

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



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

Pre-Presentation Test Video Daily Double

- List every 4th, 5th and 6th Amendment issue
 - 4th Search and Seizure
 - 5th Right against Self-Incrimination
 - 6th Right to Counsel

Adult Rights=Juvenile

Rights

- *Juvenile proceedings must be in conformity with the essentials of due process and fair treatment as guaranteed by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. In re Gault, 387 U.S. 1, 30, 87 S.Ct. 1428, 1445 (1967); Towne v. Hubbard, 3 P. 3d 154 –(Okla. Supreme Court 2000)*
- (1977). "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).
- *Nicholas v. People*, 973 P.2d 1213 (Colo. 1999); *IN RE CT*, 2006 WY 101, 140 P.3d 643 (2006)

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>

Legal Research

NDCI:

<http://www.ndcrc.org/content/constitutional-and-other-legal-issues-drug-court>

Google Scholar:

<https://scholar.google.com/>

- bmeyer@jaginc.com

Q1: Your Drug Court needs a HIPAA consent.

- A. True
- B. False



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)

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**

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

State v. Tatlow, 231 Ariz. 34, 290 P.3d 228 (2012)

- Here, as in many drug court matters, Tatlow's participation in the program was a condition of his probation and release. [Federal Confidentiality Regulations] Section 2.35 plainly contemplates that failure to successfully complete a drug court program may result in the disclosure of adverse information to justice system personnel. Indeed, section 2.35(d) provides that such information may be "redisclose[d] and use[d]" to carry out official duties with regard to the participant's release from custody. This provision makes clear that the trial judge was not required to forget that she had terminated Tatlow from the drug court program. The court's judicial notice of its own order — whether considered a "redisclosure" of information to the court system or "use" of information by the court system — was therefore entirely proper.

#2. Because the Oklahoma Constitution (Art. II, Sec. 6) requires an open courtroom, drug court staffings should be open?

- A. True
- B. False



Confidentiality Laws 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)

Open Public Courtroom ≠ Open Staffing

- 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.)

State v. LeClech, Washington Court of Appeals, NOT SELECTED (6/15/15)

- 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.

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

Q3: *Ex Parte* communications are permitted in Drug Court

- A. True
- B. False



Ethics in Drug Court: *thorny issues*

1. *Ex Parte* Communications and Staffing
2. Judicial Fraternization/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.

Judicial Ethics Opinion 2015-2

¶1 Question:

May a judge write a letter on behalf of a close relative (particular inquiry involves a grandson) who has been found guilty of a crime and is awaiting sentencing in another court?

¶2 Answer: No.

¶3 Discussion:

Canon 2, Rule 2:10 provides:

"A judge shall not make any public statement that might . . .substantially interfere with a fair trial or hearing.. ."

Canon 3, Rule 3:3 provides:

"A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding . . .except when duly summoned."

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.

Defense's duty

- "Duty of zealous representation" of client
- *C.f.*, reasonable diligence and competence in ABA Model Rule 1.3; "devotion and courage" in advocacy in ABA ("Defense Function Guidelines")
- To competently represent client in DTC must familiarize self with tx, procedures, bases for sanctions or termination, etc. (ABA Model Rule 1.1)

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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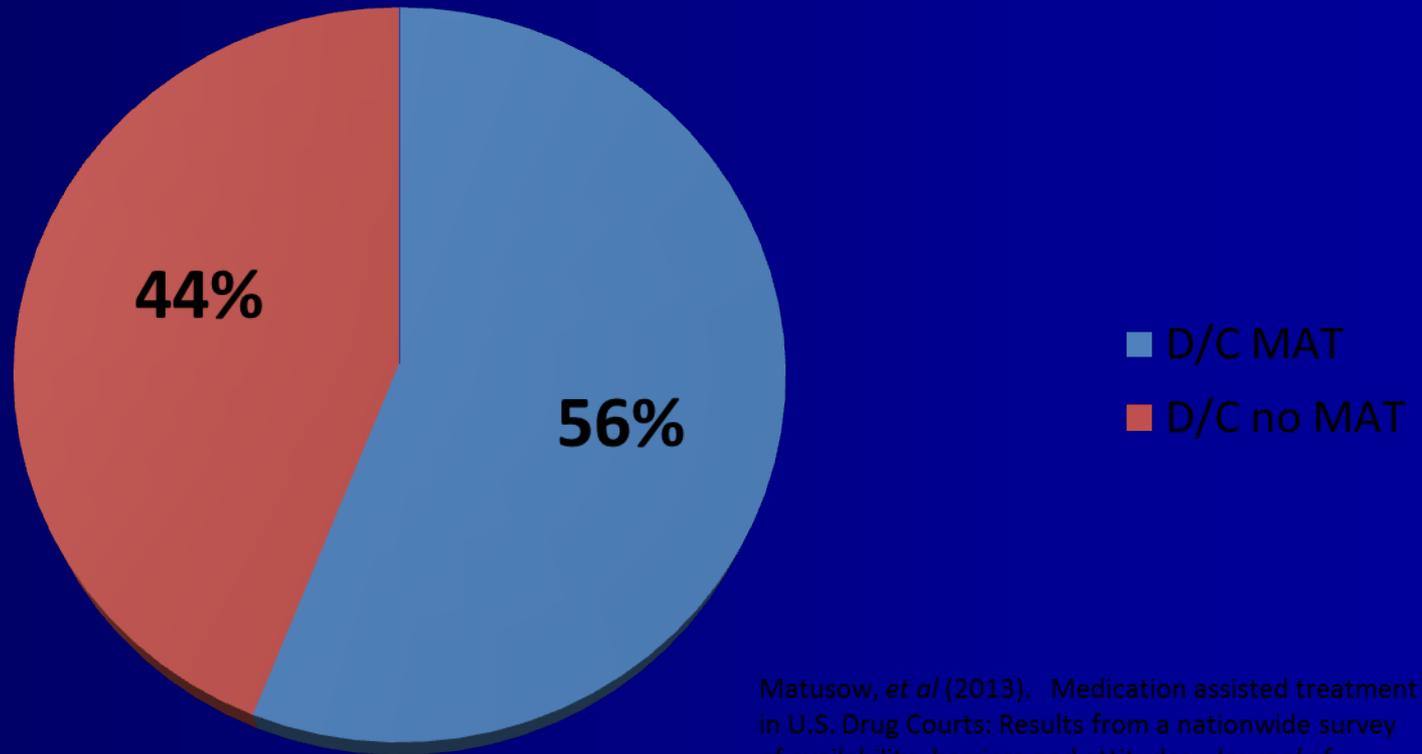
Judge William G. Meyer (ret.)
Sr. Fellow Nat. Drug Ct. Institute
Judicial Arbiter Group, Inc.
1601 Blake Street, Suite 400
Denver, Colorado 80202

Q 4: A problem solving court can prohibit MAT, such as methadone, because it substitutes one addiction for another?

- A. True
- B. False

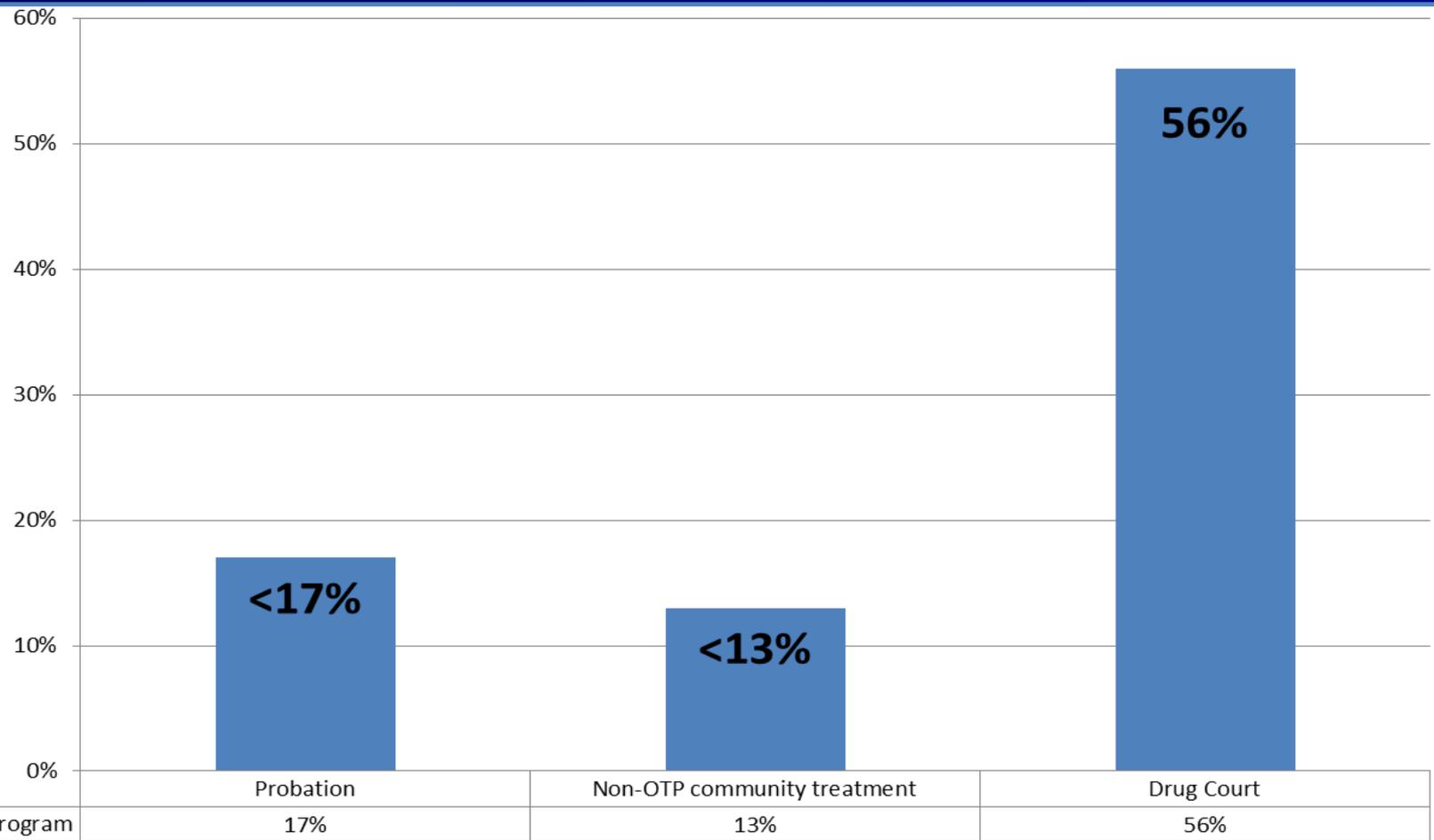


Prevalence of MAT Use in Drug Courts



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



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

Q5: Your Drug Court cannot mandate AA/NA.

- A. True
- B. False



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 = Mandate AA okay?
- *Morrissey v. Brewer*—condition due process (other constitutional rights) on privilege vs. right analysis rejected

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 on 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>

Q6: The Drug Court can prohibit the defendant from going to the French Quarter and from seeing his father.

- A. True
- B. False



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

Jones v. State, 41 P.3d 1247 (Wyo. 2001) (persons of disreputable character); *State v. Hearn*, ___ P.3d ___ (Wash. App. 2/6/06) (prohibition against associating with drug users or dealers constitutional); *Birzon v. King*, 469 F.2d 1241, 1242 (2nd. Cir. 1972); *Commonwealth v. LaPointe*, 759 N.E.2d 294 (Mass. 2001).

Q7: A Drug Court participant can be searched at any place and any time w/o probable cause or reasonable suspicion

- A. True
- B. False



Search Waiver

Sampson v. California,

___ U.S. ___, 126 S.Ct. 2193 (6/19/06)

- In parole case, mandatory search waiver constitutional and totally suspicionless search is upheld.
- Like *Knights*, but goes further because does not make a finding of reasonableness, but notes cannot be harassment

Search waivers in non-convicted cases

- Compare *State v. Ullring*, 741 A.2d 1065 (Me. 1999) (search waiver as condition of bond constitutional); and *In Re York*, 9 Cal. 4th 1133 (Calif. 1995) (same) **with**
- *Terry v. Superior Court*, 73 Cal. App. 4th 661 (Cal. App. 1999) (4th Amendment waiver improper condition in diversion case, without statutory authority) and *U.S. v. Scott*, 450 F.3d 863 (9th Cir. 2006) (search waiver probably improper when person on bond).

Q8: Termination from Drug Court requires a hearing?

- A. True
- B. False



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

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

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

- *Batista v. State*, 951 So.3d 1008 (Fla. 4th Cir. 3/21/07)

Pre-plea/diversion/ deferred prosecution termination—no right to a hearing—statutory program and contract not provide for a hearing. In conflict with *State v. Gorayeb*, 510 So. 2d 1168 (Fla 3rd Cir. 1987)

State v. Rogers, 170 P. 3d 881 (Idaho 2007)

- As of January 2006, Idaho had forty-four drug courts in operation spread out over approximately twenty-three counties and at differing levels of the judicial system within some counties. From the above discussion, it must be assumed that each drug court in Idaho operates uniquely and, therefore, the analysis in this case might not be applicable to any other particular drug court program in the state.
- Not even mention the contract analysis
- Key was diversionary program where guilty plea entered

Tate v. State, 2013 OK CR 18, 313 P.3d 274 (2013)

- (We find that this due process guarantee is also applicable to mental health court termination proceedings. Therefore, a mental health court participant must be sufficiently apprised as to the evidence and the grounds upon which his or her participation in the mental health court is terminated. See Hogar, 1999 OK CR 35, 990 P.2d at 899 (applying this same rule to drug court termination proceedings).

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

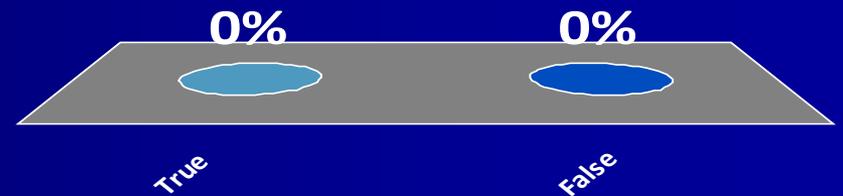
- State v. LaPlaca, 27 A.3d 719 (New Hampshire, June 28, 2011) (Even where program manual provided: “Any violation of the terms and conditions of the [Program] shall result in the imposition of sanctions, without hearing, by the court as deemed fair and appropriate, consistent with statutory authority 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.*

Pre-Allegation Waiver of a Hearing

- Neal v. State, 2016 Ark. 287 (Ark. Supreme Court 2016)

Q10: The Drug Court judge should not hear the termination hearing or probation revocation hearing.

- A. True
- B. False



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?

State v. Belyea, 160 N.H. 298, 999 A.2d 1080 (N.H. 2010) Defendant failed to show that a reasonable person would entertain significant concern about whether Judge Vaughan prejudged the facts or abandoned or compromised his impartiality in his judicial role on the drug court team. Also, Court did not have extrajudicial facts.

Mary E. FORD v. Kentucky, and William E. Flener, v. Kentucky (Ky. Appellate April 30, 2010)
Having same judge preside over drug court and revocation hearing is not a denial of right to impartial hearing/due process

*STATE v. STEWART, W2009-00980-CCA-R3-CD **** (Tenn. Crim. App. 8-18-2010) (not selected for publication) (drug court judge should not be judicial officer who determines revocation when judge previously observed violations, acted as team member, engaged in the drug court "therapeutic process" received ex parte communications in staffing because to do so would violate due process)

Grayson v. Kentucky, No. 2011-CA-000399-MR. Court of Appeals of Kentucky UNPUBLISHED (June 29, 2012) (defendant not denied due process in drug court termination hearing because she received notice of the evidence against her and judge not required to recuse.)

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

#11: Infractions involving jail as a potential sanction require a hearing, when factual basis denied.

- A. True
- B. False



Key Component #2

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

Due Process and Sanctions

- Hearing vs. non hearing:

Will defendant **potentially suffer** a loss to a **recognized liberty or property right** under the 14th Amendment.

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).

State v. Rogers, 170 P. 3d 881 (Idaho 10/22/07)

- We understand that similar to the ACDCP, many diversionary programs are informal in nature, and we do not want to unnecessarily impede the functioning of diversionary programs. The principles articulated in this opinion apply only when a participant in a diversionary program is facing termination from the program because that is when the participant faces a loss of liberty. Intermediate sanctions imposed in these programs do not implicate the same due process concerns, and continued use of informal hearings and sanctions need not meet the procedural requirements articulated here.

THORNE v. HALE

(E.D. Va. 3-26-2009)

- Thorne claims that, during the "sanctions" hearings that followed his failure to adhere to the drug court's rules, the allegations against him, the testimony of witnesses, and the presentation of evidence violated his Sixth Amendment rights. *Id.* at ¶ 57. Testimony, he asserts, was "made in secrete [sic] between the Drug Court and RACSB administrators, {Defendants Kelly Hale, Judith Alston and Sharon Gillian}, the RACSB, the Commonwealth's Attorney, and the state court judge, "to include whispered testimony to the presiding Judge at the bench, so as to exclude Plaintiff . . . from all measures of defense and redress commensurate with Due and Compulsory Process of Law."

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 addiction "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)

11. It is permissible to place an addicted drug court participant in jail, while you are awaiting a placement bed to become available?

- A. True
- B. False



Timeliness of Termination/Sanction Hearing

- 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)

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

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)

12. Polygraphs can be used in testing drug court participant's candor?

- A. True
- B. False



Polygraphs

- In almost all circumstances, Courts have prohibited the admission of polygraph tests at trial. *United States v. Scheffer*, 523 U.S. 303, 309, 311-12, (1998)
 - a. Reliability
 - b. Fifth Amendment

- Oklahoma has held the results of polygraph tests are not admissible for any purpose. See *Paxton v. State*, 867 P.2d 1309, 1323 (Okla. Cr. 1993), cert. denied, 513 U.S. 886, 115 S.Ct. 227, 130 L.Ed.2d 153 (1994).
- Probation and parole- sex offender treatment—strong guidelines Section-16 DOC-Probation and Parole OP-160601

Russell v. State, 221 Md. App. 518, 109 A. 3d 1249 (2015)

We agree with the courts cited above that polygraph examinations serve various purposes despite their questionable reliability. Indeed, polygraphs can increase the accountability of sexual offenders for past behaviors, ensure compliance with current supervision, and serve as a deterrent.

To Use or Not to Use

I recommend that polygraphs or other allegedly truth divining devices not be used because they are not reliable. Second, they can present a host of legal issues, including 5th Amendment claims.

If, in the end, polygraphs are going to be used, they should be used therapeutically, namely to adjust a person's treatment and program responsibilities.

**United States v. Von Behren, (10th
Cir. May 10, 2016) (15-1033)**

- Court of Appeals held that the exam questions presented a risk of incrimination. At least three of the questions would require an individual to admit to having committed a felony. If answered 'yes,' the examiner could ask how many times. The Court found that this level of self-incrimination is constitutionally impermissible. Refusal to answer would almost certainly mean 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
- Don't use polygraphs

- The end