

Pretrial Drug Testing

The two main pretrial outcomes that jurisdictions seek—and the only two outcomes that can legally be considered when deciding whether to detain or release a person pretrial—are to maximize court appearance and maximize community well-being and safety (i.e., minimize the likelihood of a person’s rearrest). This summary examines the current base of knowledge regarding the effectiveness of pretrial drug testing in achieving these positive outcomes.

Pretrial drug testing programs started appearing regularly in the late 1970s and early 1980s, following research that supported drug testing and treatment as ways to reduce recidivism among people convicted of a crime. Combined with the nation’s sense of urgency surrounding the War on Drugs and the availability and evolving technology of drug testing in the 1990s, the number of pretrial drug testing programs grew substantially.¹ By the end of that decade, over two-thirds (68%) of pretrial programs across the country included drug testing.² The use of drug testing by pretrial agencies reached a peak of 90% a decade later, in 2009, and currently sits at 77%.³

This summary reviews key research findings on the impact of drug testing on pretrial court appearance and arrest-free rates. The majority of findings come from evaluations of demonstration projects funded by the U.S. Department of Justice from the mid-1980s into the early 1990s—specifically, demonstration projects in Arizona, Maryland, Washington, D.C., and Wisconsin.

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Key Finding #1: There Is No Clear Association Between Drug Testing and Improved Pretrial Outcomes

Some of the earliest examinations of the relationship between drug use and pretrial misconduct were randomized controlled studies in Pima County and Maricopa County, Arizona. These studies yielded inconsistent results. The study conducted in Pima County looked at 231 people who were booked into jail and then released on pretrial supervision either with or without periodic drug testing. The study found that while those who were tested were significantly less likely to experience a new arrest pretrial (4% vs. 12%),

they were just as likely to fail to appear for court (17% vs. 18%). In contrast, a second sample of 138 people revealed that while there were no new arrests in either group, the drug testing group was more likely to fail to appear (16% vs. 11%), although this finding was statistically nonsignificant.⁴

The Maricopa County study also examined two different sample groups. First, comparing 234 people released on pretrial supervision with drug testing to those who were released on their own recognizance, the study observed no statistically significant differences in failure to appear (FTA; 30% vs. 38%) or pretrial arrest rates (25% vs. 24%). In the second sample, however, the study compared 890 people released on pretrial supervision either with or without periodic drug testing. People who were released with the condition of drug testing were found to be significantly *more* likely to fail to appear for court (35% vs. 27%) or be rearrested (45% vs. 37%) during the pretrial period.⁵

More recently, a national study of over 550,000 people released pretrial in 93 of the 94 federal judicial districts demonstrated that, among people assessed as statistically less likely to succeed pretrial,⁶ there was no statistically significant difference in pretrial failure rates when comparing people released with or without the condition of substance abuse testing.⁷ Similarly, randomized controlled trials of approximately 300 people in Maryland and in Wisconsin revealed that those released with the condition of drug testing were statistically no more likely to succeed pretrial than those who did not have the condition of drug testing.⁸

Notably, different pretrial drug testing programs have different processes. More rigorous research is needed to parse out the extent to which drug testing itself, as opposed to programs' policies and practices, impacts pretrial outcomes.

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Key Finding #2: The Impact of Noncompliance with Drug Testing on the Likelihood of Pretrial Failure Is Uncertain

Research on the impact of noncompliance with drug testing on the likelihood of pretrial failure is mixed, but recent research suggests that drug testing failures (e.g., not appearing for testing, having positive drug test results) are not necessarily indicators of impending failure pretrial.

In a 1989 study, researchers in Washington, D.C., analyzed 2,000 people who were released pretrial with the condition of drug testing. The researchers observed higher rates of FTA and new arrests among people who did not complete the drug testing program (i.e., who did not appear for one or more tests, regardless of passing or failing any of the tests) and, conversely, lower rates among those who completed successfully (i.e., who appeared for all testing as scheduled, regardless of passing or failing). The study's findings indicate, however, that although drug testing is associated with improved pretrial outcomes for those who complete the program, using it as a condition of release may not necessarily promote success.⁹

In 1990, in a study of 2,000 people accused of a felony offense in Miami-Dade, Florida, researchers found that, after controlling for other factors such as demographics and criminal history, positive drug test results for cocaine or marijuana were significantly associated with both a higher likelihood of any arrest and arrest for a serious crime (e.g., assault, robbery) pretrial. Positive drug test results were not associated with the likelihood of failure to appear, however. Notably, the study also found relatively low rates of pretrial failure overall among the people studied, with only 9% failing to appear in court and 15% arrested during the pretrial period.¹⁰

More recent research out of Mecklenburg County, North Carolina, and Lucas County, Ohio suggests that noncompliance with drug testing is not correlated with lower rates of court appearance and higher rates of new arrests. In the Mecklenburg study, for example, people who tested positive for drugs one or more times during pretrial release had a modestly higher success rate (71%) than people who never tested positive (67%).¹¹ In Lucas County, people with a drug testing violation had a relatively higher success rate (76%) than those who had a violation related to other conditions of release (34%).¹²

Additionally, research suggests that the use of “graduated sanctions”¹³ to attempt to bring people into compliance with drug testing program expectations does not affect pretrial outcomes. In the Wisconsin randomized controlled study described above, over three quarters (77%) of people were sanctioned at least once for either not appearing for a drug test or for having a positive test, half (51%) were sanctioned twice, 39% were sanctioned three times, and 30% were sanctioned four times.¹⁴ The study found that, even with a system of sanctioning, people released with the condition of drug testing were no more likely to succeed pretrial than those who did not have drug testing as a condition.¹⁵

The underlying reasons why people who are noncompliant with drug testing are more or less likely to succeed pretrial requires deeper examination. Until

researchers bridge this gap in knowledge, studies conducted to date, with their mixed results, suggest that drug testing should not be a relied-upon strategy to improve pretrial outcomes.

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Key Finding #3: Cost–Benefit Considerations Must Be Made

The lack of clear association between drug testing and improved pretrial outcomes has important implications for the benefits of pretrial drug testing programs when compared to the costs of implementing them (e.g., supplies, staff resources, third-party drug screening analyses). Although there is a paucity of publicly available cost–benefit research on pretrial drug testing programs, the Arizona demonstration projects described in Key Finding #1 offer a basic illustration of financial costs. For example, Pima County reported a 233% increase in staff workload that accompanied the new pretrial services drug testing program, translating to over \$311,000 in a 21-month period. Maricopa County reported \$1 million in total expenditures, including almost \$40,000 in staff time, associated with implementing and running the county’s drug testing project over two years. According to the researchers, given that the pretrial drug testing programs were “not likely to achieve significant or major reductions in pretrial misconduct” (p. 60), the financial costs of these programs were “difficult to justify” (p. 61).¹⁶

Research suggests that, when weighing the costs and benefits, pretrial drug testing programs may not be worth the costs.

Key Finding #4: Drug Testing Can Lead to Poorer Pretrial Outcomes Among People Assessed as More Likely to Succeed

According to the national pretrial study mentioned earlier, people assessed as more likely to succeed pretrial were, conversely, significantly more likely to fail pretrial if they were released with substance abuse testing

as a condition than if they were not. Specifically, the study found that the higher people's assessed likelihood of pretrial success, the more likely they were to fail when given the condition of substance abuse testing. Of the people assigned to testing on pretrial release, 41% who were assessed as most likely to succeed failed pretrial, compared to 27% who were assessed as having a "low-moderate" likelihood of success and 16% who were assessed as having a "moderate" likelihood of success. The authors found these results consistent with the evidence-based "risk principle" for effective intervention: intervention resources should be prioritized for people who are assessed as being less likely to succeed pretrial.¹⁷

According to a national study, people assessed as being statistically most likely to succeed pretrial are significantly less likely to appear for court and/or remain arrest-free if they have substance abuse testing as a condition than if they are released without it.

Best Practice Recommendations

The aforementioned research literature and the professional practice standards that follow offer mixed guidance regarding pretrial drug testing.

1. American Bar Association (ABA)

Standard 10-5.2(a)(vi) in *ABA Standards for Criminal Justice: Pretrial Release* explains conditions of release as follows: "If a defendant is not released on personal recognizance or detained pretrial, the court should impose conditional release, including, in all cases, a condition that the defendant attend all court proceedings as ordered and not commit any criminal offense. In addition, the court should impose the least restrictive of release conditions necessary reasonably to ensure the defendant's appearance in court, protect the safety of the community or any person, and to safeguard the integrity of the judicial process. The court may...(vi) require the defendant to...be evaluated for substance abuse treatment, undergo regular drug testing, be screened for eligibility for drug court or other drug treatment program."¹⁸

2. The National Association of Pretrial Services Agencies (NAPSA)

Standard 3.2(b) in *Standards on Pretrial Release* explains: "At the initial bail hearing, the court should determine if there is probable cause to believe the defendant committed the crime charged before setting bail, ordering conditions of pretrial release or the defendant's temporary detention" (p. 40). According to the commentary: "This Standard assumes that any

condition other than an order for the defendant to make all scheduled court appearances and refrain from criminal behavior pretrial would qualify as a 'significant restraint of liberty' within the meaning of the Gerstein decision. In particular, these Standards regard frequently-imposed conditions of pretrial supervision such as drug testing...as significant restraints" (p. 40).¹⁹

3. National Institute of Corrections (NIC)

A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency specifically does not cite drug testing as an essential element of an effective pretrial system, as the literature is unclear about which supervision conditions best assure pretrial outcomes.²⁰

Endnotes

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2. Clark, J., & Henry, D. A. (2003). *Pretrial services programming at the start of the 21st century: A survey of pretrial services programs* (NCJ 199773). <https://www.ncjrs.gov/pdffiles1/bja/199773.pdf>.
3. Pretrial Justice Institute. (2019a). *Scan of pretrial practices 2019*. <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=24bb2bc4-84ed-7324-929c-d0637db43c9a&forceDialog=0>.
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5. Britt et al., 1992.
6. According to the study, people who were statistically less likely to succeed pretrial were more likely to fail to appear in court, abscond from pretrial monitoring, and/or be revoked because of a new arrest.
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11. Pretrial Justice Institute. (2019b). *Smarter pretrial solutions: Responding to technical violations*. <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=514d95d4-413d-7a4f-f2e2-7fa588a297c2&forceDialog=0>.
12. The report did not specify “other conditions of release”; Pretrial Justice Institute, 2019b.
13. The term “graduated sanctions” refers to a system of incremental penalties that are imposed on people, in lieu of revocation to jail or prison, as a result of their noncompliant behavior. The concept, although not supported by the research, entails increasing the severity of the sanction with the number and/or severity of the violation behavior(s) in order to bring people into compliance with their supervision expectations. Current evidence-based practices involve using “effective responses to noncompliance” rather than graduated sanctions. For more information, see: Carter, M. M. (2015). *Behavior management of justice-involved individuals: Contemporary research and state-of-the-art policy and practice* (NIC Accession No. 029553). <https://s3.amazonaws.com/static.nicic.gov/Library/029553.pdf>.
14. A first violation called for “counseling,” in which treatment options and program requirements were discussed. A second violation resulted in increased frequency of drug testing and notification to the court of the person’s noncompliance. A third violation required a violation report to be sent to the court and a hearing to be scheduled. A fourth violation, the most serious, called for either a bench warrant or for the person’s release to be revoked for 3 to 5 days while their participation in the program was reconsidered.
15. Goldkamp & Jones, 1992.
16. Gottfredson, M. R., Britt, C. L., III, & Goldkamp, J. (1990). *Evaluation of Arizona pretrial services drug testing programs* (NCJRS 139966). <https://www.ncjrs.gov/pdffiles1/Digitization/139966NCJRS.pdf>.
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