ASSESSMENT OF PRETRIAL URINE-TESTING IN THE DISTRICT OF COLUMBIA

MONOGRAPH NO. 3

THE VIEWS OF JUDICIAL OFFICERS

SUBMITTED TO

NATIONAL INSTITUTE OF JUSTICE
U.S. DEPARTMENT OF JUSTICE

JUNE 1987

TOBORG ASSOCIATES, INC.

107744

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June 1987

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A NOTE ON THE MONOGRAPH SERIES

Beginning in March 1984, a comprehensive pretrial urine-testing program was implemented in the criminal justice system of the District of Columbia, with funds awarded by the National Institute of Justice (NIJ). The testing program is operated by the DC Pretrial Services Agency (PSA), an independent agency of the DC Government that is charged by law with the responsibility for (1) interviewing all arrestees to determine their eligibility for pretrial release; (2) making recommendations to the court as to appropriate terms and conditions for pretrial release in all criminal cases; and (3) monitoring compliance with pretrial release conditions for all defendants, except those released on surety bond.

Unless they are charged with federal offenses or relatively minor crimes, arrestees in Washington, DC are brought to the DC Superior Court lockup. PSA tests virtually all adult arrestees coming through the DC Superior Court lockup for the presence of selected drugs in their urine at the time of arrest; these drugs are opiates (primarily heroin), cocaine, phencyclidine (PCP), amphetamines and methadone. Test results are made available that same day to PSA's in-court representatives, who are present at the bail-setting hearing to make pretrial release recommendations to the court.

Before PSA's urine-testing program began, the only release option specifically tailored to the needs of drug users had been referral to treatment. With the advent of the drug testing program, however, a new release alternative became available for drug-using defendants, namely, placement in PSA's program of periodic urine-testing before trial. Continued drug use by a defendant, as shown by the urine-test results, is considered a violation of pretrial release conditions and is reported by PSA to the court, which may impose sanctions for the violation. Because of the increased likelihood that sanctions would be imposed for such a violation of release conditions, placement in this program was considered likely to encourage defendants to forego drug use during the pretrial period. This in turn was considered likely to reduce defendants' pretrial criminality, given the findings from prior research that drug use and crime are often related.

PSA's urine-testing program has been evaluated by Toborg Associates, Inc., under a separate, parallel NIJ grant, distinct from PSA's grant for program operations. The findings from that study are the subject of a series of six monographs. Each is briefly described below, so that interested readers can quickly identify the individual monographs of greatest utility to them.

Background and Description of the Urine-Testing Program (Monograph No. 1) presents background information on drug-crime relationships generally and, in particular, in the District

of Columbia; on the workings of the DC criminal justice system; and on the overall organization and mission of PSA. Additionally, it provides a detailed description of the operations of PSA's urine-testing program, including discussions of the various components of the program and of the way in which the program was implemented.

Analysis of Potential Legal Issues (Monograph No. 2) discusses a number of areas where legal challenges conceivably could arise, stemming either from Constitutional provisions or from established doctrines in American criminal procedure. The Constitutional issues pertain to the right to be free from (1) illegal searches and seizures; (2) self-incrimination; and (3) excessive bail; as well as the rights to be accorded due process of law and equal protection of the law. These various rights stem from the Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution. Possible challenges under criminal procedure law include the adequacy of chain-of-custody procedures for handling urine specimens; the accuracy of the urine-testing technology used; and the right of the defendant to confront and rebut government witnesses and to be accorded an administrative hearing in the face of reported violations of a court order.

The Views of Judicial Officers (Monograph No. 3) presents the findings from interviews conducted approximately one year after the start of PSA's urine-testing program with 25 DC Superior Court hearing commissioners and trial judges who had recently heard criminal cases. Topics covered include the ways in which judges use PSA's urine-testing information, their views about how the current drug testing program compares with the situation that existed before PSA's program began, and their opinions about the program's impact and about the nature of the drug-crime problems in the District of Columbia.

Analysis of Drug Use among Arrestees (Monograph No. 4) presents major findings from PSA's urine-testing of arrestees brought through the DC Superior Court lockup. The monograph discusses the rates and types of drug use found; the characteristics of users of various types of drugs, as compared with non-users of drugs; how urine-test results compared with defendants' self-reports of drug use; and the pretrial release rates of users of various types of drugs.

Periodic Urine-Testing As a Signaling Device for Pretrial Release Risk (Monograph No. 5) presents a statistical analysis of the relationship between the behavior of defendants ordered by the court into PSA's pretrial urine-testing program and subsequent observation of pretrial misconduct, that is, pretrial rearrest or failure-to-appear for court. In particular, the monograph considers whether the relative success of defendants while in the urine-testing program is associated with different rates of pretrial misconduct and whether the urine-testing program

can be viewed as a "signaling device" by which defendants identify themselves--after they have been released to await trial--as posing either high or low pretrial release risks.

The Efficacy of Using Urine-Test Results in Risk Classification of Arrestees (Monograph No. 6) considers the extent to which the initial urine-test results from the lockup testing can help to classify defendants as to differences in expected pretrial misconduct (pretrial rearrest and failure-to-appear for court). The monograph presents a statistical analysis of this issue and uses a technique which takes into account the "selection bias" caused by the facts that (1) some arrestees were not tested; (2) some arrestees were not released before trial, so no pretrial misconduct could be directly observed for them; and (3) some released defendants had conditions imposed on them that may have affected their underlying propensities to engage in pretrial misconduct. The results of the analysis show the additional exlanatory power in predicting misconduct stemming from information on drug use, as determined by the initial lockup urine-test.

THE VIEWS OF JUDICIAL OFFICERS

A. Background

Beginning in March 1984, a comprehensive pretrial drug testing program was implemented in the criminal justice system of the District of Columbia, with funds awarded by the National Institute of Justice (NIJ). The testing program is operated by the D.C. Pretrial Services Agency (PSA), an independent agency of the D.C. Government that is charged by law with the responsibility for (1) interviewing all arrestees to determine their eligibility for pretrial release; (2) making recommendations to the bail-setting judge as to appropriate terms and conditions for release in all criminal cases; and (3) monitoring compliance with release conditions for all defendants, except those released on surety bond.

Unless they are charged with federal offenses or with relatively minor crimes, arrestees in Washington, D.C., are brought to the D.C. Superior Court lockup.[1] PSA tests virtually all adult arrestees coming through the Superior Court lockup for the presence of selected drugs in their urine at the time of arrest. PSA's Drug Detection Center operates a stationary laboratory in the D.C. courthouse. Once provided by arrestees, urine samples are taken by PSA staff directly from the court cellblock to the laboratory, located in the same building, for analysis.

Using state-of-the-art laser technology (the EMIT system), PSA analyzes each sample for the presence of five (5) drugs: opiates (primarily heroin), cocaine, phencyclidine (PCP), amphetamines, and methadone. PSA's Drug Detection Center staff employs rigorous chain-of-custody procedures and quality control procedures from the time the urine sample is collected through the time the results are reported at the bail hearing.

Test results are made available that same day to PSA's in-court representatives, who are present at the bail-setting hearing to make pretrial release recommendations to the court.[2] In Superior Court release decisions now are made by special magistrates or "hearing commissioners."[3] After those decisions have been made, most cases are assigned to particular judges, who are then responsible for all subsequent actions on those cases--from pretrial hearings through adjudication and sentencing.[4]

Under D.C. law, hearing commissioners may release defendants on their own recognizance (OR); on nonfinancial conditional release (i.e., subject to certain restrictions on travel, association, behavior, etc.); on financial conditions (i.e., cash, surety or deposit bond); in the custody of a third party;

or may preventively detain certain classes of "dangerous" defendants for whom no condition or combination of conditions will protect against flight or danger to the community. (D.C. Code ss 23-1321 et seq.)

Among the release options available for drug users in the District of Columbia are (1) referral to a drug abuse treatment program; or (2) placement in a urinalysis surveillance program, run by PSA, that provides periodic urine testing before trial. Continued drug use, as shown by periodic PSA urine tests, is considered a violation of release conditions and is reported by PSA to the court, which may impose sanctions for the violation.

PSA's drug testing program is being evaluated by Toborg Associates, Inc., under a grant from NIJ. This evaluation is designed to analyze drug-crime relationships among arrestees in the District of Columbia and to assess the effectiveness of urine surveillance at controlling and reducing crime-on-bail and pretrial drug usage among adult arrestees. Prior research suggests that pretrial drug use increases the risk of both failureto-appear and crime-on-bail.[5] But what is the true nature and extent of illegal drug use among adult arrestees? Which types of drug users tend to commit which types of offenses? Can illegal drug use be controlled, and perhaps reduced, by urine surveillance, coupled with swift enforcement by the criminal justice system of violations? If so, will these interventions result in lower rearrest rates, i.e., less pretrial crime? These and similar questions are being addressed as part of the Toborg Associates study.

Preliminary findings from the lockup testing show high rates of drug use among arrestees in Washington, D.C. Since PSA's drug testing program began in March 1984, more than 30,000 urine tests have been conducted for defendants in the Superior Court lockup. Each month more than half the defendants tested have been found to have used drugs shortly before their arrest. In December 1986, 68 percent--more than two-thirds--of the arrested tested had used drugs recently, and approximately one-third of the tested arrestees had used more than one drug.

The drug test results have identified three major drugs of abuse among Washington, D.C., arrestees: PCP, cocaine and heroin. In a typical month, about 35 to 40 percent of the tested arrestees are PCP users, and about 20 percent are heroin users. These percentages have been relatively stable since PSA's drug testing program began. On the other hand, the use of cocaine has increased dramatically during the two years that PSA's drug testing program has been in operation: in March 1984, 15 percent of the tested arrestees were cocaine users; by December 1986, this percentage had increased to 43 percent.

Extensive analysis of both the lockup testing results and the data from PSA's pretrial urine surveillance program is now being conducted as part of the Toborg Associates study. In addition to this data analysis, the study includes assessment of local criminal justice practitioners' perspectives about the drug testing program. As part of that assessment, this monograph presents the findings from interviews conducted approximately one year after the start of PSA's drug testing program with 25 Superior Court commissioners and trial judges who had recently heard criminal cases.[6] The judges interviewed were selected to provide variation in terms of the extent of use they made of the drug testing program. Additionally, an effort was made to pick judges with diverse backgrounds in terms of ethnicity, sex, age, length of time on the bench, and prior experience (e.g., prosecutor, defense attorney, etc.).

Most of the interviews were conducted in person in chambers by the Principal Investigator and/or Co-Principal Investigator of the Toborg Associates evaluation project, although a few judges preferred to be interviewed over the telephone. A typical interview took 45 minutes to one hour to complete.[7] The following were among the topics covered:

- the ways in which the drug testing information is used--for making release decisions, for monitoring compliance with release conditions, and for assisting in determining appropriate sentences;
- how the current drug testing program compares with the situation that existed before PSA's program began;
- the impact of the drug testing program on jail crowding, court workload, drug use, pretrial crime and appearance for court;
- which specific components of PSA's drug testing program are most useful;
- whether any of PSA's drug testing activities should be either reduced or expanded;
- whether there are any unresolved legal issues with regard to PSA's drug testing program;
- their views about the nature of the drug abuse problems in the District of Columbia and the relationship between drug use and crime; and
- whether there are any unmet needs concerning local drug abusers who are involved in the criminal justice system and, if so, how those needs could best be met.

The views of the judges and commissioners interviewed--as reflected in representative comments taken from among the large volume of responses collected--about these topics are discussed below.

B. Uses of Drug Testing Information

Most of the judicial officers interviewed reported that they made "a great deal" of use of PSA's drug testing information. In general, judges with misdemeanor calendars reported much greater use of the information than those with felony calendars, but this was so because more misdemeanor defendants were released on nonfinanciual forms of release before trial; many felony defendants are released on surety bond or end up being detained--usually due to an inability to post bond in the amount set.[8]

Specific uses of the drug test results include (1) assisting in making release decisions; (2) monitoring defendants' compliance with drug-related conditions of release; and (3) assisting in making sentencing decisions. These are each discussed below.

(1) Assisting in Making Release Decisions

Information on defendants' drug use is made available to the commissioners for use in setting appropriate conditions of pretrial release. Drug users who are released on nonfinancial conditions are typically referred to PSA for either referral to a drug abuse treatment program or placement in PSA's urine surveillance program. If drug test results are not available when the release decision is made (e.g., because the defendant refused the drug test, was unable to urinate, or was brought to court too late in the day to be tested), the defendant will often be ordered by the bail-setting commissioner as a condition of release to report to PSA for a drug use evaluation. Such defendants are tested by PSA, and those who are found to be drug users are referred to treatment or placed in PSA's urine surveillance program.

In general, the commissioners reported that they found the drug use information helpful when making release decisions. They also noted, however, that they consider a variety of other factors as well when assessing release risk; these include charge, prior record, pending cases, family situation, and so on. Thus, the drug use information provides additional insight--through factual, verifiable information--about the defendant that is helpful when making pretrial release decisions, but it does not dominate the release decision-making process.

(2) Monitoring Compliance with Release Conditions

When drug-using defendants are released and are placed in PSA's pretrial urine surveillance program, PSA monitors their progress and reports continuing illegal drug use to the court. A

key to the success of the urinalysis surveillance program has been the willingness of most of the judges interviewed to impose sanctions when defendants fail to comply with the requirements of the program.[9] Most judges said they always, or almost always, hold hearings when PSA reports that defendants have not complied with the requirements of the surveillance program.[10] These judges consider it essential for defendants to know that "the court means business" with drug-related release conditions. Such hearings are also believed by the judges to have potential value in deterring future problems. One judge described this possibility as follows: "Drug-using defendants are headed for more serious trouble, but they may avoid developing an identity with the drug culture and may leave criminality if they are closely monitored and swiftly sanctioned."

When asked if surveillance seemed most effective with certain types of defendants, judges' responses focused in on young people--especially if they have a good family support system--as well as novice or experimental users, first offenders or persons with short criminal records, PCP users, and employed persons. Concerning those defendants for whom surveillance was thought likely to be relatively ineffective, judges typically said long-time drug users--especially heroin addicts, "hardened" offenders, or repeat offenders who did not fear incarceration.

More than half the judges reported that the most common action taken at violations hearings was to find the defendant in contempt of court for failing to comply with drug-related conditions of release, although several judges noted that they would suspend much of the contempt sentence. In these instances the typical action was to sentence the defendant to 30 or 60 days in jail for contempt of court but to suspend all but two or three days of the sentence.[11] According to the judges who use this approach, it provides an additional "hold" over defendants when they are subsequently released, because they know the balance of the suspended contempt sentence may be imposed if they continue to violate their release conditions in the original case by using drugs.

A contempt sentence for violating pretrial release conditions, while common, is not automatic. Other actions that may be taken include outright revocation of pretrial release in the original case; amending (tightening) the original release conditions--for example, by ordering a defendant who had been in the surveillance program into treatment--and the setting of a money bond. Bondsetting, it was noted, can occur under D.C. law only for defendants who pose flight, as opposed to community safety, risks. However, judges commented that most drug-users pose both types of risks, so this limitation does not seriously hinder the setting of money bond. A more serious drawback is that bonded defendants cannot participate in PSA's surveillance program, because the Agency has no statutory authority to monitor release conditions for defendants on bond.[12]

Several judges commented on the need for an immediate response to violations of release conditions. These judges felt that a short contempt sentence, imposed immediately--with the defendant taken into custody at the end of the hearing--was far more effective than a harsher sanction--even of longer incarceration--whose imposition was delayed. These judges further commented that drug users are often young persons who lack self-discipline and the ability to think about the long-term consequences of their actions. Thus, immediate, short-term responses are what is really needed to get their attention and force them to recognize the seriousness of their actions.

One judge tries to achieve these goals by sentencing drug condition violators to one day of incarceration for contempt of court "to give the defendant a chance to cool his heels and think things over." Such a sentence can be served in the court's lockup, so scarce detention space in the city's overcrowded jail is conserved, and the need to book persons into and out of the jail--which consumes much administrative time and effort--is avoided.

In addition to the need for immediate response to drug use, judges often commented on the need to be both fair and consistent with defendants. Following through with the imposition of sanctions when defendants violate release conditions was seen as an important part of this overall philosophy. As one judge pointed out, "You are not just dealing with the defendant in front of you. You must also consider any other defendants who may be in the courtroom. They'll see what you do and know if you are consistent. That's why you need to set rules and let defendants know what they are supposed to do and what will happen if they do or do not follow the rules. You have to set up a system of incentives and rewards and then stick to it."

When judges were asked about the most important considerations that affected their decisions about the types of sanctions to impose at violations hearings, the factors cited most often were the type of drug used (with PCP and heroin of particular concern); frequency of drug use; present charge; prior record, especially a record of violent offenses; and age. Concerning drug use, one judge expressed more tolerance for "hard-core" cases (e.g., heroin addicts) than for experimental or "recreational" users of drugs, because of the comparatively greater difficulty physically addicted defendants may experience in becoming drug-free.

Another judge noted that D.C. heroin addicts must sometimes wait several weeks to enter treatment, because of the waiting list at the city-operated treatment agency, and drug use before treatment entry was usually overlooked. In contrast, because of their potential for random, unpredictable violence, this judge often jails PCP users who violate their release conditions by continuing to use drugs. PCP users are not viewed by this judge as physically addicted to the drug ("they just like it") and

could, therefore, presumably forego its use with little difficulty. Cocaine use was viewed much the same way by this judge, although concern was expressed that persons who freebase cocaine may indeed become physically addicted and need treatment to overcome their craving for the drug. Likewise, individuals who use both cocaine and heroin in combination were considered by this judge to be physically addicted to drugs.[13]

One judge noted that the most important concern at a violation hearing is to see if the defendant had made any effort to improve. If the test results are mixed, this judge concludes that the defendant is making some effort to change. If the test results show consistent, continued drug use, however, this judge typically jails the defendant for violation of release conditions.

Several judges observed that there were circumstances where they would give the defendant another chance. This apparently occurs most often for defendants who dropped out of a treatment program. Judges will assess the reasons for dropping out on a case-by-case basis and may allow the defendant to re-enter the program--with a warning that further violations will not be tolerated.

Judges reported various ways of trying to "coerce" defendants who have violated their "no drug use" release conditions into drug treatment. For example, one judge will jail a violator who has previously refused treatment and order referral to treatment as a subsequent release condition. Providing "a taste of jail" is viewed as an effective way to increase the incentive for a defendant to enter treatment and do well in it. A similar sentiment was expressed by the judge who said, "[y]ou need clout over the defendant to keep the person in treatment." Another viewpoint expressed was that "if a heroin addict wants to change, then treatment can help. You must either frighten drug users or have something positive happen that makes them want to change."

Although most judges mentioned a variety of criteria as important in deciding on sanctions, one judge said simply that the only issue was whether the defendant was in compliance with release conditions. Any defendant not in compliance was typically given two weeks to comply; if this did not occur, the defendant was "stepped back" (i.e., release revoked and sent to jail).

In general, judges reported that the extent of overcrowding in the D.C. Jail had little effect on their decisions about whether to impose sanctions for violations of pretrial release conditions. As one judge said, "[i]f you start thinking about jail overcrowding, you could never lock anyone up for any reason." However, a few judges commented that the overcrowding problem forced them to think of innovative ways to enforce

release conditions, including short-term confinement of only a day or a few weekends, as distinguished from revoking release altogether.

In addition to responding to PSA's reports of non-compliance with release conditions, judges may take additional actions in response to drug use or suspected drug use. For example, one judge requires PSA to report all drug test results for defendants on his trial caseload to him, and he issues a "show cause order" whenever a defendant starts to have positive urine tests.[14] Thus, action is taken on defendants before they formally violate the conditions of the surveillance program. According to this judge, an early response is essential, because it lets the defendant know that the court views drug use seriously.

Also, several judges observed that they always order spontaneous urine tests ("one-tests") for defendants who come to court late, because such tardiness may be a symptom of active drug use. One judge reported that during a two-week period, 21 defendants had come to his courtroom late for regularly scheduled appearances, and urine tests showed that 17 of them were using drugs.

The current willingness of judges to hold violations hearings on drug conditions is one of the most striking results stemming from the initiation of PSA's drug testing program. Before the program began, hearings were rarely held for any release conditions violations. When judges were asked what they thought accounted for this change, there were three broad responses. First, the implementation of the drug testing program itself was seen as largely responsible for the change. The availability of hard data from a reliable source, coupled with the immediate availability of PSA staff to testify at violations hearings, was seen as a key reason for the changed judicial practices. Hearings can be streamlined, particularly when the violations are due to continued drug use as compared with failure to show up for testing or treatment, because the validity of the test results is rarely disputed.[15] As one judge said, "[n]ow you've got them cold. The hearings are cut and dried." Another judge commented, "[t]he testing program itself has made the difference [in the court's willingness to hold violations hearings]. You can rely on it, and have confidence in it. All defendants are tested, and the results are available quickly. Before, the test results were available erratically. Now the court has a 'regularized' program."

The second explanation given for the increase in violations hearings is that the increased public concern about drug abuse in the community has affected the pretrial release and sentencing decisions made by most judges on the court. Now, the judges are more aware of the seriousness of the drug problem and about public attitudes regarding it. As one judge remarked, "[i]t used to be that heroin use was seen as a cause of crime, because of the money needed to maintain a heroin habit. Now, people see a

direct link between drug use and non-acquisitive crime. I think this is especially true of PCP. I think people are afraid of PCP--and this includes judges."

The third reason given was that there has been a general change in philosophy with regard to the most appropriate response to drug abuse. Many of the judges indicated familiarity with the findings of recent drug-crime research.[16] As one judge explained, "[e]xperts used to urge treatment as a first alternative, but now some of that thinking has changed. Some experts think that locking people up for a while, so they can become drug-free and confront the consequences of their drug use, may be a good idea. This type of thinking has had a lot of influence on the court. Maybe it's not inhumane or untherapeutic to take swift action. Indeed, it may be both humane and therapeutic."

(3) Making Sentencing Decisions

Several judges said the pretrial drug test results were particularly useful in the post-conviction, presentencing phase of a case. When individuals with a history of drug use from earlier in the case, or from prior cases, are released pending sentencing, those judges routinely order drug testing during the presentencing period for such defendants.

Additionally, according to one judge, if test results are mixed at the time of sentencing, a two-month continuance is ordered--coupled with a judicial warning--to see if the offender can give up drugs. If that occurs, probation is usually granted; if not, incarceration typically results. In this judge's view, continuing the sentencing to observe drug use over a longer time period is preferable to placing such offenders on probation immediately and then holding probation revocation hearings later on for those who continue to use drugs. In this way, time-consuming probation revocation hearings can be avoided. Additionally, this approach extends the period during which the individuals can be tested by PSA. Once persons are placed on probation, the court must rely on testing by the city-wide treatment agency, which is not considered by the judges to be either as reliable or as prompt to report test results as PSA.

Most of the judges indicated that defendants' performance in urine surveillance or treatment before trial and pending sentencing does affect their sentencing decisions. Successful (drug-negative) test results during the pretrial period were viewed as good indicators that probation outcomes were likely to be successful. Individuals who gave up drug use during their pretrial release period were seen as persons who had shown "positive signs of learning to resist doing wrong" and for whom this learning process might well continue, if placed on probation.

On the other hand, continued drug use before trial or while pending sentencing was considered a strong indicator that drug

use would likely continue, if placed on probation. Because of the perceived relationship between drug use and crime, several judges reported a reluctance to place persons who cannot abstain from drug use on probation. Hence, a sentence of probation was widely described as more likely for drug-involved defendants who gave up drug use before trial. One judge observed that this judicial sentencing practice in itself should increase the incentive for defendants to remain drug-free before trial, as the court's philosophy on these points becomes more widely known "on the streets."

Judges also noted that drug test results reflect recent behavior and thus may be more relevant than some of the information typically included in Presentence Investigation (PSI) reports about the defendant's background and other events from the more distant past. Several judges commented that they want to know about an individual's current situation and that drug test results help them gain valuable insights about this.

Although most judges interviewed said PSA's drug test results were routinely considered and that they played an important part in their sentencing decisions, others said they use the drug test results only when they are "on the fence" about whether to impose a sentence of probation or incarceration on a particular defendant. Another viewpoint was expressed by a judge who said that pretrial drug use does not affect his decisions about sentencing, i.e., whether to impose probation or incarceration, but does affect his ancillary decisions about conditions of probation or type of incarceration. Specifically, if he places a person on probation, the extent of pretrial drug use will affect his decision about whether to order the individual into a particular type of treatment program (e.g., residential, outpatient, etc.) as a condition of probation. If he incarcerates the person, pretrial drug use will affect his efforts to send the individual to a federal facility, where he thinks better drug treatment is available. Other judges also observed that the pretrial drug test results affect their decisions about specific conditions to attach to probation sentences.

C. Comparison with Pre-PSA Testing Situation

When asked to compare the current situation--where PSA runs the drug testing program--with the situation that existed before that program was established, there was general agreement that the present situation represents a great improvement. As one judge said, "[i]t was a real void before; I would hate to go back to that." Another judge expressed a similar sentiment: "It's hard for me to understand how we could have functioned without this program."

One judge noted that pretrial drug testing of Superior Court defendants had existed at different times in different ways and for different drugs since the early 1970s and that "this [the

present PSA effort] is the best program the court has ever had for drug testing. The personnel are good: they do their job, and they're responsive to the court. You get reports from them promptly."

Major advantages cited for PSA's program, as compared to the drug testing program that preceded it, were:

- the drug test results are available quickly from PSA; before, there were often delays in getting the results;
- the drug test information is more reliable now; it is considered more scientifically reliable in a court proceeding and more precise than previously;
- the PSA program is more dependable, both about providing the court with the information it needs and about sending representatives to court when they are needed; and
- the PSA program seems better organized and more "on top of what is going on," so the court has greater confidence in it.

One judge thought that a major benefit of PSA's drug testing program is that it has generated hard statistical data on drug use that the criminal justice system, the treatment community and local politicians must take seriously and deal with. Now that the community has information on the real nature and extent of its drug problems, and on the nexus between such drug use and local crime rates, it must confront those problems, in this judge's view. Furthermore, this judge thought that every city should have a similar program, to force confrontation of the local drug problem. "And not just cities; counties need programs like this, too....They might be surprised at what they would find," he said.

D. Impact of PSA's Drug Testing Program

Judges were asked about the impact of PSA's drug testing program on jail crowding, court workload, local drug use patterns, pretrial crime, and failure-to-appear for court. Each of these impact areas is discussed below.

Concerning the impact on jail crowding, about half the judges thought that PSA's drug testing program had led to more incarceration, because of the extent to which judges are holding defendants in contempt of court and imposing jail sentences. However, several judges thought this impact was probably minimal, because the length of many of the contempt sentences is relatively short (i.e., a few days). Additionally, several persons commented that jail crowding might be reduced as a result of the drug testing program, because commissioners might "take a

chance" on releasing defendants who previously would have been detained.

Several other judges were of the opinion that the PSA testing program had actually increased pretrial release rates. In their view, some judges were now willing to take a chance on nonfinancial, conditional pretrial release for some defendants charged with drug-related offenses, or who had a history of drug abuse, whereas before they would have simply imposed a high money bond. Now, with release conditioned on periodic pretrial testing by PSA, these judges felt more comfortable with releasing such defendants, knowing that they would receive timely violation reports from PSA and could then modify or revoke release, if necessary.

Concerning the impact on court workload, responses were mixed. Most judges felt that there had been, at most, only a minimal increase in court workload, due to the holding of additional hearings. Such an increase was usually described as "not burdensome." One judge pointed out that the extent of any workload increase will depend on how the violations hearings are handled. This judge had developed a streamlined procedure that enabled most such hearings to be completed within a few minutes. Under such circumstances, an increased number of hearings would not necessarily add much time to a judge's typical workday.

Aside from any direct increase in court workload caused by holding an increased number of violations hearings, there may be indirect ways in which the drug testing program has increased the court workload. One judge felt that increased police activity to arrest drug abusers stemmed in part from the publicity that the drug testing program's results had received. Thus, she thought that there might be more drug-related arrests--and, hence, more court cases--as an indirect effect of the drug testing program.

Several judges thought that the drug testing program might actually decrease court workload or, at least, generate certain decreases to offset any increases. This could occur in several ways. Without the drug test results, a longer violation hearing might have been required, because findings would have been less clear-cut and would have taken longer to evaluate. Hence, the availability of the drug test results from PSA could reduce court time that would otherwise have been spent trying to determine the facts surrounding the violation. Additionally, one judge thought that the threat of holding violations hearings might reduce the incidence of non-appearance for court by drug-prone defendants. Because non-appearance can be costly and time-consuming, reducing its occurrence could generate substantial savings for the court. Finally, one judge noted that taking action at show-cause hearings might reduce drug-related crime and thus prevent defendants from coming into the system again with new charges at a later date. Hence, any workload increases due to holding the violations hearings might be offset by decreases in subsequent processing time that would otherwise result for new cases.

Most judges would not speculate about whether PSA's drug testing program was having an impact on drug use by the defendant population as a whole, although some judges thought it definitely was, and other judges thought it definitely was not. Those judges who thought the testing program was reducing drug use explained that the effect of "being watched" should cause some defendants to reduce their drug use, particularly "marginal" users, and "to put the word out" to their peers. Also, one judge commented that even a temporary reduction in drug use should be viewed as a positive result: "No one expects a cure, but every time we cut down on drug use, we cut down on crime."

Concerning impact on pretrial criminality, about one-half the judges thought the drug testing program was responsible for a reduction, and the other half of the judges had no opinion. The mechanisms by which judges thought pretrial crime was being reduced varied. According to certain judges, the mere fact of "being watched" should cause some defendants to reduce their criminality. Other judges thought that the key factor in reducing crime was that defendants who continued to use drugs were being locked up before they could commit pretrial crimes.[17] Several judges also commented on the relationship of heroin use to crime. Because of the need for heroin addicts to hustle to get money to buy heroin, these judges commented that any decreases in heroin use--whether by adherence to release conditions mandating "no drug use" or by detention of persons who continue to use drugs--would necessarily reduce addicts' criminality.

Concerning the impact of PSA's testing on increasing the likelihood of court appearance, responses were about evenly divided between "don't know" and "appearance is more likely." Although they admitted that they had no empirical data available to confirm their belief, several judges--based on their direct experience from hearing criminal cases for several months--commented that most defendants in PSA's drug testing program were appearing for court as scheduled and that fewer bench warrants were being issued by the court now than previously. Additionally, one judge commented that "addicts are only unreliable when they need a fix," so any reductions in drug use stemming from surveillance program participation would increase the likelihood of defendants' appearing in court when required. Also, two judges commented that they always order immediate drug tests for any defendants who come to court late and that this policy has greatly cut down on the number of late arrivals for court.

E. Resource Allocation Issues

Judges were asked about resource allocation for the drug testing program, specifically, which of the three major testing functions--lockup testing, periodic surveillance testing during the pretrial period, or "one-tests"--were considered most

important and should be retained, if budget constraints forced cutbacks. Opinions were almost evenly divided, with roughly one-third of the responses strongly favoring each of the three major functions as the top priority for retention.

Most of the judges were quick to point out that all of the testing functions are vitally important to the court and that they serve different purposes. Lockup tests identify drug users in the general arrestee population and help in the determination of appropriate conditions of release. This is considered particularly important, because of drug users' unreliability, in the eyes of most judges, as pretrial release risks unless appropriate conditions are attached to the release. Surveillance tests allow monitoring of compliance with court orders concerning drug-related conditions of pretrial release. "One-tests" provide immediate results about drug use with regard to a defendant before the court on any given date and facilitate immediate responses to drug use.

In general, when asked about drug testing activities that might be cut, judges' responses were that they did not want to think about cutting back at all, in any area. As one judge explained, "[i]t is hard to imagine what could be cut. The program does not have much fluff." When pressed, several judges thought the tests could cover fewer drugs, perhaps dropping tests for amphetamines and methadone.

While judges were reluctant to discuss the possibility of reduced drug testing services, they were eager to discuss possible areas for expansion. Most of the judges wanted to see similar programs established for juveniles at the pre-adjudication stage and for adult probationers.

Juvenile drug testing was considered a major unmet need. As one judge said, "[t]hat may well be the place we ought to have it [drug testing]. If you had to choose between juvenile and adult testing, juvenile testing might be more important. If you could identify kids using drugs, maybe you could do something with them." Other judges also commented on the potential utility of detecting drug users at an early age, before drug use has become ingrained and difficult to stop: "We may be losing the battle at the juvenile level. The adult courts see drug users at age 18, but you know they didn't just start using drugs then." Similarly: "If you can get young kids identified as drug users at 14 or 15, you can really deal with the problem. You have a much higher chance of success than with older drug users. Juvenile drug testing should be our number one priority now." Also: "It [drug testing in the juvenile system] may be more important there than anywhere else. You could at least identify drug users at an early age. Maybe you could intervene and get some change then." (A juvenile drug testing program began full-scale operation in October, 1986, under a grant from NIJ; it is being evaluated by Toborg Associates under a separate grant.)

Improved drug testing of probationers was also desired. One judge discussed this need as follows: "This court should not be dependent upon the executive branch of government [i.e., the city treatment agency, ADASA] to do drug testing of probationers. The probation division should have a testing facility in close proximity." This judge also thought that testing procedures should be simplified and that test results should be made available to the court more quickly.

Another judge commented that he did not see why a post-sentence drug testing program could not be started by the court itself, or by PSA, given that the court already had a testing laboratory, located in the basement of the courthouse. "Why not," the judge asked, "double the current staff and have it handle post-sentence cases also?"[18]

In general, judges thought that drug testing for adult probationers would be even more appropriate and important than for adult pretrial releasees, because probationers have been convicted of crimes while persons awaiting trial have not. Currently, drug testing for probationers is done on a referral basis by ADASA, the city-wide drug abuse treatment agency, at a location away from the courthouse, and a number of the judges commented that subsequent test results are not made available to the court in a timely manner. As one judge said, "[w]e need the information immediately, so we can do something about it." Another judge commented that "no community treatment agency [in Washington, D.C.] is reliable in terms of getting drug use information back to the court in a timely way." This judge went on to say that "nobody operates as fast as the bail agency [i.e., PSA]."

Some judges also expressed concern that ADASA's quality control procedures might not be as tight or as refined as those of PSA, so that contamination of samples or switching of samples might now occur for probationers. Moreover, some judges expressed concern that treatment programs--especially outpatient programs-might overlook continued drug use for clients who continued to show up for treatment. Such judges thought the present system for handling drug-using probationers by referral to outpatient programs was "too slipshod," and the few well-regarded inpatient programs were small and always filled to capacity. They wanted better monitoring by ADASA--where most criminal justice treatment clients are referred--so that sanctions could be imposed swiftly by the court when appropriate.

Additionally, some judges wanted the ability to order "one-tests" for probationers who come to court, the same way that such tests can be ordered for persons awaiting trial who are before the court for a hearing. One judge commented that "everything slips thought the cracks now, so there is no deterrent effect from the system. Everything is done on a catch-as-catch-can basis."[19]

Besides the importance of drug test results in monitoring compliance with the terms of probation, such drug testing might facilitate post-conviction release of drug users whom judges are now reluctant to place on probation and instead incarcerate. (Recall that judges reported this in connection with the pretrial release of drug users as well.) As one judge put it, "[i]f they had a similar [PSA-type drug testing] program for probationers, I would probably use probation more."

Aside from the desire to have PSA expand its drug testing to cover juveniles and probationers, judges offered few suggestions for changing the program. One judge wanted to see surveillance testing done on Saturday--at present it is not--so that once-a-week testing could be ordered for defendants whose weekday jobs made weekday testing impossible (e.g., truck drivers who are on the road during the week). Another judge wanted PSA's evening hours extended, for the same reason. And several judges expressed interest in having testing done for marijuana in addition to other drugs.

F. Legal Issues

A variety of legal issues invariably arise whenever the criminal justice system inquires into a defendant's illegal drug usage--whether by asking questions as part of a police interrogation or a court intake interview or by applying chemical testing processes (blood tests, urinalysis, etc.). Informed consent and voluntariness issues must be addressed, search and seizure questions arise, and the degree of coerciveness and intrusiveness used to obtain the information is equally important. The potential for self-incrimination is a real one, as are privacy concerns arising from the subsequent use of the information, once obtained. When, as here, the inquiry occurs at the pretrial stage--before the defendant has been convicted of the offense with which he or she is charged--all of these concerns are heightened.

As a general rule, to survive such legal challenges, drug testing of defendants must be reasonably related to a legitimate state interest; must not discriminate against suspected classifications of persons tested (e.g., discriminate by age, race, sex); and the intrusion that results must be balanced against the defendants' valid privacy interests and the right to be free from unreasonable searches and seizures.[20]

This does not mean that drug testing of pretrial arrestees is unconstitutional per se. To the contrary, it has been on-going to some extent under programs like TASC in various locales since the mid-1970s, and a body of legal literature and some case law has been built up over the past decade that supports the practice.[21] Whether pretrial drug testing of arrestees is constitutionally permissible in a given situation depends directly on how it is applied--that is, what purposes it

is expected to serve and what procedural protections are present to insure against violations of the defendants' Fifth, Eighth and Fourteenth Amendment rights. Drug testing has occurred in one form or another since 1970 for pretrial arrestees in the D.C. Superior Court, and the underlying practice has never been challenged--let alone successfully challenged.

The U.S. Supreme Court and state supreme courts repeatedly have validated the authority of trial courts to impose conditions of pretrial release in individual cases which are reasonably necessary to protect against risk of flight or risk to community safety, or both.[22] Given the proven correlation between drug use and failure-to-appear, and between drug use and crime-on-bail, one could easily argue that releasing magistrates have a duty to inquire into active drug use before making a pretrial release decision. In any event, they clearly have the authority, under D.C. and federal law, to impose conditions of release on drug users to protect against flight and danger.[23] The procedural features of PSA's drug testing program--as discussed in the first section ("Background") of this monograph--were specifically designed to address all of these legal concerns.

Several judges commented on the fact that potential legal issues must be viewed within the context of how the drug test results are used by the court. In the District of Columbia this information is used to set release conditions and help the court monitor compliance with them; it is not used to determine guilt or innocence. Consequently, legal challenges that have arisen in other contexts have not been raised with PSA's drug testing program. However, according to the judges interviewed, the results of legal challenges in those other contexts show that urine testing is not unduly intrusive, not an unreasonable search, not "testimonial" in nature and therefore not self-incriminating.

Judges noted that they are allowed to set release conditions and that all release conditions (e.g., calling PSA, staying away from certain neighborhoods, etc.) are to some extent coercive as well as intrusive. In this context, drug testing is considered a reasonable condition, and one where compliance is relatively easy to determine. "Urinalysis under court order is less intrusive, in my opinion, than breathalysers or the blood test allowed under Schmerber vs. California. If that's OK, drug testing should be too."

Another judge made a similar point by stating that, if probable cause exists, taking a urine sample is the same as fingerprinting the defendant. Urine testing is not a particularly intrusive procedure, in this judge's view, and the utility of the information obtained more than offsets any intrusiveness that does exist. This thought was also reflected in the comments of a judge who stated that drug testing fulfills a legitimate state interest and, hence, is permissible, as long as the testing is done in a non-discriminatory manner.

One judge pointed out that there is such a strong relationship between drug use and failing to appear that the court could set high bond for drug users and many of them would be unable to post the bonds. Instead, the court provides drug users with a release opportunity, subject to drug testing, with the possibility that continued drug use will cause the court to reconsider its release decision. Viewed in this light, drug testing offers an alternative to detention. This thought was mirrored by other judges, who expressed reluctance to leave drug users on the street without some monitoring. In this regard it is noteworthy that the District of Columbia has for many years released more defendants prior to trial than many other jurisdictions. Thus, it is important for District of Columbia judges to have a variety of release conditions available for use as well as ways to monitor compliance with them.

Other judges thought there had been no legal challenges to PSA's drug testing program because the District of Columbia has had lockup drug testing--for at least some defendants and for at least some drugs--for many years. Thus, such testing may have come to be viewed in this jurisdiction as a normal part of pretrial processing and one that does not work against the interests of defendants.

Although there have been no serious legal challenges to PSA's drug testing program, several judges raised legal issues that may eventually need to be resolved. One such issue concerns the use of hearsay evidence at violations hearings: can summary contempt be based on hearsay report? Can release conditions be changed based on hearsay report? Who can serve as an expert witness to discuss the reliability of the drug testing procedures and equipment? (Many of these issues have been addressed since our interviews were conducted in the Superior Court case of U.S. v. Phillip Roy, Crim. No. M12098-84 (Burgess, J.), 22-page opinion handed down on September 24, 1985.)

Another potential legal issue is whether the release conditions given to defendants are specific enough to allow a defendant to be detained because of drug use during the pretrial period. If the original release order does not include the specific condition "no drug use," then a judge must extrapolate that condition from the general one of "don't break the law." Such an extrapolation could be challenged. Judges noted, however, that this problem could be resolved if release orders always specified "no drug use" as an explicit condition of release. Another judge expressed reluctance to impose a simple "no drug use" condition, however, because use of drugs is technically not illegal; it is the act of possession or sale that is a crime.

Another potential legal issue concerns the placing of limitations on the use of the drug test results. The judges interviewed were about evenly divided between those who thought the results should be in the court jackets and hence part of the

public record and those who thought that access to the information should be restricted. Judges who want restricted access typically keep the reports they receive on defendants' drug use in files in their offices and do not place this information in the official court records. As one judge explained, the drug test results should be available on a "need to know" basis, to defense and prosecuting attorneys, but should not be available to the police for use as an investigative tool or to the general public.

Judges who thought the test results should be in the public record commented that a person's rights are reduced when an arrest occurs. In their view, such individuals are not entitled to the same confidentiality as persons who enter treatment voluntarily.

Most judges thought that the test results should always be available to judges at all criminal justice stages, including sentencing. As one judge said, "[a] judge needs to have all the relevant background information about a person, as long as that information is reliable."

One area of disagreement regarding use of the drug test results concerns probation revocation. The statute under which PSA operates states that PSA's information shall not be admissible on the issue of guilt in any judicial proceeding but may be used "for the purposes of impeachment in any subsequent proceeding." PSA interprets this to mean that its drug test results cannot be used for probation revocation, although some judges have suggested that another interpretation might be upheld, if challenged. Those judges think that the test results can be used for probation revocation. Moreover, some of the judges who agreed with PSA's interpretation thought the statute should be changed to permit use of drug test results for probation revocation purposes. As one judge said, "[y]ou should not suppress information that is available to the court that shows that a defendant is committing perjury."

G. Judicial Opinions about Local Drug Abuse Problems

When judges were asked what in their opinion is the most serious drug abuse problem among D.C. arrestees, they overwhelmingly selected PCP--and only in part because of the high rates of use found in the lockup testing.[24] One judge summarized his reasons as follows: "Because it [PCP] afflicts the young, because it is viewed as being very benign, because its addictive powers are so strong psychologically, because of strong peer pressures to use it, and because its medical effects are devastating--although we don't yet know how devastating." Another judge thought PCP was the most serious drug abuse problem among arrestees "because it leads to violent episodes. It is cheap and easy to manufacture. It is easy to come by, easy to become a dealer, easy to kill people."

Several judges also commented on the potential danger to the defendant--aside from potential danger to the community--from PCP use. PCP use may cause individuals under its influence to exhibit great strength, feel no pain and thereby injure themselves. The likelihood of attempting to resist arrest when under the influence of PCP--and thereby risk having to be forcibly subdued by police--was also cited as a risk to the life of the defendant, as well as to the police and others.

Although the judges were generally very concerned about the potential for violent behavior associated with PCP use, they also usually commented that a violent reaction must be relatively uncommon, given the widespread use of PCP. It is the potential for violence--and for extreme violence--and the fact that such violence seems to occur unpredictably, that causes the judges' high level of concern over PCP use.[25]

Judges also expressed concern about their perception that young people do not view PCP use as a major drug problem in the way they do heroin use: "Often kids don't see anything bad happen when they and their friends use PCP. The deleterious effects are camouflaged all too often. We don't know enough about PCP or about how it affects people."

Judges also observed that heroin use remains a major problem in the District of Columbia, as it has been since the early 1970s and that heroin use and acquisitive crime have long ago been shown to be closely connected. Indeed, some judges expressed concern that the heroin problem may not be getting sufficient attention now, because of the overriding concern about PCP use. Heroin use was seen by the judges as related to income-producing crime, because of the expense of maintaining a heroin habit. In general, judges thought that heroin, because of its physically addictive properties, was more difficult to stop using than other drugs.

Several judges also expressed concern about the cocaine problem in the District, although this was typically not viewed as being as serious as the PCP or heroin problems.[26] One judge commented that "cocaine use is insidious. It crosses economic classes....There are probably a lot of 'closet' cocaine users in the community, so it hard to know how much cocaine use there really is." Another judge pointed out that cocaine use seems to be increasing in the inner city. Because of its expense, it--like heroin--may be associated with significant levels of income-producing crime.

H. Unmet Needs

Judges were asked for their opinions about the unmet needs of drug abusers who are involved in the criminal justice system. The overwhelming response to this question was that more--and, to some extent, different--treatment resources are needed. As one judge explained, "PSA's drug testing program provides better

information, so we can identify drug users--but we're still not stopping, or even reducing, drug use. Our biggest need is for treatment." Judges also commented on the District of Columbia city treatment agency's traditional (and continuing) primary treatment orientation in response to opiate (heroin) use and observed that PCP and cocaine are also major drug abuse problems requiring treatment but for which modalities and facilities are currently lacking in the city.

Most of the judges observed that the drug abuse problems in the District of Columbia are enormous and growing and that treatment resources are finite. Judges often noted that the treatment community is "playing catch-up," as is the criminal justice system. However, many of the judges nevertheless felt that the quality of treatment provided by certain programs, including the city-wide treatment agency, sometimes left something to be desired. Judges based this view on their experiences when they had court-ordered defendants and offenders into treatment and then observed the results.

The specific treatment needs identified by various judges were quite diverse. Many of the judges expressed a preference for inpatient and residential treatment programs, as opposed to outpatient care, and observed that more of these programs were needed for all kinds of drugs of abuse. In the words of one judge, "[i]t is almost impossible today to get an adult male into residential treatment in less than four to six months, and that is too long to wait."

One judge discussed the need for residential programs that are "almost as confining as jail" and that "have a strong supervisory element," while another wanted to see residential treatment with less stringent requirements than therapeutic communities but more structure than "haphazard outpatient programs that do not demand enough of their clients." Still another judge described the need for 30- or 60-day residential programs for persons <u>awaiting trial</u>. According to this judge, many defendants need a structured environment while on pretrial release but do not need to be jailed or placed in traditional residential treatment.

An additional need identified was for a methadone program that a person can enter immediately "with no hassles" and no wait. As he said, "[w]e need a way to let heroin addicts obey the law <u>immediately</u>."[27]

The need for improved detoxification programs was also discussed. Several judges observed that they would sometimes sentence a person to jail for a short time, so that detoxification could occur, and then order the individual's release, conditional upon entering treatment.

Many judges thought that <u>outpatient</u> programs should be <u>changed</u> as well as expanded. In particular, judges thought such

programs should make greater efforts to keep the court apprised of the progress of persons sent to them under court orders. Additionally, several judges commented that they thought monitoring by outpatient programs was at present too sporadic. One judge said that these programs give the impression that they do not follow up on persons who are ordered into treatment by the court but who fail to appear. According to this judge, the programs seem satisfied with handling the individuals who do show up and are willing to ignore those who should have shown up but did not. This was viewed as part of an overall problem--with both outpatient and inpatient treatment programs--lack of appreciation for the seriousness of a court order to report to and enroll in treatment, poor followup, poor monitoring and failure to be responsive to the court's needs by promptly reporting treatment failures (including failures to report) as well as treatment successes.

In addition to improved treatment, many judges also wanted to see increased efforts to prevent drug abuse. These judges thought the District of Columbia should have more prevention programs in the schools and "in the streets." However, another judge noted that the education programs in existence at present "seem to be falling on deaf ears, especially with juveniles. We need to do a better job of educating kids about crime and drugs and respect for the law."

Yet another judge remarked on the fact that the absence of effective prevention programs has an impact on the court later on, when drug users enter the criminal justice system. In his view, the criminal justice system is not dealing effectively with the drug problem because the court has only few and limited options available to it. The court can send the person to jail, where treatment is poor; or it can put the person on probation, where treatment is also poor and there is poor monitoring besides. According to this judge, something should be done before the person gets to the criminal justice system: "We need to understand the reasons for drug epidemics and learn more about how to stop them. Right now, we just have a holding operation going on."

Another judge expressed particular concern that there had been no major education campaign about the dangers of PCP use: "We need to get the word out. We need massive campaigns in each community in this city--in each neighborhood, if possible. We should go to the schools, the churches, the community organizations--everywhere."

Several judges also discussed the need for better drug abuse treatment programs in the penal system--and for other changes in the penal system as well. As one judge put it, "[o]ur penal system needs to be totally revised. We need prisons that will educate and rehabilitate. What do you accomplish from ware-

housing people? Right now, we have a revolving door. People don't have any skills when they come out; they can't get jobs. What's left but drugs and crime?"

I. Concluding Remarks

In general, PSA's drug testing program was highly rated by the judges and hearing commissioners interviewed. A word used repeatedly about the program is "credibility." It has the confidence of the judicial officers of the Superior Court. This stems from fast turnaround time for test results; prompt appearance of a PSA representative in court when needed for violations hearings; the failure to date of any and all legal challenges mounted against the program, its procedures or equipment; systematic, uniform testing and monitoring procedures; and a general feeling that the program is well-managed and competently staffed.

The fact that the drug test results themselves are rarely challenged at all in a case--let alone successfully--by the defense reflects the high quality of PSA's drug testing program. Its quality control procedures mean that mistakes are rare, and this is widely acknowledged throughout the District of Columbia's criminal justice system.

PSA's information on test results and compliance by released defendants was considered excellent and reliable, as was the drug testing program itself. Judges almost universally said they were "very satisfied" with the program and that it was "very important" for it to continue. A typical comment was: "I think it's a good program, an <u>essential</u> program. A judge needs to know when a defendant is on drugs and when he is not." Also: "With the drug testing program, you have some control over what's happening with a defendant. If you leave the person in the community, you have some comfort in doing that. You also have useful information at sentencing to help you tell if the person will stay out of trouble or not."

FOOTNOTES

1. The Pretrial Services Agency (PSA) was known as the D.C. Bail Agency until 1978. The Agency is the direct descendant of the original D.C. Bail Project, one of the first pilot projects in nonfinancial pretrial release begun in 1963. Since its institutionalization in the D.C. criminal justice system by Act of Congress in 1966, the Agency has operated as an independent agency and functions under its own charter and board of directors. (Public Law 89-519.) It serves both the local courts and the federal courts in Washington, D.C.

   The D.C. Superior Court is a unified trial court of general jurisdiction. It was created by Congress in 1970 through the amalgamation of several existing local courts of limited jurisdiction. Under Public Law 91-358, the District of Columbia Court Reform and Criminal Procedure Act of 1970, jurisdiction over most criminal offenses in the District of Columbia was transferred from the U.S. District Court for the District of Columbia (the federal trial court) to the new Superior Court, as part of a broad "home rule" charter for the city. At present, the Superior Court has a complement of 55 judges and is organized into several judicial divisions, including the Criminal Division, the Family Division, the Civil Division, and the Traffic Division.

   All D.C. Superior Court judges are nominated by the President of the United States and confirmed by the U.S. Senate. Each is appointed for a fifteen-year term and may be re-appointed. The Superior Court has jurisdiction over all felonies and misdemeanors defined in the D.C. Code. Decisions of the Superior Court are appealable to the D.C. Court of Appeals--the equivalent of a State Supreme Court--and are from there appealable directly to the U.S. Supreme Court.

2. PSA representatives have been presenting drug testing results to the Superior Court only since 1984, but have been making pretrial release recommendations to the Court since the Agency's inception. Among the conditional release options PSA has traditionally recommended to the court in the past--in appropriate cases--is referral for drug treatment.

   During the 1970s, PSA also recommended drug testing in appropriate cases, but did not itself perform the testing. Urinalysis was performed by the Narcotics Treatment Administration (NTA)--the city-wide drug treatment agency, which also was a D.C. Government agency--and the test results were reported by NTA to the court, after turn-around time of a day or two. In the mid-1970s NTA maintained a testing

laboratory on-site at Superior Court. Though the interagency relationship between PSA, NTA and the Superior Court was cordial and cooperative, that early pretrial urine testing program was less comprehensive and less effective than the present PSA program: Not all defendants were tested; not all drugs of abuse were tested for; the turn-around time on test results back to the court was longer, meaning the releasing magistrate usually did not have the test results back in time for the bail hearing; the chain-of-custody procedures were of limited rigor and reliability; and the technology then in use for doing the testing--thin layer chromatography (TLC)--was less reliable and accurate than the EMIT system currently used by PSA.

Due to budget constraints and policy decisions in the early 1980s, the testing of court-ordered urine samples by NTA--by then renamed the Alcohol and Drug Abuse Services Administration (ADASA)--ceased. Thus, Superior Court judges were without a mechanism for obtaining pretrial urine tests of defendants on which to base their pretrial release decisions, though they had come to rely on this tool as a result of the earlier NTA/ADASA service.

The details of this prototype drug testing and referral program operated during the 1970s is fully described in John P. Bellassai and Phyllis N. Segal, "Addict Diversion: An Alternative Approach for the Criminal Justice System," 60 Georgetown Law Journal 667 (1970); and John P. Bellassai and Michael J. English, The Case for the Pretrial Diversion of Heroin Addicts in the District of Columbia (Washington, D.C.: American Bar Association Special Committee on Crime Prevention and Control, 1972). This early D.C. testing program was also an antecedent of the federally funded Treatment Alternatives to Street Crime (TASC) program, which adopted many of its features. For more information on the TASC program, see Mary A. Toborg, et al., Treatment Alternatives to Street Crime (TASC) Projects, National Evaluation Program Phase I Summary Report (Washington, D.C.: National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice, February 1976).

3. The position of hearing commissioner was created in 1982 to ease the administrative burden on the trial judges of the Superior Court--much in the way U.S. magistrates function in federal district courts. When our interviews were conducted, there were five hearing commissioners at Superior Court. Among other duties, they conduct bail-setting hearings, which in past years were presided over by the judges of the Court. Although they may accept guilty pleas, they do not sit in trials; jurisdiction over a criminal case typically passes on to one of the judges then assigned to the Criminal Division of the Court after bail has been

set and preliminary motions heard by one of the hearing commissioners.

4. Misdemeanor cases are transferred to the trial judge as soon as the hearing commissioners have set release conditions. Felony cases are handled by the commissioners through the pre-indictment period, which may be several months, and are then transferred to the trial judge.

5. See, for example, John P. Bellassai and Michael J. English, op. cit., note 2; Jeffrey A. Roth and Paul B. Wice, Pretrial Release and Misconduct in the District of Columbia, PROMIS Research Project Publication No. 16 (Washington, D.C.: Institute for Law and Social Research, April 1980); Mary A. Toborg, Drug Use and Pretrial Crime in the District of Columbia, 1979-81, Final Report, prepared for the National Institute of Justice by Toborg Associates, March 1984; Mary A. Toborg and Michael P. Kirby, National Institute of Justice Research in Brief: Drug Use and Pretrial Crime in the District of Columbia (Washington, D.C.: National Institute of Justice, 1984); Eric D. Wish and Bruce D. Johnson, "The Impact of Substance Abuse upon Criminal Careers," paper prepared for The National Research Council, Panel on Research on Criminal Careers, December 6, 1984; and William Rhodes, et al., Pretrial Release and Misconduct in Federal District Courts, prepared for the Bureau of Justice Statistics, U.S. Department of Justice, December 1984, and summarized in the Bureau of Justice Statistics Special Report, "Federal Offenses and Offenders: Pretrial Release and Misconduct," January 1985.

6. These judges comprise most of the Superior Court judges who heard criminal cases in the six months prior to the interviews. Superior Court employs a "rotation" system, whereby the judges sit for designated periods in various assignments--misdemeanor trial, felony trial, juvenile matters, domestic relations matters, traffic cases, etc.--and then "rotate" on to other assignments. At any given time, approximately 25 judges are assigned to the Criminal Division.

7. Each interview consisted mainly of a series of open-ended, standardized questions. However, depending on individual responses received, other follow-on questions invariably suggested themselves and were asked. Judges and commissioners spoke freely to the research team, but it was previously agreed that any quotations used in reports on the interview findings would not be attributed to any particular judicial officer by name.

8. Typically, money bonds require only that the defendant reappear for court as scheduled. Restrictive conditions limiting the behavior or association of the defendant while

on release are rarely, if ever, attached to monetary release by the court. Thus, for those defendants on whom a money bond is placed, the drug testing condition is not set by the court. Though Washington, D.C., has consistently demonstrated one of the highest rates of nonfinancial pretrial release (own recognizance or conditional release) in the nation, nevertheless roughly 25 percent of criminal defendants still have money bail (surety, cash or deposit bond) set by the court, especially in felony cases.

9. When judges were asked about their responses to violations of treatment conditions, most said they handled these the same way as surveillance violations. However, several judges noted that they had not received many notices of treatment violations and, when they did, these violations were usually for failure to show up for treatment, not for continued drug use while in treatment.

10. Although most judges thought violations hearings were important, one judge disagreed. This judge rarely holds violations hearings because he is "not sure what it would accomplish." He notes that few options are available in the District of Columbia for dealing with drug abuse and, in the absence of effective treatment, he does not think that removing a drug user from the streets for a few days through incarceration will have much impact on drug use or drug-related crime, either in the individual case or generally.

11. Employed defendants may be given weekend sentences, so as not to jeopardize their jobs.

12. See note 8, above.

13. In fact, analysis of lockup drug test results conducted by Toborg Associates for NIJ as part of this evaluation of the effectiveness of PSA's drug testing program found a significant level of heroin-plus-cocaine use among the arrestee population. See Monograph No. 4, Analysis of Drug Use Among Arrestees.

14. At a "show cause" hearing, the defendant (who has been subpoenaed) through his or her attorney must appear and respond to evidence about violation of a court order--in this instance, the conditions of pretrial release. In other words, the defendant must show cause why release should not be revoked and/or why he or she should not be held in contempt of court for violating the court's order to refrain from drug use and to report to PSA for periodic drug testing while on release.

15. One judge described the hearing process as follows: he asks the defense attorney and the defendant if they challenge

PSA's violation report. If they do not, the hearing can be completed in about five minutes. If they do, the judge calls PSA, which sends a staff person to the courtroom to testify.

16. Superior Court judges periodically have been briefed as a group about drug-crime research findings, and many of them indicated that they followed news accounts and research publications on these issues carefully, on their own initiative. In addition, PSA issues a monthly memorandum to all interested parties which reports the results of lockup testing for the previous month. Total number of defendants positive for all illegal drugs, as well as the percentage of this total who were positive for any one of these drugs, is contained in the report, together with a month-by-month graph showing drug abuse trends and levels among defendants in the lockup. Many Superior Court judges follow these monthly statistical reports from PSA closely.

17. Of course, the actual extent of pretrial criminality is hard to determine, as many crimes are not reported and of those reported, many are not solved. Though an imperfect measure of the problem, pretrial rearrest rates are the best empirical measure available to determine the level of pretrial crime in a given community.

    Much of the extant research on drug use and pretrial crime has been done in the District of Columbia. See, for example, John P. Bellassai and Michael J. English, op. cit., note 2 (followup study of drug use, rearrests and dispositions on 1,716 D.C. heroin addicts released in 1971 by Superior Court and referred to NTA for testing and treatment); Jeffrey A. Roth and Paul B. Wice, op. cit., note 5 (study of pretrial release, rearrest and failure-to-appear for more than 8,000 defendants arrested in 1974); and Mary A. Toborg, op. cit., note 5 (study of pretrial release, pretrial rearrest, failure-to-appear and self-reported drug use for more than 21,000 defendants arrested over the 1979-81 period). The findings from the latter study have been summarized and published by NIJ; see Mary A. Toborg and Michael P. Kirby, National Institute of Justice Research in Brief: Drug Use and Pretrial Crime in the District of Columbia (Washington, D.C.: National Institute of Justice, 1984).

18. Testing of juvenile defendants began in October 1986, funded by a grant from NIJ. Testing of adult probationers would be beyond PSA's present mandate. However, the Agency's experience might be used to help develop pilot or experimental programs for this population.

19. A recent study of felony probation found this to be a common problem. Traditional probation arrangements have required

the offender to make only marginal contact with the criminal justice system. To overcome this limitation, some jurisdictions have developed "intensive supervision programs" that include a number of restrictions on the probationers' behavior and that provide for the imposition of immediate sanctions in the event of violation. See Joan Petersilia, et al., Granting Felons Probation (Santa Monica, CA: The Rand Corporation, 1985).

20. See Bell v. Wolfish, 441 U.S. 520, 532 (1979), (general parameters of balancing test courts must apply when considering intrusive searches of the body or removal of body fluids).

21. See, for example, J. Bellassai and P. Segal, op. cit., note 2, at pp. 701-709; Peter Yaszi, Legal Issues in Addict Diversion: A Technical Analysis (Washington, D.C.: Drug Abuse Council, Inc., and ABA Pretrial Intervention Service Center, 1975), at pp. 30-38; Criminal Justice Branch, National Institute on Drug Abuse, Criminal Justice Alternatives for Disposition of Drug Abusing Offender Cases--Judge (Washington, D.C.: U.S. Government Printing Office, 1978), at pp. 11, 15-35; and J. Bellassai, et al., Police Referral to Drug Treatment: Risks and Benefits (Rockville, MD: National Institute on Drug Abuse, 1980), at pp. 40-48.

The lead case in this area is Schmerber v. California, 384 U.S. 757 (1966). In Schmerber, the U. S. Supreme Court held that the compulsory taking of a blood sample from a suspect in a criminal case does not violate the Fifth Amendment right against self-incrimination, as there is not "testimonial" evidence derived, and does not violate the Fourth Amendment ban on unreasonable searches and seizures, so long as the methods used to obtain the body fluids are "not shocking to the conscience." Many state and federal cases have since analogized urine tests to blood tests.

Several recent cases have upheld the appropriateness of using urinalysis results in administrative proceedings where a positive test result can lead to a sanction. See U.S. v. Phillip Roy, Crim. No. M12098-84 (D.C. Superior Court, Burgess, J., issued September 24, 1985) (use of positive urine test results to hold defendant in contempt of court for violating pretrial release conditions); and State v. Coughlin, No. 84 Civ. 5779-CSH (U.S. Distr. Ct. So. Distr. N. Y., Haight J., issued December 19, 1984) (random testing of New York State prison inmates upheld). Both of these cases involved the use of the EMIT method of urinalysis relied on by PSA. But whereas the court in Roy found the technology to be more than sufficiently reliable on which to base a decision whether the defendant was using drugs, the court in Coughlin expressed reservations about relying on EMIT test results alone without confirmation by another

testing technology. (But note that the EMIT equipment in use in the New York prison was the less reliable portable model, not the stationary equipment used by PSA in Washington, D.C.) See also Jensen v. Lick, 589 F.Supp. 35 (U.S. Distr. Ct. N. Dakota), in which the court upheld an EMIT screening program for federal probationers, taking judicial notice of the fact that the U.S. Government's Center for Disease Control found it to be 97-99% accurate. (Both Coughlin and Lick cited Schmerber and endorsed the analogy of urine tests to blood tests.)

22. See Barbara Gottlieb, Public Danger As a Factor in Pretrial Release: A Comparative Analysis of State Laws (Washington, D.C.: National Institute of Justice, 1985); and Barbara Gottlieb and Phil Rosen, Public Danger As a Factor in Pretrial Release: Digest of State Laws (Washington, D.C.: Toborg Associates, Inc., 1985). See also National Association of Pretrial Services Agencies (NAPSA), Performance Standards and Goals for Pretrial Release and Diversion: Release (Washington, D.C.: NAPSA, 1978), at pp. 21-24, 29-33; and American Bar Association, Second Edition ABA Standards for Criminal Justice: Chapter 10--Pretrial Release (Approved Draft), (Chicago, Illinois: American Bar Association, 1980), at pp. 15-16 (ABA Standard 10-5.2(d)--judge may prohibit defendant from using drugs as a condition of release).

23. D.C. Code s 23-1321(a) (authority to impose restrictive release conditions on D.C. defendants) and s 203(a) of the Federal Bail Reform Act of 1984, codified at 18 U.S.C. s 3142(c)(2) (listing of 11 restrictive conditions of non-financial release that may be imposed on federal defendants to protect against flight or safety risks, including refraining from using illegal drugs and drug treatment).

24. Because of the context of this question, i.e., in connection with PSA's drug testing program, alcohol was rarely mentioned as a drug of abuse.

25. Because PCP is relatively inexpensive to purchase, judges do not view it as being strongly associated with economic crimes.

26. Recall that the judges' interviews were conducted before cocaine use became as widespread among arrestees as it is now.

27. Many outpatient methadone maintenance programs, including those run by ADASA, sometimes have waiting lists for entry into treatment. ADASA serves individuals who "walk in" on their own and seek treatment as well as persons referred to it by the criminal justice system. Because of this, ADASA cannot always accurately project the demand for treatment and is, therefore, sometimes unable to meet the immediate needs of the court.