the defendant's confidential court file, not to be released without a court order. The district attorney and the prosecutor also receive a copy of everything submitted to the court.

The district attorney is under an agreement that a positive drug test cannot be used for additional charges. However, the probation department can use a positive drug test as a violation to revoke probation if the defendant is on an active grant of probation with a drug prohibition. Positive test results are not released to the probation department until the case is complete.

According to Terry Clark, Assistant Director, Pretrial Services Division, the L.A. program has accomplished its purpose. The problems with the program stem from the large number of court districts the agency has to work with. There are twenty-five municipal court districts and every judge has his own opinion of what works and what does not. Communicating the agency's rationale for the proposed conditions of release or the proposed sanctions for failure to comply with the release conditions, according to each courts' preference, creates confusion. L.A. is now in the process of looking at the concurrence rate as to whether the judge follows the agency's recommendation to see what they can do to improve it.<sup>46</sup>

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46. Telephone interview with Ralph Rodgers, Senior Investigator at Pretrial

*G. Pima County, Arizona (Tucson)*<sup>47</sup>

Tucson began fullscale pretrial drug testing in October 1987 and has had to repeatedly scale down testing because of limited funds. The first three years was entirely funded with federal grants from the Department of Justice. As is typical, modifications of the program, including what drugs were tested for and when testing occurred, ensued after each year,

During the first year, all felony defendants were tested for five drugs, four standard drugs (marijuana, cocaine, opiates and amphetamines) and one rotating drug (rotated barbiturates and benzo-diazaphine). Low results prompted the agency to stop testing for marijuana and the two rotating drugs after the first year.

During the first two years, the defendant was tested for drugs prior to his initial court appearance so that the results of the test could be incorporated in a recommendation to the judge. The judge, prosecutor and defense counsel were notified if the defendant initially tested positive. If the judge wanted to know what drug the defendant had been using, an agent from pre-trial services attending the hearing would provide the requested information. Pretrial services would also file a notice with the court every time the defendant tested positive and send a similar notice to the prosecutor and the defense counsel. The court had discretion on whether this information became part of the public record of the hearing, depending upon whether the judge put the notice on file.

During the third year of the program, the agency discontinued drug testing prior to the initial appearance and switched to using a risk assessment scale to determine whether they would recommend a defendant be monitored for drug usage pending trial. The whole process went more smoothly as the bugs worked out during the third year, but the agency was forced to drastically reduce testing when the federal funds ran out. Cost was the primary reason given for narrowing pretrial drug testing to only those defendants

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Services (Mar. 30, 1992).

47. The information in this section is from a telephone interview with Kim Holoway, Director of Pretrial Services (Oct. 23, 1990).

who have a known drug problem. In July of 1991 the program again was scaled down because of limited local funding. The funding went from \$15,000 to \$2,000. Now only defendants with known drug problems that are thought to be problematic are monitored. Ms. Holoway, the Director of Pretrial Services, said the cutback in funding was strictly a financial issue; the commissioners and judges supported the program.<sup>48</sup>

#### *H. Harris County, Texas*<sup>49</sup>

Drug testing in Harris County began in 1985 in one court, with seventy-five percent of the funds coming from the Law Enforcement Administration Association (LEAA) and the balance from county funds. It now operates exclusively on local funds, with the majority of courts participating in drug monitoring pending trial.<sup>50</sup> What is most unique about Harris County drug testing is that there are no written procedures for pretrial drug testing. The courts have discretion to require any defendant to be tested as a condition of release and monitored while on release.

Following arrest, each case is reviewed by the district attorney. If charges are filed, if bond is set, and if the defendant cannot make bond, there is a hearing, generally within twenty-four hours, in which the judge decides under what conditions the defendant can be released without bond. Defendants are only tested for drugs if a court mandates testing or monitoring as a condition of release.

All thirty-six courts in Harris County use different criteria for setting release conditions. In one court, everyone released must be tested for drugs, whether charged with a felony or a misdemeanor. In some courts, defendants are tested if they are arrested for any of five charges. In other courts, judges make a probability assessment which considers the defendants drug history, criminal charge, probation records, and other known information. If defendants do not

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48. Telephone interview (Mar. 29, 1992).

49. The information in this section is from a telephone interview with Carol Oeller, Director of Pretrial Services (Oct. 29, 1990).

50. The average number of defendants screened per month in 1989 was fifty-eight. One thousand four hundred and forty-two specimens were tested with two hundred and twenty-nine confirmed positive tests. Sixty-eight of the defendants tested positive for cocaine. *Id.*

consent to the court mandated testing, they are not released.

Selected defendants are tested for cocaine, amphetamines, opiates, PCP, barbiturates, methadon and marijuana. The method used for testing is the standard EMIT. If the test is positive, the medical examiners office, which receives the samples and performs the testing, retests using both GC/MS and TLC to confirm. This ensures that reincarceration or revocation of probation is deserved.

Typically, judges require defendants to be monitored twice weekly. If the test is positive the judge is verbally notified of which drug(s) the defendant tested positive for.<sup>51</sup> Defendants are allowed to test positive for a week or so to let the drugs work out of their system. If defendants test positive after the first week then they are sent back to jail. The agency has tried to work with the judges recommending increasing sanctions for defendants who consistently test positive, however, judges in Harris County do not believe in graduated sanctions.

### III. DIFFERENCES IN THE PRETRIAL DRUG TESTING PROGRAMS

Although all six of the pretrial drug testing programs, except Harris County, began following the D.C. model, each county has modified their program primarily because of research and budget limitations. Differences in interpretation include: (1) who is tested; (2) which drugs are tested for; (3) the method used for testing and retesting if positive; (4) at what stage arrestees are tested; (5) whether monitoring is scheduled or random; (6) how the drug monitoring results are reported to the judge; and (7) what sanctions the judge imposes for testing positive.<sup>52</sup>

#### A. *Who is Tested*

Unlike the D.C. model that tests all arrestees, four of the five jurisdictions (Los Angeles, Tucson, Portland, and Mil-

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51. For confidentiality reasons nothing in writing is submitted to the judge and the pre-trial service records with the drug testing results are kept confidential. However, if the defendant is reincarcerated the prosecutor and defense council usually know why. *Id.*

52. Harris County is not included in the summary of differences because it is not a federal pilot project and has no written polices and procedures.

waukee) test only felons.<sup>53</sup> The reasoning is that felons have a higher probability of rearrest and skipping town. Jurisdictions that have limited funds must focus on those with the highest probability of committing future offenses.

### *B. What Drugs are Tested For*

The goal in pretrial drug testing is to find which drugs in the area are most abused and then to test defendants for those drugs. To reduce the cost, jurisdictions screen different drugs and drop those tests which defendants rarely test positive for.<sup>54</sup> D.C. tests for five drugs: cocaine, opiates, amphetamines, PCP and methadone. All five of the jurisdictions test for cocaine and opiates. In addition, four of the five test for amphetamines and two test for PCP.<sup>55</sup> Other drugs tested for include marijuana,<sup>56</sup> benzo-diazepines,<sup>57</sup> and barbiturates.<sup>58</sup>

### *C. Method Used for Testing and Retesting*

D.C. uses EMIT, as does four of the five jurisdictions,<sup>59</sup> as the standard method of testing because of its cost efficiency. EMIT costs approximately eight dollars per test. In contrast, GC/MS, generally used by large corporations, costs approximately eighty dollars per test. Although EMIT is less accurate, EMIT is 95% accurate compared to GC/MS which is 99% accurate, such a difference is not crucial when the court is only testing to decide whether drug monitoring is appropriate. If the test is disputed or if it is used for revoking a defendant's release or probation, all of the jurisdictions, except D.C., use another methodology to retest, generally GC/MS.

### *D. Scheduled or Random Testing*

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53. Maryland tests everyone that fails to make bond.

54. The average number of drugs tested for is three. Los Angeles and Milwaukee test for five drugs.

55. Los Angeles, Portland, Milwaukee and Tucson test for amphetamines. Los Angeles and Maryland test for PCP.

56. Milwaukee only.

57. Milwaukee only.

58. Los Angeles only.

59. Los Angeles uses Radio-Immunoassay (RIA) to test and GC/MS to confirm positive tests if requested.

Because of the large numbers of defendants tested in D.C., because of the test location in Maryland, and because of limited funds in Tucson, testing is done on a regular schedule. The drawback of using a schedule is that some defendants may circumvent the system by planning their drug usage around the tests. Jurisdictions, however, must weigh practicality against the chance that some defendants may evade the system.

Three of the five jurisdictions are able to use random monitoring which is the most effective. Los Angeles randomly monitors defendant,s drug usage using the color code system, requiring defendants to call in each day to see which color must report that day for testing. Portland uses a number system similar to the color code system, requiring defendants to call in each day to see which number must report for testing. Wisconsin randomly tests defendants by giving them a monthly bus ticket and requiring them to call in each day to see whether they need to come in and be tested.

#### *E. Reporting Test Results to Judges*

All of the jurisdictions report, either verbally or in writing, whether the presence of specific drugs were found in a defendant's urine by using the general phraseology: substance abuse is "indicated," "not indicated" or "undetermined." If the judge wants to know what the defendant tested positive for, he can ask an agent of pretrial services. Typically, however, the judge is only concerned with whether the defendant is using drugs not what particular drugs he is using.

The District of Columbia and Portland give the court a written report of each defendant's drug tests. Because the report becomes public record, the specific drugs which the defendant tested positive for are not included on the report for confidentiality reasons. Los Angeles and Maryland also submit written reports to the judge, however, the report, in these places, does not become part of the public record. Wisconsin and Tucson have stricter confidentiality requirements, which require the test results to be verbally reported to the judge. This helps to ensure that the test results are not used improperly.

### *F. Sanctions for Testing Positive*

Jurisdictions are split on how to implement sanctions against defendants who continue to test positive. Three of the counties believe defendants must stop "cold turkey," in contrast to the other two who believe defendants should not be punished for testing positive if they are trying to stop and are having a difficult time.

The District of Columbia, Los Angeles, and Tucson have escalating sanctions for defendants who continue to test positive. Initially, defendants are given a grace period of a week to ten days to get the drugs out of their system. After the grace period, defendants typically receive a verbal warning after the first positive, a written warning after the second positive, intensified testing and or a recommendation for treatment after the third positive and a request for a show-cause hearing<sup>60</sup> after the fourth or fifth positive.

Courts in Portland and Wisconsin are more lenient in their sanctioning of defendants monitored on release. If the defendants are appearing and testing positive, the courts will encourage the case workers to continue to work with the defendants and try to get them into treatment. If defendants are not appearing for testing or otherwise violating release conditions and testing positive, the judge may revoke the release. Research has shown that it may take weeks for a defendant to overcome a drug addiction even if he is trying. A defendant may, therefore, test positive for weeks until he can get enough control to stop.

## IV. TRENDS IN PRETRIAL DRUG TESTING

All of the federally funded pretrial drug testing programs initially involved two components: (1) a drug test after arrest, while the defendant is in custody prior to arraignment, and (2) drug testing as a condition of release for defendants with indications of drug use.<sup>61</sup> Four of the five jurisdictions following the D.C. model have terminated the initial drug test, believing it more cost effective to focus resources on

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60. In a show-cause hearing a defendant must show why he should not be reincarcerated.

61. Indications of drug use include: positive test in custody, self-report, drug history or current drug charges.

drug monitoring. Only Maryland has continued the initial drug test, which it believes significantly helps judges set release conditions for safeguarding the community.

The jurisdictions that have discontinued the first component claim that initial drug testing is not as useful in identifying drug users as it is in identifying what the offender population is using and to what extent. Those jurisdictions advocate that pretrial services should perform initial tests for about a year to learn what to test for and how frequently to test and then terminate the first component and focus all of the resources on the second component to expand limited treatment facilities.

If states could expand their treatment facilities, they could help defendants overcome their addiction rather than just deter their usage with testing. In most communities there are long waiting lists for treatment services, making it difficult to provide defendants with counseling for drug abuse prior to trial.

States should also work on expanding jail capacity to provide room for defendants who are reincarcerated because they continue to test positive. Defendants who have their release revoked because they continue to test positive and then are re-released within twenty-four hours because of insufficient jail capacity cannot be expected to take the sanction seriously.

Those who support continuing use of drug testing prior to arraignment assert that the cost<sup>62</sup> of performing initial drug testing is worthwhile because it provides information that is valuable in determining which arrestees are at high risk of pretrial misconduct.<sup>63</sup> "Without testing, drug use by arrested suspects is at best difficult. Research in New York City shows that only about half of the arrestees who test positive admit in confidential interviews to recent drug use."<sup>64</sup> Studies have also indicated that "risk assessment factors," such as a criminal record for drug abuse, do not distinguish between defendants that are casual drug users,

62. "The average cost per day in jail in 1987 for one inmate was approximately fifty-seven dollars, whereas the average cost of a drug test was approximately eleven dollars. Pretrial drug testing puts judges in a position to release a larger percentage of the defendants under less risky conditions." Stewart, *supra* note 10, at 76.

63. Christy Visser, *Using Drug Testing to Identify High-Risk Defendants on Release: A Study in the District of Columbia*, 18 J. OF CRIM. JUST. 321 (1990).

64. Stewart, *supra* note 10, at 69.

distinguish between defendants that are casual drug users, whose pretrial misconduct risk is low, and defendants that are periodically using two or more drugs and tend to be more dangerous.<sup>65</sup> Results from statistical studies on the association between urine test results and pretrial misconduct show that drug tests do provide information that is associated with pretrial misconduct over and above the information typically available to judges.<sup>66</sup> Because drug use correlates so strongly with increased risk of flight and risk to community safety, it is important that judges have information regarding a defendant's drug use by testing the defendant's urine after arrest and prior to release.<sup>67</sup> The director of the D.C. program, John Carver, is the strongest supporter of initial drug testing of all defendants. Judges are also strong supporters of the two part program, initial drug testing and systematic drug monitoring. Judges are more willing to release defendants who might previously have been detained on high bond if the judge had suspected drug use (e.g., due to a drug-related charge or history of drug abuse) on the condition of participation in a monitoring program, with the frequency determined by the results of the initial drug test.

Preliminary findings show that monitoring defendants' drug use has been a strong deterrent to drug abuse, both during the pretrial period and as a probation condition.<sup>68</sup> Accordingly, more jurisdictions should be allocating funds for drug testing and monitoring and tracking the results. Unfortunately, jurisdictions have not been allocating funds. Because of the recession's effect on counties, jurisdictions have had to scale back or phase out their pre-trial and in some cases also their post-trial testing programs. The trend may be to replace the bail system with a pretrial release system better able to monitor and help defendants with drug problems, but the ability to apply this research and reap the results may have to wait for an upswing in the economy.

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65. *Id.*

66. Persons testing positive for heroin or cocaine have a higher probability of failure to appear, while those testing positive for PCP are significantly more likely to be rearrested. Smith et al., *supra* note 10, at 123-24.

67. CARVER, *supra* note 4, at 3.

68. Stewart, *supra* note 10, at 74.

## V. CONCLUSION

Research has shown that defendants commit crimes at much higher rates during periods when they are actively using drugs than during times when they are drug free. Acting on this research, the NIJ implemented seven urine drug testing pilot programs. These programs rest on the hypothesis that the risk of pretrial misconduct can be reduced if defendants who use drugs can be identified at arrest, their release conditioned on the requirement to remain drug free, and their compliance with that condition monitored by mandatory drug testing during the pretrial release period. In each county the judiciary has supported both initial drug testing and drug monitoring.

Independent analysis of the District of Columbia program's results along with the other five jurisdictions still testing indicates that systematic pretrial drug testing does decrease the risk of defendants' pretrial misconduct (i.e., failure to appear for hearings and rearrest pending trial). This is due in part to the test which enables the agencies to detect illicit drug use quickly and intervene expeditiously. Further, approximately two-thirds of the defendants assigned to the testing stayed with the program and overcame their drug problem.

Evidence of a strong correlation or relationship between pretrial drug testing and a reduction of pretrial misconduct is the foundation for the NIJ's recommendation to the President. The President, in his National Drug Control Strategy encourages adoption of drug testing programs throughout the criminal justice system.

*Cynthia Durrant Jensen*