IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of XXX Case Number XXX

Honorable

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION NOT TO REQUIRE SUSPICIONLESS MARIJUANA TESTING AS A CONDITION OF RELEASE

I. A marijuana testing requirement in this case is not the "least restrictive" means necessary to assure the Defendant's future appearance or the community's safety, and this Court should exercise its discretion in crafting case-specific release conditions rather than impose a blanket condition that has outlived its historical justification.

a. Defendant's history and characteristics do not warrant the imposition of a marijuana testing condition, under a faithful analysis of the Bail Reform Act.

The Bail Reform Act of 1984 states that if a court cannot release a person on that person's personal recognizance or an unsecured appearance bond, then a court shall order release subject to the "least restrictive further condition or combination of conditions that the judicial officer determines will reasonably assure the appearance of the person as required and the safety of the community. . ." 18 U.S.C. § 3142(c)(1)(B).

There is no reason to believe that requiring regular marijuana[1] testing in this case is necessary in order to assure Defendant's return to court or to safeguard the public. Defendant

[1] This motion primarily uses "marijuana" to refer to the controlled substance, although occasionally it is referred to as "cannabis." "Cannabis" refers to the cannabis plant, which contains a large number of biologically active chemicals, including most notably delta-9-tetrahydrocannabinol ("THC") and

[INSERT FACT SPECIFIC CLAIMS: is not charged with a crime associated with mj use; has never tested positive for mj ever/recently; has appeared notwithstanding prior positive tests; is not charged with a drug-related offense/have a record of endangering the public as a result of marijuana use.] The mere fact that a defendant has used or may use marijuana is not itself grounds to find that the defendant poses either a risk of flight or danger to the community. Routine, blanket imposition of a marijuana testing requirement is at odds with the current legal, social, and scientific understanding about the risks posed by marijuana use. Rather, the court should exercise its discretion and not impose a marijuana testing requirement unless the court finds specific reasons, beyond mere past or potential use of marijuana, that such use would be dangerous or lead to a failure to return to court.

b. *Routine imposition of a marijuana testing requirement on the grounds that marijuana use threatens community safety or risks defendant's flight is out of step with current treatment of marijuana at both the federal and state level.*

Routinized testing of marijuana is a relic of historical views about marijuana use, which considered marijuana as a dangerous drug with no beneficial or socially acceptable uses.[2] In 1970, Congress temporarily placed marijuana on Schedule I, alongside heroin and LSD and above Schedule II drugs like cocaine, fentanyl, methamphetamine, or oxycodone, where it remained for half a century.[3] But in the past decade, at both the federal and state level, the legal

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cannabidiol ("CBD"). THC is the compound that makes a person "high"; the Controlled Substance Act controlled "marihuana" in Schedule I due to THC's psychoactive properties. In 2018, Congress removed cannabis (including derivatives and extracts etc.) with a THC content less than .3% from classification as marijuana, designating it "hemp" and decontrolling products (whether THC or CBD) derived from "hemp." See generally FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD), U.S. Food & Drug Admin., https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd#whatare.

[2] Memorandum on Federal Arrestee Drug Testing (hereinafter "Executive Memo"), 31 Weekly Comp. Pres. Doc. 51 (Dec. 18, 1995). (memorandum from President Clinton to the Attorney General encouraging mandatory drug testing for all arrested federal offenders).

[3] *Drug Scheduling*, Drug Enforcement Administration, https://www.dea.gov/drug-information/drug-scheduling. Interestingly, when Congress passed the Controlled Substances Act in 1970 ("CSA"),

status of marijuana has changed dramatically. Those changes reflect both better scientific and medical knowledge about the risks and benefits of marijuana use, as well as changed societal judgments about marijuana's dangers relative to other illicit substances. These changes, both legal and social, undermine the idea that marijuana use is *per se* dangerous and that routine imposition of testing is justified.

The federal status of marijuana changed most dramatically on October 6, 2022, when President Biden issued "A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana."[4] That Proclamation granted "full, complete, and unconditional pardon" to persons convicted of simple possession offenses under federal law and the D.C. Code.[5] In the President's supporting statement, he lamented that "[t]oo many lives have been upended because of our failed approach to marijuana."[6] In addition, President Biden also ordered the Secretary of Health and Human Services and the Attorney General to "initiate the administrative process to review expeditiously how marijuana is scheduled under federal law," noting the absurdity of scheduling marijuana higher than drugs like fentanyl or heroin that "are driving our overdose epidemic."[7] Per the Controlled Substances Act, 21 U.S.C. § 811, the Attorney General ultimately schedules or changes the schedule of a controlled substance after a

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Congress placed cannabis on Schedule I – the most controlled schedule – as a temporary measure. The CSA created a "Presidential Commission on Marihuana and Drug Abuse," colloquially known as the Shafer Commission, that was tasked with recommending the proper schedule for cannabis. In 1972, the committee recommended that cannabis be decriminalized for personal use, but neither the President nor Congress followed suit and cannabis remained a Schedule I substance. *See generally* David V. Patton, *A History of United States Cannabis Law*, J.L. & Health 1, 17-18 (2020).

[4] Proclamation No. 10467, 87 Fed. Reg. 61441 (Oct. 12, 2022) (citing 21 U.S.C. § 844 and D.C. Code § 48-904.01(d)(1)).

[5] Michael D. Shear & Zolan Kanno-Youngs, *Biden Pardons Thousands Convicted of Marijuana Possession Under Federal Law*, N.Y. Times, Oct. 6, 2022, https://www.nytimes.com/2022/10/06/us/politics/biden-marijuana-pardon.html; United States v. Woo Kim, No. 21 CR 796 (KHP), 2022 U.S. Dist. LEXIS 210757 (S.D.N.Y. 2022).

[6] *See* Executive Memo, *supra* note 1.

[7] *Id.*

regulatory process that includes an eight-factor assessment, most pertinently the risks and dangers of the drug. Before rescheduling, the Attorney General must consult experts from the Department of Health and Human Services (HHS), and the statute makes binding on the Attorney General their findings as to scientific and medical matters, see 21 U.S.C. § 811(b). HHS has since recommended reclassifying marijuana as a Schedule III substance.[8] Although the Attorney General makes the final judgment on the classification, and that process is still underway, the request by the President to initiate rescheduling, along with his statements, support the conclusion that Schedule I is no longer the proper classification of marijuana.

President's Biden pardon and rescheduling request are the most direct actions by the federal government demonstrating that federal officials no longer consider marijuana use or possession *de facto* dangerous or illicit behavior akin to use or possession of heroin, cocaine, fentanyl or other Schedule I or II drugs. But there are added indicia as well. First, in 2018, Congress passed and President Trump signed into law what is colloquially known as the "Farm Bill." The 2018 Farm Bill differentiated between low- and high-THC cannabis, thus legalizing both THC and CBD (the two key psychoactive chemicals in cannabis) so long as they were derived from cannabis with less than .3% THC (called "hemp").[9] Second, the FDA has acknowledged the medical benefits of both CBD and THC: as of 2023, the FDA has approved one CBD product derived from cannabis (Epidiolex), and two synthetic-THC products (Marinol and Syndros) as pharmacological treatments.[10] Those approvals show that, in fact, the key

[8] Editorial Board, Biden is right: Marijuana belongs in a different category, Wash. Post, Sept. 15, 2023, https://www.washingtonpost.com/opinions/2023/09/15/marijuana-schedule-one-drug/.
[9] John Hudak, *The Farm Bill, hemp legalization and the status of CBD: An explainer*, Brookings Institute (Dec. 14, 2018), https://www.brookings.edu/articles/the-farm-bill-hemp-and-cbd-explainer/.
[10] *FDA and Cannabis: Research and Drug Approval Process*, FDA, https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process. The FDA has also approved a drug with a key ingredient similar to synthetic THC, called Cesamet.

psychoactive substances in cannabis are not unreservedly dangerous, but in fact can have medicinal value.

Third, and importantly, the federal government effectively ceased enforcement of marijuana possession over a decade ago in states that legalized marijuana. In 2013, the Department of Justice issued what has become known as the "Cole Memo," named for the deputy attorney general who authored it.[11] The Cole Memo set the standard for exercising prosecutorial discretion in enforcing federal marijuana laws in states that had legalized marijuana, and instructed U.S. Attorneys to focus on distribution and trafficking crimes (not possession or use) specifically as regards to minors and criminal enterprises. A second, lesser-known Cole Memo issued a year later in 2014 further clarified that *financial crimes* associated with marijuana sales – such as money laundering, Bank Secrecy Act, or other types of offenses – should *also* target criminal enterprises and sales to minors, and not sales considered legal under the regulatory structure of a state.[12] Even though Attorney General Jeff Sessions rescinded this guidance during the Trump Administration,[13] federal marijuana prosecutions (which already were almost entirely trafficking-related offenses) continued their precipitous decline during the Trump Administration.[14] Attorney General Garland has since effectively endorsed the Cole memo guidance,[15] and the DOJ has continued to deprioritize marijuana prosecutions.

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[11] *See, e.g.*, James M. Cole, Deputy Attorney General, Guidance Regarding Marijuana Enforcement, United States Department of Justice, Office of the Attorney General (Aug. 29, 2013) (commonly known as the "Cole Memo").
[12] Mark Motivans, *Federal Justice Statistics, 2021*, United States Department of Justice, Bureau of Justice Statistics, 7 tbl.3, https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fjs21.pdf (showing decline from 7,723 marijuana-related arrests in 2011 to 2615 arrests in 2021).
[13] Jeffrey B. Sessions, Attorney General, Marijuana Enforcement, United States Department of Justice, Office of the Attorney Genearl (Jan. 4, 2018) (revoking the Cole Memo).
[14] Motivans, *supra* note 12.
[15] Kyle Yager, *U.S. Attorney General Reiterates That Marijuana Enforcement Wastes Department Resources, But Declines to Comment on Formal Guidance*, Marijuana Moment (Apr. 26, 2022),

Finally, in response to this changing understanding of the nature of marijuana use and increased legalization of sale, possession, and use by states, Congress in 2015 began an annual practice of prohibiting the Department of Justice from expending any appropriated funds to interfere with state legalization efforts, via its appropriations power (the "Rohrabacher-Farr Amendment"). Several federal courts have held that these provisions bar specific prosecutions conducted in contravention of this mandate.[16] And the legislative branch has repeatedly introduced measures to legalize marijuana at the federal level in various forms,[17] including New York Senator and Majority Leader Schumer's Cannabis Administration and Opportunity Act.[18]

All of these changes point to the inescapable conclusion that neither the Federal Executive nor the Legislative branches view use or possession of marijuana as an unmitigated danger akin to substances like heroin or cocaine. As such, the Judicial branch should also not treat it that way. A nonenforced federal law is not a solid foundation on which to impose a marijuana drug testing condition for release, particularly when the Bail Reform Act specifically requires both that conditions bear a relationship to public safety or risk of flight *and* that they be the least restrictive necessary.

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https://www.marijuanamoment.net/u-s-attorney-general-reiterates-that-marijuana-enforcement-wastes-department-resources-but-declines-to-comment-on-formal-guidance/.

[16] Joanna R. Lampe, *Funding Limits on Federal Prosecutions of State-Legal Medical Marijuana*, (Feb. 4, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10694#:~:text=In%20each%20fiscal%20year%20since,possession%2C%20or%20cultivation%20of%20medical.

[17] See, e.g., States Reform Act, H.R. 5977, 117th Cong. (2021) (bill by Rep. Nancy Mace (R-SC) to deschedule marijuana and leave it to the states in a manner akin to alcohol); Marijuana Opportunity Reinvestment and Expungement ("MORE") Act, H.R. 3617, 117th Cong. (2022) (bill that has twice passed the house, was sponsored by then-Senator Kamala Harris in 2019 and Rep. Jerrold Nadler (D-NY), to decriminalize marijuana); Secure and Fair Enforcement ("SAFE") Banking Act of 2021, H.R. 1996, 117th Cong. (2021) (bill that has passed the House repeatedly, sponsored by by Rep. Perlmutter (D-CO), Rep. David Joyce (R-OH), and Rep. Jeff Merkley (D-OR), with 180 cosponsors in House and 42 co-sponsors in Senate, to effectively legitimate banking and financial services for marijuana businesses – primarily held up by equity concerns).

[18] Cannabis Administration and Opportunity Act, S. 4591, 117th Cong. (2022).

c. The state and local trends toward legalization of adult use of marijuana further indicate that routine marijuana testing requirements cannot be justified on generalized danger or flight risk grounds.

The evolving federal legal and policy landscape demonstrates a more sophisticated understanding of the potential risks, dangers, and addiction propensity of marijuana relative to other drugs. A 2017 study by an expert panel of the National Academies of Science, Engineering, and Medicine reviewed the existing literature on marijuana, and found both risks and benefits of marijuana use.[19] But none of their findings raised alarms for either risk or danger akin to that for other illicit substances routinely tested, such as cocaine or heroin. In fact, several findings pointed to substances (like alcohol) that are routinely *not* tested but have been shown to correlate to higher rates of violence or maladaptive behaviors.[20] Indeed, in light of President Biden's request, it is likely that marijuana will soon be rescheduled, and if so will be reclassified as equivalent to or even below other drugs that are *not* routinely tested as a condition of release, such as ketamine or hallucinogens.

Of course, the Bail Reform Act grants this Court the power to order abstinence from even *legal* substances, not just illicit ones, as a condition of release. 18 U.S.C. § 3142(c)(1)(B). But the Act requires that such orders be imposed only if they can satisfy the requirement of "least

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[19] *See, e.g.*, National Academies of Science, Engineering, Medicine, Comm. on the Health Effects of Marijuana, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research* 13-15 (2017), https://www.ncbi.nlm.nih.gov/books/NBK423845/pdf/Bookshelf_NBK423845.pdf.

[20] Alcohol, opiates, and cocaine are associated with triggering aggressive behaviors, while cannabis is not. Peter D. Anderson & Gyula Bokor, *Forensic Aspects of Drug-Induced Violence*, J. Pharm. Prac. (2012), https://pubmed.ncbi.nlm.nih.gov/22215647/. Cannabis' potential for addictiveness mirrors caffeine's and falls below that of alcohol or tobacco. Mitch Earleywine & Mallory Loflin, *Overdose: The Failure of the U.S. Drug War and Attempts at Legalization: Article: Curious Consequences of Cannabis Prohibition*, 6 Alb. Gov't L. Rev. 438 (2013). Or consider, for instance, that in New York City in 2021, fentanyl was the most common substance involved in overdose deaths (80%), followed by cocaine (47%), alcohol (39%), and heroin (37%). Approximately half (49%) of all opioid-involved overdoses also involved cocaine; alcohol was involved in 41% of opioid-involved deaths. *Unintentional Drug Poisoning (Overdose) Deaths in New York City in 2021*, NYC Health (Jan. 2023), https://www.nyc.gov/assets/doh/downloads/pdf/epi/databrief133.pdf.

restrictive condition" to assure public safety or return to court. In this case, those facts are not present – the simple fact that a person *may* use marijuana no longer, standing alone, supports a conclusion that such use is a danger to the community or risks defendant's flight. In this respect, this Motion can be differentiated from those in which the marijuana testing is imposed as a result of a specific and genuine risk as a result of the facts or circumstances of the defendant or case,[21] or those that ask a court to grant explicit *permission* to use marijuana.[22] Here, Defendant simply argues that imposition of a marijuana testing requirement is not the least restrictive means of either ensuring public safety or defendant's return to court. The Court should accordingly elect not to impose a marijuana testing requirement in the same way that the Court may routinely elect *not* to impose testing requirements for other illicit (such as hallucinogens like LSD or psilocybin) or licit (such as alcohol, Xanax, or Ritalin) substances with psychoactive effects.

II. Current ambiguity in legal status of marijuana, in light of its legalization and commercial availability in New York, makes imposition of a marijuana test requirement in this case both unjust and wasteful of this Court's and Pretrial Services's limited resources.

a. Racial disparity/injustice

In 2021, New York joined 22 other states in legalizing the recreational use of marijuana by adults.[23] Those states join every other state in the union in authorizing some legal use of marijuana – whether for recreational or medical purposes. Although marijuana remains illegal at the federal level, its legalization by 23 states is important for several reasons.

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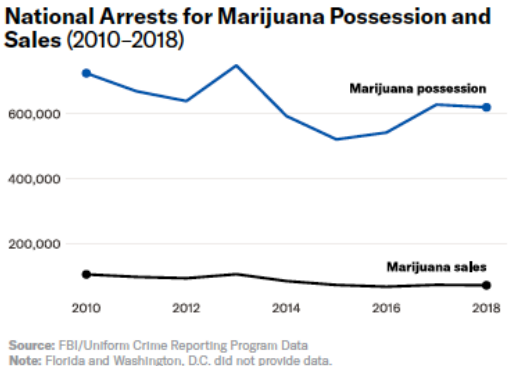
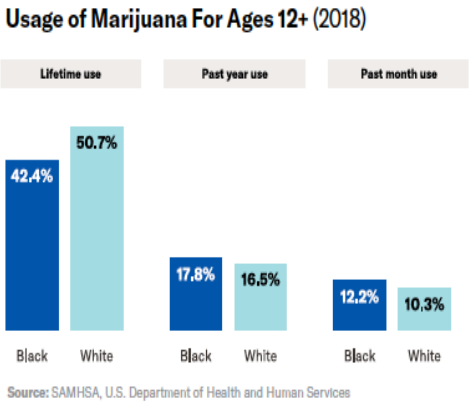
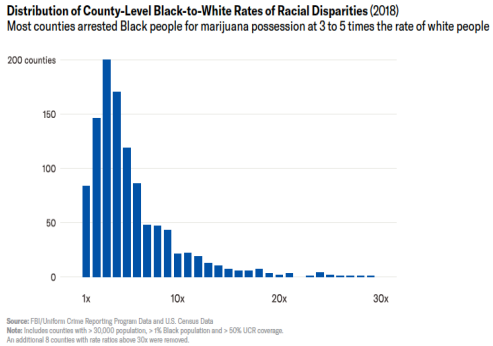
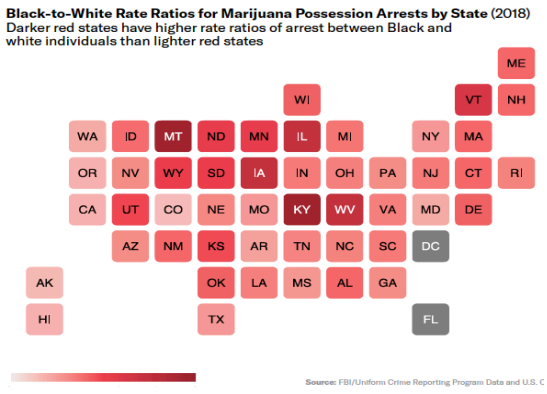
[21] *See, e.g.*, Medina v. State, 188 N.E.3d 897 (Ind. Ct. App. 2022).
[22] For instance, a number of cases have addressed a defendant's request that the federal court give the defendant specific permission to use medical marijuana in conformity with state law. *See, e.g.*, United States v. Griffin, 2021 WL 5917185 (W.D. Pa. 2021) (denying permission). *But see id.* n.1 (noting courts in the Western District that have granted such permission).
[23] *Factbox: U.S. States Where Recreational Marijuana Is Legal*, (June 1, 2023, 10:01 AM), https://www.reuters.com/world/us/us-states-where-recreational-marijuana-is-legal-2023-05-31/

First, unnecessary federal monitoring of marijuana use deepens the divide between those who profit from the highly lucrative marijuana business and those for whom use of marijuana is punished ruinously. Efforts toward legalization were propelled in part by the indefensibly stark reality of a racially charged system of enforcement of marijuana use. A comprehensive report from the ACLU examined state-level data from 2010 to 2018. As reflected in the report's figures below, it found over "6.1 million marijuana arrests in the United States, 88% of which were for possession."[24] The report further found that, across the country, "a Black person is 3.64 times more likely to be arrested for marijuana possession than a white person, even though Black and white people use marijuana at similar rates."[25]









[24] ACLU, *Tale of Two Countries* 5 (2020). In fact, in 2018, police made more marijuana arrests than for all violent crime combined, and the vast majority of those were for possession, not trafficking. *Id.*

[25] *Id.* In some states, the disparity was as high as 10x the rate. *Id.* at 32 tbl.7. And in one county, the disparity was as high as 97x more likely. *Id.* at 34. Disparities are also high for the Hispanic population, although many jurisdictions do not record Hispanic demographic information as comprehensively.

At the same time, in the past decade legal marijuana has become a big business interest, overwhelmingly benefitting white people. With lawful business in 39 states and the District of Columbia, *legal* marijuana topped $25 billion in 2021, eclipsing Starbucks' $20.5 billion in sales that year, and with continued growth projected.[26] And while precise numbers are hard to find, a common estimate shows that over 80% of marijuana business owners are white.[27] It is hard to imagine a just legal regime that could tolerate a white business class profiting from selling a product to a racially diverse array of patrons, while also arresting and policing consumption of that product's use by Black communities. Yet that is the present state of the world when it comes to marijuana enforcement. White people, who have long enjoyed effective immunity from policing or prosecution of marijuana use, are now also the beneficiaries of *actual* legal immunity for state-legal marijuana cultivation and sales – both at the federal (Cole Memos) and state levels – even while Black and Brown people continue to be monitored and policed for simply using or possessing marijuana.

Second, and relatedly, the unnecessary imposition of marijuana testing requirements undermines the principle of legality, and its associated aim of faith in the rule of equitable administration of law. Most ordinary New Yorkers, having purchased marijuana from a state-legally operated marijuana business storefront and hearing that "weed is now legal" in New York, will fail to appreciate the subtleties of federalism. This is particularly acute given that the federal government has, outside of imposition of release conditions, effectively stopped policing

[26] Steve Gelsi, *Legal Cannabis Sales Exceed Starbucks N. America Sales in 2021: Report*, (May 4, 2022, 10:27 AM), https://www.marketwatch.com/story/legal-cannabis-sales-exceed-starbucks-n-america-sales-in-2021-report-2022-05-04.

[27] Courtney Connley, *Cannabis Is Projected to Be a $70 Billion Market by 2028—Yet Those Hurt Most by the War on Drugs Lack Access*, (Jul. 1, 2021, 11:30 AM), www.cnbc.com/2021/07/01/in-billion-dollar-cannabis-market-racial-inequity-persists-despite-legalization.html.

marijuana possession or distribution and trafficking by state-legal entities. Given this reality, it cannot be said that a person's positive test for marijuana is a fair marker of asocial tendencies or a willingness to break laws. In this way, it is not just the nuance of *de jure* versus *de facto* legalization that is the problem – it is also that the *de jure* state legalization and *de facto* federal legalization undermines any claim that marijuana is so inherently dangerous or destructive, or so debilitating to a person's ability to return to court, that testing and monitoring a person's usage is necessary without further findings of risk or danger under the Bail Reform Act. Imposition of a marijuana testing requirement, without additional evidence indicating that such a requirement in fact is necessary in order to secure the defendant's return to court or community safety, thus contravenes the mandate of the Bail Reform Act.

b. Imposing a marijuana testing requirement in this case is inefficient, and diverts scarce resources from efforts that actually impact public safety.

The final reason that this Court should not impose a marijuana testing requirement in this case is that, in light of our changing understanding of the nature and risks of marijuana use, such requirements are wasteful in terms of both time and judicial resources. Routine pretrial drug testing emerged in the late 80s as a means of reducing pretrial misconduct.[28] Overall, roughly 63% of all released federal defendants have a drug testing requirement.[29] Interestingly, studies showed mixed results of its efficacy – in part because generalized testing does not differentiate well between casual and problematic users,[30] and in part because the process of testing itself

[28] Nancy E. Gist, *Pretrial Drug Testing: An Overview of Issues and Practices*, United States Department of Justice, Bureau of Justice Statistics, 3 (1999), https://www.ojp.gov/pdffiles1/176341.pdf.
[29] George E. Browne & Suzanne M. Strong, *Pretrial Release and Misconduct in Federal District Courts, Fiscal Years* 2011, United States Department of Justice, Bureau of Justice Statistics, https://bjs.ojp.gov/content/pub/pdf/prmfdcfy1118.pdf.
[30] *See e.g.*, Daniel Abrahamson, Use of Tests Pretrial, Drug Testing Legal Manual, § 9:3 (Nov. 2022) (noting that "[i]t is not unusual for persons who have been arrested to test positive for drugs, especially for marijuana" and that a study of 10 metropolitan areas found that a positive test for marijuana was the

(with associated fees, transportation costs, and time away from work or caregiving) arguably work to undermine its underlying purpose.[31]

In addition, monitoring defendants for marijuana consumption also takes time and resources away from overloaded pretrial services officers.[32] If a defendant tests positive, they must take the time to write a report and attend court hearings, even though [such actions rarely result in revocation/demonstrably serve any safety or other benefit.][33] That is time that the officer could be spending on more productive endeavors, and ones critical for public safety, such as assisting persons with use disorders in accessing treatment, ensuring compliance with conditions directly pertinent to risks of violence, and preparing for revocation hearings for conduct that actually does pose a risk of safety or flight.[34]

CONCLUSION

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most common drug in all but one city); *id.* (reviewing studies that show negligible if any benefit to routine drug testing at arrest).

[31] Sarah Cornett, *The Fraught and Expensive Cycle of Drug Testing*, https://www.arnoldventures.org/stories/the-fraught-and-expensive-cycle-of-drug-testing; Peggy M. Tobolowsky & James F. Quinn, *Drug-Related Behavior as a Predictor of Defendant Pretrial Misconduct*, 25 Texas Tech. L. Rev. 1019, 1052 (2000) ("[T]here is no research consensus that any of the drug-specific criteria is a significant predictor of individual pretrial misconduct. Prior and current drug charge information has not been shown to more effectively predict individual pretrial misconduct than prior and current criminal charge information generally.").

[32] Abrahamson, *supra* note 30, at § 9:3 ("Perhaps the strongest argument against pretrial drug testing is its cost effectiveness in comparison to alternatives.").

[33] *Cf.* United States v. Trotter, 321 F. Supp. 3d 337, 341 (E.D.N.Y. 2018) (terminating supervised release early, notwithstanding positive marijuana test, noting even prior to New York's legalization that "[w]ithout addressing the advantages and dangers of the change in criminal laws on smoking marijuana, it is obvious that marijuana use, through law, policy, and social custom, is becoming increasingly accepted by society.").

[34] Mitch Earleywine & Mallory Loflin, *Curious Consequences of Cannabis Prohibition*, 6 Alb. Gov't L. Rev. 438, 448 (noting that "legalization appears to have already helped unclog the justice system in [legalized] states"); *id.* at ("Over seventy-five years of cannabis prohibition have led to numerous arrests at considerable expense, but the impact on the number of users appears minimal."). *Cf.* Zachary J. Weiner, Note, *Revoking Supervised Release in the Age of Legal Cannabis*, 94 St. John's L. Rev. 231 (2020).

The Court would not be authorizing a violation of federal law by prioritizing which drugs to test based on Defendant's history and risk. Courts can still impose marijuana testing on a case-by-case basis when facts — either in the case, or other violations of release conditions — warrant. But in this case, imposition of a marijuana testing requirement cannot be justified as the least restrictive condition necessary to ensure public safety and Defendant's return to court.