

Being a Legal Eagle: *Confidentiality, Ethical and Constitutional Requirements*



National Drug Court Institute
Judge William G. Meyer (ret.)
Senior Judicial Fellow

Refresher/Crash Course

- Confidentiality/HIPAA
- Ethics
 - Ex Parte Communications
 - Judge Participant Contact Outside Courtroom
 - Defense Function
- Limited Constitutional Issues

42 CFR, part 2-Summary

- **Is it a program-AOD fed assistance?**
- **Is it patient identifying information?**

General Rule: Patient Identifying Information cannot be disclosed



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SUMMARY

<ul style="list-style-type: none">•Consent<ul style="list-style-type: none">advisementelements•Re-disclosures	<p>No Consent-civil</p> <p><u>Good cause</u></p> <ul style="list-style-type: none">a. Can't obtain info otherwiseb. Public Interest outweighs<ul style="list-style-type: none">Injury to patientDr./Patient relationshipTreatment service
<p>Confid. vs. Tx Communication</p> <p><u>Good Cause &</u></p> <ul style="list-style-type: none">SBI protection orInves. Serious CrimeWaiver by testimony	<p>•No Consent--Criminal</p> <p><u>Good Cause &</u></p> <ul style="list-style-type: none">Serious CrimeDiscovery likely successful

HIPAA

- Contrary to myth, HIPAA covered entities do not include the courts, court personnel, accrediting agencies like JCAHO and law enforcement personnel including police or probation officers.
- **GAINS CENTER, “Dispelling the Myths...”**
Feb. 2007

HIPAA

- **Is provider a covered entity?**

health care provider, payee or biller using electronic transmission of health care information (PHI)

- **Does the court have in place a order that allows the transmission and disclosure of potential PHI in the court proceedings?**

45 CFR 164.512 (a), (e) release as required by law or during administrative or judicial proceedings

- **Does your consent form tell the drug court participant existence of order and that potentially PHI will be released to the drug court team as a condition of his participation in drug court? (note: not as a condition of treatment)**

45 CFR 164.508(b)(4)

Confidentiality and Open Courtroom

- The provisions of 42 CFR 2.35 and the need for open courtrooms required denial of motion to close proceedings. Florida v. Noelle Bush, Florida Circuit Court (Oct. 2002)



What about staffing—Open?

- State v. Sykes, 339 P. 3d 972 (Wash. 12/18/14)
(Adult drug courts are philosophically, functionally, and intentionally different from ordinary criminal courts. Based on their unique characteristics, we hold that adult drug court staff meetings are not subject to the open courts provision of article I, section 10 of the Washington State Constitution. Whether adult drug court staff meetings are presumptively open or closed is left to the discretion of the individual drug courts.)

What about Defendant's right to be at every critical stage of proceeding—staffing too?

- A defendant's right to be present at a proceeding is required "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."
However, this right is not absolute.Just as closed staffings are critical to the success of drug court in the context of public trial rights, the presence of the defendant at staffings would frustrate the collaborative purpose of drug court. *State v. LeClech*, Washington Court of Appeals, NOT SELECTED (6/15/15)

Best Practices

- Assume Confidentiality Laws apply
- Designate someone on the team to be Confidentiality Compliance Officer
- Provide CCO with resources
- Your Consents should cover HIPAA, open courtroom and voluntariness, with acknowledgement of representation.
- Follow the rule of minimization
- Obtain an Administrative Judicial Order for HIPAA
- Update your Releases regularly
- Document your privacy policies

Ethics in Drug Court: *thorny issues*

1. *Ex Parte* Communications and Staffing
2. Judicial Fraternalization/Impartiality
3. Role of the Defense Counsel

Ex Parte Communications

- Several States including Oklahoma, Minnesota, Montana, New York, Indiana, Idaho, Arkansas and Colorado have amended their Canons of Judicial Conduct to address the *ex parte* communication issue facing problem solving courts.

A judge may initiate, permit, or consider *ex parte* communications expressly authorized by law or by consent of the parties, including when serving on therapeutic or problem-solving courts such as many mental health courts, drug courts, and truancy courts. In this capacity, judges may assume a more interactive role with the parties, treatment providers, probation officers, social workers, and others. Comment Canon 2.9

The Judge and Drug Court Participants

Judge attended group activities, softball games, bowling night, holiday party, spring picnic, Disneyland trip, with drug court participants.



Disciplined

- *Matter of Blackman*, 591 A.2d 1339 (N.J. 1991)

Judge Blackman argued that his attendance was an innocent mistake; he had no improper motive and had been friends with the Defendant for many years. The court was unpersuaded and stated: “The lesson is that a judge who attends a public or social event will be perceived as endorsing or supporting not only the event itself but also persons associated with the event.”

- *In re Jones*, 581 N.W.2d 876 (Neb. 1998)

Judge met individually with probationers. The judge justified a portion of his conduct on his sincere concern for the welfare of addicts and their progress. The Nebraska Supreme Court was unpersuaded and found that Jones’ conduct constituted a violation of Canon 1 (uphold integrity and Independence of Judiciary) and Canon 2 in that Jones failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Respect Role of Defense

- National Legal Aid and Defender Association:

Nothing in the problem solving court policies or procedures should compromise counsel's ethical responsibility to...challenge evidence or findings and the right to recommend alternative treatments or sanctions.

ABA Standards Defense Function

- *The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation. ABA Model Rule 1.2; (“Defense Function Guidelines”)*
- To competently represent client in DTC must familiarize self with treatment, procedures, bases for sanctions or termination, etc. (ABA Model Rule 1.1)

Smith v. State

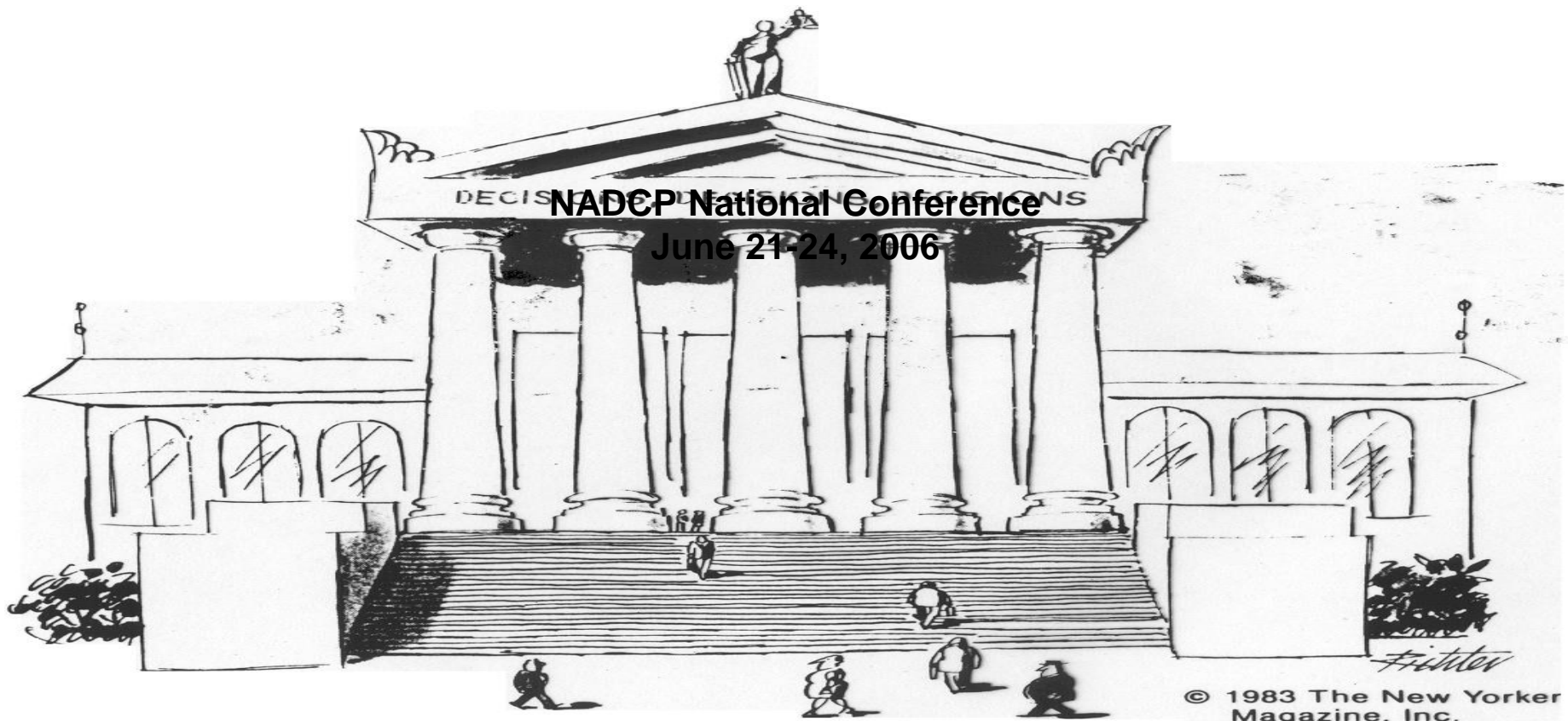
Florida Ct. App. 4th Dist. 3/19/03

- It is essential that lawyers educate themselves as to the availability, requirements, and appropriateness of drug court programs. Only then can they effectively advise their clients. It is equally important for the institutions that educate future lawyers, as well as those that educate the other disciplines that play vital roles in the drug court process to incorporate drug courts into their curricula. For lawyers to do otherwise is for them to become legal dinosaurs. To ignore the need to learn about the drug court process is to ignore the evolution of the justice system. The sooner the Bar educates itself, the issue raised in this case will become extinct.

Best Practices

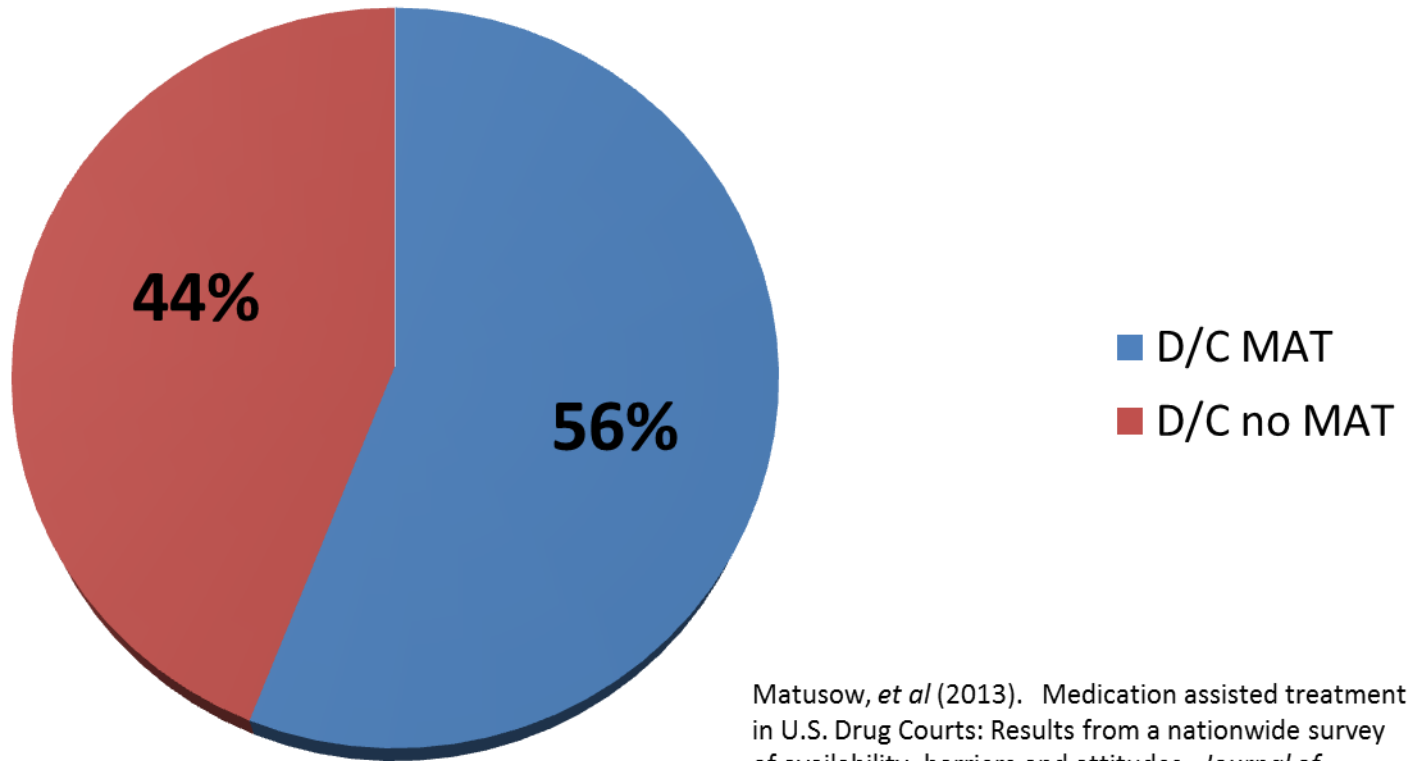
- Ensure that DA and Defense Counsel attend staffings and review hearings
- Where CJC permit *ex parte*-insure disclosure to opponent
- Judges avoid public activities (non-judicial) with participants, except for cameo appearance
- Respect Ethical Obligations of Defense Counsel

Constitutional Issues in Drug and other Problem-Solving Courts



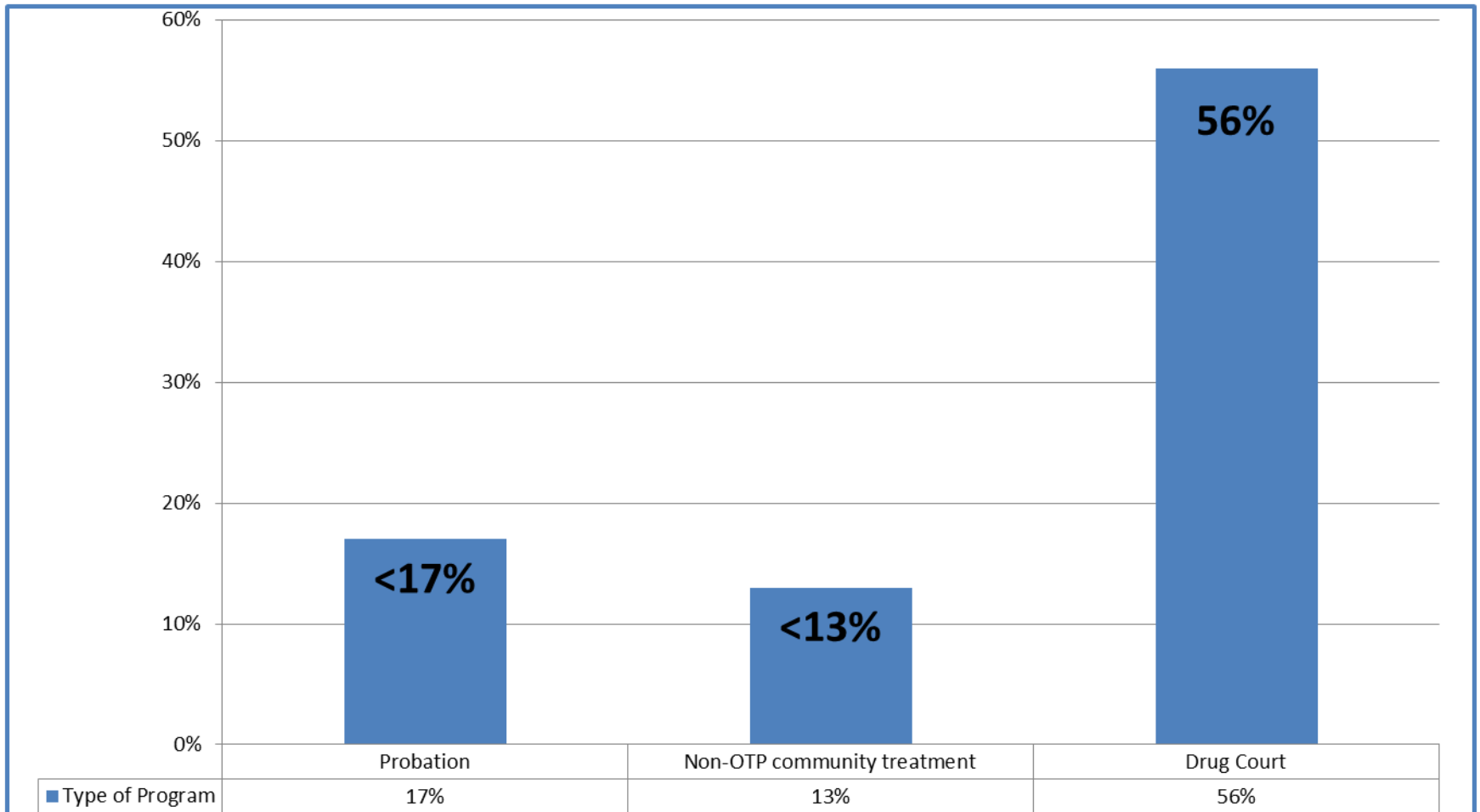
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Prevalence of MAT Use in Drug Courts



Matusow, *et al* (2013). Medication assisted treatment in U.S. Drug Courts: Results from a nationwide survey of availability, barriers and attitudes. *Journal of Substance Abuse Treatment*, 44, 473-480.

Drug Court Use of MAT Compared with Other Criminal Justice Interventions



The Unequivocal Position of NDCI

Inclusion of MAT as part of opioid abuse treatment in drug courts is recommended by the NDCI as well as the National Association of State Alcohol and Drug Abuse Directors

NDCI Drug Court Practitioner Fact Sheets. Alexandria, VA: National Drug Court Institute; 2002. *Methadone and other pharmacotherapeutic interventions in the treatment of opioid dependence*: National Association of Drug Court Professionals. (2010). *Resolution of the Board of Directors on the availability of medically assisted treatment (M.A.T.) for addiction in Drug Courts*; National Association of Drug Court Professionals. (2013 & 2015). *Adult Drug Court Best Practice Standards (Vol. I & II-Standards I, V & VI)*. Alexandria, VA..

When, if ever, can the Drug Court say No & Still Keep Federal Funding?

- Medications available by prescription must be permitted, **unless** the judge determines the existence of one of the following conditions :
 1. the client is **not** receiving those medications as part of treatment for a diagnosed substance use disorder;
 2. a licensed clinician, acting within their scope of practice, has **not** examined the client and determined that the medication is an appropriate treatment for their substance use disorder
 3. the medication was **not** appropriately authorized through prescription by a licensed prescriber

The Bottom Line

- **Under no circumstances** may a drug court judge, other judicial official, correctional supervision officer, or any other staff connected to the identified drug court deny the use of these medications when made available to the client under the care of a properly authorized physician and pursuant to regulations within an Opioid Treatment Program or through a valid prescription.

What about mandating cessation as a condition of Drug Court graduation?

- **In all cases**, MAT must be permitted to be continued for as long as the prescriber determines that the medication is clinically beneficial. Grantees must assure that a drug court client will not be compelled to no longer use MAT as part of the conditions of the drug court, if such a mandate is inconsistent with a licensed prescriber's recommendation or valid prescription.

Challenging Blanket MAT Prohibitions

- **Americans with Disabilities Act (ADA)**
Prohibits discrimination by state and local governments
- **Rehabilitation Act of 1973 (RA)**
Prohibits discrimination by federally operated or assisted programs

Discovery House, Inc. v. Consol. City of Indianapolis, 319 F.3d 277, 279 (7th Cir. 2003)
("the ADA and the [Rehabilitation Act] . . . run along the same path and can be treated in the same way").

- **Due Process protections of 14th Amendment**
- **8th Amendment-cruel and unusual punishment**

FIRST AMENDMENT

- Working the twelve steps requires:
 - **Confess to God “the nature of our wrongs” (Step 5);**
 - **Appeal to God to “remove our short comings” (Step 7);**
 - **By “prayer and meditation” to make “contact” with God to achieve the “knowledge of his will” (Step 11).**

FIRST AMENDMENT

- *Kerr v. Ferry*, 95 F.3d 472, 479-80 (7th Cir. 1996) (prison violated Establishment Clause by requiring attendance at Narcotics Anonymous meetings which used “God” in its treatment approach);
- *Griffin v. Coughlin*, 88 N.Y. 2d 674 (1996) cert. denied 519 U.S. 1054 (1997) (conditioning desirable privilege – family visitation – on prisoner’s participation in program that incorporated Alcoholics Anonymous doctrine was unconstitutional as violation of the Establishment Clause);
- *Inouye v. Kemna*, 504 F.3d 705 (9th Cir. 9-7-2007, amended on 10/3/07)(Parole officer lost qualified immunity by forcing AA on Buddhist)
- *Hanas v. Inter City Christian Outreach*, 542 F. Supp. 2d 683 (E.D. Mich. 2/29/08) (Drug Court program manager and drug court consultant held liable for actions related to referral to faith based program, where they knew of participant’s objections while in the program and when the program denied the participant the opportunity to practice his chosen faith –Catholicism)).

- Voluntary program—Can you mandate AA without secular alternative?

Equal Protection Violation



Not all is lost

- *O'Conner v. California*, 855 F. Supp. 303, 308 (C. D. Calif.) (no Establishment Clause violation where DUI probationer had choice over program, including self-help programs that are not premised or monotheistic deity)
- *In Re Restraint of Garcia*, 24 P.3d 1091 (Wash. App. 2001) (same)
- *Americans United v. Prison Fellowship*, 509 F.3d 406 (8th Cir. 12/3/07) (state supported non-coercive, non-rewarding faith based program unconstitutional First Amend. establishment clause violation, where alternative not available)
- LifeRing Recovery <http://www.unhooked.com>
- Rational Recovery <http://www.rational.org>
- Secular Organizations for Sobriety (SOS) <http://www.secularhumanism.org/sos>

First Amendment and Area Restrictions

- Who uses place and area restrictions?

Reasonable when narrowly drawn:

- 1) **Whether the defendant has a compelling need to go through/to the area;**
- 2) **A mechanism for supervised entry into the area;**
- 3) **The geographic size of the area restricted, and**
- 4) **The relatedness between the restriction and the rehabilitation needs of the offender.**

See People v. Rizzo, 362 Ill. App. 3d 444 (2005).

Association Restrictions

- Watch who you hang out with
- Not necessarily know that they are druggies or felons, look at what associates are doing and where they are

Malone v. State, 2012 Ark. App. 280, (2012); State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006); Jones v. State, 41 P.3d 1247 (Wyo. 2001) (persons of disreputable character); State v. Hearn, 128 P.3d 139 (Wash. App. 2006) (prohibition against associating with drug users or dealers constitutional); Commonwealth v. LaPointe, 759 N.E.2d 294 (Mass. 2001).

Search Waiver

Sampson v. California, 547 U.S. 843 (2006)

- In parole case, mandatory search waiver constitutional and totally suspicionless search is upheld. No need to have a finding of reasonableness, but observes the search cannot be for harassment.
- Probationers and parolees, who are subject to a clearly disclosed search condition of parole or probation, have greatly diminished expectations of privacy such that warrantless searches survived Fourth Amendment scrutiny.

Due Process

- Procedural protections are due under the due process clause when the defendant will **potentially suffer** a loss to a **recognized liberty or property right** under the 14th Amendment.
- If due process applies, the question remains what process is due.

Fuentes v. Shevin, 407 U.S. 67 (1972).

Morrissey v. Brewer, 408 U.S. 471 (1972).

Due Process

- Revocation=Termination
- *People v. Anderson*, 833 N.E.2d 390 (Ill. App. 2005); *State v. Cassill-Skilton*, 122 Wash. App. 652 (Wash. App. 2004); *Hagar v. State*, 990 P.2d 894 (Ok. 1999). *In Re Miguel*, 63 P.3d 1065, 1074 (Ariz. App. 2003) (juvenile).

Due Process

What is required?

- P/C determination
- Written Notice
- Right to Appear
- Cross-Exam and call witnesses
- Independent magistrate
- Written findings-reasons

Gagnon v. Scarpelli, 411 U.S. 778, 781-782 (1973).
(probation)

- Right to Counsel—state mandate



Weight of Authority

- **HARRIS v. COMMONWEALTH**, 279 Va. 541 (2010)

Consequently, because Harris had no opportunity to participate in the termination decision, when deciding whether to revoke Harris' liberty and impose the terms of the plea agreement deprived Harris of the opportunity to be heard regarding the propriety of the revocation of his liberty interest.

- **GOSHA v. STATE**, *Gosha v. State*, 927 N.E.2d 942 (Ind. Ct. App. 2010)

In termination from drug court, due process rights include:

written notice of the claimed violations, disclosure of the evidence against him, an opportunity to be heard and present evidence, the right to confront and cross-examine witnesses, and a neutral and detached hearing body

- **HUNT v. COMMONWEALTH**, 326 S.W.3d 437 (Ky. 2010) summary probation revocation proceeding when defendant sentenced to probation with drug court as a condition of probation, where no evidence presented, but simple conclusory statements made and counsel appointed immediately prior to hearing violated due process)
- **State v. Shambley**, 281 Neb. 317 (2011) (Drug court program participants are entitled to the same due process protections as persons facing termination of parole or probation.)

Pre-Allegation Waiver of Hearing

- Neal v. State, 2016 Ark. 287 (Ark. Sup. Ct. 6/30/16) (Citing *LaPlaca* and *Staley, infra*, Ark. Sup. Ct. holds: “[T]he right to minimum due process before a defendant can be expelled from a drug-court program is so fundamental that it cannot be waived by the defendant in advance of the allegations prompting the removal from the program.”)
- State v. LaPlaca, 27 A.3d 719 (New Hampshire 2011) (Even where program manual provided: “Any violation of the terms and conditions of the [Program] shall result in the imposition of sanctions, without hearing, by the court as deemed fair and appropriate, consistent with statutory authority and the descriptions as outlined in the [Program] policy manual. The defendant waives any right(s) to any and all hearings. Termination of participation in the [Program] shall result in the imposition of the suspended prison sentences and fines without hearing. The defendant shall affirmatively waive any and all rights to a hearing”, waiver pre-notice of allegations was not enforceable.
- Court relied upon *Staley v. State*, 851 So.2d 805 (Fla. Dist. Ct. App. 2003) (Failure to provide the participant a pre termination hearing was a violation of due process in the context of removal from drug court and imposition of a suspended sentence.) See also *Gross v. State of Maine*, Superior Court case # CR-11-4805 (2/26/13)
- *People v. Freeman* not selected Calif. Ct Appeals 4th Dist. 2nd Div. 1/23/12—*contra, without discussion.*

Due Process & Judicial Impartiality

- Test:

U.S. v. Ayala, 289 F.3d 16, 27 (1st Cir. 2002) (would the facts, as asserted, lead an objective reasonable observer to question the judge's impartiality)

Alexander v. State, 48 P. 3d 110 (Okla.
2002)

- Requiring the District Court to act as Drug Court team member, evaluator, monitor and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a Drug Court participant's program.
- Therefore, in the future, if an application to terminate a Drug Court participant is filed, and the defendant objects to the Drug Court team judge hearing the matter by filing a Motion to Recuse, the defendant's application for recusal should be granted

What is the trend on recusal?

Recusal Not Required

1. *State v. Belyea*, 160 N.H. 298, 999 A.2d 1080 (N.H. 2010)
2. *Mary Ford v. Kentucky*, (Ky. Appellate April 30, 2010)
3. *Grayson v. Kentucky*, No. 2011-CA-000399-MR. Court of Appeals of Kentucky UNPUBLISHED (June 29, 2012)
4. *Arizona v. Tatlow*, No. 1 CA-CR 11-0593, Court of Appeals of Arizona, Division One, Department C. (December 4, 2012)
5. *Arizona v. Perez Cano*, No. 1 CA-CR 11-0473 Court of Appeals of Arizona (September 20, 2012) UNPUBLISHED
6. *State v. Rogers*, 170 P. 3d 881 (Idaho 2007)
7. *State v. McGill*, No. M2015-01929-CCA-R3-CD. (Tenn: Court of Criminal Appeals 7/18/2016) (rejecting *Stewart*)

Recusal Required

1. *Minnesota v. Cleary*, No. A15-1493 (Court of Appeals of Minnesota July 5, 2016.) (When the sole basis for revoking probation is a probationer's termination from drug court and the drug court judge participated in the drug court team's decision to terminate the probationer from drug court, a probationer is entitled to have a judge other than the drug court judge preside over the probation revocation hearing, because of the appearance of lack of impartiality)
2. *State v. Stewart*, W2009-00980-CCA-R3-CD (Tenn. Crim. App. 8-18-2010)(not selected for publication)

Ethics Opinions

Tennessee Advisory Opinion 11-01

- Question: Does the Code of Judicial Conduct permit a judge, who is a member of a drug court team, to preside over the revocation/sentencing hearing of a defendant who is in the drug court program?

Yes, unless the judge has personal knowledge of the facts giving rise to the revocation

Kentucky 10/10/11 JE_122

- Recusal issues where a Drug Court or Mental Health Court judge presides in a revocation hearing based on defendant's violation of terms of participation in drug or mental health program.

Yes, unless the judge has personal knowledge of the facts giving rise to the revocation

- **Canons of Judicial Conduct**

3C and 3E—Recusal for Appearance of Partiality & Remittal of Recusal

Due Process and Sanctions

- Hearing vs. non hearing—If the drug court participant does not admit the violation and denies the factual basis of the alleged non compliance and jail is a possible sanction, ask yourself:
 1. Will the defendant **potentially** suffer a loss to a **recognized liberty** or property right at the sanctioning hearing?
 2. If the answer to 1. is yes, the due process clause is implicated.
 3. Because due process is implicated, the issue becomes, **what type of hearing** is participant entitled to.

Gagnon v. Scarpelli, 411 U.S. 778, 781-782 (1973); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) overruled on other grounds *Sandlin v. Conner*, 515 U.S. 472 (1995) *In Re Miguel*, 63 P.3d 1065, 1074 (Ariz. App. 2003). (juvenile entitled to hearing).

Key Component #2

- Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

NICELY v. COMMONWEALTH, 2007-

CA-002109-MR (Ky. App. 4-24-2009)

- ***Under these circumstances, if a sentencing court chooses to find a defendant in contempt for violating conditions of probation as opposed to revoking or modifying the conditions of probation, the defendant must be afforded certain due process rights, including a hearing. Pace, supra at 395.***

STATE v. STEWART, (Tenn. Crim. App. 8-18-2010) (NSOP)

- ⊙ Having reviewed the record, we are additionally troubled by the four or five occasions where the defendant in this case was "sanctioned" to significant jail time by the drug court team during the two years he participated in the program.
- ⊙ Leaving aside (as we must) **the obvious due process concerns attendant to any additional deprivation of the defendant's liberty that has been imposed through a collaborative, non-adversarial, and at times *ex parte* process rather than through a traditional adversarial evidentiary hearing, there is considerable tension between this outcome and the general guidelines under which drug courts should operate.** The drug court program explicitly recognizes that alcohol and drug addition "is a chronic, relapsing condition," that "many participants [will] exhibit a pattern of positive urine tests," and expressly contemplates that many participants will experience periods of relapse "[e]ven after a period of sustained abstinence."

Mississippi Commission on Judicial Performance v.
Thompson, _____Miss. ____, (Miss Supreme Court
5/21/2015)

(Judge Thompson's conduct of depriving participants in drug court of their due-process rights when he signed orders of contempt without the persons being properly notified of the charge of contempt or a right to a hearing, and by conducting "hearings" immediately after "staffing meetings" without adequate time for the persons to have proper counsel or evidence presented, violated Canons 1, 2A, 3B(1), 3B(2), 3B(4), 3B(8), and constitutes willful misconduct in office and conduct prejudicial to the administration of justice. Result: Judge removed from office)

Sanctioning Hearing

Taylor v. State, CR-15-0354 (Ala. Crim. App. 9/9/16)

Sanctioning hearing using hearsay not due process violation. Concurrence: I realize that developing specific procedures for handling drug-court sanctions can be an arduous task — especially given the dearth of case law in this State addressing drug-court programs. I would encourage other drug-court judges in this State either to use or to develop a drug-court-sanction procedure similar to the one outlined in this Court's opinion (ie: provision of a hearing). I would also recommend to other drug-court professionals that they take advantage of the vast training resources and educational opportunities available through the National Association of Drug Court Professionals.

He/She is an Addict and, if I release her, she will OD

- Robinson v. California, 370 U.S. 660 (1962)[1], The Eighth Amendment of the Constitution was interpreted to prohibit criminalization of particular conduct—status as an addict, as contrasted with prohibiting the use of a particular form of punishment for a crime.

Preventive Detention

- Hoffman v. Jacobi (S.D. Ind., 9/29/2015)
(Magistrate Judge recommends class certification on 42 USC §1983 damages and injunctive relief suit against Drug Court Judge and team for incarcerating participants for lengthy periods of time, while awaiting placement in drug treatment facilities. Plaintiffs allege that the decision to hold them in jail pending placement was made without counsel, hearing, consideration of bond, or other rights of due process) (Injunctive relief moot-Court Closed—Judge forced to Resign 4/22/16)

Preventive Detention

Kansas v. Hendricks, 521 U.S. 346, (1997) (upholding the preventive detention of sexual predators because the detention was preceded by an adversarial hearing that afforded the individual robust procedural protections, including the right to state funded counsel, the right to present and cross-examine witnesses, and the right to an annual case review to determine if detention was still warranted). *Kansas v. Crane*, 534 U.S. 407, 415 (2002) (holding that a state law authorizing the civil commitment of sex offenders was unconstitutional because it did not require an adversarial hearing as to whether the offender lacked control over the dangerous behavior).

Civil Commitment

- O'Conner v. Donaldson 422 US 563 (1975) (cannot fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different)
- Addington v. Texas 441 US 418 (1979) (clear and convincing evidence)

County of Riverside v. McLaughlin, 500 U.S. 44, 52, 111 S. Ct. 1661, 114 L.Ed.2d 49 (1991).

- In [Gerstein v. Pugh, 420 U. S. 103 \(1975\)](#), this Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest.
- Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*.

Arrest on Original Charge vs Probation Revocation

- Although strict 48 hr. rule in **Riverside** may not apply to arrest for probation violation, due process and state statute/rule generally require **prompt** probable cause determination to continue to detain the individual. Gagnon v. Scarpelli, 411 U.S. 778, (1973); Morrissey v. Brewer, 408 U.S. 471 (1972) See also: Warner, C. “The Waiting Game: How States Deny Probationers Their Constitutional Right to a Preliminary Hearing”, 8 Crim. Law Brief 13 (2012-2013); Fowler v. Cross, 635 F. 2d 476, (5th Circuit 1981) (denying qualified immunity and finding civil liability for denial of prompt preliminary hearing in probation revocation)

Best Practices

- Provide a secular alternative to AA and written consent
- Place and Area restrictions rationally related to rehabilitation
- Written, knowing 4th Amend. waiver
- Provide DP protections at termination hearing
- If participant denies factual basis and jail possible sanction, provide DP protections at Sanctions hearing
- Provide equal access to drug court participation to all
- Consider whether Defendant can recuse Judge for revocation, or written waiver
- Insure participant knows what (s)he getting into (Boykin advisement)—no staffing access
- Use MAT, when clinically indicated and appropriately prescribed
- Do not use preventive detention

Resources

- **LEGAL ACTION CENTER, “Confidentiality and Communication”, (LAC 2012)**
- **NDCI, “Ethical Considerations for Judges and Attorneys in Drug Court” (May 2001)**
- **NDCI, “Federal Confidentiality Laws and How They Affect Drug Court Practitioners” (2001)**
- **NDCI, “Critical Issues for Defense Attorneys in Drug Court” (2003)**
- **GAINS CENTER, “Dispelling the Myths...” Feb. 2007**
- **Chapters in Judicial Manual (2011) on Ethics, Confidentiality & Legal Issues**
- **NDCI**
<http://www.ndci.org/law>

- The end