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Pretrial Release and Detention and Pretrial Services

Pretrial Detention in the Criminal Justice Process .... *Vincent L. Broderick*

Bail Bondsmen and the Federal Courts .... *James G. Carr*

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Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services .... *John S. Goldkamp*

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Federal Probation

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This Issue in Brief

In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.

—United States v. Salerno, 107 S.Ct. 2095 (1987)

While it is impossible to predict future offender population levels with absolute precision, current Federal law enforcement policies and legislative initiatives lead everyone to agree that the number of new Federal offenders will continue to increase at a substantial rate. It is clear that the detention crisis will only become more severe if no action is taken to relieve the current situation. . . . If adequate bedspace to detain thousands of potentially dangerous prisoners is not acquired, public safety and the Federal Criminal Justice System itself could be threatened.

—Federal Detention Plan 1993-97 (United States Department of Justice, December 1992)

This is a special edition of *Federal Probation* devoted to the topics of pretrial detention and release and pretrial services. The two quotations above make an eloquent case for the timeliness and relevance of such an edition. The notion of depriving individuals of their liberty before they are proven guilty is one that deserves constant consideration and discussion by members of a free society. We hope this issue will provoke both.

The issue opens with a "call to arms" to persons actively involved in the criminal justice process—be they judges, probation or pretrial services officers, defense counsel, prosecutors, or prison officials—to use their knowledge and experience to foster effective approaches to the Nation's crime problem. Decrying what he calls a "Draconian" approach to alleviating crime, the Honorable Vincent L. Broderick, U.S. district judge, Southern District of New York, points out the folly in downplaying community corrections, fostering more prison construction, mandating longer prison terms, and enhancing the role of the criminal prosecutor while denigrating the role of the judiciary. In his article, **"Pretrial Detention in the Criminal Justice Process,"** he focuses on accelerating detention rates as a prime example of "one troublesome manifestation of the Draconian approach."

What can bail bondsmen do for defendants that the courts cannot? Absolutely nothing, contends the Honorable James G. Carr, U.S. magistrate judge, Northern District of Ohio, in his article, **"Bail Bondsmen and the Federal Courts."** Writing on the theme "corporate surety bonds fulfill no function and provide no service that cannot otherwise be accomplished within the framework of the Bail Reform Act, Judge Carr explains why releasing defendants on nonfinancial conditions imposed by the court is far preferable to involving bail bondsmen in the release process. He gives possible explanations for the perpetuation of bail bondsmen in some districts and urges pretrial services officers who continue to recommend surety bonds and judges who adopt such recom-

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Using Drug Testing to Reduce Detention

By John A. Carver, J.D.*
Director, Pretrial Services Agency, Washington, DC

Introduction

THE DECADE of the eighties saw a rapid expansion in drug testing. This expansion was made possible, in part by advancements in the technology for detecting drugs of abuse in the urine and in part by changing public attitudes stemming from the latest drug epidemic. By the end of the decade, 60 percent of businesses with more than 5,000 employees had drug testing programs in place.[1] President Reagan issued an executive order calling for drug testing of Federal workers in "safety sensitive" positions.[2] When the Bush White House issued the first National Drug Control Strategy, drug testing throughout the criminal justice system was an important component.[3] In the Federal court system, Congress enacted legislation establishing demonstration programs of mandatory pretrial drug testing in eight Federal districts.[4] Finally, the Bush Administration introduced legislation requiring states to implement criminal justice drug testing as a prerequisite for receiving block grant assistance funds.[5]

In contrast to the rapid expansion of drug testing in some segments of society, and despite the exhortations of the two previous "drug czars," criminal justice systems have been slow to augment their use of this technology. Most jurisdictions use drug testing in probation and parole supervision. However, many of these same jurisdictions have not sought to extend drug testing to arrestees or to use drug testing as a routine component of pretrial release supervision.[6] Various reasons have been offered to explain this reluctance to adopt pretrial drug testing. Commonly heard justifications include: "Our jail is already crowded—identifying more drug users will only make matters worse"; or, "until we have enough treatment programs, it is pointless to do drug testing."

A strong case can be made that testing arrestees should be given higher priority. There is ample evidence that "the most serious drug use can be found in persons being detained and monitored by the criminal justice system."[7] Yet the justification for establishing comprehensive pretrial drug testing does not rest with the sheer numbers of drug abusers flooding our courts every day. Rather, the technology, when carefully implemented, can strengthen a pretrial services program. Pretrial drug testing enhances judicial decisionmaking in two important ways. First, as a risk assessment tool, it identifies recent drug users, thus establishing the need for release conditions tailored to the problems of individual defendants. Second, as a monitoring or supervision technique, drug testing provides an effective means for managing the large number of drug-abusing defendants who are released while awaiting trial.

The key to reducing unnecessary jail crowding can be found in good "front end" services and a pretrial release system which operates on the principle that there should be a presumption in favor of pretrial release on the least restrictive conditions reasonably calculated to ensure the defendant's appearance in court and the public safety.[8] Given the extent of drug use among arrestees, a program of pretrial drug testing is an important component in such a scheme. Experience from many jurisdictions has shown that when presented with a range of supervised release options, judges are more than willing to make use of them. In the District of Columbia, the implementation of comprehensive drug testing as one of several release options led to *increases* in the percentages of defendants granted supervised release.[9] More recently, when Prince Georges County, Maryland, introduced pretrial drug testing, the number of arrestees released to supervision rose from 1,024 in 1988 to 1,635 in 1990, a 59 percent increase.[10] The director of the pretrial services program reports that the once overcrowded jail is now 200 persons below the "cap." He attributes this drop in the jail population to the existence of the drug testing program and the willingness of the judges to release defendants to its supervision.[11]

It is the position of this article that drug testing is an essential element of supervision. Given the high incidence of drug use among arrestees, and the well-documented association between drug use and crime, a "full service" pretrial program *must* incorporate drug testing in its risk assessments and in its arsenal of supervised release options. Drug testing is a necessary (if not sufficient) condition for accomplishing significant and responsible reductions in pretrial detention populations. Without comprehensive drug testing, we cannot

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effectively address one of the most powerful and most pervasive of risk factors—drug abuse.

Intensive Pretrial Supervision—A Case Study

It is the thesis of this article that drug testing is an indispensable tool in the supervision of a majority of defendants. A full range of supervision options is the key to reducing detention. The introductory section described the experience of the D.C. Pretrial Services Agency implementing drug testing and the corresponding rise in release rates. This section focuses more narrowly on just one aspect of pretrial supervision—the agency's Intensive Pretrial Supervision Program. Since this program was established with the specific goal of reducing detention (and, indeed, is only available as an option for detained defendants), it provides a good "case study," testing the premise of this article that drug testing is an important element in the supervision of high risk cases and is thus essential in reducing detention.

Background of the Program

The District of Columbia, with one of the oldest pretrial services programs in the country, has a long tradition of using nonfinancial release conditions. In the D.C. Superior Court, more than two-thirds of all arrestees are released at first appearance. Despite the relatively high release rates, the city, like many cities, has a jail crowding problem and is a defendant in a number of jail suits. As a result of a consent order signed in 1986, the city agreed to provide additional funds to the Pretrial Services Agency to expand conditional release alternatives. The director of the agency decided that the funds could best be used by establishing a new program of Intensive Pretrial Supervision, which would be available as a release option *only* for defendants remaining in detention after their initial appearance. The program was formed with two specific goals: (1) to *reduce* pretrial incarceration and (2) to structure the program in such a way as to provide a release alternative *consistent with public safety concerns.*

From the beginning, several features were viewed as critical. First, the program would have to have the confidence of the judiciary. Second, frequent drug testing would be necessary as one element of intensive supervision. Third, a range of social services should be available. Fourth, violations of program requirements would have to be dealt with swiftly.

Program Elements

After considerable negotiation, a memorandum of understanding was signed and the program began operations. Cases of detainees are screened by pretrial services officers for eligibility for the program and recommendations are forwarded to the court. If the judge accepts the recommendation and grants release, the defendant is placed in the third party custody of the D.C. Department of Corrections and is transferred from the D.C. Jail to a halfway house operated by the department. The defendant remains in the halfway house for a 2-week orientation, assessment, and transition period. Twice weekly drug testing begins immediately and continues throughout the defendant's placement in the program. A case manager is assigned during the halfway house phase and continues working with the defendant on a daily basis as long as the case is active. Caseloads may not exceed 20 individuals. If the defendant complies with all program requirements in the "halfway house phase," he or she can be released to the "community phase" after a home visit by the case manager has confirmed a stable living situation.

Quick action on violations was deemed a critical element to the success of the program and was the subject of considerable negotiations during the planning phase. Traditionally, the Pretrial Services Agency prepared violation notices for the judge with jurisdiction of the case. The judge, if so inclined, would then set a "show cause" hearing to take up the violation. Notice would be sent to the lawyers and the defendant. Under the best of circumstances, several weeks might pass between the violation and the judicial response. This was viewed as unacceptable for a program geared to high risk defendants. The challenge to program planners was to fashion an administrative as opposed to a judicial enforcement mechanism. The solution was to structure the program so that the defendant would be placed in the legal third party custody of the D.C. Department of Corrections. With this mechanism, condition violators would have the same legal status as escapees from work release and could be apprehended (if necessary) by the existing "warrant squad" of the department. The defendant's due process right to a hearing was addressed through the memorandum of understanding, which specifies that a judicial hearing must occur within 5 days after a return to custody. This feature—quick, "administrative" detention of violators followed by an adversary hearing—has proven to be one of the most frequently praised aspects of the program by the judges who use it.

Finally, to manage all aspects of the program, the Pretrial Services Agency set up a local area computer network and developed specialized software to track the status of cases as they move through the various phases of the program. The software provides a variety of management reports and maintains statistics on program outcomes.

Defendant Characteristics

The Intensive Pretrial Supervision Program was designed for defendants not deemed eligible for release at their first appearance. Since most defendants in the District of Columbia are released, presumably those *not* released possess higher risk characteristics. A look at risk factors of the defendants entering the program over the past 2 years confirms this view.[12]

Drug use among criminal justice populations is known to be associated with higher rates of criminality.[13] An NIJ-sponsored evaluation of the Pretrial Services Agency's drug testing program confirmed this relationship, finding that "urine test results make a consistent, significant, incremental contribution to risk classification for arrestees in the District of Columbia.[14] A separate evaluation of data from the D.C. program concluded that "the most striking result in these analyses is the size of the risk multiplier associated with a positive drug test result. For subjects testing positive for a single drug other than PCP, the rearrest risk in the early weeks after release is three to four times as great as their drug-negative counterparts; and if two drugs are involved, it is nearly five times as great."[15]

Releasees to the Intensive Pretrial Supervision Program are predominantly drug users. Eighty percent of all defendants in the program had a history of drug use, as determined by at least one positive drug test conducted by the Pretrial Services Agency.

Most defendants released to the program are charged with serious crimes and have extensive criminal records. Seventy-six percent were charged with a felony. Only 14 percent of the 564 defendants in this data sample had neither a prior arrest nor a prior conviction. Seventy percent had prior convictions. Forty-five percent had two or more prior convictions. Twelve percent were on probation or parole at the time of their arrest for which they were eventually released to intensive supervision. Twenty-five percent had a pending criminal case.

A look at these figures makes clear why these 564 defendants were *not* viewed as particularly good candidates for release at their first appearance. Many were charged with serious offenses. Most had numerous prior contacts with the criminal justice system. Almost all had a documented history of drug use. Yet despite these factors, all were, in fact, released to the Intensive Pretrial Supervision Program.

Impact of the Program

Reduction in Pretrial Incarceration

The Intensive Pretrial Supervision Program was designed to serve as a secure release option primarily for higher risk cases—i.e., those remaining in detention. Moreover, with supervision in the form of frequent drug tests, curfew checks, and appointments with case managers, one would expect that closer scrutiny would result in higher violation rates. This has been the experience of the program since its inception, with the rate of violations fluctuating between one-third and one-half of all releasees. Despite the seemingly high violation rate, the program has been successful in achieving its two stated goals: (1) effectively facilitating the pretrial release of incarcerated individuals; while (2) preserving community safety.

To measure the first goal—reduction of pretrial incarceration—the agency developed computerized techniques for tracking each defendant throughout all phases of the program and calculating the "jail days saved."[16] For each defendant released to intensive supervision, the number of days between release and either final disposition of the case or return to custody after violation is computed. Even defendants who violate the terms of their release and return to jail represent a net increase in "jail days saved" during the time that they were in the program. The number of "jail days" saved has been substantial. During the first 18 months of operation, 450 defendants were released to the program, representing 30,054 "jail days." More recently, from 1991 through the end of 1992, 569 people (with a total of 685 criminal cases) entered the program, accounting for a total of 23,517 "jail days" saved as a result.

Violations

During the study period from January 1, 1991, to December 31, 1992, slightly more than one-half of all defendants entering the program violated at least one program requirement. Of those violations, 50 percent were remanded to custody.[17] The overwhelming number (69 percent) was for drug use. Curfew violations constituted 25 percent of all violations detected.

Drug Usage

Although the largest violation category is drug usage, the supervision has been remarkably successful when one looks at the overall reduction in the use of drugs among program participants. As the section on defendant characteristics pointed out, this population is heavily involved in both drug use and criminal behavior. Eighty percent of releasees from 1991 through 1992 had positive drug test results at some point in their contact with the criminal justice system.

Defendants in this program *know* they are facing immediate return to custody at the first positive drug test. They are tested frequently for a broad range of drugs.[18] During the 2-year study period, the agency conducted 7,014 drug tests of defendants assigned to Intensive Pretrial Supervision. Of those, 6,579 were negative, and only 435 were positive. Six percent of all

drug *tests* for defendants while in the Intensive Pretrial Supervision program were positive.[19] When positive results for legal methadone are subtracted, the rate drops to 3.5 percent.

To put these results in perspective, the positive rate of tests for defendants in "normal" supervision was also calculated. For purposes of comparison, "normal" supervision refers to defendants routinely required to submit to weekly testing as a condition of release. While this condition is imposed on the basis of some indication of drug usage, there is no mechanism in place to impose immediate sanctions for positive drug tests.[20] The percent of drug tests with a positive result for this much larger group is 36 percent. In summary, while it appears that testing reduces overall drug usage among those subject to the test, the effect is most pronounced among those facing the most immediate sanctions—those in the Intensive Pretrial Supervision Program.

Subsequent Arrests on New Charges

For many, the "bottom line" issue is whether the supervised release of high risk defendants can be accomplished while preserving community safety. One measure of this question is the rate of arrest on new charges. The percentage of defendants arrested on new charges while in the Intensive Pretrial Supervision Program has always been very low. During the 2-year period from which these data were drawn, the arrest rate on felony charges was just 3.5 percent. The arrest rate on *any* charge, felony or misdemeanor, was 7.8 percent.

For purposes of comparison, subsequent arrest rates were calculated for a comparable sample of released felony defendants *not* in the Intensive Supervision Program. Among this group under "normal" supervision, 24 percent were arrested on new charges while the original case was pending. This rate of rearrest is more than triple the rate of the high risk population in intensive supervision.

Policy Discussion

To review, the Intensive Pretrial Supervision Program has facilitated the release of significant numbers of individuals who, without the program, would probably have remained incarcerated until final case disposition. Despite the fact that defendants in the program have both serious criminal records and documented histories of drug use, the program has achieved its dual goals of facilitating release while preserving community safety. Both drug positive rates and subsequent arrest rates are substantially lower than for similar defendants under less stringent release conditions. On the other hand, violation rates—especially drug test violations—are high. Close to half of all defendants eventually violate a release condition and are returned to custody.

This apparent anomaly (low positive rates for *samples* but high violation rates for *individuals*) is not so anomalous when one considers the following. First, addiction is a chronic and relapsing condition. "Slips" are inevitable for many addicts, especially as restrictions are eased and defendants are released to the community phase of the program. Second, an important feature of the program is the *immediate* response to drug testing violations. Sanctions are swift and certain. Once a defendant returns to drugs, he or she is back in custody, where there is less opportunity to find drugs or commit crimes.

Close drug monitoring, coupled with swift sanctions, result in much lower rates of new arrests. The experience of the program seems to confirm earlier research which showed that pretrial drug testing served as a good "signal" or predictor of performance with respect to pretrial rearrest.[21] By establishing procedures to act quickly on the basis of the defendant's "signal" (i.e., the urine test result) overall rates of rearrest remain low.

The policy implications of both the earlier empirical research and the practical experience of the Intensive Pretrial Supervision Program are quite powerful. Taken together, they suggest that even those defendants in the category of highest statistical risk (i.e., chronic drug users with prior criminal records) can be effectively managed or supervised during the pretrial period. This is not to suggest that the supervision, in and of itself, is sufficient in every case, or even in most cases. It *does* suggest that many more defendants can be safely released before trial, if such release is conditioned on periodic drug testing. With drug testing, the research suggests that defendants will quickly sort themselves into two subgroups: those who comply and those who don't. Those who do not or cannot comply are statistically much more likely to be rearrested. Since these defendants have violated a court order, the program or the judge can then impose more restrictive conditions of release or revoke release.[22] In short, the improvement in the program's monitoring capability through the use of drug testing, coupled with swift and certain sanctions, permit the court to release a larger number of cases and then concentrate its resources on those who fail to abide by the terms of their release.

Conclusion

The justification for pretrial drug testing stems in part from what is known about the association between drug addiction and crime. Many studies conducted over the past 20 years have added to our knowledge of this relationship. It is now well documented, for example, that among arrestees, frequent users of multiple types of drugs are much more likely

to commit felony crimes than are less drug-involved offenders. Furthermore, heavy drug users commit many more crimes during periods of active drug use than during periods of relative abstinence. Drug use is an "accelerator" of criminal activity. Likewise, if drug use can be curtailed through court-ordered supervision with close monitoring and quick action to enforce violations, drug use declines, with a corresponding reduction in rates of offending.

This suggests two important reasons for conducting pretrial drug testing. First, the knowledge that there is an association (not necessarily a causal relationship) between drug use and crime means that knowledge about drug use is potentially useful for judges in fashioning pretrial release conditions. Second, to the extent that court "coercion" can be effective in reducing drug use and bringing about a corresponding reduction in criminality, drug testing (possibly coupled with treatment) offers the promise of improved monitoring pending final case disposition.

The experience of the Intensive Pretrial Supervision Program of the D.C. Pretrial Services Agency provides "real world" confirmation of these theoretical concepts. Specifically designed to facilitate the release of pretrial detainees while preserving public safety, the program has accomplished its goals. Although individuals in the program might be considered the "hardcore" among the defendant population, their outcome measures—lowered rates of drug abuse and lowered rates of rearrests—confirm the validity of this approach. Furthermore, the number of "jail days saved" as a result of the program has been substantial and has ensured continued support from city officials.

The success of the program can be attributed to a number of factors, beginning with the enthusiasm and dedication of pretrial services officers who staff it. Also important is the availability of a halfway house to serve as both a transition to the community phase of the program and the first of several possible sanctions for violations. Certainly the ability of the program to fashion policies ensuring swift and certain sanctions for violations is a key element.

Finally, without drug testing, it is doubtful that the program would have achieved the same impact with this high risk, drug-dependent population. The technology of drug testing offers great promise to pretrial services practitioners. The challenge for all of us is to use it wisely to further the goals to which we all subscribe.

NOTES

[1]*See*, Bureau of Labor Statistics, U.S. Department of Labor, Survey of Employer Anti-Drug Programs (1989).

[2]51 Fed. Reg. 32889 (September 17, 1986).

[3]"National Drug Control Strategy," The White House, September 1989, p. 26. "Probation, like parole, court-supervised treatment, and some release programs, should be tied to a regular and rigorous program of drug testing in order to coerce offenders to abstain from drugs while integrating them back into the community. Such programs make prison space available for those drug offenders we cannot safely return to the streets. But unless they rigidly enforce drug abstinence under the threat of incarceration, these efforts lose their teeth. Drug tests should be part of every stage of the criminal justice process—at the time of arrest and throughout the period of probation or incarceration, and parole—because they are the most effective way of keeping offenders off drugs both in and out of detention."

[4]Pub.L. 100-690, Title VII, § 7304, Nov. 18, 1988, 102 Stat. 446. For a description of the experience of these Federal demonstration programs, see "Final Report of the Director of the Administrative Office of the United States Courts on the Demonstration Program of Mandatory Drug Testing of Criminal Defendants," submitted to the Congress of the United States, March 29, 1991.

[5]S.635, Violent Crime Control Act of 1991, 102nd Congress, 1st Session, Title IX—Drug Testing, Sec. 902, Drug Testing in State Criminal Justice Systems as a Condition of Receipt of Justice Drug Grants. Introduced March 13, 1991.

[6]A survey conducted by the National Criminal Justice Association in 1991 found that urine testing in probation and parole populations is common. "Testing among arrestees was also reported, but further analysis found that much testing of arrestees occurred as part of the nationwide Drug Use Forecasting (DUF) program (an anonymous, quarterly survey of drug use trends) rather than as a sanction or control measure." *Status of NCJA Research on Issues Affecting Drug Testing of Criminal Justice Populations in the States*, a report of the National Criminal Justice Association, August 1991.

[7]Eric D. Wish, *U.S. Drug Policy in the 1990s: Insights from New Data from Arrestees*, 25 International J. of the Addictions, 377, 390 (1990).

[8]*See*, Performance Standards and Goals for Pretrial Release, Standard IV, National Association of Pretrial Services Agencies, 1978.

[9]Annual Reports of the District of Columbia Pretrial Services Agency, 1983 through 1987. Overall release rates rose from 68 percent in 1983, the year prior to the implementation of on-site comprehensive urine testing, to 76 percent in 1987, 3 years after the program was initiated.

[10]"Report on Supervised Release," Al Hall, director, 1990.

[11]Interview with Al Hall, director, April 25, 1991.

[12]The following data on characteristics of defendants released to Intensive Pretrial Supervision are drawn from 564 people and cover the period from January 1, 1991, to December 31, 1992.

[13]*See* Bernard A. Gropper, U.S. Department of Justice, *Probing the Links Between Drugs and Crime*, National Institute of Justice, Research in Brief, October 1984.

[14]Mary A. Toborg, John P. Bellassai, Anthony M.J. Yezer, and Robert P. Trost, "Assessment of Pretrial Urine Testing in the District of Columbia," National Institute of Justice, December 1989.

[15]Christy Visher and Richard Linster, "A Survival Model of Pretrial Failure" (draft discussion paper presented at the 1988 annual meeting of the American Society of Criminology), 23.

[16]Since the program is *only* available as a "bond review" option and may not be used at the defendant's first appearance, every defendant placed represents "jail days" saved. Stated another way, by program design Intensive Pretrial Supervision may not be used as a "net widening" mechanism.

[17]When the program was first established, violations resulted in a remand to jail. As the program has evolved, procedures have changed. Now when violations are detected, the defendant is moved back to the halfway house phase for a 2- to 3-week "re-stabilization" period. If no additional violations occur, the defendant can be released once again to the community phase of the program.

[18]Currently, defendants in the Intensive Pretrial Supervision Program are tested for six substances: cocaine, opiates, PCP, methadone, amphetamines, and marijuana.

[19]The percentage is calculated as follows: If defendant A had 20 tests while in the program, and defendant B had 5 tests and defendant A had 2 positive results and defendant B none, the positive test rate is 2 of 25.

[20]Pretrial services personnel produce automated drug test summaries for all defendants with drug testing conditions several days prior to scheduled court appearances. While many judges use these reports as the basis for "show cause" hearings, sanctions are not always applied as quickly as for defendants in the Intensive Pretrial Supervision Program.

[21]Mary A. Toborg, John P. Bellassai, Anthony M.J. Yezer, and Robert P. Trost, "Assessment of Pretrial Urine Testing in the District of Columbia," National Institute of Justice, December 1989.

[22]Courts have broad authority to enforce their orders through a variety of mechanisms. Additional release conditions can be imposed in response to a violation. These additional conditions might take the form of increased frequency of testing, referral to treatment, enrollment in a residential treatment program, or possibly placement in a halfway house. Courts can also invoke their inherent powers to enforce their orders, convening a hearing at which the defendant is required to "show cause" why he or she should not be held in contempt of court for violating the order. In the District of Columbia, a separate provision of the law, §23-1329, spells out "penalties for violation of conditions of release" and states that "a person who has been conditionally released . . . and who has violated a condition of release shall be subject to revocation of release; an order of detention; and prosecution for contempt of court."