A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts

Center for Justice Innovation

ATTRISE

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* Aptly reflecting the epoch-spanning length of this project, both contributing organizations have changed their names since it began. The Center for Justice Innovation was formerly the Center for Court Innovation. All Rise was formerly the National Association of Drug Court Professionals.

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INTRODUCTION TO THE PRACTITIONER'S GUIDE

OVERVIEW

Drug courts have become a common feature of court systems across the country, offering an effective, evidence-based approach to addressing the underlying substance use disorders that often contribute to crime. Since the first drug court was launched in Miami in 1989, approximately 1,700 adult drug courts—and nearly 4,000 treatment courts of all types—have opened nationwide.[1] Federal and state governments have invested hundreds of millions of dollars to plan, operate, train, and evaluate these courts.[2] More than two decades of research has shown that drug courts save lives, reduce reoffending, strengthen families, and improve public trust in justice.[3]

One of the major critiques of drug courts, however, is that they raise constitutional and legal concerns related to due process, right to counsel, access to appropriate treatment, confidentiality of information, and other fundamental legal protections.[4] It is critically important that drug court judges, attorneys, and partner agencies understand these constitutional and legal issues to ensure their courts conform to the law and protect the rights of participants.

This guide is intended to help practitioners identify and navigate the major legal issues that arise in adult drug courts. It is organized in a chronological fashion that follows the typical drug court process from start to finish, exploring the legal issues that arise at each stage. Chapter 1 discusses drug court eligibility and the legal implications of excluding certain individuals. Chapter 2 addresses the drug court admissions process, including plea agreements, waivers of rights, and participant contracts. Chapter 3 explores many of the common requirements that drug courts impose on participants, including community service, geographic restrictions, and employment requirements. In Chapter 4, we look at the unique operational features of drug courts such as drug testing, cross-agency information sharing, staffing meetings, and intermediate sanctions in response to participant noncompliance. Chapter 5 considers drug court termination hearings and sentencing. Finally, Chapter 6 addresses special rules for pre-plea drug courts.

Throughout this guide, the authors offer practice recommendations in areas where the law is unsettled or especially complex. These recommendations are the authors' best advice for complying with the law while also operating an effective drug court that adheres to evidence-based practices.

Pre-plea Drug Courts

The final chapter of this Practitioner's Guide is entitled "Special Considerations for Pre-Plea Drug Courts." Although current data are scarce, the Bureau of Justice Statistics' 2012 *Census of Problem-Solving Courts* reported that 27% of adult drug courts accept pre-plea cases.[5] Defendants in these courts do not plead guilty, are presumed innocent, and have greater liberty interests than participants in post-plea drug courts. As a result, there are special legal considerations that pre-plea courts must keep in mind. The chapter explains these considerations and highlights where pre-plea and post-plea courts differ.

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1 National Drug Court Resource Center, Painting the Current Picture: A National Report on Treatment Courts in the United States (2022), https://ndcrc.org/pcp/. Other treatment court models include juvenile drug treatment courts, family treatment courts, veterans treatment courts, tribal healing to wellness courts, Driving While Intoxicated/Driving Under the Influence courts, mental health courts, co-occurring disorder courts, and others. These models sometimes go by other names depending on state and local practices.

2 Lisa N. Sacco, *Federal Support for Drug Courts: In Brief*, Congressional Research Service (Mar. 20, 2018), https://sgp.fas.org/crs/misc/R44467.pdf. Many state governments have also invested heavily in drug courts. For example, Texas appropriated $16.5 million for "specialty courts" in fiscal year 2016 alone. State of Texas, Legislative Budget Board, Specialty Courts: An Issue Brief from Legislative Budget Board Staff (July 2016), https://www.lbb.texas.gov/Documents/Publications/Issue_Briefs/3015_Specialty_Courts_0701.pdf.

3 The National Institute of Justice's Multi-site Adult Drug Court Evaluation (MADCE) is the leading national study of adult drug court outcomes. MADCE researchers produced several lengthy reports between 2011 and 2014 detailing different aspects of the evaluation. These reports, and the study's dataset, can be found at https://nij.ojp.gov/topics/articles/nijs-multisite-adult-drug-court-evaluation#about.

4 *See, e.g.*, *Eric Lane, Due Process and Problem Solving Courts*, 30 Fordham Urb. L. J. 955 (2003).

5 Suzanne M. Strong et al., *Census of Problem-Solving Courts, 2012*, Bureau of Justice Statistics (revised 2016), https://www.bjs.gov/content/pub/pdf/cpsc12.pdf.

What Is Covered Here (and What Is Not)

This guide addresses the major constitutional issues that commonly arise in adult criminal drug courts, including those related to the Fourth Amendment (search and seizure), Fifth Amendment (self-incrimination), Sixth Amendment (right to counsel), Eighth Amendment (cruel and unusual punishment), and 14th Amendment (due process and equal protection rights).[6] In addition, this guide discusses some of the major federal laws that impact drug courts, particularly the Federal Rules of Evidence, Americans with Disabilities Act (ADA), Health Insurance Portability and Accountability Act (HIPAA), and various privacy-related regulations.

Notably, this guide focuses primarily on how the U.S. Constitution and federal laws impact drug courts. State court decisions are frequently cited throughout this guide, but those decisions generally rely on state constitutional principles of due process and equal protection that closely mirror their federal counterparts. This guide does not attempt a comprehensive review of state-specific laws that may affect drug court operations, such as state privacy protections, rules of evidence, or right to counsel laws.

It is important to note, however, that state and local laws may, at times, offer greater protection than federal law or may impose additional procedural requirements. It is therefore important that judges and attorneys familiarize themselves with their jurisdiction's laws and adjust their practices as needed. State bar associations and state associations of drug court professionals may be able to offer additional guidance.

Case Law

The legal analysis and recommendations in this guide are derived from case law (court decisions) that interpret and apply the U.S. Constitution and relevant statutes.

Some of the legal issues addressed in this guide have clear answers that have been handed down by the U.S. Supreme Court and thus apply nationwide. For example, a probationer is entitled to a hearing with due process protections before their probation can be revoked.[7] When these kinds of issues arise, it is clear what drug courts are required to do—simply follow the Supreme Court's guidance.

However, most of the legal issues addressed in this guide have not been considered by the Supreme Court, but by an assortment of state courts and lower federal courts. The resulting patchwork of case law can make it difficult for drug court practitioners to determine what the law permits or requires, particularly if their own state's courts have not addressed an issue. As seen throughout this guide, the available case law falls into three basic scenarios.

1. **The weight of authority is clear.** Often a legal issue has been considered by courts in several jurisdictions, and the courts have consistently reached similar conclusions. Take, for example, the question whether a probationer can be required to submit to random drug testing. Many state courts and lower federal courts have addressed this question, and there is a clear consensus that random drug testing is permitted, at least when the probationer has a documented pattern of drug use. In this scenario, the weight of authority is clear, and drug court practitioners can be reasonably certain about the governing law.
2. **Case law is conflicting**. Sometimes a legal issue has been considered by courts in more than one jurisdiction, and the courts have reached different conclusions. For example, what kind of hearing, if any, is a drug court participant entitled to before the court can impose intermediate sanctions? As described in Chapter 4, courts in Idaho and Kentucky have held that an informal hearing, with minimal due process protections, is sufficient for imposing sanctions. But courts in Arizona and Maryland have held that sanctions require a formal hearing with robust due process protections. What does this split of opinion mean for, say, a drug court in Florida? The answer is unclear. Therefore, when courts are divided like this, the authors offer a recommended approach that considers the available court decisions, research on effective drug court practices, and the guidance provided by the *Adult Drug Court Best Practice Standards*.[8]

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6 This guide does not address the unique legal issues that arise in juvenile drug courts, family drug courts, mental health courts, veterans drug courts, and other drug court models. Although many of the topics covered in this guide are relevant to all treatment courts, important issues related to juvenile justice, child dependency, mental health and competency, and other specialized areas of law are beyond the scope of this document.

7 Gagnon v. Scarpelli, 411 U.S. 778, 781–82 (1973); Morrissey v. Brewer, 408 U.S. 471, 488 (1972).

8 National Association of Drug Court Professionals, Adult Drug Court Best Practice Standards (2022).

3. **Case law does not exist.** Occasionally a legal issue arises that the courts have not yet considered. One such issue is the applicability of the Americans with Disabilities Act (ADA) to drug courts. Does the ADA, for example, require drug courts to provide participants with addiction medications when prescribed by a doctor? Although there are strong arguments for this position—and the *Adult Drug Court Best Practice Standards* clearly and emphatically direct drug courts to ensure access to addiction medications—no court has taken up this issue directly. Until the case law develops further, drug courts are left to answer these questions themselves. Here again, the authors recommend an approach based on drug court research, guidance from subject matter experts, and the *Adult Drug Court Best Practice Standards*.

The authors also note that courts sometimes use outdated language to describe court-involved individuals and that such language may be considered offensive or inappropriate. The authors have striven to use person-first, inclusive language when not directly quoting or interpreting case law but have retained the courts' language when citing court decisions directly.

WORDS OF CAUTION: LEGAL CONSIDERATIONS VERSUS RECOMMENDED PRACTICES

Users of this guide should keep in mind an important caveat: what the law permits and what drug courts *should* do are not always the same.

For example, it would probably be legal to require all drug court participants to remain in the program for four years or to exclude individuals who are currently unhoused. But no drug court should adopt these policies, because research clearly indicates that they would undermine participants' success and exclude persons without reasonable justification.

Thanks to two decades of research, we know how to build effective drug courts. In fact, drug courts are the most researched and best understood criminal justice intervention in modern history. Hundreds of studies have led to the development of the *Adult Drug Court Best Practice Standards*.[9] Created by the National Association of Drug Court Professionals (now All Rise) with the help of leading experts, the *Standards* offer clear and detailed operational guidelines to drug courts across the country. Every drug court should strive to achieve these standards.

Throughout this guide, the authors highlight key areas where the law permits practices that are contrary to the *Standards* and other expert guidance.

In addition, the authors have included recommendations throughout this document. These recommendations are intended to provide concrete guidance that is consistent with both legal requirements and best practice standards.

9 *Id.*

CHAPTER 1: ELIGIBILITY

In most jurisdictions, the number of defendants who could benefit from drug court far exceeds the available drug court capacity. By necessity, drug courts must make difficult decisions about which defendants get into the program and which do not. This chapter considers important constitutional and legal issues that are implicated whenever a drug court makes eligibility determinations.

EQUAL PROTECTION

A defendant's access to drug court is often controlled by the judge, the prosecutor, the probation department, or another government actor.[10] Accordingly, referral to drug court is an exercise of government discretion that is subject to equal protection principles. The equal protection clause of the Fourteenth Amendment requires states to treat similarly situated individuals in a like manner.[11] In determining whether a law or government practice violates the equal protection clause, courts use three tests.

Strict scrutiny: If a law or government practice burdens a "suspect class" of individuals, courts employ *strict scrutiny*. Suspect classes are those based on race, national origin, religion, or alienage. Under strict scrutiny review, the government must show that the law or practice serves a *compelling state interest* and is *narrowly tailored* to serve that interest.

Laws or government practices that impact a "fundamental right" also receive *strict scrutiny*. For equal protection purposes, however, fundamental rights are limited to the right to migrate between states, the right to vote, the right to marry, and the right to secure access to the justice system.

Intermediate scrutiny: Courts have employed a middle tier of review, usually called *intermediate scrutiny*, in cases involving a "semi-suspect class" of individuals. Nearly all such cases involve classifications based on gender. Under intermediate scrutiny review, the government must show that the law or practice furthers an *important state interest* by means that are *substantially related* to that interest.

Rational basis: When a law or government practice does not burden a fundamental right or a suspect class, it must only pass the *rational basis* test. Under this analysis, the law or practice is valid if it serves a *legitimate government purpose*. Almost all laws and policies relevant to drug courts fall into this category of review.

Under this framework, successful equal protection claims generally involve a statute or government action that either (1) impacts a fundamental right or (2) differentiates treatment of individuals based on race, national origin, religion, alienage, or gender. The next two sections consider these types of equal protection challenges in the drug court context.

No Fundamental Right to Participate in Drug Court

Courts have consistently held that there is no fundamental right to participate in a drug court. Therefore, no state, county, city, or other jurisdiction is required to open a drug court. Moreover, if a jurisdiction chooses to open a drug court, potential participants can be excluded from the program for any legitimate government purpose, provided that the exclusionary criterion does not burden a suspect class.

Case Law

- The U.S. Supreme Court held in *Marshall v. United States* that there is no fundamental right to substance use treatment at public expense after a criminal conviction and affirmed the application of minimal scrutiny to a defendant's participation in a drug treatment diversion program when no suspect class is involved.[12]

10 It is important to note that this kind of "gatekeeping" function, although common, can be highly problematic. The *Adult Drug Court Best Practice Standards* call on drug courts to maintain objective, evidence-based eligibility criteria and to eliminate subjective decision-making. Accordingly, judges, prosecutors, and other actors generally should not be permitted to prevent an eligible person from entering drug court based on subjective factors, such as the person's perceived motivation for treatment, attitude, and so on. *National Association of Drug Court Professionals, Adult Drug Court Best Practice Standards*, Vol. I, at 5 (2018).

11 U.S. Const. amend. XIV.

12 Marshall v. United States, 414 U.S. 417, 421–22 (1974).

- In *State v. Harner*, the Washington Supreme Court applied *Marshall* and held that rational basis review is proper because there is no fundamental right to participate in a drug court program, and persons charged with drug offenses are not a suspect class.[13]
- The Indiana Court of Appeals, in *Lomont v. State*, applied the rational basis test to uphold the exclusion of a defendant from a diversion program, reasoning that the defendant was not a member of a suspect class and had no fundamental right to participate.[14]
- In *State v. Little*, the Washington Court of Appeals used the rational basis test to determine there was no equal protection violation for bringing drug charges against a defendant in a county that had not established a drug court, as drug courts were established on a county-by-county basis and not mandated as statewide programs.[15]

Burdening a Suspect Class

Because there is no fundamental right to participate in drug court, a successful equal protection claim generally must show that a drug court law, policy, or practice unlawfully burdens a suspect class. For example, a drug court statute or policy that categorically excludes individuals who are not citizens of the United States (an alienage classification) would be subject to strict scrutiny and would almost certainly be declared unconstitutional. Similarly, a drug court that accepts only women (a gender classification) would be subject to intermediate scrutiny and would be upheld only if the policy was shown to further an important state interest by means that are substantially related to that interest.

A Note About the Intent Doctrine

Equal protection violations are difficult to prove. The U.S. Supreme Court has held that a law's discriminatory impact does not, by itself, make the law unconstitutional. Proof of discriminatory *intent* is required to show a violation of the equal protection clause.[16] Among other consequences, this doctrine complicates legal challenges to racial and ethnic disparities in drug courts. While studies suggest that there are marked racial disparities in the enforcement of drug laws, access to drug courts, provision of treatment services, and drug court outcomes, the need to demonstrate discriminatory intent, and not simply discriminatory outcomes, makes it extremely difficult to bring legally actionable claims.[17] Despite this legal hurdle, however, it is critically important that drug courts take affirmative steps to root out both discriminatory intent and impact in their policies, practices, and decision-making, in keeping with the *Adult Drug Court Best Practice Standards*.[18]

There are few cases addressing equal protection claims related to drug courts or other alternative-to-incarceration programs, in part because of the difficulty of proving discriminatory intent. It is clear, however, that racial and ethnic disparities persist throughout the justice system and that drug courts are not immune from the systemic and individual biases that produce these disparities. Moreover, disparities are not limited to race and ethnicity; discrimination based on gender, sexual orientation, disability, and socioeconomic status is endemic as well. Drug courts must take care to ensure that their policies and practices do not disproportionately exclude individuals because of these factors.

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13 State v. Harner, 103 P.3d 738, 743 (2004); *see also* Jim v. State, 911 So. 2d 658, 661 (Miss. Ct. App. 2005) (holding that there can be no equal protection claim when "no one has the right to attend the drug court"); Phillips v. State, 25 So. 3d 404, 409 (Miss. Ct. App. 2010) (affirming that there is no right to attend drug court).

14 Lomont v. State, 852 N.E.2d 1002, 1005 (Ind. Ct. App. 2006).

15 State v. Little, 66 P.3d 1089, 1095 (Wash. Ct. App. 2003); *see also* People v. Anderson, 833 N.E.2d 390, 395 (Ill. Ct. App. 2005) (finding that the defendant did not have the right to participate in drug court because such participation is a matter of legislative and judicial grace).

16 *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1976) (holding that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"); Washington v. Davis, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white"); United States v. Armstrong, 517 U.S. 456, 468 (1996); *see also* Oyler v. Boles, 368 U.S. 448, 456 (1962) (finding that the "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" but that equal protection prohibits prosecutors from deliberately basing their decision to prosecute on "an unjustifiable standard such as race, religion, or other arbitrary classification.").

17 Douglas B. Marlowe, *Achieving Racial and Ethnic Fairness in Drug Courts*, 49 Court Rev. 436, 438 (2013), https://digitalcommons.unl.edu/ajacourtreview/436 (noting that representation of African Americans was estimated to be approximately 7 percentage points lower in drug courts than in the arrestee and probation-and-parole populations, and approximately 20 percentage points lower than in jails and prisons).

18 National Association of Drug Court Professionals, *Adult Drug Court Best Practice Standards*, Vol. I, at 11 (2018).Standard II: Equity and Inclusion calls upon drug courts to ensure that their practices are nondiscriminatory in "intent and impact." *Id.*

RECOMMENDATION

Drug courts have an "affirmative obligation" to identify and redress disparities in referrals and admissions, access to culturally appropriate treatment services, compliance monitoring, sanctioning, graduation rates, and long-term outcomes.[19]

Drug courts should take advantage of existing resources, and work with researchers and experts whenever possible, to continuously analyze their programs and remedy existing disparities.[20]

Alienage

Alienage refers to a person's status as noncitizen of the United States. For equal protection purposes, alienage is considered a suspect classification that receives strict scrutiny. A law or policy that categorically excludes noncitizens from drug court would be upheld only if a court found that the policy serves a compelling state interest and is narrowly tailored to serve that interest. Under this stringent standard, such a law or policy is unlikely to survive a court challenge.

Case Law

- In *United States v. Carolene Products Co.*, the U.S. Supreme Court held that laws should receive heightened judicial scrutiny when they discriminate between "particular religious . . . or national . . . or racial minorities" or "discrete and insular minorities."[21]
- The U.S. Supreme Court, in *Graham v. Richardson*, applied *Carolene Products* and held that aliens are a prime example of "discrete and insular" minorities to which heightened scrutiny should apply.[22]
- In *Bernal v. Fainter*, the U.S. Supreme Court explicitly held that "a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny."[23]

Exception for Undocumented Persons

Despite the case law just mentioned, the U.S. Supreme Court has held that undocumented persons are not a suspect class. Therefore, laws or policies that burden undocumented persons receive only rational basis review. The rational basis test may be met where a person's undocumented status creates a significant barrier to drug court participation. Examples of such an incompatibility include the likelihood that the participant will be deported, the likelihood that the participant will be detained by federal authorities if sanctioned to jail, and the participant's ineligibility for Medicaid and other entitlement programs needed to access treatment and other recovery support services.

Case Law

- In *Plyler v. Doe*, the U.S. Supreme Court held, "[w]e reject the claim that 'illegal aliens' are a 'suspect class.' No case in which we have attempted to define a suspect class . . . has addressed the status of persons unlawfully in our country."[24]
- The Supreme Court of Nebraska held, in *State v. Cerritos-Valdez*, that "a defendant's undocumented status may properly be considered by the sentencing court as one of many factors so long as it is . . . relevant to the defendant's ability or willingness to comply with recommended probation conditions."[25]

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19 National Association of Drug Court Professionals, Resolution of the Board to Directors: On the Equivalent Treatment of Racial and Ethnic Minority Participants in Drug Courts (2010).

20 There are numerous resources available online free of charge. A good place to start is All Rise's equity and inclusion toolkit. National Association of Drug Court Professionals, Equity and Inclusion: Equivalent Access Assessment and Toolkit (2019), https://www.allrise.org.

21 United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

22 Graham v. Richardson, 403 U.S. 365, 372 (1971) (explaining that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.").

23 Bernal v. Fainter, 467 U.S. 216, 216 (1984) ("As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny.").

24 Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982).

25 State v. Cerritos-Valdez, 889 N.W.2d 605, 612 (Neb. 2017).

- In *People v. Hernandez-Clavel*, the Colorado Court of Appeals explained that a defendant's "illegal alien status" can be relevant to his or her ability to complete probation and, further, that the defendant's illegal entry into the country may demonstrate "unwillingness to conform his or her conduct to the conditions of probation" or "disregard for the law."[26]
- *In People v. Espinoza*, a California Court of Appeals upheld an exclusion from drug court where there was a substantial likelihood that the defendant, an illegal alien, would be deported and therefore unable to complete the program.[27]

However, excluding the person solely based on their immigration status, with no showing that their immigration status poses an actual barrier to completion, is impermissible.[28]

RECOMMENDATION

When an undocumented person seeks to participate in drug court, the court should consider whether the person's immigration status is likely to disrupt their participation in the program or prevent them from accessing the services they need to be successful in the program. If there are specific, articulable reasons why the person's immigration status is likely to prevent them from completing the program, then excluding that person from drug court is permissible.

Indigence

Indigence is not a suspect classification, and therefore laws and government practices that create classifications based on indigence receive rational basis review. Nonetheless, courts have consistently held that excluding a person from an alternative-to-incarceration program, or removing a person from such a program, because of the person's inability to pay fines or fees related to the program, is a violation of the equal protection clause.

Case Law

- The U.S. Supreme Court, in *Williams v. Illinois*, held that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."[29]
- In *State v. Shelton*, the U.S. Supreme Court found a violation of equal protection when the defendant was denied home detention because he could not afford a monitor and was therefore remanded to jail.[30]
- The Indiana Court of Appeals in *Mueller v. State* held that removing the defendant from a diversion program solely on the basis that the defendant could not pay program fees violates equal protection. Moreover, the court said, "the argument that the fees help offset the costs of running the pretrial diversion program is not sufficient to establish a rational basis for distinguishing between the indigent and those able to pay the fees."[31]
- In *People v. Trask*, a California Court of Appeals held a defendant granted deferred entry of judgment under state law could not be terminated from such diversion based solely on her inability to pay the fees of the program to which she had been referred.[32]

26 People v. Hernandez-Clavel, 186 P.3d 96, 99 (Colo. Ct. App. 2008).

27 People v. Espinoza, 132 Cal. Rptr. 2d 670, 671 (Cal. Ct. App. 2003).

28 The Nebraska Supreme Court noted in 2017 that "a consensus has developed that it is impermissible for a sentencing court to deny probation based solely on a defendant's undocumented status." State v. Cerritos-Valdez, 889 N.W.2d 605, 611 (Neb. 2017) (citing cases from New York, Georgia, Colorado, Kansas, California, and Oregon). Note that defendants pleading guilty to a crime must be advised of any potential immigration consequences that a guilty plea may carry. See Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

29 Williams v. Illinois, 399 U.S. 235, 242 (1970).

30 State v. Shelton, 512 S.E.2d 568, 570 (1998).

31 Mueller v. State, 837 N.E.2d 198, 204 (Ind. Ct. App. 2005).

32 People v. Trask, 119 Cal. Rptr. 3d 91, 92 (Cal. Ct. App. 2010).

RECOMMENDATION

Drug courts should assess each participant's ability to pay fines and program fees using an accepted "ability to pay" assessment tool. If the participant does not have the ability to pay, then the fines and fees should be reduced or eliminated commensurate with the participant's means. No person may be denied participation because of their inability to pay fines or program fees. Likewise, no participant may be denied the right to graduate or receive other benefits of the program because of their inability to pay.[33]

Criminal History

Having a previous conviction for a crime is not a suspect classification. Therefore, a defendant may be excluded from drug court on the basis of criminal history as long as the exclusion serves a legitimate government interest.

Case Law

- In *Marshall v. United States*, the U.S. Supreme Court held that it is not an equal protection violation to exclude violent or repeat offenders from drug treatment, reasoning that those offenders are less likely to be deterred or rehabilitated by such treatment.[34]
- In *People v. Fuller*, a California Court of Appeals held that "[it] is certainly reasonable to exclude from the rehabilitation program individuals with a background of excessive criminality" who may be "less amenable to treatment, control and cooperation, and their very presence may involve danger to other participants."[35]
- In *People v. Meador*, the Appellate Court of Illinois held that the defendant was properly denied the opportunity to participate in drug court where the defendant's addiction-related criminal history combined with his ongoing decision to surround himself with people who enabled his addiction led the trial court to conclude that drug court would be "a waste of resources" and "too risky."[36]

RECOMMENDATION AND CAUTION

This is an area where the law and best practices differ. Courts have held that a person may be excluded from a drug court on the ground that their criminal history makes them inappropriate for the program. It is legally permissible, therefore, to exclude a person because they have a violent criminal history, a history of selling drugs, or some other factor that the court deems incompatible with drug court.

However, the *Adult Drug Court Best Practice Standards* instruct drug courts not to maintain blanket exclusions based on a person's current charges or criminal history.[37] Research indicates that individuals with a violent criminal history perform as well as, or better than, other participants in drug court.[38] Similarly, many individuals who sell drugs do so in small amounts to fund their own substance use disorders and stand to benefit greatly from drug court. As the *Standards* advise, admission to drug court should be based on the person's risk of reoffending (as determined by a validated risk assessment) and their need for treatment services. Drug courts should primarily serve individuals who have both a high risk of reoffending and a high need for treatment.

Based on the clear weight of the research and the guidance provided by the *Standards*, the authors recommend that drug courts eliminate blanket exclusions based on current charges or criminal history and that eligibility decisions be based primarily on an individual's risk of reoffending and need for treatment.[39]

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33 For more information about fines and fees in the justice system, see Ojp Diagnostic Center, Resource Guide: Reforming the Assessment and Enforcement of Finesand Fees (2016), https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/finesfeesresguide.pdf. Additional resources can be found on the website of the Fines and Fee Justice Center: https://finesandfeesjusticecenter.org/.

34 Marshall v. United States, 414 U.S. 417, 427 (1974).

35 People v. Fuller, 97 Cal. Rptr. 455, 457 (Cal. Ct. App. 1971).

36 People v. Meador, 2012 Ill. App. (4th) 100774-U, at *15, *25 (Jan. 5, 2012).

37 National Association of Drug Court Professionals, *Adult Drug Court Best Practice Standards*, Vol. I, at 5–6 (2018). Standard I: Target Population calls upon drug courts not to categorically exclude individuals charged with drug dealing or violent crimes, unless serving such individuals is prohibited by law. *Id.*

38 *See Id.*

39 In practice, compromises regarding charge and criminal history exclusions are sometimes necessary to secure the support of prosecutors or other actors for the drug court program.

Health Conditions

There is limited case law addressing an individual's exclusion from drug court based on a physical or mental health condition. However, the available case law confirms that physical and/or mental illness does not create a suspect class for equal protection purposes. Therefore, exclusion of individuals with physical or mental health conditions from drug court is subject only to rational basis review.

In applying this standard, courts have consistently found that exclusion from drug court because of physical or mental illness can serve a legitimate government interest. For example, drug courts may lack the resources or specialized expertise to meet an individual's specialized health needs. Likewise, the individual's health may be so impaired that it would be virtually impossible for the individual to complete the program.

Case Law

- In *Evans v. State*, the court found no equal protection violation where a defendant had been excluded from a program because the program did not have the expertise and counseling services to handle his serious mental health issues. The court also determined the defendant was not excluded from the program solely due to his HIV status, but the program could consider its lack of access to HIV-related resources in determining his eligibility for participation[40]
- In *People v. Pacheco*, a California Court of Appeals upheld a decision denying the defendant access to pretrial diversion services, on the ground that his schizophrenia condition made it unlikely he could receive treatment "in the community" without posing "an unreasonable risk of danger to public safety."[41]

Note that the above discussion and case law pertain only to protection under the equal protection clause. As discussed below, the Americans with Disabilities Act provides broader protection for some individuals with serious health conditions.

Prescription Drugs

From a legal perspective, drug courts have broad latitude to exclude defendants whose use of prescribed medications interferes with the court's ability to monitor participants' compliance or undermines the program's fundamental structure or goals. The use of prescription medications does not create a suspect class for equal protection purposes. Therefore, exclusion of individuals who take prescribed medications is subject only to rational basis review.

Case Law

- A California Court of Appeals, in *People v. Webb*, upheld the defendant's exclusion from drug court based on his health conditions, which included an inability to sit for long periods of time, inability to travel to required hearings and appointments, and inability to focus on participation in drug court as a result of strong pain medications.[42]
- In *Evans v. State*, the Georgia Court of Appeals found no equal protection violation where the defendant was excluded from drug court because he was taking four prescription medications, one of which could cause a false positive during drug testing.[43]

40 Evans v. State, 667 S.E.2d 183, 186 (Ga. Ct. App. 2008).
41 People v. Pacheco, 290 Cal. Rptr. 3d 370, 373 (Cal. Ct. App. 2022).
42 People v. Webb, 2011 Cal. App. LEXIS 1896, *6 (Mar. 15, 2011).
43 Evans v. State, 667 S.E.2d 183, 185 (Ga. Ct. App. 2008).

ELIGIBILITY AND THE AMERICANS WITH DISABILITIES ACT

The previous section considered drug court eligibility from an equal protection perspective. There are, however, federal statutes that offer additional protections against discrimination beyond those provided by the Fourteenth Amendment's equal protection clause. The most important of these statutes for drug courts is the Americans with Disabilities Act (ADA).[44]

Enacted in 1990, the ADA is a federal civil rights law that prohibits discrimination against individuals with disabilities in employment, access to state and local government services, public accommodation and commercial facilities, transportation, and telecommunications. Title II of the ADA specifically governs access to state and local government services, including drug courts. It prohibits discrimination in the provision of public services, specifying that no qualified individual with a disability shall "by reason of such disability" be excluded from participation in, or be denied the benefits of, a public entity's service, programs, or activities.[45]

An individual must meet several criteria to qualify for ADA protection.[46]

1. The individual must have a "disability," which is defined as a physical or mental impairment that "substantially limits" a "major life activity." Notably for drug courts, substance use disorders and emotional illness are all considered impairments for purposes of the ADA. Major life activities include functions such as caring for oneself, performing manual tasks, walking, learning, parenting, and working.[47]
2. The individual must be "otherwise qualified" for the government service, meaning that they meet the essential eligibility requirements for the program or activity in question. In the drug court context, a person who meets the program's eligibility criteria (which typically include having a substance use disorder, having eligible charges and criminal history, meeting risk and need classifications, etc.) would be considered "otherwise qualified."[48]
3. The individual must have been excluded from the government service "because of" their disability rather than because of a neutral, nondiscriminatory reason.[49]

The ADA requires public entities to "make reasonable modifications" to accommodate individuals who fall within its protections. It does not, however, require accommodations that would "fundamentally alter" the nature of the program.[50]

A plain reading of the ADA suggests that defendants seeking to enter a drug court program may be protected if they can demonstrate that they have a physical or mental impairment that substantially limits a major life activity and that they otherwise meet the essential eligibility requirements of the drug court program. Under such circumstances, the drug court may be required to make reasonable accommodations to avoid discriminating against the potential participant. It is not difficult to imagine a scenario that meets these criteria. A defendant, for example, may suffer from an intellectual development disorder (an impairment) that prevents her from working (a substantial impairment of a major life activity) but is otherwise able to meet the drug court's eligibility and participation requirements.

In fact, however, there is very little case law directly addressing this issue. Only a few courts have considered claims that excluding a person from drug court on the basis of a disability violates the ADA, and they have rejected this argument.

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44 Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213. Also relevant here is the Rehabilitation Act of 1973, which prohibits disability discrimination by programs operated by the federal government and programs that receive federal support. State and local drug courts that receive federal grant funding are subject to the Rehabilitation Act. For practical purposes, however, the protections afforded by the Rehabilitation Act are the same as those provided by the ADA. See Rehabilitation Act of 1973, 29 U.S.C. § 701. Therefore, the Rehabilitation Act is not considered separately here.

45 42 U.S.C. § 12132.

46 42 U.S.C. § 12102(1)–(3).

47 *Id.*

48 *Id.*

49 42 U.S.C. § 12112.

50 42 U.S.C. § 12182(b)(2)(A)(ii).

Case Law

- *In Evans v. State*, the Georgia Court of Appeal found the defendant failed to demonstrate that his mental illness or HIV-positive status created an impairment affecting a major life activity, as required by the statute, and therefore, the ADA was inapplicable.[51]
- The Iowa Court of Appeals, in *State v. Barclay*, rejected the defendant's claim that he was improperly denied entry into drug court because he had failed to demonstrate his mental illness substantially limited a major life activity. Furthermore, the court questioned the applicability of the ADA to criminal sentencing decisions, explaining that "*Barclay* has not pointed us to any precedent from Iowa or other jurisdictions where a criminal defendant has relied on the ADA to successfully attack a sentencing court's exercise of discretion, and we have found none."[52]

RECOMMENDATION

Given the current case law, drug courts lack clear guidance about when and how the ADA applies to eligibility decisions. Until the case law is further developed, drug courts should strive to accept participants with disabilities whenever the court and its partner agencies can reasonably accommodate the participant's special needs. Individuals whose needs cannot be met in the drug court should be given appropriate opportunities to participate in other diversion programs that may be available.

NOTE: This section addresses only the ADA's relevance to a defendant's *eligibility* for drug court. The ADA's applicability to drug court participants, including whether the ADA requires drug courts to allow participants to use addiction medications, is addressed in Chapter 3.

51 Evans v. State, 667 S.E.2d 183, 186 (Ga. Ct. App. 2008).

52 State v. Barclay, 2017 Iowa App. LEXIS 43, at *10 (Iowa Ct. App. Jan. 11, 2017).

CHAPTER 2: ADMISSION

Drug courts admit new participants on either a pre-plea or post-plea basis. In pre-plea drug courts, eligible defendants are admitted to the program before entering a final plea to the underlying charges, and the defendant proceeds through the program while the charges are still pending. If the defendant completes the drug court program successfully, the charges are generally dismissed or reduced. If the defendant fails to complete the program, prosecution of the original charges resumes. For more information about pre-plea models, see Chapter 6: Special Considerations for Pre-Plea Drug Courts.

In post-plea drug courts, the defendant is admitted to the program only after pleading guilty to one or more charges. Successful completion of the drug court program may result in the plea being vacated and the charges being dismissed or reduced. Failure to complete the program usually results in the defendant being sentenced to a predetermined term of incarceration.[53]

This section explores some of the legal issues that arise during the post-plea drug court admission process, including the requirements for a valid plea and the rights commonly waived when entering a drug court.

PLEA AGREEMENTS

In post-plea drug courts, the defendant is required to plead guilty before entering the program. The defendant's guilty plea can be taken in a regular criminal court or in the drug court itself. In either scenario, the basic requirements for a valid plea are the same: the plea must be made voluntarily, knowingly, and intelligently.

Voluntary, Knowing, and Intelligent Plea

A valid guilty plea must be voluntary, knowing, and intelligent. This means that the defendant must understand the charges to which they are pleading guilty, the legal consequences of the plea, and the rights being waived.

In the drug court context, a knowing and intelligent plea means that the defendant must understand the jurisdiction's drug court model, terms of enrollment, consequences of termination, incarceration credit scheme, and any other material information about the program that may impact the defendant's rights.

In addition to being knowing and intelligent, a plea must be voluntary, meaning that it is made freely, without any coercion, threats, false promises, or bribes. Note, however, that a plea is not considered involuntary simply because the defendant feels that pleading guilty in return for a reduced punishment is a better choice than facing a higher penalty authorized by statute.[54]

Case Law

- In *Boykin v. Alabam*a, the U.S. Supreme Court explained that a guilty plea is more than an admission of conduct; rather, it is a conviction. Therefore, the court held it was error to accept the defendant's guilty plea without an affirmative showing that it was intelligent and voluntary.[55]
- The 2nd Circuit Court of Appeals reasoned, in *Hanson v. Phillips*, that a significant factor in determining whether a plea is intelligently and voluntarily entered is whether it was based on the advice of competent counsel.[56]
- A Florida appellate court held, in *Smith v. State*, that counsel's failure to inform the defendant of the conditions and requirements of drug court meant that the plea was not voluntarily and intelligently entered.[57]

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53 There are numerous variations on the post-plea drug court model. In post-plea/presentence courts, participants enter the program before sentencing and may never be sentenced if they successfully complete the program. In post-plea/post-sentence courts, the participant is sentenced before entering the program, but the sentence is stayed or held in abeyance while the participant is in the program. Similarly, the legal status of participants varies. In some jurisdictions, drug court is almost always a term of probation. In others, there is no probation involvement, and participants are under some form of interim supervision. For our purposes, these program design differences do not affect the application of the legal principles discussed in this paper.

54 Brady v. United States, 397 U.S. 742, 751 (1970) (finding that a guilty plea is not invalid under the Fifth Amendment as involuntary self-incrimination simply because it is "motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.").

55 Boykin v. Alabama, 395 U.S. 238, 242 (1969); *see also* People v. Haffiz, 976 N.E.2d 216, 217 (N.Y. 2012).

56 Hanson v. Phillips, 442 F.3d 789, 800–01 (2d Cir. 2006).

57 Smith v. State, 840 So. 2d 404, 405–07 (Fla. Dist. Ct. App. 2003).

- In *Waley v. Johnston*, the U.S. Supreme Court held that a guilty plea is involuntary when coerced. The court determined that a conviction on a guilty plea coerced from federal law enforcement is a violation of due process, comparing it to a conviction supported by a coerced confession.[58]
- The Utah Supreme Court held, in *State v. Forsyth*, that a guilty plea can be considered voluntary only if the accused had a clear understanding of the charge and entered the plea without any undue influence, coercion, or improper inducement.[59]

Plea Colloquy

A knowing, intelligent, and voluntary waiver of one's rights must be clear in the court record. Case law establishes several procedural safeguards that courts should follow when accepting plea agreements.

Case Law

- The U.S. Supreme Court's decision in *Boykin v. Alabama* held that a court may not presume, on a silent court record, that the defendant knowingly, voluntarily, and intelligently waived his constitutional rights. The court determined that a plea colloquy that fails to explicitly address the Sixth Amendment right to trial by jury, Sixth Amendment right to confront one's accusers, and Fifth Amendment privilege against self-incrimination results in reversible error.[60]
- In *State v. Sullivan*, the Louisiana Court of Appeals determined that a guilty plea was knowing, intelligent, and voluntary where the plea colloquy included express inquiries into and clear responses that affirmed the defendant's understanding of what he was doing in entering the plea, the rights being waived, and the charges against him.[61]
- The Washington Supreme Court held, in *Woods v. Rhay*, that "it is the duty and responsibility of the trial judge to satisfy himself that the plea is in fact voluntary, and to ascertain that the accused person fully appreciates and understands the consequences of his plea." The court further held that "the trial judge's inquiries together with the accused person's responses should be made a matter of record so that doubt may not later be cast upon the propriety of the proceedings."[62]

RECOMMENDATION

When taking a defendant's guilty plea, the court must engage in an on-the-record colloquy to establish that the defendant understands the charges, the rights being forfeited, and the possible punishments and consequences that the guilty plea may carry. If a plea agreement contemplates that the defendant will enter drug court, the colloquy should also establish that the defendant understands the nature of the program, its conditions and requirements, and the possible consequences of noncompliance.

A written, signed plea agreement reduces the possibility of the plea being found invalid. However, a written agreement does not cure an insufficient record.[63] Practitioners must not allow a written agreement to supplant the on-the-record colloquy.

Effect of Mental Illness or Impairment on Plea

In accepting a defendant's guilty plea, it is incumbent on the court to ensure that the defendant fully comprehends the proceedings. The court must clearly establish that the defendant understands the terms of the plea agreement and the rights being waived. These safeguards are particularly important in cases involving defendants who have a history of mental illness, substance abuse, or other cognitive impairment. Courts are advised to address, on the record, any potential impairment by medication, illicit drugs, alcohol, or mental illness that might inhibit the defendant's ability to enter a knowing, intelligent, and voluntary plea.

58 Waley v. Johnston, 316 U.S. 101, 104 (1942).
59 State v. Forsyth, 560 P.2d 337, 338–39 (Utah 1977).
60 *Boykin*, 395 U.S. at 242.
61 State v. Sullivan, 827 So.2d 1260, 1265 (La. Ct. App. 2002).
62 Woods v. Rhay, 414 P.2d 601, 604 (Wash. 1966).
63 Smith v. State, 840 So. 2d 404, 407 n.1 (Fla. Dist. Ct. App. 2003).

Case Law

- In *United States ex rel. Fitzgerald v. LaVallee*, the 2nd Circuit Court of Appeals held that ingesting narcotics prior to a entering a plea did not per se render the defendant incompetent; while drug use may be a relevant factor, the appropriate test is whether a defendant is able to consult with counsel and understand the proceedings against them. The court further reasoned that a heavy drug user may be more competent after taking their regular dose instead of taking a plea while experiencing symptoms of withdrawal.[64]
- The Georgia Court of Appeals, in *Shaw v. State*, upheld the defendant's guilty plea because the defense counsel affirmed the defendant's medication did not impair his awareness or understanding of the proceedings and the defendant affirmed his understanding of the charges against him and the rights he was waiving.[65]
- In *People v. McQueen*, a New York appellate court upheld the defendant's guilty plea on the grounds that he was fully advised of his rights, denied any threat or coercion, and stated that he was satisfied with counsel's representation. The court further held that the defendant's use of psychiatric medications did not nullify his plea because he coherently answered the court's inquiries, acknowledged that he was thinking clearly during the plea colloquy, and denied having any difficulty communicating with counsel.[66]
- In *Commonwealth v. Hunt*, a Massachusetts appellate court found that the defendant made a knowing plea even though he had a history of mental illness and was unmedicated at the time of his plea. The record established that the defendant coherently responded to the judge's questions, discussed the sentence, successfully negotiated court costs, and acted rationally throughout the proceedings.[67]

In addition, some case law calls upon courts to solicit verbal responses from the defendant—beyond a simple "yes" or "no"—to adequately gauge the defendant's understanding of the proceedings. These cases have found that a one-word affirmative or negative response cannot adequately guarantee that a mentally impaired defendant has a sufficient understanding of the charges and the rights being waived.

Case Law

- In *People v. Bradshaw*, New York's highest court held that the defendant's waiver of the right to appeal, and therefore his guilty plea, was invalid in part because he did not verbally confirm that he understood what right he was forgoing or the concept of an appeal. The court expressed particular concern about the inadequacy of the appeal waiver due to the defendant's background and history of mental illness.[68]
- A New Mexico appellate court determined, in *State v. Michaelback*, that an intellectually disabled defendant with an IQ of 57 cannot enter a knowing, intelligent, and voluntary guilty plea or waive his rights because he is not capable of understanding the nature of the proceedings or his role within them. The court specifically noted that the lower court's reliance on the defendant's one-word responses at the plea hearing "was not in accord with the law."[69]
- In *People v. Brown*, a New York appellate court held that when the defendant executes a written waiver of rights, the trial court must still engage in an on-the-record discussion with the defendant. The court explained that the trial judge should engage in a comprehensive colloquy that clearly places on the record the defendant's understanding of the nature of the right to appeal and the consequences of waiving that right.[70]

Despite the special concerns expressed in the above cases, mental illness does not, by itself, negate a knowing, intelligent, and voluntary plea.

64 United States ex rel. Fitzgerald v. LaVallee, 461 F.2d 601, 602 (2d Cir. 1972).

65 Shaw v. State, 691 S.E.2d 267, 269–70 (Ga. Ct. App. 2010).

66 People v. McQueen, 57 A.D.3d 1103, 1103 (N.Y. App. Div. 2008).

67 Com. v. Hunt, 900 N.E.2d 121, 125–26 (Mass. App. Ct. 2009) (note that the plea was ultimately held invalid on the grounds that it was not made intelligently; the trial judge failed to establish on the record that the defendant was made aware of the elements of the crime).

68 People v. Bradshaw, 961 N.E.2d 645, 651–52 (N.Y. 2011).

69 State v. Michaelback, 2010 N.M. App. LEXIS 273, at *15–18 (N.M. Ct. App. June 23, 2010).

70 People v. Brown, 122 A.D.3d 133, 140 (N.Y. App. Div. 2014).

Case Law

- In *Bailey v. Weber*, the 8th Circuit Court of Appeals held that a defendant who was "mildly retarded" could enter a voluntary and knowing plea. The court determined that there was evidence to support the defendant's competence, including his prior armed robbery conviction, his experience in litigation, the extra precautions his counsel took to ensure his comprehension, and the quality of his answers during plea colloquy.[71]
- The 5th Circuit Court of Appeals held, in *Bolius v. Wainwright*, that the mere presence of a mental illness or disability does not necessarily mean a defendant is incompetent to plead. Rather, the trial court must consider whether the defendant's mental illness is so debilitating that he is unable to consult with counsel and have a rational and factual understanding of the proceedings.[72]
- In *People v. Ashley*, a New York appellate court held that the voluntariness of a guilty plea is not invalidated merely by a later assertion that the defendant had a history of mental illness and suicidal behavior without sufficient evidence to substantiate a claim of lack of competency at the time of pleading.[73]

RECOMMENDATION

During a plea colloquy, the court should inquire into whether the defendant may be suffering from any impairment from the use of legal or illegal drugs, mental illness, cognitive disability, or other causes. If there are indications of possible impairment, the court must take special care to establish on the record that, despite such impairment, the defendant understands the charges against him, the rights he is forfeiting, and the possible punishments and consequences that a guilty plea may carry. Judges may delay the entry of a plea to allow a defendant additional time to consult with counsel if needed. In addition, judges may consider asking defendants to explain in their own words what they understand the drug court program to entail. These extra steps can help to ensure that pleas are truly knowing and intelligent.

WAIVER OF RIGHTS

Defendants traditionally waive several constitutional rights when entering a guilty plea, including the right to trial, the right to confront witnesses, and the privilege against self-incrimination. Waiver of these rights is generally permitted if the waiver itself is knowing, intelligent, and voluntary.[74]

Right to Appeal

In addition to these basic constitutional rights, defendants are often required to waive the statutory right to appeal as part of a plea agreement. A knowing, intelligent, and voluntary waiver of the right to appeal is generally permissible.

Case Law

- In *People v. Mumm*, a California appellate court held that a defendant may waive the right to appeal as part of a plea bargain if the waiver is knowing, intelligent, and voluntary.[75]
- A New York appellate court, in *People v. Conway*, determined that a drug court participant's appeal waiver at the time of plea was knowing and intelligent because it was on the record and the defendant also executed a written waiver form that set forth his appellate rights and indicated he had discussed the waiver with his counsel.[76]

71 Bailey v. Weber, 295 F.3d 852, 855 (8th Cir. 2002).
72 Bolius v. Wainwright, 597 F.2d 986, 990 (5th Cir. 1979).
73 People v. Ashley, 71 A.D.3d 1286, 1287 (N.Y. App. Div. 2010).
74 *See, e.g.*, Peretz v. United States, 501 U.S. 923, 936 (1991).
75 People v. Mumm, 120 Cal. Rptr. 2d 18, 20 (Cal. Ct. App. 2002).
76 People v. Conway, 45 A.D.3d 1055, 1055–56 (N.Y. App. Div. 2007).

- In a more recent case, *People v. Lowe*, a New York appellate court held that, even though the defendant had reviewed a written memorandum outlining the consequences of pleading guilty, the memorandum did not adequately explain the nature of the rights being waived and lumped the right to appeal with other rights. Moreover, the trial court failed to inquire whether counsel had discussed the appeal waiver with the defendant or whether defendant understood it.[77]
- An Iowa appellate court held, in *State v. Bellville*, that an appeal waiver by a drug court participant was invalid because the court failed to inquire whether the defendant knew he had a right to appeal, knew he was giving up that right voluntarily, and understood the penal consequences of giving up his right to appeal.[78]

Right to a Sanction Hearing or Termination Hearing

It is important to note that waiving the right to appeal does not prevent a defendant from later challenging the court's decision to find the defendant in violation of a condition of drug court, to terminate the defendant from the program, or both. Drug courts often involve a lengthy and intense period of supervision, during which the court may find the participant in violation of the program's conditions, order a range of sanctions (including jail), terminate the participant from the program, and impose a sentence on the underlying charge. It is impossible for a defendant to knowingly and intelligently waive the right to contest such future allegations before they have been made, when their validity cannot be known. Such a waiver would impermissibly infringe the defendant's right to due process.

Case Law

- In *People v. Kitchens*, a New York appellate court held that the defendant's general waiver of his right to appeal did not foreclose review of his contention that he was denied his right to due process when the sentencing court did not hold a hearing regarding the circumstances surrounding his failure to complete the drug court program.[79]
- A Florida appellate court, in *Staley v. State*, found that although a drug court participant may waive his rights to due process after those rights have been implicated, such as after a violation petition is filed, it is impossible for him to knowingly and intelligently waive his right to contest allegations before knowing the content of those allegations.[80]
- In *State v. LaPlaca*, the New Hampshire Supreme Court rejected the defendant's waiver of the right to a termination hearing because it was impossible for the defendant to have knowledge of the allegations brought against him when the facts giving rise to those allegations had yet to occur. The failure to provide a hearing deprived the defendant of his due process rights.[81]

RECOMMENDATION

A drug court participant, like any other defendant, may waive their general right to appeal when entering a guilty plea. Such a waiver, however, does not foreclose the defendant's due process right to challenge future allegations of noncompliance. Therefore, drug courts must not require participants to waive the right to a violation hearing or termination hearing.[82]

Waiver of Right to Request Judicial Recusal

The drug court model calls upon judges to be centrally involved in the supervision of participants. During regular compliance hearings, the judge interacts directly with participants and discusses the participants' progress in the program. Participants are encouraged to discuss intimate details of their lives, including their substance use

77 People v. Lowe, 133 A.D.3d 1099, 1100–01 (N.Y. App. Div. 2015).

78 State v. Bellville, 2005 Iowa App. LEXIS 963, at *5 (Iowa Ct. App. Aug. 31, 2005).

79 People v. Kitchens, 46 A.D.3d 577, 578 (N.Y. App. Div. 2007).

80 Staley v. State, 851 So. 2d 805, 807 (Fla. Dist. Ct. App. 2003).

81 State v. LaPlaca, 27 A.3d 719, 725–26 (N.H. 2011) (note that the court's holding is limited to "the context of the imposition of [the defendant's] full suspended sentence of incarceration"; the court expressly declined to decide whether a defendant can prospectively waive the right to hearing "in the context of the imposition of lesser sanctions").

82 Once in the program, a drug court participant may waive the right to contest *specific* allegations of noncompliance as long as such waiver is knowing, intelligent, and voluntary. The cases cited in this section prohibit the prospective waiver of a hearing to contest *future* allegations of noncompliance.

treatment, mental health issues, relationships with partners and children, housing situation, and more. In addition, judges lead frequent meetings with the interdisciplinary drug court team, where team members provide the judge with detailed information about participants' day-to-day progress.

Given the high level of judicial involvement in drug courts, practitioners and courts have raised questions about the ability of drug court judges to remain impartial when deciding whether to terminate a participant from the program or deciding how to sentence a terminated participant. Some appellate courts, in fact, have held that an independent judge must be assigned to hear a drug court participant's termination and/or sentencing hearing. Other appellate courts have advised that recusal motions by drug court participants should generally be granted when termination or sentencing decisions are at issue.

Some drug courts have sought to address these concerns by requiring participants, at the time they enter the drug court program, to waive their right to request judicial recusal at a later termination or sentencing hearing. This practice seems to rest on the assumption that the right to request judicial recusal can be given up—like many other rights discussed in this section—through a knowing, intelligent, and voluntary waiver. Although there is no clear case law on this issue, it is doubtful that such waivers would withstand a constitutional challenge. A more complete discussion of issues surrounding termination and judicial recusal is included in Chapter 5: Termination and Sentencing.

RECOMMENDATION

In the absence of case law, statute, or rule addressing this issue, the safest practice is to *not* require drug court participants to waive their right to request judicial recusal in termination/revocation hearings. Such waiver language should be eliminated from drug court contracts.[83] Additionally, drug courts should generally grant a motion for recusal of the drug court judge if one is filed by a participant.

Waiver of Custody Credits

Custody credits are often applied to reduce a defendant's post-sentence incarceration in recognition of time spent in custody prior to sentencing. Drug court participation does not constitute "custody" for credit purposes. However, drug court participants may spend some time incarcerated prior to drug court enrollment or as part of a drug court sanction. Therefore, the issue of custody credits should be clearly addressed in the drug court contract. If the drug court requires participants to waive custody credits, such waiver must be knowing, intelligent, and voluntary. For more information about custody credit time, see Chapter 4: Monitoring and Sanctions.

Case Law

- In *People v. Black*, a California Court of Appeals upheld the defendant's waiver of previously accrued custody credits as a condition of participation in drug court, finding that the waiver was knowing and voluntary. Moreover, the court noted that such a waiver is not invalidated by failure to include an explicit advisement that it would apply to any future prison term imposed upon probation revocation.[84]
- The Indiana Court of Appeals in *House v. State* analogized a drug court agreement to a plea bargain and found that the defendant knowingly and voluntarily agreed to waive credit time. However, the waiver applied only to credit time accrued *after* execution of the waiver.[85]

Search Waivers

Drug courts frequently require defendants to submit to warrantless searches—which often include random drug testing—as a condition of participation. A search waiver may appear in the plea agreement, probation conditions, or drug court contract. These kinds of search waivers are generally unproblematic in post-plea drug courts if they are entered into knowingly, intelligently, and voluntarily. In the post-plea context, a search waiver can be upheld as a reasonable condition of probation, a valid waiver based on the defendant's consent, or both. Note, however, that pre-plea drug courts face different legal hurdles when it comes to search waivers. For more information on search waivers in pre-plea drug courts, see Chapter 6.

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83 This recommendation is consistent with the recommendations of the Treatment Court Institute. See National Drug Court Institute, The Drug Court Judicial Benchbook 168–69 (Douglas B. Marlowe & William G. Meyer eds., 2011).

84 People v. Black, 97 Cal. Rptr. 3d 338, 345–46 (Cal. Ct. App. 2009).

85 House v. State, 901 N.E.2d 598, 600–01 (Ind. Ct. App. 2009).

Case Law

- In *Griffin v. Wisconsin*, the U.S. Supreme Court held that a probation officer's search of a probationer's home without probable cause was reasonable and valid because probation qualifies as a "special need" of the state and carries with it a decreased expectation of privacy.[86]
- In *United States v. Knights*, the U.S. Supreme Court extended its previous holding in *Griffin*, finding that a warrantless search of a probationer's home by a police officer investigating a separate crime is valid when it is supported by reasonable suspicion of criminal activity and there is a probation condition authorizing warrantless searches. The court declined to decide whether the probation condition constituted consent to all searches regardless of individualized suspicion.[87]
- The California Supreme Court explained, in *People v. Ramos*, that by accepting probation, "a probationer consents to the waiver of Fourth Amendment rights in order to avoid incarceration" and that "a probationer who has been granted the privilege of probation on condition that he submit at any time to a warrantless search may have no reasonable expectation of traditional Fourth Amendment protection."[88]
- In *State v. Benton*, the Ohio Supreme Court held that a consent-to-search condition of parole was valid following the defendant's knowing, intelligent, and voluntary acceptance of the parole terms. The court further held that such a consent-to-search waiver authorizes random searches without reasonable suspicion.[89]
- The Supreme Court of Wisconsin found, in *State v. McAuliffe*, a condition of probation requiring probationers to submit to random searches to be constitutional so long as the condition "bears a reasonable relationship to the probationer's criminal activity, the probationer's rehabilitation, and society's protection from future criminal drug violations."[90]

Right to Determine One's Own Treatment

As a general matter, individuals are entitled to make decisions about their own medical treatment. This principle is rooted in the due process right to bodily integrity. The *Adult Drug Court Best Practice Standards* reinforce this right by directing drug courts to work with their treatment partners and participants in setting person-centered treatment goals and choosing from among available treatment options and providers.[91]

Despite drug courts' commitment to person-centered treatment, however, a participant's right to determine their own treatment is necessarily limited. Drug court participants agree, as a condition of the program, to follow a court-ordered treatment plan that, in nearly all drug courts, includes the ultimate goal of abstinence from all illicit substance use. If the participant refuses to abide by the treatment plan, the participant may be sanctioned or terminated from the program.[92]

Similarly, while drug courts seek to connect each participant with a treatment provider that will meet their needs and that the participant is comfortable with, participants generally do not have the right to demand the treatment provider of their choosing.[93] Drug courts have an obligation to provide participants with a continuum of care and ensure that treatment providers are appropriately credentialed and that they provide evidence-based treatments (including medications for addiction treatment), support the mission and policies of the drug court, and agree to share appropriate information with the drug court.[94] When a participant's preferred treatment provider does not meet these criteria, the drug court is legally justified in requiring the participant to use a court-approved provider.

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86 Griffin v. Wisconsin, 483 U.S. 868, 875 (1987).

87 United States v. Knights, 534 U.S. 112, 118–19 (2001).

88 People v. Ramos, 101 P.3d 478, 488 (Cal. 2004).

89 State v. Benton, 695 N.E.2d 757, 762–63 (Ohio 1998).

90 State v. McAuliffe, 125 P.3d 276, 282 (Wyo. 2005).

91 National Association of Drug Court Professionals, Adult Drug Court Best Practice Standards, Vol. I, at 11 (2018). See Standard V: Substance Use Disorder Treatment.

92 In *Walker v. Lamberti*, a participant in a pre-plea drug court diversion program informed the judge that he wanted to "opt out" of the program and return to normal case processing. The court refused to let the participant opt out and instead remanded him to a jail-based treatment program after he failed a drug test. On review, the Florida Court of Appeal sustained the judge's decision, holding that the drug court agreement, which the participant signed knowingly and voluntarily, created a binding contract that required the participant to comply with his treatment plan and other program requirements. Walker v. Lamberti, 29 So. 3d 1172, 1175–76 (Fla. Ct. App. 2010).

93 In *United States v. Lingle*, a federal district court in North Carolina upheld the government's authority to direct the probationer to a treatment provider approved by the probation department, noting that the probationer "is not at liberty to choose his treatment provider." United States v. Lingle, 557 F. Supp. 3d 673, 685 (E.D.N.C. 2021).

94 National Association of Drug Court Professionals, Adult Drug Court Best Practice Standards, Vol. I, at 11 (2018). See Standard V: Substance Use Disorder Treatment.

RECOMMENDATION

A drug court participant's right to determine their own treatment is limited in some important respects by their voluntary agreement to abide by the conditions of the drug court program. Nonetheless, consistent with the *Adult Drug Court Best Practice Standards*, drug courts should strive to accommodate participants' preferences and individual needs when assigning them to a treatment provider and developing treatment plans. Building a strong therapeutic alliance—a cooperative relationship between the client and treatment provider—and promoting shared decision-making lead to improved therapeutic outcomes.

CHAPTER 3: PARTICIPATION

Successful drug court participants typically spend 12–24 months in the program before graduating. During this period, participants are subject to a number of treatment and supervision requirements. Some of these conditions—including randomized drug testing, regular court hearings, and compliance with court-ordered treatment—are standard for all drug court participants. Other conditions, such as participation in employment services or refraining from contact with specific individuals, may be ordered on an individualized basis depending on a participant's unique circumstances. In addition, drug courts utilize procedural innovations, like team staffing meetings and graduated incentives and sanctions, that differ from conventional case processing. This section discusses some of the constitutional and legal considerations that are implicated during an individual's participation in drug court.

MANDATORY DRUG TESTING

The *Adult Drug Court Best Practice Standards* indicate that drug courts should require all participants to submit to frequent, randomized drug testing.[95] Mandatory drug testing is generally allowed as a condition of probation, and by extension as a condition of a post-plea drug court, if it is reasonably related to the instant case. Factors that have established a "reasonable relation" include the nature of the crime; the defendant's history of drug use; and the need for deterrence, public safety, and rehabilitation. In the drug court context, the nature of the crime, the defendant's history of drug use, or both will normally provide ample justification for mandatory drug testing.

Case Law

- In *United States v. Jordan*, the 7th Circuit Court of Appeals held that a condition of post-conviction release requiring drug and alcohol treatment is valid as long as the condition is "reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the need for adequate deterrence, protection of the public, and effective treatment" and "involves no greater deprivation of liberty than is reasonably necessary to achieve sentencing goals."[96]
- In *United States v. Duff*, the 9th Circuit Court of Appeals held a search must be reasonable and must be based upon the probation officer's reasonable belief that it is necessary to the performance of the officer's duties. The Court of Appeals found that the court-imposed requirement that the defendant refrain from violating laws gave sufficient notice that he might be drug tested: "[d]ue process does not require that prior notice be given of the techniques through which noncompliance will be detected."[97]

For more information on the methodological and due process requirements for drug testing, refer to Chapter 4: Monitoring and Sanctions.

RESTRICTIONS DURING PARTICIPATION

Alcohol Restrictions

Drug courts often require participants to abstain from alcohol and submit to alcohol testing, even if they have no history of alcohol use disorder. These conditions are typically intended to promote the participant's treatment and recovery, as alcohol consumption may increase the likelihood that a participant will relapse to their primary drug or develop an alcohol use disorder.[98] However, alcohol is a legal substance, raising the question whether such restrictions are permitted. Courts have consistently held that restrictions on alcohol consumption and alcohol testing requirements are permissible, as a condition of probation or post-conviction supervision, if these conditions are reasonably related to the defendant's rehabilitation and the prevention of future crime and are no more restrictive than necessary to serve these goals.

95 National Association of Drug Court Professionals, Adult Drug Court Best Practice Standards, Vol. II, at 26 (2018).

96 United States v. Jordan, 485 F.3d 982, 984 (7th Cir. 2007).

97 United States v. Duff, 831 F.2d 176, 179 (9th Cir. 1987).

98 See Petra K. Straiger, et al., *Overlooked and Underestimated? Problematic Alcohol Use in Clients Recovering from Drug Dependence*, 8 Addiction 7 at 1188–93 (July 2013).

Case Law

- In *United States v. Loy*, the 3rd Circuit Court of Appeals remanded the case to the district court, instructing the court to state its reasoning for requiring alcohol testing and treatment as a condition of post-conviction release. In doing so, the Court of Appeals reminded the district court that "the conditions of supervised release must be reasonably related to the goals of deterrence, protection of the public, and rehabilitation of the defendant" and "that any condition implicating the deprivation of liberty can be no greater than necessary to meet these goals."[99]
- In *People v. Beal*, a California Court of Appeals upheld a probation condition ordering the defendant, who was convicted of a drug charge, to abstain from alcohol. The court reasoned that there is a relationship between alcohol and drug use and that alcohol use may lead to future criminality when the defendant has a history of substance abuse. The condition was therefore reasonably related to the underlying crime and the prevention of future criminality.[100]

Recreational Marijuana Restrictions

Laws pertaining to marijuana are evolving rapidly. This section and the following section should be regarded as a general summary of the law as of the date of publication. Drug court practitioners are strongly advised to seek legal counsel and review their state's laws, court decisions, and regulations on this topic before formulating any policy that would restrict marijuana use by drug court participants.

As of this writing, 19 states have fully legalized marijuana for recreational use, and it can reasonably be anticipated that additional states will legalize such use in the future.[101] The question therefore arises whether drug courts may prohibit participants from using recreational marijuana even where it is lawful. Case law indicates that the answer is generally yes, as long the prohibition is related to the crime for which the defendant was committed, the defendant's rehabilitation, and the prevention of future crime.

Case Law

- I*n People v. More*t, a California Court of Appeal upheld a probation condition prohibiting the possession or use of marijuana even though the defendant's charges did not involve drugs. The court found the condition reasonably related to future criminality due to the defendant's history of marijuana use and present charges, despite lawful possession of a medical marijuana card. The court analogized such restriction to probation conditions prohibiting the consumption of alcohol.[102]
- In *State v. Dahlberg*, the Ohio Court of Appeals considered the validity of a probation condition prohibiting the defendant from possessing or using marijuana, "even if legalized." The court upheld the condition, noting that it was clearly related to (1) the defendant's underlying drug possession and illegal firearm conviction, (2) the defendant's rehabilitation, and (3) prevention of future crime.[103]

Other courts have interpreted probation conditions prohibiting involvement with "illegal drugs" to include marijuana, even where recreational marijuana is legal under state law. These courts have reasoned that the federal Controlled Substances Act preempts state laws legalizing marijuana and, therefore, marijuana remains an illegal drug for purposes of probation compliance.

Case Law

- The Washington Court of Appeals, in *State v. Reamer*, held that a community custody condition prohibiting the defendant from associating with known users or sellers of "illegal drugs" included users and sellers of marijuana. The court explained that the federal Controlled Substances Act "preempts state law, even for marijuana wholly grown and distributed intrastate. The complication of different state and federal drug enforcement policies does not excuse a person from knowing that for marijuana, it is still illegal."[104]

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99 United States v. Loy, 191 F.3d 360, 370–71 (3d Cir. 1999).

100 People v. Beal, 70 Cal. Rptr. 2d 80, 82 (Cal. Ct. App. 1997).

101 As of this writing, 19 states have fully legalized marijuana for recreational use. Current information regarding marijuana legalization across the United States can be found in DISA (n.d.), "Marijuana Legality by State," https://disa.com/map-of-marijuana-legality-by-state.

102 People v. Moret, 104 Cal. Rptr. 3d 1, 10–11 (Cal. Ct. App. 2009).

103 State v. Dahlberg, 2021 Ohio. App. LEXIS 563, at *82 (Ohio Ct. App. Mar. 1, 2021); see also *State v. Ryan*, 2021 Ohio App. LEXIS 3954, at *31 (Ohio Ct. App. Nov. 15, 2021).

104 State v. Reamer, 2019 Wash. App. LEXIS 2007, at *10 (Wash. Ct. App. July 29, 2019).

- In *United States v. Blanding*, a federal district court in Connecticut held that a pretrial release condition that "the Defendant must not break federal, state, or local law while on release" prohibited the defendant from possessing or using marijuana, notwithstanding the fact that Connecticut had legalized medical and recreational marijuana. Providing a detailed summary of previous federal case law, the court explained that possession of marijuana is illegal under federal law, that federal law prevails over conflicting state laws, and that federal courts "routinely" uphold conditions like the one in this case.[105]

Medical Marijuana Restrictions

Many states have enacted laws permitting the use of medical marijuana when authorized by a qualified health care provider for the treatment of an eligible medical condition.[106] These laws raise the question whether drug courts can prohibit the use of medical marijuana by a participant who has obtained proper authorization under state law.[107] Jurisdictions that have addressed this issue generally fall into two major groups: those where medical marijuana use may be prohibited on a case-by-case basis and those where medical marijuana use by drug court participants is expressly permitted.[108]

Medical Marijuana Use May Be Prohibited on a Case-by-Case Basis

Courts traditionally have broad discretion in setting supervision conditions. Conditions are generally considered valid if they are related to (1) the crime committed, (2) the defendant's rehabilitation, or (3) preventing future criminal activity. In some states, courts have applied these long-standing principles to the issue of medical marijuana use by probationers, holding that such use may be prohibited after a consideration of the individualized circumstances of each case.

Case Law

- A California Court of Appeal held, in *People v. Leal*, that a probation condition prohibiting use of medical marijuana is permissible if the condition is related to the crime itself or to preventing future criminality. The probationer in question had a valid medical marijuana card but was convicted of possessing marijuana for sale and illegally possessing a firearm. The court determined that the probationer was improperly using his medical marijuana card as a shield to illegally sell marijuana and that he illegally carried a gun to protect his marijuana-selling business. The court upheld the probation condition, finding that it was related to the crimes for which the defendant was convicted and to prevention of future criminality.[109]
- In *People v. Stanton*, a New York court observed that, when setting probation conditions, it must "give due consideration to the crime charged, the particular circumstances of the defendant, and the purpose of the penal sanction."[110] Under this standard, New York courts have the authority to prohibit medical marijuana use when they deem it appropriate in light of the circumstances. In the present case, however, the court allowed the probationer to use medical marijuana, finding that he had no criminal history involving drugs, that he had a valid authorization card, that he suffered serious pain from accident-related injuries that was being alleviated by medical marijuana, and that denying medical marijuana would require him to revert to more addictive prescription opioids. Under the circumstances, the court held that "[p]rohibiting medical marijuana in this case would hardly serve any lawful and logical relation to the defendant's rehabilitation."[111]
- The Colorado Supreme Court held, in *Walton v. People*, that state statute created a presumption that medical marijuana use by probationers is permitted, but that the presumption can be rebutted if the prosecution establishes that the probationer's use of medical marijuana would be contrary to the goals of sentencing. Therefore, a blanket policy prohibiting probationers from using medical marijuana is invalid, but a court may prohibit medical marijuana in a particular case by looking at the individual's circumstances and the statutory sentencing goals.[112]

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105 United States v. Blanding, 2022 U.S. Dist. LEXIS 4379, at *7 (D. Conn. Jan. 6, 2022).

106 Marijuana remains illegal under federal law, as confirmed by the U.S. Supreme Court in *Gonzales v. Raich*, 545 U.S. 1 (2005). Nonetheless, the federal government has declined to enforce federal law when a person buys, sells, or uses medical marijuana in accordance with state law.

107 Medical marijuana is legally distinct from prescription drugs for drug court purposes. Unlike prescription drugs, medical marijuana typically cannot be "prescribed" by health care providers because of marijuana's status as an illegal Schedule 1 controlled substance under federal law. Rather, it is usually "authorized" by a physician under the state's medical marijuana statute. In addition, state medical marijuana laws often provide authorized users with legal protections that are not available for prescription drugs.

108 Note that participants in federal drug courts are strictly prohibited from using medical marijuana. *See., e.g.,* United States v. Nixon, 839 F.3d 885, 888 (9th Cir. 2016); United States v. Schostag, 895 F.3d 1025, 1028 (8th Cir. 2018) (holding that federal district courts have no discretion to allow a supervisee to use medical marijuana while on supervised release).

109 People v. Leal, 149 Cal. Rptr. 3d 9, 18 (Cal. Ct. App. 2012).

110 People v. Stanton, 60 Misc. 3d 1020, 1026 (Sullivan County Ct. 2018).

111 *Id.*

112 Walton v. People, 451 P.3d 1212, 1217 (Colo. 2019).

Medical Marijuana Use Is Expressly Permitted

- Courts in Arizona, Montana, Oregon, and Pennsylvania have interpreted their states' medical marijuana statutes as divesting sentencing judges of the authority to restrict medical marijuana use by individuals under state supervision.

Case Law

- The Arizona Supreme Court held, in *Reed-Kaliher v. Hoggatt*, that a sentencing court may not prohibit a probationer from using medical marijuana, nor may it revoke probation for a probationer's use of medical marijuana. The court pointed to the language of the state's statute, which provides immunity against "penalty in any manner, or the denial of any right or privilege," for medical marijuana use pursuant to the statute. The court held that a probation condition prohibiting the use of medical marijuana denied the probationer a privilege and therefore violated the statute.[113]
- In *State v. Nelson*, a Montana sentencing court ordered that a probationer could possess medical marijuana *only in pill form*, a restriction that was not authorized by the state's medical marijuana law. The Montana Supreme Court overruled, holding that the state's medical marijuana law "does not give sentencing judges the authority to limit the privilege of medical use of marijuana while under state supervision."[114]
- The Oregon Court of Appeals held, in *State v. Kilgore*, that a probation condition prohibiting marijuana use "must contain an exception for marijuana use that complies with Oregon's medical marijuana laws if the probationer holds a medical marijuana registry identification card."[115]
- The Pennsylvania Supreme Court considered the state's medical marijuana law in a class action case challenging a policy prohibiting probationers from using medical marijuana "regardless of whether the defendant has a medical marijuana card." The state argued that the medical marijuana law did not apply to probation conditions and that the policy was needed to effectively supervise probationers. The court acknowledged that the state's law creates challenges for probation supervision. Nonetheless, the court held that the probation policy was unenforceable because it impermissibly "dilute[d] the immunity afforded to probationer[s]" by the state's medical marijuana law.[116]

In these four states, it is arguably impermissible for drug courts to prohibit participants from using medical marijuana in compliance with state law. Courts in these states have held that prohibiting a probationer from using medical marijuana, or terminating probation because of such use, constitutes a denial of a "right or privilege" in violation of the statute. By the same reasoning, it could be argued that prohibiting medical marijuana use by drug court participants, or terminating drug court participants for such use, is equally impermissible.[117]

Drug courts in these states, and in other states with similarly worded medical marijuana statutes, should consult with legal counsel before developing policies limiting drug court participants' use of medical marijuana.

RECOMMENDATION

In states where drug court participants must be permitted to use medical marijuana, drug courts may still verify that participants possess valid authorization under state law and that their medical marijuana use does not extend beyond the period of authorization.[118]

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113 Reed-Kaliher v. Hoggatt, 347 P.3d 136, 138 (Ariz. 2015); *see also* State ex rel. Polk v. Hancock, 347 P.3d 142, 145 (Ariz. 2015).

114 State v. Nelson, 195 P.3d 826, 829 (Mont. 2008).

115 State v. Kilgore, 435 P.3d 817, 818 (Or. Ct. App. 2019).

116 Gass v. 52nd Jud. Dist., Lebanon Cnty., 232 A.3d 706, 708 (Pa. 2020)

117 Despite the case law cited in this section, drug courts in Arizona and Montana continue to prohibit the use of marijuana by participants. In Arizona, the Administrative Office of the Courts has advised that marijuana users may be excluded from drug court as long as "a probation alternative that is not more punitive is available." See Memorandum, *Probationer Use of Marijuana Permitted by Arizona Law*, Arizona Administrative Office of the Courts, dated April 16, 2021.

118 For additional guidance, see National Association of Drug Court Professionals, Frequently Asked Questions: Medical Marijuana in Treatment Courts (Oct. 2022).

Restrictions on the Use of Medications for Addiction Treatment

Medications for addiction treatment (MAT) are the standard of care for treating opioid use disorders.[119] The *Adult Drug Court Best Practice Standards* make clear that drug courts must support the use of these medications when properly prescribed by a licensed physician.[120] The law, however, has been slow to catch up to the science on this issue. As of this writing, there are no reported court decisions holding that drug courts must permit participants to use addiction medications. Nonetheless, recent case law and U.S. Department of Justice enforcement actions under the Americans with Disabilities Act (ADA) suggest that the law is changing and that the ADA should be interpreted to require access to addiction medications.

As discussed in Chapter 1, Title II of the ADA prohibits state and local governments from discriminating on the basis of disability when providing access to government programs, including court- and jail-based programs. The ADA applies when (1) a person has a disability (defined as a physical or mental impairment that substantially limits a major life activity), (2) the person is otherwise qualified for the program, and (3) the person is denied access to the program because of the disability. If these three conditions are met, the ADA requires the government to make reasonable accommodations to allow the person to access the program.

Case law has clearly held that drug courts and other diversion programs are "government programs" under the ADA.[121] Likewise, courts have repeatedly held that a substance use disorder is a "disability" when it substantially limits a major life activity such as caring for oneself, caring for one's children, or maintaining employment.[122] In light of these cases and the clear language of the ADA, it stands to reason that drug courts must make the "reasonable accommodation" of allowing participants to use addiction medication, a lifesaving treatment that is the standard of care for their disability. However, courts traditionally have not been willing to extend ADA protection to the use of addiction medication by drug court participants.[123]

In recent years, though, new case law and federal enforcement actions suggest that the legal landscape may be shifting in favor of ADA protection for addiction medication.

U.S. Department of Justice Enforcement Actions

The U.S. Department of Justice's (DOJ) Civil Rights Division has taken strong steps in recent years to enforce the ADA against state and local justice systems that deny addiction medication to individuals with substance use disorders.

In February 2022, the DOJ completed an investigation into possible ADA violations by Pennsylvania's Unified Judicial System after receiving complaints that courts in the state had ordered probationers and drug court participants to stop using addiction medications. In a detailed letter, the DOJ outlined court policies and practices in at least seven counties that denied or limited access to addiction medications.[124] The DOJ concluded that these policies and practices violated the ADA and demanded that Pennsylvania undertake a number of specific actions to end discrimination against individuals with substance use disorders. Pennsylvania did not respond to the DOJ letter, and the DOJ filed a lawsuit in federal court. The lawsuit is pending as of this writing.[125]

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119 Douglas B. Marlowe, Treatment Court Practitioner Toolkit, National Association of Drug Court Professionals 6 (2021) (citing the positions of the National Institute of Drug Abuse, Substance Abuse and Mental Health Services Administration, Office of the Surgeon General, and World Health Organization).

120 National Association of Drug Court Professionals, Adult Drug Court Best Practice Standards, Vol. I, at 6 (2018), ("If adequate treatment is available, candidates are not disqualified from participation in Drug Court because . . . they have been legally prescribed psychotropic or addiction medication").

121 See, e.g., Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 210, 212 (1999) (ADA applies to correctional programs); Evans v. State, 667 S.E.2d 183, 186 (Ga. Ct. App. 2008) (drug court is a public entity under the ADA); People v. Brathwaite, 816 N.Y.S.3d 331, 335 (Crim. Ct. 2006) (alternative sentencing program is a public entity under the ADA).

122 *See, e.g.*, MX Group, Inc. v. City of Covington, 293 F.3d 326, 340 (6th Cir. 2002) (noting that is it well established that addiction constitutes an "impairment" under the ADA and that it "substantially limits" major life activities, including employment, parenting, and everyday functioning); United States v. City of Baltimore, 845 F. Supp. 2d 640, 649–50 (D. Md. 2002) (holding that residents of a substance use treatment facility were individuals with a disability by virtue of their substance use disorders).

123 *See, e.g.*, Beisel v. Espinoza, 2017 U.S. Dist. LEXIS 73391, at *4–8 (D. Fla. May 15, 2017) (upholding family drug court's order directing participant to discontinue Suboxone, finding no violation of the ADA, 14th Amendment, or 8th Amendment); Bazzle v. State, 434 P.3d 1090, 1101 (Wyo. 2019) (upholding adult drug court's order directing participant to discontinue Suboxone without considering possible ADA violation); State v. Barclay, 895 N.W.2d 923, 923 (Iowa. Ct. App. 2017) (finding no ADA violation when defendant was excluded from drug court because of a mental health disorder; further finding that the ADA does not apply to criminal sentencing decisions).

124 *See* Letter from U.S. Dep't of Just. to Robert J. Krandel, Admin. Off. of Pa. Ct. (Feb. 2, 2022), https://www.ada.gov/ujs_lof.pdf.

125 *See* Press Release, U.S. Dep't of Just., Justice Department Files Suit Against Pennsylvania Court System for Discriminating Against People with Opioid Use Disorder (Feb. 24, 2022), https://www.justice.gov/opa/pr/justice-department-files-suit-against-pennsylvania-court-system-discriminating-against-people.

In Massachusetts, the DOJ reached agreements with the state's parole board, trial courts, and correctional facilities to settle allegations of ADA violations stemming from the denial of addiction medications.[126] The DOJ announced that the agreements are "part of an ongoing effort by the U.S. Attorney's Office to enforce the ADA and to eliminate discriminatory barriers to treatment for [substance use disorders]."[127] The agreement with the Massachusetts Trial Court resulted from a complaint that drug court participants were ordered or pressured to stop taking their lawfully prescribed addiction medications without an individualized assessment by a medical professional and that participants were required to take Vivitrol exclusively, without regard for the specific treatment recommendations of qualified medical professionals.[128]

Case Law Applying the ADA in Correctional Settings

At least two recent federal court cases have found violations of the ADA when correctional facilities required inmates to discontinue their addiction medications while incarcerated.

Case Law

- In *Pesce v. Coppinger*, the defendant, in active recovery from opioid use disorder with the help of methadone, was facing a 60-day prison term at a correctional facility that did not allow methadone. The defendant sought a preliminary injunction ordering the prison to provide him methadone as prescribed by his physician. After considering the defendant's struggles with other treatments and his doctor's testimony that he was not ready to discontinue methadone, the U.S. District Court for the District of Massachusetts held that the prison's policy violated the ADA, as well as the Eighth Amendment's prohibition against cruel and unusual punishment (which applies to incarcerated individuals).[129]
- The U.S. District Court for the District of Maine reached a similar conclusion in *Smith v. Aroostook County*, a case involving a defendant in active recovery from opioid use disorder with the help of buprenorphine. Facing 60 days in jail on a theft charge, the defendant sought a preliminary injunction ordering the jail to provide her buprenorphine as prescribed by her doctor. The court noted that the defendant had found sustained recovery only with medication and that previous attempts to taper her dosage had failed. In addition, the court found that the jail's policy was based on stigma around addiction medications rather than medical science. Accordingly, the court found a violation of the ADA and ordered the jail to provide the defendant with buprenorphine as prescribed.[130]

These cases do not apply directly to drug courts. However, they suggest a willingness by federal courts to consider the applicability of the ADA in justice system settings, and their rationale for finding ADA violations would apply just as well in courts as it does in jails. Coupled with the U.S. Department of Justice's ongoing efforts to enforce the ADA, including in Massachusetts drug courts, there is a strong argument that it is only a matter of time until courts rule that the ADA requires drug courts to permit addiction medications. In any event, drug court practitioners are reminded that the *Adult Drug Court Best Practice Standards* and the consensus of medical experts dictate that drug court participants should never be denied addiction medications when properly prescribed.

RECOMMENDATION

It is critically important that drug courts allow participants to use addiction medications when properly prescribed and work proactively with physicians and treatment providers to ensure that participants can access these lifesaving medications. Drug courts should permit all three FDA-approved medications—buprenorphine, methadone, and naltrexone—and allow participants to select the medication that they choose in coordination with their prescribing physician. In addition, drug courts should not require participants to discontinue the use of addiction medications as a condition of successful completion of the program.

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126 *See* Press Release, U.S. Dep't of Just., U.S. Attorney's Office Settles Disability Discrimination Allegations with Massachusetts Parole Board (Dec. 17, 2021), https://www.justice.gov/usao-ma/pr/us-attorneys-office-settles-disability-discrimination-allegations-massachusetts-parole; Press Release, U.S. Dep't of Just., U.S. Attorney's Office Settles Disability Discrimination Allegations with the Massachusetts Trial Court Concerning Access to Medications for Opioid Use Disorder (Mar. 24, 2022), https://www.justice.gov/usao-ma/pr/us-attorney-s-office-settles-disability-discrimination-allegations-massachusetts-trial; Press Release, U.S. Dep't of Just., U.S. Attorney Rollins Announces Correctional Facilities Statewide to Maintain All Medications for Opioid Use Disorder (Apr. 1, 2022), https://www.justice.gov/usao-ma/pr/us-attorney-rollins-announces-correctional-facilities-statewide-maintain-all-medications.

127 Press Release, U.S. Dep't of Just. (Dec. 17, 2021), *supra* note 126.

128 Press Release, U.S. Dep't of Just. (Mar. 24, 2022), *supra* note 126.

129 Pesce v. Coppinger, 355 F. Supp. 3d 35, 46–47 (D. Mass. 2018).

130 Smith v. Aroostook County, 376 F. Supp. 3d 146, 162 (D. Maine 2019).

Twelve-Step Programs

Some drug courts require participants to attend 12-step programs, such as Alcoholics Anonymous or Narcotics Anonymous, as part of their overall case plan. Despite their popularity and potential benefits, drug courts must be careful when requiring participants to attend these programs because of their explicitly faith-based approach. Courts have consistently held that mandating a defendant to attend Alcoholics Anonymous, Narcotics Anonymous, or any similar faith-based program without offering a secular alternative is an impermissible violation of the First Amendment.

Case Law

- In *Hazle v. Crofoot*, the 9th Circuit Court of Appeals observed that it is "uncommonly well-settled case law" that the First Amendment is violated when the state coerces an individual to attend a religion-based treatment program. On this basis, the court approved summary judgment in favor of a parolee whose parole was revoked when he refused to attend a residential treatment program that required him to acknowledge a higher power.[131]
- In *Warner v. Orange County Department of Probation*, the 2nd Circuit Court of Appeals held that the probation department violated the establishment clause of the First Amendment by requiring the defendant to participate in Alcoholics Anonymous.[132]
- A federal district court in New York held, in *Warburton v. Underwood*, that the emphasis placed on God, spirituality, and faith in a "higher power" by 12-step programs such as Alcoholics Anonymous and Narcotics Anonymous illustrates "that the underlying basis of these programs is religious and that participation in such programs constitutes a religious exercise. It is an inescapable conclusion that coerced attendance at such programs therefore violates the Establishment Clause."[133]

It is also unconstitutional to condition other privileges, such as family visitation, on participation in Alcoholics Anonymous or similar faith-based programs.

- In *Griffin v. Coughlin*, New York's highest court held that a state prison violated the First Amendment's establishment clause by conditioning his eligibility for the prison's Family Reunion Program on his participation in a program that incorporated the 12 steps of Alcoholics Anonymous.[134]

However, mandating participation in a 12-step program is permitted if a secular alternative is offered.

- The 3rd Circuit Court of Appeals, in *Bobko v. Lavan*, found no First Amendment violation where a prisoner who was required to complete drug treatment in prison was offered a secular option within the prison's treatment program.[135]
- The Washington Court of Appeals, in *In re Garcia*, concluded that the Department of Corrections did not coerce participation in a religious program where nonreligious classes were available to defendant.[136]
- In *O'Connor v. California*, a federal district court in California found no First Amendment violation where the probationer had several choices of programs, including self-help programs that are not premised on a monotheistic deity.[137]

RECOMMENDATION

Participants may participate in Alcoholics Anonymous and similar 12-step programs, but the court cannot mandate participation in such a program unless secular alternatives are offered. Drug courts should provide participants with a list of available programs.

131 Hazle v. Crofoot, 727 F.3d 983, 986 (9th Cir. 2013).
132 Warner v. Orange Cnty. Dep't of Prob., 173 F.3d 120, 121 (2d Cir. 1999).
133 Warburton v. Underwood, 2 F. Supp. 2d 306, 316–18 (W.D.N.Y 1998).
134 Griffin v. Coughlin, 673 N.E.2d 98, 108–09 (N.Y. 1996).
135 Bobko v. Lavan, 157 Fed. Appx. 516, 518 (3rd Cir. 2005).
136 In re Garcia, 24 P.3d 1091, 1096–97 (Wash. Ct. App. 2001).
137 O'Connor v. State of Cal., 855 F. Supp. 303, 308 (C.D. Cal. 1994).

Geographic Restrictions

It is constitutionally permissible to prohibit a drug court participant from frequenting certain locations if the restriction is reasonably related to the participant's rehabilitation needs and is not vague or overbroad.

Case Law

- In *Oyoghok v. Municipality of Anchorage*, the Alaska Court of Appeals upheld a probation condition prohibiting the defendant from entering a "two-block radius" where prostitution was common after she was convicted of solicitation of prostitution. The court held that the restriction was not unconstitutionally vague or overbroad and was reasonably related to the defendant's rehabilitation.[138]
- A Florida appellate court, in *Johnson v. State*, upheld a term of probation prohibiting the defendant, who was convicted of possession of drug paraphernalia, from coming within one block of an area known known for drug trafficking and in which the probationer had previously been arrested.[139]
- An Illinois Court of Appeals, in *People v. Pickens*, upheld a probation condition prohibiting the defendant from entering specific city boundaries within which 95% of prostitution arrests, including the defendant's, occurred. The court also noted that the probation terms allowed defendant to obtain specific, written permission from her probation officer to complete legitimate errands in the area.[140]

In other cases, courts have struck down conditions that they found to be impermissibly vague or overly broad.

- In *State v. Wright*, the Ohio Court of Appeals struck down a probation condition prohibiting the defendant from entering any place where alcohol is "sold, served, given away, or consumed." The court held that the condition was so vague that it failed to properly inform the defendant what conduct is permissible. It further held that the condition was overbroad, subjecting him to possible punishment for innocent conduct such as going to the grocery store or gas station.[141]
- In *People v. Beach*, a California Court of Appeal invalidated a probation condition that banished the defendant, an elderly woman convicted of murder, from the community where she lived for 24 years. The court held that the condition was unreasonably broad and impermissibly infringed on her constitutional right to travel within the state.[142]

To determine whether a geographic restriction is reasonable, the court may consider factors such as whether the defendant has a compelling need to enter the area, whether supervised entry into the area is feasible, and the geographic size of the restricted area.[143]

Association Restrictions

Drug courts often prohibit participants from associating with certain individuals or groups. These types of restrictions must be specific enough to let the participant know which kinds of associations are prohibited. In addition, they must be narrowly tailored so that there is no greater restriction of liberty than is necessary to serve the goals of supervised release.

Case Law

- The 9th Circuit Court of Appeals, in *United States v. Vega*, held that a condition of post-conviction supervised release prohibiting the defendant from knowingly associating with "any member of a criminal street gang" was not impermissibly vague and was appropriately related to the case considering the defendant's prior gang membership.[144]

138 Oyoghok v. Municipality of Anchorage, 641 P.2d 1267, 1270–71 (Alaska Ct. App. 1982).
139 Johnson v. State, 547 So. 2d 1048, 1048 (Fla. Dist. Ct. App. 1989).
140 People v. Pickens, 542 N.E.2d 1253, 1257 (Ill. App. Ct. 1989).
141 State v. Wright, 739 N.E.2d 1172, 1175 (Ohio Ct. App. 2000).
142 People v. Beach, 195 Cal. Rptr. 381, 385 (Cal. Ct. App. 1983).
143 People v. Rizzo, 842 N.E.2d 727, 727 (Ill. App. Ct. 2005).
144 United States v. Vega, 545 F. 3d 743, 749–50 (9th Cir. 2010).

- By contrast, the same court decided three years earlier, in *United States v. Soltero*, that prohibiting a probationer from associating with any known member of "any disruptive group" was overbroad and invalid. The court observed that "any disruptive group" could be interpreted to include "a labor union on strike, a throng of political protesters, or a group of sports fans celebrating after their team's championship victory." Such a broad prohibition, the court concluded, was a substantial infringement on the probationer's First Amendment rights and not reasonably related to the probationer's rehabilitation or protecting the public.[145]
- The 7th Circuit Court of Appeals, in *United States v. Showalter*, upheld a condition of probation barring the defendant from association with neo-Nazis and skinheads.[146]

Incidental contact with a prohibited person or group is generally not enough to warrant revocation of supervisory release.

- The U.S. Supreme Court reversed a parole revocation in *Arciniega v. Freeman*, where the revocation was based on the parolee's association with individuals with prior convictions working at the same restaurant.[147]
- In *United States v. Green*, the Second Circuit held that a condition prohibiting association with criminal street gangs applies only to those known to be gang members by the probationer and excludes incidental contacts.[148]
- The D.C. Circuit explained in *United States v. Burroughs* that incidental or non-intentional contact is not prohibited.[149]

Prior Association

Courts may restrict a defendant's association with former colleagues, even those with no criminal background, if the judge determines that such an association increases the defendant's chance of relapse into criminal behavior.

Case Law

- In *United States v. Bolinger*, the court upheld restrictions on activities involving or membership in motorcycle clubs with which the defendant had prior associations, finding that the defendant was more likely to relapse into crime if he returned to his prior associations and noting that probation conditions "may seek to prevent reversion into a former crime-inducing lifestyle by barring contact with old haunts and associates, even though the activities may be legal."[150]
- The court held, in *LoFranco v. U.S. Parole Commission*, that a restriction on association with a motorcycle gang of which defendant was formerly a member was permissible, but that a condition prohibiting association with "any outlaw motorcycle gang" was unconstitutionally vague.[151]

Persons with Criminal Records

Courts may restrict association with persons who have criminal records, even those with whom the defendant has no personal relationship, if the judge determines that such an association increases the defendant's chance of relapse into criminal behavior.

Case Law

- The 2nd Circuit Court of Appeals, in *Birzon v. King*, upheld a parole condition prohibiting contact with persons having a criminal record and rejected the argument that the condition was so vague it violated due process.[152]
- *In Andrews v. State*, the Georgia Court of Appeals upheld a condition of a drug court contract requiring participants "to avoid people or places of disreputable or harmful character [including] drug users and drug dealers."[153]

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145 United States v. Soltero, 510 F. 3d 858, 866–67 (9th Cir. 2007).
146 United States v. Showalter, 933 F. 2d 573, 574–76 (7th Cir. 1991).
147 Arciniega v. Freeman, 404 U.S. 4, 4–5 (1971).
148 United States v. Green, 618 F.3d 120, 124 (2d Cir. 2010).
149 United States v. Burroughs, 613 F.3d 233, 246 (D.C. Cir. 2010).
150 United States v. Bolinger, 940 F.2d 478, 480–81 (9th Cir. 1991).
151 LoFranco v. U.S. Parole Comm'n, 986 F. Supp. 796, 808–11 (S.D.N.Y. 1997).
152 Birzon v. King, 469 F.2d 1241, 1242 (2d Cir. 1972).
153 Andrews v. State, 623 S.E.2d 247, 251 (Ga. Ct. App. 2005).

- In *State v. Allen*, the court noted that prohibitions of association with persons having a criminal record have generally been upheld on grounds that the restriction is related to the crime for which the offender was convicted, is intended to prevent future criminal conduct, or bears a reasonable relationship to an offender's rehabilitation.[154]
- The Washington Court of Appeals held, in *State v. Hearn*, that a condition prohibiting association with drug users or dealers is constitutional when such association is intrinsic to crime.[155]
- In *Jones v. State*, the Wyoming Supreme Court held that, while a condition limiting association with people who drink or use controlled substances may be valid, the court must specify the type of individuals or identify specific individuals to be avoided, and the court must indicate how the condition will further rehabilitation, will protect the public, or is necessary to accomplish essential needs of the state.[156]

RECOMMENDATION

It is permissible to restrict the associations of drug court participants. However, courts must take care that such restrictions are not so vague as to be unenforceable and that the restriction has a connection to the participant's rehabilitation. In addition, the court should articulate on the record the particularized reasons why the restriction is connected to the participant's rehabilitation. Incidental contact with a prohibited person is generally not a violation of probation or release.

Spousal Association Restrictions

Courts have long held that the spousal relationship is a central component of an individual's constitutionally protected liberty interest. Therefore, restrictions on a defendant's association with their spouse are subject to heightened scrutiny. Restrictions on spousal association generally must be based on an individualized determination that such a restriction is needed to promote the defendant's rehabilitation, and the scope of the restriction must be narrowly tailored and no more restrictive than necessary.

Case Law

- The 5th Circuit Court of Appeals, in *United States v. Balderas*, found that probation conditions that restrict constitutional rights should be upheld "if they are narrowly tailored and are directly related to deterring the defendant and protecting the public." The court upheld a probation condition that prohibited the probationer from living with her husband because doing so "might interfere with her rehabilitation."[157]
- In *United States v. Rodriguez*, the 3rd Circuit Court of Appeals upheld a condition limiting probationer's contact with her husband on the grounds that the probationer "committed the charged crimes at [her husband's] behest" and that the condition was "directly related to the salutary purpose of reducing [her husband's] ability to induce her to commit crimes and protecting the public from further offenses."[158]
- The Alaska Court of Appeals, in *Dawson v. State*, struck down a condition that required the probationer to obtain permission from his probation officer before associating with his spouse as an overly broad encroachment on liberty. The Court of Appeals found that the sentencing court "made no apparent effort to tailor the scope of the marital association restriction to the specific circumstances of Dawson's case [and that] the disputed condition delegates to Dawson's probation officer unconditional and unlimited authority to regulate Dawson's marital relationship."[159]
- In *State v. Nickerson*, the Arizona Court of Appeals upheld a condition limiting contact between codefendant spouses to joint counseling sessions, telephone conversations, and visits at the discretion of the probation officer because such separation served a rehabilitative purpose.[160]

154 State v. Allen, 634 S.E.2d 653, 658–60 (S.C. 2006).
155 State v. Hearn, 128 P.3d 139, 142 (Wash. Ct. App. 2006).
156 Jones v. State, 41 P. 3d 1247, 1258–60 (Wyo. 2001).
157 United States v. Balderas, 358 Fed. Appx. 575 (5th Cir. 2009).
158 United States v. Rodriguez, 178 Fed. Appx. 152, 158 (3d Cir. 2006).
159 Dawson v. State, 894 P.2d 672, 681 (Alaska Ct. App. 1995).
160 State v. Nickerson, 791 P.2d 647, 649 (Ariz. Ct. App. 1990).

- The Oregon Supreme Court held, in *State v. Martin*, that a probation condition that "absolutely prohibited [the probationer] from association with any person who has ever been convicted of a crime," including her husband, was invalid as an unreasonable infringement on the probationer's liberty. The court found that "the sentencing court should have determined from the record whether as a matter of fact the spouse would be a bad influence so as to endanger rehabilitation or public safety and, if so, what interference with marital rights less than complete separation would serve to protect society's interests."[161]
- The Oregon Court of Appeals upheld a probation condition, in *State v. McSweeney*, that restricted the defendant from associating with persons who use or possess controlled substances. The court found that the condition was "intimately related" to the offense and that it did not go beyond what was necessary to accomplish the aim of probation. On this basis, the court permitted the defendant to reside with her spouse "unless he returns to drug use."[162]

Victims of Family and Intimate Partner Violence

If a defendant has a history of abusing a family member or an intimate partner, a court may restrict the defendant's association with those individuals to protect them from continued abuse. However, such a restriction should be narrowly drawn so that complete bans on marital privacy are not a general practice.

Case Law

- A California Court of Appeals, in *People v. Jungers*, upheld a probation condition prohibiting the probationer from initiating contact with his wife because of his history of domestic violence and threats from jail.[163]
- In *People v. Forsythe*, the Colorado Court of Appeals upheld a condition limiting the probationer's unsupervised contact with her minor children, considering her "longstanding history of being unwilling or unable to provide safe and adequate care for her young children."[164]
- In *Commonwealth v. LaPointe*, the Supreme Judicial Court of Massachusetts upheld conditions limiting the probationer's contact with minors, including a prohibition on living with his minor children and any future children he might have, because of his history of sexually abusing his daughter.[165]
- The Oregon Court of Appeals upheld a probation condition in *State v. Gilkey* requiring the probationer to receive written permission from his probation officer or the court before contacting his wife, based on his record of domestic violence, noting further that such a condition was not a complete ban on marital communication.[166]

RECOMMENDATION

Restrictions on spousal association must be narrowly tailored and applied only when the association would detract from the defendant's rehabilitation. In cases of family or intimate partner violence, restrictions on spousal and family association should be as limited as possible, except for conditions imposed for the safety of family member victims.

Dress Restrictions

Dress restrictions are permitted if they are reasonably related to the offense and to the goal of preventing future criminality. Nonetheless, dress restrictions that are excessively vague may impermissibly violate the First Amendment. Such restrictions must give the participant adequate notice of what kinds of dress are permitted.

161 State v. Martin, 580 P.2d 536, 537 (Or. 1978).
162 State v. McSweeney, 860 P.2d 305, 306 (Or. Ct. App. 1993).
163 People v. Jungers, 25 Cal. Rptr. 3d 873, 879 (Cal. Ct. App. 2005).
164 People v. Forsythe, 43 P.3d 652, 653 (Colo. Ct. App. 2001).
165 Com. v. LaPointe, 759 N.E.2d 294, 298 (Mass. 2001).
166 State v. Gilkey, 826 P.2d 69, 71 (Or. Ct. App. 1992).

Case Law

- The 9th Circuit Court of Appeals, in United *States v. Brown*, struck down as overly vague a restriction prohibiting the offender from wearing clothing "which may connote affiliation or membership in" specific gangs. The court found that the phrase "may connote" failed to adequately define precisely what apparel Brown should refrain from wearing.[167]
- In *United States v. Green*, the 2nd Circuit Court of Appeals struck down as unconstitutionally vague a probation condition that prohibited the offender from "the wearing of colors, insignia, or obtaining tattoos or burn marks (including branding and scars) relative to" criminal street gangs, finding that the range of colors associated with criminal street gangs is "vast and indeterminate" and this condition "does not provide Green with sufficient notice of the prohibited conduct."[168]

Financial Conditions

Although drug court participants may be required to pay for treatment services, supervision-related costs, and statutory fines and fees as a condition of supervised release, the equal protection clause prohibits the imposition of incarceration simply because an individual is unable to meet these financial obligations. Accordingly, the imposition of fines, fees, and treatment-related costs should be conditioned on the participant's ability to pay.

Case Law

- The U.S. Supreme Court, in *Fuller v. Oregon*, upheld a state statute requiring convicted offenders to repay certain fees and expenses because the statute also required consideration of the burden that such payment would impose on the offender and a finding that the offender is or will be able to pay those costs.[169]
- In *Williams v. Illinois*, the U.S. Supreme Court held that detaining prisoners for inability to pay fines violates the equal protection clause.[170]
- The 8th Circuit Court of Appeals, in *Fenner v. United States*, held that requiring defendant to participate in and pay for treatment was not unconstitutional due to previous convictions, history, and refusal to undergo treatment while in prison.[171]
- In *United States v. Bull*, the 11th Circuit Court of Appeals upheld a probation condition requiring the offender to contribute to his treatment costs, conditioned on his ability to pay, despite the fact that the sentencing court determined that the offender could not afford to pay a fine.[172]
- In *State v. Haught*, a West Virginia court found requirements to pay fees constitutional when an inquiry into the defendant's ability to pay is conducted before conditioning probation on reimbursement of costs.[173]

Exception for Willful Refusal to Pay

If probationer has willfully refused to pay a fine when they have the means to do so—in contrast to true inability to pay—the state may use imprisonment as a sanction to enforce collection.

Case Law

- The U.S. Supreme Court, in *Tate v. Short*, emphasized that there is no "constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so."[174]
- In *Gilbert v. State*, the Nevada Supreme Court held that the state may imprison a defendant who has the financial means to pay a fine but willfully fails to do so.[175]

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167 United States v. Brown, 223 Fed. Appx. 722, 724 (9th Cir. 2007).
168 United States v. Green, 618 F.3d 120, 124 (2d Cir. 2010).
169 Fuller v. Oregon, 417 U.S. 40, 43–48 (1974).
170 Williams v. Illinois, 399 U.S. 235, 240–45 (1970).
171 Fenner v. United States, 600 F.3d 1014, 1025–27 (8th Cir. 2010).
172 United States v. Bull, 214 F.3d 1275, 1278–79 (11th Cir. 2000).
173 State v. Haught, 294 S.E.2d 122, 125–26 (W. Va. 1988).
174 Tate v. Short, 401 U.S. 395, 400–01 (1971).
175 Gilbert v. State, 669 P.2d 699, 703 (Nev. 1983)

RECOMMENDATION

Drug courts may not impose fines, fees, or other financial obligations that are beyond a participant's ability to pay. Before imposing such conditions, drug courts must assess a person's ability to pay and adjust any financial obligations accordingly.[176] Moreover, drug courts should strongly consider eliminating fines, fees, and other costs whenever possible, as there is no evidence that they improve treatment court outcomes, and they may pose an unnecessary barrier to success for many participants.

Employment Conditions

Conditions Requiring Employment

Courts frequently impose conditions of probation that require defendants to make good faith efforts to seek and maintain employment. Some drug courts impose similar requirements on participants as a condition of their involvement in the program. Such employment requirements are generally permissible.

Case Law

- The 8th Circuit Court of Appeals, in *United States v. Melton*, held that "a defendant's failure to put forth a good faith effort to seek employment is a valid ground for revoking a supervised release."[177]
- In *United States v. Montgomery*, the 8th Circuit Court of Appeals found that a defendant's failure to secure stable employment was willful and not attributable to her mental illness or physical disability, taking as evidence a "history of manipulation" and that "she had no problem holding a job prior to her conviction."[178]
- The 5th Circuit Court of Appeals, in *United States v. Payan*, held a probationer may be imprisoned for refusing to obtain employment in order to pay fines or restitution imposed by the court. "If the defendant is found to have willfully refused to pay the fine or restitution when he had the means to do so, or to have failed to make sufficient bona fide efforts to obtain employment or borrow money with which to pay the fine or restitution, the government is justified in using imprisonment as a sanction to enforce collection."[179]

On the other hand, a court may find a participant in violation of an employment requirement only if there is sufficient evidence in the record that the individual had the ability to work but refused to make reasonable efforts to obtain employment. Absent such a factual record, a participant's failure to work should not be considered a violation of his or her conditions of release.

- The Indiana Court of Appeals, in *Garrett v. State*, vacated a defendant's probation revocation because there was insufficient evidence to show that her inability to secure employment was due to her lack of effort to become employed.[180]

Conditions Restricting Employment

Courts occasionally seek to prohibit a defendant from working in a specific career or for a specific employer. Such prohibitions are generally permissible when reasonably related to the defendant's crime and the goals of probation.

Case Law

- The 8th Circuit Court of Appeals, in *United States v. Carlson*, upheld an occupational restriction that barred the probationer from working in the medical field following a conviction for fraudulently obtaining prescription medication. The court found that the employment restriction was "clearly related to the crimes for which Carlson was convicted."[181]

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176 "Ability to pay" calculators are widely available for courts to use. For a video demonstration of how such calculators work, see Center for Justice Innovation, California's "Ability to Pay" Calculator Reduces Burden of High Fines and Fees on Drivers (updated Nov. 15, 2019), https://www.innovatingjustice.org/articles/california-ability-pay-calculator. *See also* Fines and Fees Justice Center, LFO (Legal Financial Obligations) Calculator (State of Washington) (June 3, 2018), https://finesandfeesjusticecenter.org/articles/washington-lfo-calculator-legal-financial-obligations-fines-fees/.

177 United States v. Melton, 666 F.3d 513, 517 (8th Cir. 2012).

178 United States v. Montgomery, 532 F.3d 811, 814 (8th Cir. 2008).

179 United States v. Payan, 992 F.2d 1387, 1396 (5th Cir. 1993).

180 Garrett v. State, 680 N.E.2d 1, 3–4 (Ind. Ct. App. 1997).

181 United States v. Carlson, 406 F. 3d 529, 531 (8th Cir. 2005).

- In *Thomas v. State*, the Alaska Court of Appeals upheld a condition prohibiting the probationer from continuing to work in the commercial fishing industry following his conviction for theft crimes that were related to his work in that industry.[182]
- The Ohio Court of Appeals, in *State v. Graham*, upheld a condition prohibiting the probationer, a certified public accountant convicted of securities violations, from working with the general public but allowing him to continue working as an accountant in a position involving no public contact.[183]

Conditions restricting employment may be invalid, however, if there is no showing that the restriction is reasonably related to the offense and the goals of probation.

- The 6th Circuit Court of Appeals, in *United States v. Stepp*, found that imposition of a condition that required defendant to "seek and maintain full-time employment outside the field of boxing" was unreasonable because the court did not demonstrate a connection between the crime and the occupation.[184]
- In *United States v. Cooper*, the 8th Circuit Court of Appeals invalidated a condition that prohibited the probationer from taking any trucking job that would involve his absence from the city for more than 24 hours, finding that such an employment restriction must be directly related to the nature of the offense.[185] A Florida court, in *Hussey v. State*, invalidated a condition that prohibited the probationer, who was convicted of firearm and drug offenses, from working in the carnival business, finding the condition not reasonably related to the probationer's offenses or his rehabilitation.[186]
- In *State v. Robinson*, the Tennessee Criminal Court of Appeals invalidated a condition prohibiting the probationer from continuing to work as a pharmacist on the ground that the prohibition was punitive and overbroad rather than rehabilitative.[187]

RECOMMENDATION

Employment requirements should be determined on an individualized basis, taking into account the participant's physical and mental health, child care or other familial responsibilities, and any other factors that may inhibit the person's ability to work. In addition, drug courts should consider allowing participants to substitute volunteer work for employment on a case-by-case basis.

Community Service Conditions

Community service has long been used as a condition of probation and is increasingly required as a condition of participation in drug courts or as a sanction for noncompliance. Community service requirements are generally permitted as reasonably related to the rehabilitation of the participant.

Case Law

- The 3rd Circuit Court of Appeals, in *United States v. Restor*, observed that community service may be a proper condition of probation, finding that requiring community service may serve the rehabilitative purpose of probation by helping to reinstate offenders in society, integrate them in a working environment, and inculcate a sense of social responsibility.[188]
- The court in *People v. Dagostino* listed community service as a permissible condition of probation under the state's diversion statute for persons who have committed nonviolent drug offenses.[189]

182 Thomas v. State, 710 P.2d 1017, 1019 (Alaska Ct. App. 1985).
183 State v. Graham, 633 N.E.2d 622, 625 (Ohio Ct. App. 1993).
184 United States v. Stepp, 680 F.3d 651, 671–72 (6th Cir. 2012).
185 United States v. Cooper, 171 F. 3d 582, 585–86 (8th Cir. 1999).
186 Hussey v. State, 504 So. 2d 796, 797 (Fla. Dist. Ct. App. 1987).
187 State v. Robinson, 139 S.W.3d 661, 666–67 (Tenn. Crim. App. 2004).
188 United States v. Restor, 679 F.2d 338, 340–41 (3rd Cir. 1982).
189 People v. Dagostino, 12 Cal. Rptr. 3d 223, 231 (Cal. Ct. App. 2004).

RECOMMENDATION

Community service obligations are generally permissible and can be an effective sanction in drug court, especially when used as an alternative to a jail sanction. However, drug courts should be careful not to impose excessive community service obligations that may interfere with a participant's ability to complete other program requirements or focus on their treatment and recovery.

CONFIDENTIALITY

An individual's right to privacy—and particularly the right to protect sensitive health-related information—is governed by a complex web of constitutional, statutory, and common-law principles. This section provides a brief overview of relevant laws and is meant to give drug court practitioners a general understanding of how these laws apply in the drug court context. However, a comprehensive review of these issues is beyond the scope of this publication. For a more detailed analysis, drug court practitioners are encouraged to refer to the resources offered by the Legal Action Center and the U.S. Department of Health and Human Services.190 In addition, practitioners should ensure that they understand any state and local confidentiality laws that apply to their courts.

Right to Privacy Under the Fourteenth Amendment

The due process clause of the Fourteenth Amendment protects an individual's right to privacy, including the right to avoid unwanted disclosure of personal matters.[191] Numerous federal court decisions have held that this right includes the right to protect one's sensitive medical information, as well as information related to sex, sexual orientation, and gender identity. When a government actor—such as a judge, prosecutor, or probation officer—discloses a person's sensitive personal information to others, they may be liable for violating the person's constitutional right to privacy.

Case Law

- In *Powell v. Schriver*, the 2nd Circuit Court of Appeals observed that the right to privacy includes the right to protect information "about the state of one's health" and that a person's privacy interest increases with the sensitivity of the information at issue. Applying this principle, the court held that a prison guard violated a prisoner's right to privacy by carelessly revealing to others that the prisoner was transgender.[192]
- In *Doe v. City of New York*, the 2nd Circuit Court of Appeals held that "individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition."[193]
- In the tragic case of *Sterling v. Borough of Minersville*, a police officer arrested a teenager for underage drinking and, while holding him at the police station, threatened to disclose the teenager's homosexuality to his family. Upon his release from custody, the teenager killed himself. When his mother sued the city for violating her son's right to privacy, the 3rd Circuit Court of Appeals held that a person's "sexual orientation [is] an intimate aspect of [one's] personality entitled to privacy protection" and that the city could be held liable.[194]
- A decade later, the 3rd Circuit Court of Appeals held in *Doe v. Delie* that an HIV-positive prisoner's right to privacy was violated when the prison conducted "open-door" physician visits, which allowed guards and other inmates to learn of his condition. In addition, the prisoner's right to privacy was violated by the "loud announcement" of his medications and by the prison's practice of informing escort guards of his condition.[195]

190 The Legal Action Center is online at www.lac.org. The U.S. Department of Health and Human Services offers a variety of resources, including *HIPAA for Professionals*, https://www.hhs.gov/hipaa/for-professionals/index.html.

191 Whalen v. Roe, 429 U.S. 589, 599–600 (1977). In this landmark case, the U.S. Supreme Court noted that the right to privacy involves at least two different kinds of interests. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.*

192 Powell v. Schriver, 175 F.3d 107, 111–12 (2d Cir. 1999).

193 Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994).

194 Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3d Cir. 1990).

195 Doe v. Delie, 257 F.3d. 309, 315 (3d Cir. 2001).

- In *Douglas v. Dobbs*, the 10th Circuit Court of Appeals interpreted the Fourteenth Amendment right to privacy to include protection of a person's prescription drug records. The court reasoned that prescription records "contain intimate facts of a personal nature" that can reveal information about a person's illnesses, contraception, and other sensitive medical issues.[196]

In light of this case law, it is important that drug court practitioners take care not to disclose sensitive personal information about court-involved individuals, particularly when that information concerns a person's medical conditions, sexuality, or gender identity.

Federal Confidentiality Statutes

Two major federal confidentiality laws are relevant to drug courts: 42 Code of Federal Regulations Part 2 ("Part 2") and the Health Insurance Portability and Accountability Act (HIPAA). Both laws limit the disclosure and use of health-related records that identify a specific individual. Part 2 applies only to records related to substance use disorder services. HIPAA applies to all health care–related records. Both laws include exceptions that allow for some information sharing within drug court teams.

42 C.F.R. Part 2

Part 2 regulations "impose restrictions upon the disclosure and use of substance use disorder patient records" by any person or entity providing substance use disorder services.[197] The regulations are meant to protect people with substance use disorders from negative consequences that may result from seeking treatment, such as loss of employment, housing, or child custody; discrimination; and enhanced vulnerability for arrest, prosecution, and incarceration.

Covered Entities

Part 2 applies to federally assisted programs that provide substance use disorder services. For Part 2 purposes, "program" includes dedicated substance use disorder treatment agencies as well as specially identified units within hospitals or other general medical facilities. A program is "federally assisted" if it receives federal funding, even if the funding is not directly used to pay for substance use disorder services.[198] If a provider meets both definitions—of "program" and "federally assisted"—it is considered a "Part 2 program" and must protect patient records in accordance with Part 2's regulations.[199]

Importantly for drug courts, Part 2 also applies to any individual or entity who receives protected information from a Part 2 program pursuant to a patient consent agreement or other lawful disclosure. Such an individual or entity is considered a "lawful holder" of the information and must protect it in accordance with Part 2. Therefore, drug courts (and their partner agencies and team members) should assume that any information they receive about a person's substance use disorder diagnosis or treatment is protected by Part 2 and may not be re-disclosed except as allowed by law.

Protected Information

Part 2 protects all records containing patient-identifying information. "Records" is defined broadly to include "any information, whether recorded not or not, created by, received, or acquired by a Part 2 program" or a lawful holder.[200] "Patient-identifying information" includes any information that reasonably identifies an individual as applying for or receiving substance use disorder diagnosis, treatment, or referral for treatment by a Part 2 program.[201]

In the drug court context, Part 2 covers patient-identifying information pertaining to current and past program participants as well as to individuals who were identified as having a substance use disorder as part of the drug court's eligibility screening process, even if they were not accepted into the drug court.[202] In addition, a drug court may not confirm that a person is or has been a drug court participant without their consent. Even discussions that do not name a participant but that could potentially lead to a participant's identification are prohibited without consent.

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196 Douglas v. Dobbs, 419 F.3d 1097, 1101 (2005).

197 42 C.F.R. § 2.2 (2022).

198 A program is also considered federally assisted if it has received tax-exempt status from the Internal Revenue Service, is licensed or certified by the federal government (e.g., as a Medicare/Medicaid provider or as a Drug Enforcement Administration–approved provider of controlled substances), or is operated by the federal government or by a state or local government that receives federal funding that could be used to provide substance use disorder services.

199 In addition, Part 2 also applies to "lawful holders" of patient-identifying information.

200 42 C.F.R. § 2.11 (2022).

201 *Id.*

202 *Id.*

Disclosure and Use of Protected Information

A Part 2 program may not disclose patient-identifying information unless the patient consents in writing.[203] "Disclosure" includes any communication or sharing of any patient-identifying information.[204] A patient's written consent must contain specific elements set forth in 42 C.F.R. § 2.31. Consent forms that do not contain each of the required elements are invalid. The Legal Action Center offers sample consent forms that meet Part 2's requirements.[205]

Notably for drug courts, Part 2 includes special provisions for patient consent when treatment is mandated by a court—for example, as a condition of probation, parole, or sentencing. In these cases, consent can be made irrevocable for a reasonable period of time, and the rules of re-disclosure of protected information in the regular course of a justice system official's duties are relaxed.[206] Drug court practitioners should closely review the special regulations pertaining to patient consent when treatment is mandated by a court.

In addition, a Part 2 program also may not "use" patient-identifying information without the patient's consent. "Use" is not specifically defined in Part 2, but it generally includes "sharing, employment, application, utilization, examination, or analysis" of protected information.[207] Part 2 specifically prohibits the use of protected information to criminally investigate or prosecute a patient, unless authorized by a special court order.

Relationship to State Laws

States may enact laws that provide greater protections than Part 2. Therefore, practitioners should carefully review their own state's laws to determine whether they include any such provisions. On the other hand, states may not permit any disclosure of information that is prohibited by Part 2. In other words, when federal and state laws differ, the more protective law will apply.

Practice Note

As the Legal Action Center has noted, "[f]ederal health privacy law is in a period of ongoing and unprecedented change."[208] In 2020, the Substance Abuse and Mental Health Services Administration (SAMHSA) released two sets of changes to Part 2. However, these changes are not final, as additional updates will be needed to implement the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, which amended Part 2's underlying statute. Therefore, additional changes to Part 2 are expected to be finalized in the near future.[209]

RECOMMENDATION

Part 2 sets forth a complex and ever-changing set of regulations that even trained attorneys can struggle to apply. It is critically important that drug courts take care to protect the confidentiality of patient-identifying information in accordance with this law.

Drug courts should always assume that, as "lawful holders" of protected information, they are prohibited from disclosing, without proper consent, any patient-identifying information pertaining to a current participant, a former participant, or any individual screened for drug court eligibility. This restriction applies to the court itself and to its partner agencies and team members. Of particular note, protected information shared among team members in staffing meetings or status hearings may not be disclosed outside those contexts.

Practitioners are advised to refer to the latest resources offered by the U.S. Department of Health and Human Services and the Legal Action Center for up-to-date guidance on future changes to Part 2.

203 Disclosure may also be permitted if a statutory exception applies. The exceptions are beyond the scope of this paper but generally include medical emergencies, research-related needs, audits, and other situations specified in 42 C.F.R. §§ 2.51, 2.61, 2.63, 2.65 (2022).

204 42 C.F.R. § 2.11 (2022).

205 *See Sample Forms Regarding Substance Use Treatment Confidentiality*, Legal Action Ctr. (Aug. 31, 2020), https://www.lac.org/resource/sample-forms-regarding-substance-use-treatment-confidentiality.

206 42 C.F.R. § 2.35 (2022).

207 42 C.F.R. § 160.103 (2022).

208 Legal Action Ctr., Confidentiality & Communication (8th ed., 2021).

209 *Id.*

Health Insurance Portability and Accountability Act of 1996 (HIPAA)

HIPAA is a sweeping law enacted in 1996 to improve the delivery and coordination of health care in the United States.[210] Among its many provisions, the law gave authority to the secretary of health and human services to develop regulations for the protection of patient health information. These regulations, known as the Privacy Rule, were established in 2000 and modified in 2002. The Privacy Rule governs the disclosure of protected health information by covered entities and gives individuals certain rights over how their protected health information is used. The Privacy Rule is found at 45 C.F.R. Part 160 and Part 164.[211]

Covered Entities

HIPAA defines "covered entity" as "a health care provider who transmits any health information in electronic form in connection with a transaction" covered by the HIPAA regulations.[212] This definition includes most doctors, health clinics, nursing homes, pharmacies, and other common health care providers, including substance use treatment providers.[213]

Drug courts are not likely to be considered covered entities under HIPAA. First, drug courts generally are not "health care providers" for HIPAA purposes.[214] Second, even if a drug court's routine screening and assessment of potential participants is considered health care, drug courts do not electronically transmit the kind of information—such as health care claims processing, billing and payments, and other administrative and financial transactions—that is covered by HIPAA. Therefore, drug court operations are usually unaffected by HIPAA.[215]

Nonetheless, drug courts should be aware of HIPAA's requirements to ensure that participants' consent forms for the release of protected health information are legally adequate. Additionally, HIPAA requires administrative safeguards that Part 2 does not.

Protected Information

HIPAA requires covered entities to protect any information that identifies an individual and relates to that individual's past, present, or future medical treatment. This protection is broader than that offered by Part 2, which applies only to information related to substance use disorder services. Again, however, HIPAA's protections apply only to "covered entities," which do not include drug courts.

Disclosure and Use of Protected Information

Under HIPAA, a covered entity may not share, release, or transmit a patient's protected health information without the patient's authorization. The requirements for a proper authorization under HIPAA are similar to those mandated by Part 2 (see above). In addition, HIPAA requires that the authorization be written in plain language.

Relationship to State Laws

HIPAA generally preempts conflicting state laws.[216] However, it does not preempt state laws that are "more stringent" than the HIPAA Privacy Rule.[217] Therefore, drug court practitioners should carefully review their own state's laws to determine whether they include any privacy protections that exceed HIPAA's and follow the more stringent state regulations where they exist.

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210 Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 42 U.S.C. § 1320d.

211 45 C.F.R. § 160 (2022); 45 C.F.R. § 164 (2022).

212 Covered transactions include health care claims processing, billing and payments, and other administrative and financial transactions set forth in 45 C.F.R. § 160.103 (2022).

213 In addition, "covered entity" includes health plans and health care clearinghouses, as well as business associates that receive or transmit protected health information on behalf of a covered entity. 45 C.F.R. § 160.103 (2022).

214 "Health care" for HIPAA purposes includes "preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition" of an individual.

215 A possible exception is a drug court that operates an in-house treatment program in which individuals providing treatment are employed by the court. There is no case law on this issue. However, at least one state's attorney general has advised drug courts that operate in this manner that they may be considered "health care providers" under HIPAA.

216 *See* 45 C.F.R. § 160.202 (2022), which provides that a state law is preempted if a program would "find it impossible to comply" with both the state and federal requirements or if the state law "stands as an obstacle" to achieving HIPAA's purpose.

217 45 C.F.R. § 160.203(b) (2022). In addition, there are several other exceptions to the general rule that HIPAA preempts contrary state laws. These other exceptions, however, are generally not relevant to the operation of drug courts. *See* 45 C.F.R. § 160.203 (2022).

RECOMMENDATION

Drug courts can simplify their operations by adopting consent forms that meet the requirements of both Part 2 and HIPAA. Forms that do not contain all of the elements required by these laws are invalid. The Legal Action Center offers model consent forms that meet the requirements of both laws.

Common-Law Confidentiality Protections

In addition to the privacy protections provided by the U.S. Constitution and federal statutes, there are common-law confidentiality doctrines that apply in every state. The most familiar of these are attorney-client confidentiality, the attorney-client privilege, the attorney work product doctrine, the doctor-patient privilege, and the psychotherapist-patient privilege.

Attorney-Client Confidentiality

Considered a bedrock principle of the Western legal tradition, attorney-client confidentiality is enshrined in federal law and the laws of every state. The specific parameters of attorney-client confidentiality may vary slightly between jurisdictions, but the general principle is set forth in the American Bar Association's *Model Rules of Professional Conduct*, Rule 1.6, which provides that "a lawyer shall not reveal information relating to the representation of the client unless the client gives informed consent . . . ."[218] In this context, "informed consent" requires that the lawyer explain to the client the potential risks of disclosing the information and any alternatives to disclosure.[219] There are some narrow exceptions to the rule of confidentiality. For example, an attorney may disclose information about the representation if necessary to prevent death or serious bodily harm.[220]

Drug court attorneys are bound by attorney-client confidentiality to the same extent as attorneys in other settings. Despite the "team" orientation fostered in drug courts, attorneys may not disclose information about their representation of a drug court client without the client's informed consent. Specifically, attorneys may not disclose any information the client may provide regarding their drug use, any new criminal acts the client may have committed, or any other noncompliance with the conditions of drug court participation, unless the client specifically consents after the lawyer explains the risks of such disclosure.

RECOMMENDATION

Defense counsel is prohibited from disclosing confidential information without client consent. However, defense counsel generally should encourage the client to disclose drug use and other noncompliance to the court when such disclosure is in the client's long-term interest. Honesty is encouraged and rewarded in drug court and is an important part of recovery. Of course, if the client chooses to disclose, defense counsel must advocate on the client's behalf regarding any sanctions or other actions taken by the court.

Attorney-Client Privilege

The attorney-client privilege is closely related to, but distinct from, the concept of attorney-client confidentiality. It is a rule of evidence that protects the attorney from being called to testify in court concerning communications with the client. This privilege is intended to foster open and full communication between the lawyer and client and to promote effective legal advice. The privilege applies to both written and oral communications between lawyer and client, as long as the communication was made in confidence for the purpose of providing legal advice to the client. The client is the holder of the privilege, and therefore only the client may waive it. The most significant exception to the attorney-client privilege is the "crime-fraud exception," which allows the disclosure of communications when the client tries to use the lawyer's services to commit a new crime. Attorneys in drug court are bound by the attorney-client privilege. Unless an exception applies or the client waives the privilege, the attorney may not testify or otherwise provide evidence about communications with the client in a drug court case or any other judicial proceeding.

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218 Model Rules of Pro. Conduct r. 1.6(a) (Am. Bar Ass'n 1983).

219 Model Rules of Pro. Conduct r. 1.0(e) (Am. Bar Ass'n 1983).

220 Model Rules of Pro. Conduct r. 1.6(b) (Am. Bar Ass'n 1983). Other exceptions include the disclosure of information to prevent the client from committing certain crimes and other rare exceptions set forth in Rule 1.6(b).

Attorney Work Product

The attorney work product privilege is the more recent cousin of the attorney-client privilege. Like its older relative, the attorney work product doctrine is an evidentiary rule that limits the use of confidential information in judicial proceedings. Specifically, it protects against the disclosure of documents or other physical evidence created by the attorney or client for the purpose of litigation. Such protected documents include factual summaries, chronologies, interview notes, writings related to legal strategy, and anything else prepared for the purpose of assisting with a current or anticipated court case. In general, either the attorney or the client may assert the privilege. Attorneys in drug courts are bound by the work product privilege. Unless both the attorney and client waive the privilege, neither may disclose written documents or other tangible evidence created by the attorney or the client for the purpose of representing the client in the drug court case.

Doctor-Patient Privilege

Although not recognized in federal courts, all states have established some form of doctor-patient privilege through legislation, case law, or both. The contours of the privilege vary by state, but it generally prevents physicians and most other medical professionals, including nurses, from testifying about the patient's medical information in any judicial proceeding unless the client waives the privilege. The doctor-patient privilege applies to the treatment of substance use disorders in the same manner as it applies to other medical conditions. Therefore, medical professionals involved in a drug court participant's care may not testify about the patient's medical information without the patient's consent.

Psychotherapist-Patient Privilege

Federal law and the laws of every state recognize the psychotherapist-patient privilege, which also extends to licensed social workers.[221] This privilege is especially important for drug courts, as psychotherapists and social workers are often involved in the provision of treatment services to participants. The privilege prevents such providers from testifying in any judicial proceeding about their communications with participants or disclosing information about a participant's care.

RECOMMENDATION

There is a dizzying array of overlapping privacy protections embedded in the U.S. Constitution, federal statutes, state statutes, and common law. This section has outlined the basic features of the privacy protections provided by the 14th Amendment, HIPAA, Part 2, and the common law. However, the practical application of these protections is complex and requires specialized legal advice. In addition, this publication does not attempt to cover the countless privacy statutes and regulations maintained at the state level. It is important that drug courts work with qualified local experts to develop a full understanding of all applicable privacy laws and ensure that they are adequately protecting the privacy of their participants.

LEGAL REPRESENTATION OF PARTICIPANTS

In some jurisdictions, the public defender's office takes the position that it does not represent participants in post-plea drug courts, ostensibly on the ground that its representation ends when the defendant enters a guilty plea. At least one appellate court decision has expressly rejected this argument.

Case Law

- In *Dave v. State*, the Georgia Court of Appeals considered the case of a mental health court participant who was terminated from the program after a hearing at which the participant did not appear and was not represented by counsel. The appellate court rejected the argument that the defense attorney's representation ended when the defendant entered her guilty plea. On the contrary, "where no judgment of conviction and sentence has been entered, counsel remains counsel of record until the trial court enters an order permitting withdrawal or substitute counsel enters an appearance." In this case, the court held that the defendant was still represented by her plea counsel when the mental health court termination hearing was held and plea counsel should have received notice of the hearing.[222]

221 The U.S. Supreme Court has held that Rule 501 of the Federal Rules of Evidence protects confidential communications between licensed psychotherapists and social workers and their patients in the course of diagnosis or treatment from compelled disclosure. See Jaffe v. Redmond, 518 U.S. 1, 2 (1996).

222 Dave v. State, 876 S.E.2d 882, 877 (2022).

Although this single ruling is not binding outside Georgia, its reasoning is persuasive and reflects the general principle that defense counsel representation continues at least through sentencing. It is also consistent with the *Adult Drug Court Best Practice Standards*, which call for defense counsel representation at every staffing meeting and drug court hearing.[223]

RECOMMENDATION

Defense counsel should continue to represent clients throughout their participation in drug court and should not seek to withdraw from representation before the final adjudication of the client's criminal case—i.e., entry of conviction and sentence, or dismissal of the charges. Defense counsel representation is critically important to protecting the rights of drug court participants and has been shown to promote participant success in the program.

223 National Association of Drug Court Professionals, Adult Drug Court Best Practice Standards, Vol. II at 38 (2018).

CHAPTER 4: MONITORING AND SANCTIONS

INTRODUCTION

Drug courts use a system of graduated incentives and sanctions to promote behavior change. Participants meeting the program's requirements and making progress are rewarded with a range of incentives that may include praise from the judge, a reduction in the frequency of court hearings, tangible rewards (such as movie tickets or gift certificates), and many other potential incentives. On the other hand, participants who are not adhering to the program's guidelines may be sanctioned by the court, with sanctions including mandated court observation, essay writing, more frequent court hearings, stricter monitoring by probation or court staff, community service, and other sanctions up to and including jail.

Sanctions often impact a drug court participant's liberty interest by restricting their movement, confining them to jail, or otherwise limiting their freedom. Moreover, sanctions become part of the participant's drug court record and may be used in a later termination proceeding to justify removing the participant from drug court and sentencing them to jail or prison on the underlying charges. For these reasons, drug courts must afford participants due process when imposing sanctions. The level of due process afforded for any specific sanction should be commensurate with the severity of the deprivation at stake. This section considers the processes by which drug courts monitor participants' compliance and the legal issues raised by monitoring and sanctions.

STAFFING MEETINGS

"Staffing" refers to a meeting of the drug court team, usually held outside the courtroom and off the record, to discuss participants' progress in the program. These meetings are central to the drug court model's emphasis on ongoing client monitoring, as they enable the team to share information about participants with the judge and prepare for the drug court's formal status hearings. According to the *Adult Drug Court Best Practice Standards*, staffing meetings should involve the judge, prosecutor, defense attorney, law enforcement, treatment representatives, and other relevant partner agencies.[224]

Staffings are intended to serve as an informal mechanism for the drug court judge to receive the latest information about participants' progress in the program. Accordingly, staffings typically include an exchange of information regarding participants' treatment plans, physical and mental health issues, attendance and behavior in the program, family circumstances, and other factors relevant to their progress.

No findings of fact or final determinations—for example, about noncompliance, sanctions, termination, phase movement, or graduation—should be made during the staffing. Rather, team members discuss possible responses, from both a treatment and a supervision perspective, for the judge to consider. The judge must reserve final decision-making until the case is called in a formal court hearing and the participant is present and given an opportunity to consult with counsel and be heard.

Because staffings are informal and advisory in nature, the judge's presence does not, in and of itself, convert the meeting into a proceeding requiring the same due process formalities as a court hearing. If, however, a staffing begins to resemble a traditional court proceeding by reaching final decisions that affect the participant's liberty interests—such as sanctions or termination—the defendant gains the right to be present, to have an open and public hearing, and to be represented by counsel. In practice, such instances should not occur, as the purpose of the staffing is to gather and share information, not to replace the formal drug court proceedings. Any decisions that affect the participant's liberty should not be finalized during the staffing but rather made by the judge in open court.

224 National Association of Drug Court Professionals, Adult Drug Court Best Practice Standards, Vol. II at 39–41 (2018).

Case Law

- In *State v. Tyler T.*, the Nebraska Supreme Court distinguished between the formal drug court hearings, where the judge may issue sanctions, and less formal drug court actions such as staffing meetings. "[W]here a liberty interest is implicated in problem-solving court proceedings, an individual's due process rights must be respected." However, "[g]iven the therapeutic component of problem-solving court programs, we are not prepared to say that each and every action in such a proceeding must be a matter of record."[225]
- In *State v. Sykes*, the Washington Supreme Court held that drug court staffings need not be open to the public under the "open court" provisions of the Washington State Constitution. Notably, however, the court declined to decide whether closed staffings are permissible under the U.S. Constitution.[226]
- In *State v. Stewart*, the Tennessee Court of Criminal Appeals found a due process violation when the drug court judge delegated decision-making authority to the drug court team.[227]

RECOMMENDATION

Drug courts must not make formal findings or decisions about a participant's case during staffing. Staffing must be regarded as an informal information-gathering session conducted in preparation, not replacement, of the court appearance. The judge must make all final determinations after a hearing on the record in court.

Ex Parte Communications

Ex parte communications are those that involve the court and only one of the involved parties. Historically, the law has prohibited or strictly limited these kinds of communications to support the fundamental fairness of the judicial process. Generally, judges and attorneys are subject to professional discipline if they engage in ex parte communications that are prohibited by applicable laws or rules of conduct.

Rules for Judges

Despite the general disapproval of ex parte communications, many jurisdictions have amended their rules to allow drug court judges to engage in certain kinds of ex parte communications because of the unique team environment and less adversarial nature of drug courts. These jurisdictions recognize that communications between team members, sometimes without one or the other party present, facilitate the goals of rapidly addressing participants' treatment needs and responding swiftly when issues of noncompliance arise. Ultimately, the permissibility of ex parte communications in drug courts is determined by jurisdiction-specific rules. Examples of jurisdictional rules for ex parte communications are listed below. Practitioners should review their own jurisdiction's ex parte communication rules.

ABA Model Code of Judicial Conduct

Ex parte communications are generally prohibited pursuant to Rule 2.9 of the Model Code of Judicial Conduct. However, the Code's comments include an exception for problem-solving courts: "A judge may initiate, permit, or consider ex parte communications expressly authorized by law when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others."[228]

Oklahoma

Oklahoma's Code of Judicial Conduct largely tracks the Model Code, with some exceptions, including Rule 2.9(A)(4), which states: "With the consent of all parties, the judge and court personnel may have ex parte communication with those involved in a specialized court team. Any party may expressly waive the right to receive that information." In addition, Comment 4 was changed slightly in the Oklahoma Code to read: "A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on specialized courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others."[229]

225 State v. Tyler T., 781 N.W.2d 922, 925 (Neb. 2010).
226 State v. Sykes, 339 P.3d 972, 977 (Wash. 2014).
227 State v. Stewart, 2008 Tenn. Crim. App. LEXIS 784, at *10–11 (Tenn. Crim. App. Oct. 6, 2008).
228 Model Code of Jud. Conduct r. 2.9 cmt. 4 (2011).
229 *See* Okla. Stat. tit. 5A, § 2.9 cmt. 4 (2021).

New York

New York's standards of judicial conduct are included in the Rules of the Chief Administrator of the Courts. Section 100.3(B)(6)(e) provides an exception to the general rule against ex parte communications, stating: "A judge may initiate or consider any *ex parte* communications when authorized by law to do so."[230]

This provision has been interpreted by an Administrative Order of the Chief Judge of the Courts and by an opinion of the state's Advisory Committee on Judicial Ethics to permit certain ex parte communications in drug courts.

The Administrative Order provides that "a Judge presiding over a drug court may, at a drug court appearance or staffing session, initiate, permit or consider ex parte communications with treatment providers, probation officers, law enforcement officials and other members of the drug court team who are not court personnel, provided the absent party and his or her attorney have consented thereto."[231]

The Advisory Committee opinion states: "A judge presiding over drug court . . . is authorized under 22 NYCRR 100.3(B)(6)(e) to consider ex parte communications at staffings and court appearances from drug court team members provided there has been consent as required under Administrative Order 142/03."[232]

Rules for Attorneys

Although many jurisdictions now allow drug court judges to engage in certain ex parte communications, the rules for attorneys generally have not kept pace. Rule 3.5 of the American Bar Association's *Model Rules of Professional Conduct* provides that an attorney shall not communicate ex parte with a judge unless authorized to do so by law or court order.

Most states have adopted some form of this rule and have not created exceptions for attorneys working in drug courts. It can be argued, therefore, that a drug court attorney who engages in ex parte communications—for example, a prosecutor who participates in status hearings without defense counsel present—is violating the rules of professional conduct and subject to discipline.

To avoid ex parte concerns, the safest course of action is to ensure that attorneys for *both* the prosecution and defense are present at every staffing meeting, status hearing, and other formal gathering of the drug court. This is also the approach directed by the *Adult Drug Court Best Practice Standards*, as consistent attendance by all team members, including the attorneys, is associated with significantly better participant outcomes.[233] If consistent attendance by all attorneys is not feasible, it is important that attorneys be present at any hearings where a liberty interest is in jeopardy. In addition, ex parte communications occurring between status hearings should be made by email to all team members rather than verbally.

STATUS HEARINGS AND SANCTIONS

At status hearings, the drug court judge typically reviews participants' progress since the last hearing and engages in direct communication with each participant about their treatment, recent achievements, and any challenges they may be experiencing. Achievements are rewarded with various incentives, and significant noncompliance may result in sanctions.[234]

In contrast to staffing meetings, status hearings more closely reflect the character of a standard court proceeding and therefore must be on the record and open to the public. In addition, counsel for the state and the defendant should be present at all status hearings to avoid ex parte communication concerns, as discussed in the preceding section.

Authority to Impose Sanctions

Drug courts have the lawful authority to sanction participants when they fail to comply with a program requirement. Common examples of such noncompliance include failing to attend treatment sessions, failing to submit to drug testing as ordered, leaving the area in violation of a geographic restriction, or committing a new offense.

230 N.Y. Comp. Codes R. & Regs. tit. 22, § 100.3 (2021).

231 Admin. Order of the Chief Judge of the Courts 142/03 (April 8, 2003).

232 Advisory Comm. on Judicial Ethics Opinion 04-88 (March 10, 2005).

233 National Association of Drug Court Professionals, Adult Drug Court Best Practice Standards Vol. II, at 41 (2018).

234 For more information about effective uses of incentives and sanctions, *see* Douglas Marlowe, *Behavior Modification 101 for Drug Courts: Making the Most of Incentives and Sanctions*, National Drug Court Institute (Sept. 2012).

Case Law

- The Kentucky Supreme Court, in *Commonwealth v. Nicely*, discussed and affirmed the authority of drug courts to use jail as a sanction for non-adherence to drug court terms of participation.[235]
- In *Alexander v. State*, the Oklahoma Court of Criminal Appeals observed that the state's drug court statute calls upon drug court judges to recognize that "relapses and restarts" are considered "part of the rehabilitation process" and directs judges to order progressively increasing incentives and sanctions to promote offender accountability.[236]
- In *State v. Stewart*, the Tennessee Court of Criminal Appeals noted that drug court judges are directed to use "a wide panoply of sanctions" in instances of noncompliance, including admonishment from the bench, increased monitoring, confinement in the courtroom or jury box during proceedings, jail, and more.[237]

RECOMMENDATION

In accordance with the Adult Drug Court Best Practice Standards, sanctions should be applied in a progressive manner and take into consideration factors such as the severity of the noncompliance, the participant's phase in the program, and the participant's positive gains in the program.[238] However, participants should not receive punitive sanctions if they are generally complying with their treatment and supervision requirements but are not responding to the treatment interventions. In these circumstances, the participant's treatment provider and physician may determine that an adjustment to the treatment plan is needed.[239]

Sanctions and Due Process Rights

Constitutional due process protections are implicated when a defendant faces a possible impairment of a liberty or property right.[240] In the drug court context, a participant's liberty interest is at stake whenever the court is considering the possible imposition of a sanction, particularly when a jail sanction or another sanction restricting the participant's movement (such as home confinement, geographic restrictions, or association restrictions) is contemplated.

It is clear, therefore, that participants are entitled to some measure of due process whenever a drug court is considering sanctions. Less clear is what specific due process protections are required at this stage.

Case law in at least two jurisdictions has suggested that the full range of due process protections required in drug court termination or probation revocation hearings is not required for the imposition of sanctions.

Case Law

- The Idaho Supreme Court, in *State v. Rogers*, held that a drug court participant facing termination from the program is entitled to the due process protections required for probation or parole termination, further stating, however, that "[i]ntermediate 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."[241]
- In *Commonwealth v. Nicely*, the court explained that "the elements of due process normally accorded a defendant at a probation revocation hearing are not followed" for a drug court sanction, on the ground that "defendants who enter drug court waive those rights while in the program, and upon discharge from the program, the defendant retains all those rights at any probation revocation hearing that follows."[242]

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235 Commonwealth v. Nicely, 326 S.W.3d 441, 446 (Ky. 2010).

236 Alexander v. State, 48 P.3d 110, 113 (Okla. Crim. App. 2002).

237 State v. Stewart, 2010 Tenn. Crim. App. LEXIS 691, at *6 (Crim. App. Aug. 18, 2010).

238 National Association of Drug Court Professionals, Adult Drug Court Best Practice Standards, Vol. I, at 27 (2018) (Standard IV.E. Progressive Sanctions).

239 *Id.* at 27 (Standard IV.G. Therapeutic Adjustments).

240 Note that this section discusses due process requirements at the intermediate sanctions phase. Due process requirements at the termination and sentencing phase are addressed in Chapter 5: Termination and Sentencing.

241 State v. Rogers, 170 P.3d 881, 886 (Idaho 2007).

242 Com. v. Nicely, 326 S.W.3d 441, 446 (Ky. 2010).

Other courts, however, have taken the opposing view, that drug court sanctions involving a loss of liberty require the same kinds of due process protections as probation revocation hearings.

Case Law

- The Maryland Court of Appeals held, in *State v. Brookman*, that sanctions involving the loss of liberty require due process protections including notice, opportunity to be heard, representation of counsel, opportunity to confront and contest adverse evidence, and opportunity to have the court consider factors that mitigate against a sanction of incarceration.[243] The court subsequently upheld this decision in State v. Alexander.[244]
- The 7th Circuit Court of Appeals, in *Hoffman v. Knoebel*, found that Indiana law, consistent with the due process clause, provides that drug court participants have the right to receive written notice, obtain the disclosure of evidence against them, confront and cross-examine witnesses, and be represented by counsel before a jail sanction can be imposed.[245]

This split in the case law suggests that, except in those states where courts have expressly ruled otherwise, drug courts may impose intermediate sanctions using "informal" procedures that do not include the full due process protections required for a probation revocation hearing.

Nonetheless, the safer and fairer approach is to provide the full due process protections afforded at a probation revocation hearing when imposing sanctions, at least where a jail sanction is contemplated. The most recent case law on intermediate sanctions appears to be moving in the direction of requiring more due process. Consistent with this recommendation, the Treatment Court Institute's *Judicial Benchbook* advises that, "when a drug court participant contends that he or she did not engage in the conduct that is subject to a jail sanction, the court should give the participant a hearing with notice of allegations, the right to be represented by counsel, the right to testify, the right to cross-examine witnesses, and the right to call his or her own witnesses."[246]

RECOMMENDATION

When a participant denies allegations of noncompliance, a drug court should conduct a hearing at which the participant has the right to receive notice of the allegations, to be represented by counsel, to call witnesses, and to cross-examine the prosecution's witnesses.

DRUG TESTING

Drug testing is an indispensable feature of drug courts. The *Adult Drug Court Best Practice Standards* call upon drug courts to conduct frequent, randomized drug testing of all participants and recommend a minimum of two tests per week.[247] In addition, positive drug tests may lead to sanctions, raising important concerns about the reliability of drug testing and due process in the testing and sanctioning process.

Scientific Reliability

To be admissible in a court proceeding, a drug test must meet the jurisdiction's standard of reliability. Federal courts and more than half of all states employ the *Daubert* standard for scientific testing, named after the landmark U.S. Supreme Court decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*[248] Under this standard, evidence regarding scientific testing is admissible only if the judge determines the test's reliability after considering the following factors: (1) whether the testing technique can be or has been validated, (2) whether the technique has been subject to peer review and publication, (3) the technique's known or potential error rate, (4) the existence and maintenance of standards controlling the technique's operation, and (5) whether the technique is generally accepted in the relevant scientific community.[249]

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243 State v. Brookman, 190 A.3d 282, 300 (Md. 2018).
244 State v. Alexander, 467 Md. 600 (Md. 2020).
245 Hoffman v. Knoebel, 894 F.3d 836, 840 (7th Cir. 2018).
246 National Drug Court Institute, The Drug Court Judicial Benchbook 169–70 (Douglas B. Marlowe & William G. Meyer eds., 2011).
247 National Association of Drug Court Professionals, Adult Drug Court Best Practice Standards Vol. II, at 26 (2018).
248 Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
249 *Id.* at 592–95.

Other states—including California, Illinois, Maryland, New Jersey, New York, Pennsylvania, and Washington—continue to adhere to the *Frye* standard, which derives from an older federal court case. Under the *Frye* standard, expert testimony regarding scientific evidence is admissible if the technique used to gather it has "gained general acceptance in the particular field in which it belongs."[250]

Still other states have created their own standards for determining the reliability and admissibility of scientific evidence.[251]

Drug Testing Methods

There are two major categories of drug tests: instrumented tests (also called laboratory-based tests) and screening tests (also called point-of-collection tests). Drug courts rely primarily on screening test methods, such as test cups or dipsticks, because they are less expensive and produce quicker results than instrumented tests done in a laboratory. In practice, screening tests are generally sufficient for everyday use in drug court because most participants admit drug use upon testing positive and do not contest the accuracy of the test results. However, screening tests typically do not meet the reliability standards set forth in either *Frye* or *Daubert*. Therefore, when a defendant challenges the results of a non-instrumented drug test, due process requires that a confirmatory drug test be conducted using a method that meets the jurisdiction's reliability standards for scientific evidence.

Drug court practitioners should be familiar with their jurisdiction's legal standard for the admissibility of scientific evidence and ensure that the testing techniques they use meet that standard. It is beyond the scope of this publication to consider the technical specifications and reliability of the numerous and ever-evolving drug testing techniques available in the field. In general, however, courts have recognized the scientific reliability of the most common laboratory methods for analyzing urine samples, including gas chromatography/mass spectrometry (GC/MS) and liquid chromatography/tandem mass spectrometry (LC/MS/MS). For more information about specific drug testing methods, practitioners should consult with their qualified experts for guidance.[252]

Case Law

- The Georgia Court of Appeals held, in *Grinstead v. State*, that the results from a non-instrumented drug test were improperly admitted into evidence, as the reliability of the test had not been established.[253]
- The Texas Court of Criminal Appeals, in *Somers v. State*, found that the enzyme-multiplied immunoassay technique (EMIT) test, which is a laboratory-based test, is reliable scientific evidence. The court relied on precedent indicating the EMIT test was utilized by the National Institutes of Health, law enforcement agencies, hospitals, and the military, as evidence of reliability.[254]
- In *United States v. Bentham*, the Southern District of New York examined the issue of "sweat patch" drug tests, noting that there are conflicting scientific studies indicating the possibility of false positives for this type of screening test. The court declined to state definitively whether sweat patch tests may be admitted into evidence, noting experts "were in disagreement" and the test "may sometimes be fallible."[255]

Handling Procedures and Chain of Custody

Due process requires that drug tests be properly administered, that testing samples be handled with care, and that the chain of custody of such samples be rigorously documented. Lapses in these procedures—for example, a technician fails to follow the manufacturer's instructions for administering a drug test, or the transportation and storage of a sample are not documented—generally result in the test being ruled inadmissible in court.

Case Law

- In *Wilcox v. State*, a probation officer refrigerated the defendant's urine sample before testing and failed to establish that the sample was brought to the required temperature at the time of testing. Based on the probation officer's failure to follow the testing manufacturer's instructions, the Arkansas Court of Appeals ruled that the test result was unreliable and could not be used as the basis for a probation violation. The

250 Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

251 *See, e.g.*, People v. Shrek, 22 P.3d 68, 77 (Colo. 2001); Mitchell v. Mt. Hood Meadows Oreg., 99 P.3d 748, 755 (Or. Ct. App. 2004).

252 Depending on the jurisdiction, such experts may sometimes be found in probation departments, parole departments, behavioral health agencies, or other government agencies. *See also* Drug Testing in a Drug Court Environment: Common Issues to Address, U.S. Dept. of Justice, Office of Justice Programs (May 2000), https://www.ojp.gov/pdffiles1/ojp/181103.pdf.

253 Grinstead v. State, 605 S.E.2d 417, 419–20 (Ga. Ct. App. 2004).

254 Somers v. State, 368 S.W.3d 528, 543 (Tex. Crim. App. 2012).

255 United States v. Bentham, 414 F. Supp. 2d 472, 473–74 (S.D.N.Y. 2006).

court held that "a drug sample that has been handled and tested in an unreliable manner cannot yield a reliable result."[256]

- In *Wykoff v. Resig*, the 7th Circuit Court of Appeals held that even prison inmates, who have fewer due process rights than probationers, are entitled to "minimal due process safeguards" to ensure the reliability of drug testing. In addition, the court held that the "handling procedures" for urine specimens must be "reasonably definite" and "fully and carefully documented at all stages."[257]

CUSTODY CREDITS

Traditionally, courts have held that defendants have no fundamental right to receive credit for time spent incarcerated prior to sentencing unless an applicable statute creates such a right.[258] In practice, however, most states and the federal government have enacted statutes requiring custody credit for any period of presentence incarceration if such incarceration was related to the offense for which the defendant is being sentenced.[259] As a result, drug court participants who are terminated and sentenced on the underlying charges are generally entitled to credit for any time they spent in jail prior to sentencing, including for intermediate jail sanctions imposed by the drug court, unless the participant has properly waived the right to receive custody credit.

Case Law

- The Kentucky Supreme Court held, in *Commonwealth v. Nicely*, that a drug court participant "is entitled to custody credit for the days he served [in jail] as drug court sanctions."[260]
- In *House v. State*, the Indiana Court of Appeals held that "a defendant imprisoned due to violating the terms and conditions of a drug court is entitled to credit time."[261]

Custody Credit for Non-jail Confinement

Questions about custody credit typically arise when a drug court participant has served time in jail pending entry into the program or as part of a drug court sanction. However, there are other situations where a person may be entitled to custody credit, such as when a participant is ordered to be confined to a residential treatment facility or is placed under home confinement. At least one court has held that a drug court participant is entitled to custody credit for time spent in a court-ordered residential treatment program.

Case Law

- In *State v. Calvin*, the Iowa Supreme Court concluded that a drug court participant was entitled to custody credit for time spent in jail as a result of drug court program violations and for time spent in the Iowa Residential Treatment Center (IRTC) pursuant to an order of the drug court. The drug court's order provided that "the act of leaving [the IRTC] shall be deemed an escape and defendant may be prosecuted on a separate criminal violation for such escape." The Iowa Supreme Court's decision noted that the state's custody credit statute expressly grants credit for time served in a mental health facility.[262]
- In *Commonwealth v. Fowler*, the Pennsylvania Superior Court declined to give a drug court participant custody credit for time spent in court-ordered residential treatment because the facility was "not so restrictive as to constitute custody." The court noted that the treatment facility was not locked and that nothing prevented the participant from leaving. However, the court noted that "it is within the trial court's discretion whether to credit time spent in an institutionalized rehabilitation and treatment program as time served 'in custody,'" leaving open the possibility of such credit in other cases.[263]

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256 Wilcox v. State, 258 S.W.3d 785, 787 (Ark. Ct. App. 2007).

257 Wykoff v. Resig, 613 F. Supp. 1504, 1513–14 (N.D. Ind. 1985).

258 *See, e.g.*, Kimble v. State, 438 S.W.2d 705, 711 (Ark. 1969) (denying custody credit on the grounds that "we have no statute permitting this to be done."); State v. Hodge, 147 S.E.2d 881, 883 (N.C. 1966) ("time spent in jail awaiting trial will not be credited on the sentence imposed and need not be considered by the judge in fixing his punishment.").

259 *See, e.g.*, Ark. Code Ann. § 5-4-404 (2020) ("If a defendant is held in custody for conduct that results in a sentence to imprisonment or confinement as a condition of suspension or probation, the court, the Division of Correction, or the Division of Community Correction shall credit the time spent in custody against the sentence . . . ."); N.C. Gen. Stat. § 15-196.1 ("The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent . . . in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence or the incident from which the charge arose").

260 Commonwealth v. Nicely, 326 S.W.3d 441, 449 (Ky. 2010) (citing Ky. Rev. Stat. § 532.120(3)).

261 House v. State, 901 N.E.2d 598, 601 (Ind. Ct. App. 2009) (citing Ind. Code § 35-50-6-3(a)).

262 State v. Calvin, 839 N.W.2d 181, 187 (Iowa 2013) (citing Iowa Code § 903A.5(1)).

263 Com. v. Fowler, 930 A.2d 586, 595 (Pa. Super. Ct. 2007).

- By contrast, the Massachusetts Court of Appeals, in *Commonwealth v. Speight*, flatly held that "an inpatient drug treatment program as a condition of probation does not equal incarceration" and is therefore not entitled to custody credit.[264]
- The Washington Court of Appeals held, in *State v. Poston*, that an offender who fails to successfully complete a drug court program must, at sentencing on the underlying charge, be credited with time spent in jail *and on electronically monitored home detention*. The court noted that Washington's custody credit statute grants credit for both "total" and "partial" confinement and that partial confinement includes "electronically monitored home detention."[265]

As noted in each of the above cases, a drug court participant's right to custody credit— for time served in jail, in court-ordered residential treatment, or on home confinement—derive from state statute. Drug court practitioners should be familiar with their state's custody credit statutes and ensure that they are applied appropriately in all cases.

Custody Credit for Time Served Due to Contempt

- Courts have the inherent power to find a defendant in contempt of court as a result of conduct that is disruptive, disrespectful, or otherwise improper and to order such person jailed for a period of time permitted by law. Such jail time is not considered punishment for the defendant's underlying criminal charge but is considered to be a separate penalty for conduct offensive to the court. As such, it is not eligible for custody credit under most state statutes, which grant credit for time served as *a result of the criminal charge for which the defendant is being sentenced*.[266] Therefore, a drug court participant is typically not entitled to custody credit for any time spent in jail for contempt of court.

Given this fact, some drug courts have made it a practice to find participants in contempt of court when issuing jail sanctions for violations of the program's terms—such as missing a drug test or a treatment appointment—and to grant the participant no custody credit for these jail sanctions when they are ultimately terminated from the program. This practice has been expressly prohibited by appellate courts in several states.

Case Law

- The leading case on this topic is *Commonwealth v. Nicely*, where the Kentucky Supreme Court reviewed the case law from around the country and concluded that "[t]he overwhelming majority of jurisdictions that have considered this issue have concluded that holding a defendant in contempt of court for violating conditions of probation offends fundamental principles of fairness." The court reasoned that the defendant, a drug court participant, would not have served jail sanctions but for the underlying criminal conduct that brought them into drug court. Therefore, the court concluded, the defendant was entitled to custody credit for the jail sanctions pursuant to the state's statute.[267]
- In *State v. Calvin*, the Iowa Supreme Court held that a drug court participant is entitled to credit for time spent in custody as a result of program sanctions. In so ruling, the court broke with the Iowa Court of Appeals, which had ruled just two years earlier that violations of drug court conditions could be treated as contempt of court, for which no custody credit is earned.[268]

RECOMMENDATION

Jail sanctions resulting from a participant's violation of drug court conditions should be imposed pursuant to the court's statutory authority to amend the participant's terms of probation or release, not pursuant to the court's inherent "contempt of court" powers.

264 Com. v. Speight, 794 N.E.2d 600, 602–03 (Mass. Ct. App. 2003).

265 State v. Poston, 73 P.3d 1035, 1036 (Wash. Ct. App. 2003) (citing Wash. Rev. Code §§ 9.94A.505(6), 9.94A.030(31)).

266 *See, e.g.*, Ky. Rev. Stat. Ann. § 532.120(3) (2022) (granting custody credit for "[t]ime spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence").

267 Com. v. Nicely, 326 S.W.3d 441, 449 (Ky. 2010). In so holding, the court cited similar decisions in other jurisdictions, including *Alfred v. State*, 758 P.2d 130, 132 (Alaska Ct. App. 1988); *Jones v. United States*, 560 A.2d 513, 515 (D.C. 1989).

268 State v. Calvin, 839 N.W.2d 181, 187 (Iowa 2013) (breaking with the Iowa Court of Appeals' unreported decision in *State v. Greening*, No. 10-0935, 2011 Iowa App. LEXIS 217 (Iowa Ct. App. 2011)).

Waiver of Custody Credits

As discussed in more detail in Chapter 2, a drug court participant may be required to waive the right to receive custody credits as a condition of entering the program, as long as such waiver is entered into knowingly, intelligently, and voluntarily.

Case Law

- In *People v. Black*, a California Court of Appeals upheld the defendant's waiver of previously accrued custody credits as a condition of participation in drug court, finding that the waiver was knowing and voluntary. Moreover, the court noted that such a waiver is not invalidated by failure to include an explicit advisement that it would apply to any future prison term imposed upon probation revocation.[269]
- The Indiana Court of Appeals, in *House v. State*, analogized a drug court agreement to a plea bargain and found that the defendant knowingly and voluntarily agreed to waive credit time. However, the waiver applied only to credit time accrued *after* execution of the waiver.[270]

No Custody Credit for Drug Court Participation Generally

Mere participation in drug court does not constitute custody for credit purposes. While drug court participants are entitled to credit for any time they serve in jail as a result of sanctions, they are not entitled to credit for the time spent simply participating in the drug court program.

Case Law

- In *Commonwealth v. Fowler*, the Superior Court of Pennsylvania (one of the state's appellate courts) held that a defendant was not entitled to custody credits for time spent in a drug court program because participation in the program was voluntary and the defendant had requested placement in the drug court program as an alternative to prison.[271]

INCARCERATION WHILE AWAITING TREATMENT

In some communities, a lack of available treatment services means that drug court participants may have to wait for a treatment slot to become available. Waiting periods for residential treatment beds are particularly common. Faced with this dilemma, drug courts sometimes incarcerate participants until appropriate treatment is available. This practice is typically grounded in the belief that jail is a safer environment for the participant and will help prevent the participant from overdosing or otherwise harming themself.

As of this writing, no appellate court has expressly considered the use of jail to prevent self-harm in the drug court context. However, this practice is akin to preventive detention or involuntary commitment, two areas where there are clear constitutional standards requiring a finding by clear and convincing evidence that (1) the person poses a reasonably immediate danger to themself or others, and (2) no less restrictive alternative is available.[272]

Drug courts should employ a comparable standard when considering the use of jail to protect participants from overdose or other self-harm. In other words, drug courts should use jail for this purpose only after making a finding, following an adversarial hearing, that jail is necessary to protect a participant from imminent and serious harm and that the participant's safety cannot reasonably be ensured through less restrictive means. Such an approach protects participants' liberty interests and is consistent with drug court best practices.

Case Law

- The U.S. Supreme Court, in *United States v. Salerno*, upheld the constitutionality of the Bail Reform Act of 1984, which authorized pretrial preventive detention under certain circumstances. The court concluded that the law adequately protects due process by requiring the government "to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."[273]

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269 People v. Black, 97 Cal. Rptr. 3d 338, 345–46 (Cal. Ct. App. 2009).

270 House v. State, 901 N.E.2d 598, 600–01 (Ind. Ct. App. 2009).

271 Comm. v. Fowler, 930 A.2d 586, 595 (Pa. Super. Ct. 2007).

272 For a discussion of federal and state laws pertaining to preventive detention, see National Center for State Courts, Pretrial Preventive Detention (February 2020), https://www.ncsc.org/__data/assets/pdf_file/0026/63665/Pretrial-Preventive-Detention-White-Paper-4.24.2020.pdf. For a discussion of federal and state laws pertaining to involuntary commitment, see Substance Abuse and Mental Health Services Administration, Civil Commitment and the Mental Health Care Continuum: Historical Trends and Principles for Law and Practice (2019), https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care.pdf.

273 United States v. Salerno, 481 U.S. 739, 750 (1987).

- In *State v. Porter*, the New Hampshire Supreme Court upheld the state's preventive detention statute, which provided that "the court may order preventive detention without bail . . . only if [it] determines by clear and convincing evidence that release will endanger the safety of [the defendant] or the public."[274]
- In *Mendoza v. Commonwealth*, the Supreme Judicial Court of Massachusetts upheld that state's preventive detention statute. The court noted that the law closely mirrored the federal Bail Reform Act of 1984, upheld by the U.S. Supreme Court in *Salerno*. Specifically, the state law permits preventive detention "[o]nly if the judge determines after a hearing that no conditions of release will reasonably assure the safety of any other persons." Moreover, the law requires the judge "to find the requisite dangerousness by clear and convincing evidence" at an adversarial hearing.[275]
- The U.S. Supreme Court, in *O'Conner v. Donaldson*, held that a person with "mental illness" may not be confined against their will "if they are dangerous to no one and can live safely in freedom." This case is commonly understood to mean that involuntary commitment on the ground of mental illness requires a finding of dangerousness.[276]
- In *Lessard v. Schmidt*, a federal district court in Wisconsin held that involuntary commitment must be justified by a degree of danger to self or others that is "great enough to justify such a massive curtailment of liberty" and that such danger must be "imminent."[277]
- In 1978, the U.S. Supreme Court clarified that "dangerousness" in involuntary commitment proceedings must be proven by clear and convincing evidence.[278]

RECOMMENDATION

Drug courts should not order a participant confined in jail pending treatment unless the court finds by clear and convincing evidence following an adversarial hearing that (1) the participant poses a reasonably immediate danger to themself or others, and (2) no less restrictive alternative is available.

In addition, drug courts should exhaust all less restrictive alternatives before resorting to jail. Consistent with best practices, such alternatives may include

- initiating medications for addiction treatment (MAT) if medically indicated;
- identifying a safe, prosocial, and responsible family member or significant other to stay with the participant and alert staff if there is a problem;
- requiring the participant to report daily to a treatment program, the court, or probation;
- developing a specialized group for persons at acute risk for overdose;
- requiring the participant to attend daily mutual peer support groups if recommended by a treatment professional and acceptable to the individual;
- having a peer specialist work with the participant and accompany the person to treatment sessions or peer support groups; or
- conducting frequent probation home visits, imposing monitored home detention or curfew, or both.

If none of these less restrictive options is likely to be adequate and jail is unavoidable, then the participant should be released from custody as soon as an acceptable alternative becomes available. This process should ordinarily take no more than a few days. While the participant is in custody, drug court staff should ensure that the person receives uninterrupted access to MAT, psychiatric medication, and other needed services.

274 State v. Porter, 2021 N.H. LEXIS 131, 2021 WL 3930281 (N.H. 2021).
275 Mendoza v. Commonwealth, 673 N.E.2d 22, 25 (Mass. 1996).
276 O'Conner v. Donaldson, 422 U.S. 563, 575 (1975).
277 Lessard v. Schmidt, 349 F. Supp. 1078, 1093–94 (E.D. Wis. 1972).
278 Addington v. Texas, 441 U.S. 418 (1978).

CHAPTER 5: TERMINATION AND SENTENCING

Drug court participants who commit serious or repeated violations of program conditions, such as consistently refusing to engage in treatment or absconding from the program, may be terminated from the program and, in post-plea drug courts, sentenced on the underlying charges to which they have pleaded guilty. Termination and sentencing trigger due process protections.

TERMINATION HEARING REQUIRED

Defendants are entitled to due process whenever they face the loss of a recognized liberty or property interest. Because termination from drug court may result in a sentence of incarceration, it is clear that termination proceedings trigger certain due process rights. What is less clear is what specific due process protections are required at this stage. The majority of jurisdictions that have ruled on this question have concluded that termination from drug court is akin to probation revocation and that the same due process protections apply. Other jurisdictions have developed their own due process standards for drug court termination, with varying levels of protection.

The *Gagnon* Standard of Due Process

In *Morrissey v. Brewer*, the U.S. Supreme Court considered what due process protections are required when a person faces revocation of parole.[279] The court held that, while "parole revocation does not call for the full panoply of rights due a defendant in a criminal proceeding," it does implicate significant liberty interests and requires a hearing with certain due process protections.[280] A year later, in *Gagnon v. Scarpelli*, the court extended this holding to probation revocation proceedings. As a result of these cases, probationers are entitled to the following minimum due process protections before their probation can be revoked:

- written notice of the alleged violations of parole;
- disclosure to the parolee of evidence against the parolee;
- the opportunity to appear in person and present evidence;
- the right to confront and cross-examine adverse witnesses;
- a "neutral and detached" magistrate or hearing body; and
- a written statement by the decision-maker explaining the evidence relied on and the reasons for revoking probation.[281]

Since *Gagnon*, courts in many states have held that termination from drug court is analogous to probation revocation and that the same due process protections are required.

Case Law

- In *State v. Shambley*, the Nebraska Supreme Court held that drug court participants facing termination are entitled to the same due process protections as probationers facing revocation, as set forth by the U.S. Supreme Court in Gagnon.[282]
- In *State v. Rogers*, the Idaho Supreme Court held that the liberty interest in remaining enrolled in a drug court program is akin to the interest in remaining on probation and should be governed by the same due process standards, citing *Morrissey* and *Gagnon*.[283]

279 Morrissey v. Brewer, 408 U.S. 471, 471 (1972).
280 *Id.*
281 Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).
282 State v. Shambley, 795 N.W.2d 884, 894–95 (2011).
283 State v. Rogers, 170 P.3d 881, 886 (2007).

- In *Harris v. Commonwealth*, the Virginia Supreme Court held that a probationer participating in drug court had a conditional liberty interest and "was entitled to an orderly process providing him with notice and an opportunity to be heard" before he could be terminated from the program, citing *Morrissey* and *Gagnon*.[284]
- The Indiana Court of Appeals, in Gosha v. State, held that a drug court participant must be afforded due process before termination and that the due process protections required are the same as those afforded a defendant in probation revocation proceedings pursuant to *Gagnon*.[285]

Other Due Process Standards

Courts in other states have crafted their own due process standards for drug court termination. These tend to emphasize the flexible nature of due process and leave more discretion for trial courts to decide what specific due process protections are required in each case.

Case Law

- In *People v. Fiammegta*, New York's highest court held that, when a defendant faces expulsion from a court-ordered drug treatment program for misconduct, the court must carry out an inquiry of "sufficient depth" to satisfy itself that there was a legitimate basis for the program's decision and must explain the nature, basis, and conclusions of that inquiry on the record. However, the court refrained from defining the required due process protections with greater particularity.[286]

WAIVER OF TERMINATION HEARING

As discussed in Chapter 1, a drug court participant may not be required to waive the right to a termination hearing as a condition of entering the program.

Case Law

- The New Hampshire Supreme Court, in *State v. LaPlaca*, rejected the defendant's waiver of the right to a termination hearing on the ground that it is impossible for a defendant to have knowledge of the allegations brought against him when the facts giving rise to the allegations had yet to occur. Therefore, such a waiver could not be knowing, intelligent, and voluntary.[287]
- In *State v. Staley*, the Florida District Court of Appeal held that the defendant "simply could not have knowingly and intelligently waived his right to contest allegations against him without knowing what those allegations were." The court noted that "[a] probationer can certainly waive his rights to due process and to statutory procedures after they have been implicated. Thus, for instance, once an affidavit of violation has been filed the probationer may elect not to contest it. But we do not believe he can prospectively waive these rights."[288]

EVIDENTIARY STANDARDS

As discussed above, termination from drug court does not require the same due process protections as a criminal trial.[289] Similarly, evidentiary standards are relaxed in a drug court termination hearing. For example, termination hearings do not use the "beyond a reasonable doubt" standard that is required to obtain a criminal conviction. Rather, a drug court participant may be terminated from the program if the court finds, by a preponderance of the evidence put forth at the hearing, that the participant has violated a program requirement.

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284 Harris v. Com., 689 S.E.2d 713, 715–16 (Va. 2010).

285 Gosha v. State, 931 N.E.2d 432, 434–35 (Ind. Ct. App. 2010).

286 People v. Fiammegta, 923 N.E.2d 1123, 1129 (N.Y. 2010). Note that *Fiammegta* involved a diversion program, not a drug court. The diversion program did not involve regular judicial monitoring or graduated incentives, sanctions, and therapeutic adjustments as a drug court would. In addition, the defendant's expulsion from his treatment provider triggered automatic imposition of sentence under the terms of the diversion program. These distinguishing factors suggest that the court's holding may apply only to this kind of diversion setting.

287 State v. LaPlaca, 27 A.3d 719, 725–26 (N.H. 2011).

288 State v. Staley, 851 So.2d 805, 807 (Fla. Dist. Ct. App. 2003).

289 *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (outlining the specific due process protections required in a probation revocation hearing, which many courts have applied to drug court termination).

Case Law

- The Washington Court of Appeals, in *State v. Varnell*, held that in a drug court termination hearing, the burden is on the state to prove noncompliance by a preponderance of the evidence.[290]
- In addition, hearsay evidence is generally admissible at a drug court termination hearing if the court finds it to be sufficiently reliable.

Case Law

- In *United States v. Pierre*, the 7th Circuit Court of Appeals held that the usual rules of evidence do not apply to probation hearings and that hearsay is admissible.[291]
- In *State v. Rogers*, the Nebraska Court of Appeals held that admissible evidence in a drug court termination hearing may include letters, affidavits, and other material that would not be admissible in a criminal trial.[292]
- However, the Delaware Supreme Court, in *Simmons v. State*, held that the trial court abused its discretion by relying solely on hearsay evidence to terminate a participant from a diversion program. The court indicated that, while hearsay evidence is admissible at a probation revocation hearing, it must be supplemented by some other "competent evidence" to support revocation.[293]

JUDICIAL RECUSAL IN REVOCATION/SENTENCING HEARING

Among the due process rights guaranteed to drug court participants facing revocation and sentencing is the right to a "neutral and detached magistrate."[294] The question therefore arises whether a drug court judge can be considered neutral and detached, or whether post-termination revocation/sentencing hearings should be handled by another judge.

There is a split of authority on this issue. Appellate courts in Arizona, Idaho, New Hampshire, Maryland, and other states have held it permissible for a drug court judge to preside over a participant's revocation/sentencing hearing.[295]

Case Law

- The Arizona Court of Appeals, in *State v. Tatlow*, rejected the defendant's claim that the drug court judge should have recused himself from hearing the defendant's probation revocation and sentencing hearing because of the judge's "personal knowledge" of the drug court proceedings. The court explained that opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.[296]
- In *State v. Rogers*, the Idaho Supreme Court held that a drug court judge may preside over a participant's termination proceedings and may serve as the participant's sentencing judge. The court stressed that due process is flexible and that termination/sentencing hearings may be relatively informal as long as the basic safeguards set forth by the U.S. Supreme Court in *Morrissey* and *Gagnon* are provided.[297]

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290 State v. Varnell, 155 P.3d 971, 974 (Wash. Ct. App. 2007).

291 United States v. Pierre, 47 F.3d 241, 241 (7th Cir. 1995).

292 State v. Rogers, 170 P.3d 881, 885 (2007); *see also* Withers v. State, 15 N.E.3d 660, 665 (Ind. Ct. App. 2014) (holding that the trial court did not err in taking judicial notice of attendance records as evidence in a drug court termination hearing because they were reliable hearsay evidence for the purpose of that termination); State v. Johnson, 679 N.W.2d 169, 174 (Minn. Ct. App. 2004) (finding that a hearsay letter from probation officer as to defendant's failure to attend required victim impact program was admissible in probation revocation hearing).

293 Simmons v. State, 788 A.2d 132, 132 (Del. 2001); *see also* State v. Shambley, 795 N.W.2d 884, 896 (2011) (noting that although procedure may be relaxed to allow consideration of evidence that would not be admissible in an adversary criminal trial, the court may not rely solely on hearsay; determining that a preponderance of the evidence is required to demonstrate alleged grounds for terminating a participant from the drug court program).

294 *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

295 Notably, these courts employed the traditional, case-by-case analysis for judicial recusal claims, inquiring whether a reasonable person with knowledge of the circumstances would doubt the judge's impartiality. Therefore, these decisions should not be understood to hold that it is *always* permissible for a drug court judge to handle a participant's termination and sentencing, only that it was permissible in the circumstances presented in these cases.

296 State v. Tatlow, 290 P.3d 228, 234 (Ariz. Ct. App. 2012).

297 State v. Rogers, 170 P.3d 881, 884 (Idaho 2007).

- The Maryland Court of Appeals employed the traditional case-by-case approach in *Conner v. State* and held that "the information learned by [the drug court judge] in the exercise of his duties . . . was information obtained while serving in his judicial capacity and was not 'personal knowledge' of the kind requiring disqualification." Therefore, the court found it proper for the drug court judge to preside over the termination/sentencing hearing.[298]
- In *State v. Belyea*, the New Hampshire Supreme Court ruled that a drug court judge may preside over a drug court termination/sentencing hearing. Using the traditional case-by-case approach to judicial disqualification, the court found no evidence that "an objective, disinterested observer . . . would entertain significant doubt about [the drug court judge's] ability to fairly and impartially judge the issues presented at the defendant's termination hearing." The court noted that the drug court judge "remained an impartial judicial officer" while presiding over the drug court and the judge relied upon "no disputed evidentiary facts" when ruling on the defendant's termination.[299]

On the other hand, courts in Minnesota, Oklahoma, and Wisconsin have found that a drug court participant's due process rights are violated when the drug court judge hears the participant's revocation/sentencing. Furthermore, the Minnesota and Oklahoma courts adopted a bright-line rule requiring recusal in revocation/sentencing hearings whenever a drug court participant requests it.

Case Law

- The Wisconsin Court of Appeals, in *State v. Marcotte*, held that the drug court judge was objectively biased when he presided over a participant's sentencing hearing and that the participant was entitled to be resentenced by a different judge. The court found that the drug court judge demonstrated a "high level of personal investment" in the participant's case, made comments during drug court proceedings indicating how he would sentence the participant if he failed the program, and had significant ex parte information about the participant that no other sentencing judge would have.[300]
- In *State v. Cleary*, the Minnesota Court of Appeals found that "a reasonable examiner, with full knowledge of the facts and circumstances, would question the [drug court] judge's impartiality." The court observed that the role of the drug court judge is designed to be "more interactive" with the parties, that the judge has a "more personal" relationship with participants, and that the judge "learns intimate details of the participant's life." Consistent with the National Drug Court Institute's recommendation, the court adopted a bright-line rule: when a probationer seeks to disqualify the drug court judge from presiding over their probation revocation hearing, "the judge shall recuse."[301]
- The Criminal Court of Appeals of Oklahoma, in *State v. Alexander*, acknowledged the potential for bias where a drug court judge is required to act as a team member, evaluator, monitor, and final adjudicator. Therefore, the court adopted a rule similar to Minnesota's: "[I]f 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 and the motion to remove the defendant from the Drug Court program should be assigned to another judge for resolution."[302]

RECOMMENDATION

As noted in the *Cleary* and *Alexander* decisions, the Treatment Court Institute recommends that drug court judges grant all participant requests for recusal in drug court termination, revocation, and sentencing hearings. This approach recognizes the potential for judicial bias, or the reasonable appearance of bias, and seeks to err on the side of protecting the participant's due process rights.

298 Conner v. State, 248 A.3d 318, 332 (Md. Ct. App. 2021).

299 State v. Belyea, 999 A.2d 1080, 1085 (N.H. 2010).

300 State v. Marcotte, 943 N.W.2d 911, 918 (Wisc. Ct. App. 2020). The Court of Appeals further urged drug courts to follow the guidance of the *Drug Court Judicial Benchbook* and assign a different judge to preside over participants' sentencing hearings. However, the court declined to adopt a blanket rule to this effect, noting that "[w]hether a judge is objectively biased . . . must be determined on a case-by-case basis." Id. at 921.

301 State v. Cleary, 882 N.W.2d 899, 908 (Minn. Ct App. 2016) (citing Douglas Marlowe & William Meyer, *The Drug Court Judicial Benchbook*, National Drug Court Institute (2011)).

302 Alexander v. State, 48 P. 3d 110, 115 (Okla. Crim. App. 2002).

CHAPTER 6: SPECIAL CONSIDERATIONS FOR PRE-PLEA DRUG COURTS

Although current data are scarce, the Bureau of Justice Statistics' 2012 Census of Problem-Solving Courts reported that 27% of adult drug courts accept pre-plea cases.[303] Defendants do not plead guilty prior to entering these courts, and therefore they have greater liberty and privacy interests than participants in post-plea drug courts. As a result, there are special legal considerations that pre-plea drug courts must take care to follow. This chapter explains these considerations and highlights key areas where the law pertaining to pre-plea and post-plea drug courts differs.

CONDITIONS OF PRETRIAL RELEASE GENERALLY

A person charged with a crime "may not be punished prior to an adjudication of guilt."[304] Such punishment runs afoul of the due process clause of the Fourteenth Amendment. Therefore, pretrial restrictions on a person's liberty may not be imposed as form a punishment. Rather, pretrial release conditions must serve a legitimate, compelling, and nonpunitive government interest. Federal courts have recognized three major government interests that meet this test: ensuring the defendant's appearance at trial, safeguarding the integrity of the judicial system, and protecting the public from a defendant who is dangerous.[305]

State constitutions and statutes reflect these limitations. All states have authorized their courts to impose pretrial release conditions to ensure the defendant's return to court and to preserve the integrity of the judicial process.[306] In most states, though not all, courts may also impose conditions to protect public safety if the defendant is found to be unusually dangerous.[307] State statutes usually set forth specific factors that courts must consider in setting pretrial release conditions, such as the nature of the charges, previous failures to appear in court, and the defendant's ties to the community. In addition, state statutes often provide a list of permissible conditions of release. Common examples include secured or unsecured bond, travel restrictions, electronic monitoring, drug testing, and participation in treatment or other services when appropriate.

In setting a defendant's pretrial release conditions, the court must make an *individualized determination*, based on the defendant's specific circumstances, about what conditions are needed to ensure the defendant's return to court and, where permissible, to protect specific individuals or the public at large.[308] Blanket conditions of release imposed without regard to the defendant's circumstances are generally impermissible.[309]

If the court determines that a particular defendant has a substance use disorder and may benefit from treatment, the defendant may enter into an agreement to participate in a pre-plea drug court program.[310] Courts have likened such agreements to a contract between the court and the participant, similar to a plea agreement.[311] Just like a plea agreement, an agreement to participate in a pre-plea drug court must be made knowingly, intelligently, and voluntarily.[312]

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303 Suzanne M. Strong et al., *Census of Problem-Solving Courts*, 2012, Bureau of Justice Statistics (revised October 12, 2016), https://www.bjs.gov/content/pub/pdf/cpsc12.pdf.

304 Bell v. Wolfish, 441 U.S. 520, 535 (1979).

305 United States v. Salerno, 481 U.S. 739, 748 (1987).

306 *See, e.g.*, Conn. Gen. Stat. § 54-64a (2022); N.J. Stat. Ann. § 2A:162-22 (2022); Tenn. Code Ann. § 40-11-115 (2022); Wash Crim. R. 3.2 (2022).

307 *Id.* A handful of states, including New York, do not permit courts to consider a defendant's dangerousness in setting pretrial release conditions.

308 Schultz v. State, 2022 U.S. App. LEXIS 21048 (11th Cir. 2022); Valdez-Jimenez v. Eighth Jud. Dist. Ct. of Nevada, 460 P.3d 976, 985 (Nev. 2020); State v. Wein, 417 P.3d 787, 789 (Ariz. 2018).

309 United States v. Salerno, 481 U.S. 739, 748 (1987); State v. Wein, 417 P.3d 787, 789 (Ariz. 2018).

310 Without an individualized determination that pre-plea drug court is a necessary condition in each specific case, a defendant's agreement to participate in drug court would arguably violate the "unconstitutional conditions" doctrine. See United States v. Scott, 450 F.3d 863, 866-67 (9th Cir. 2006).

311 Walker v. Lamberti, 29 So. 3d 1172, 1173 (Fla. Ct. App. 2010).

312 *Id.* at 1176.

PROHIBITIONS ON DRUG AND ALCOHOL USE

Courts may generally prohibit a defendant from consuming alcohol or other drugs as a condition of pretrial release if the court determines that such a condition is reasonable and necessary to ensure the defendant's appearance in court. In some states, courts have specific statutory authority to impose such conditions.[313] In other jurisdictions, this authority is included in statutory "catch-all" provisions that grant courts the power to impose "any other conditions" that the court determines are appropriate.[314]

As with all conditions of release, courts must make an individualized determination whether to prohibit the use of alcohol or other drugs based on the specific facts and circumstances of the case, such as the defendant's criminal history, history of alcohol/drug use, and the likelihood that alcohol/drug use may interfere with the defendant's future court appearances.

WARRANTLESS SEARCHES AND RANDOM DRUG TESTING

Drug courts often require participants to consent to warrantless searches of their homes, vehicles, and persons, including submission to random drug testing. In post-plea drug courts, these kinds of requirements are generally valid, because individuals on probation or other forms of post-plea supervision have "sharply reduced liberty and privacy interests."[315]

However, participants in pre-plea drug courts have "far greater" liberty and privacy rights than probationers and "have suffered no judicial abridgement of their constitutional rights."[316] As a result, courts have generally held that pre-plea conditions requiring a defendant to submit to warrantless searches are permissible only when the court makes an individualized determination, based on the defendant's specific circumstances, that such a condition is necessary to ensure the defendant's future appearance in court.[317]

Case Law

- In United *States v. Scott*, the 9th Circuit Court of Appeals held that a pretrial release condition authorizing random drug testing and warrantless search of the defendant's home was impermissible under the Fourth Amendment unless the court has made an *"individualized determination" that the defendant's drug use is likely to lead to nonappearance at future court hearings.* The court declined, however, to specify the type of individualized finding required to support such a search condition.[318]
- In *State v. Ullring*, the Maine Supreme Judicial Court upheld a bail condition allowing random searches of the defendant's home. The court noted that, while a random search condition is not likely to be reasonable in every case, "[t]here are situations in which the history and personal situation of the defendant, including the charges against him or her, justify a determination by a judicial officer that a random search condition is both necessary and the least restrictive alternative that will ensure the defendant's appearance and the integrity of the judicial process."[319]

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313 *See, e.g.*, Ariz. R. Crim. P. 73(c) (authorizing a release condition prohibiting defendant from "consuming intoxicating liquors or any controlled substance that is not properly prescribed"); Me. Rev. Stat. Ann. tit. 15, § 1026(3) (authorizing release conditions prohibiting possession and use of alcohol and illegal drugs); Wash. Rev. Code. § 10.21.030(2) (authorizing the imposition of a release condition prohibiting defendant from "possessing or consuming any intoxicating liquors or drugs not prescribed to defendant" and requiring the defendant to "submit to testing to determine the defendant's compliance with this condition").

314 *See, e.g.*, Mont. Code Ann. § 46-9-106 ("reasonable conditions that ensure the appearance of the defendant and protect the safety of the community or of any person"); 234 Pa. Code Ch. 5 Rule 527(A)(3) ("any other appropriate conditions designed to ensure the defendant's appearance and compliance with the conditions of bail").

315 United States v. Scott, 450 F.3d 863, 873 (9th Cir. 2006).

316 *Id.* at 873–74.

317 Depending on state law, warrantless search conditions may also be permissible if the court makes an individualized determination that such conditions are necessary to protect the integrity of the judicial process and/or public safety. *See, e.g.*, In re York, 892 P.2d 804, 811 (Cal. 1995) (explaining that California's bail law—Penal Code § 1318—allows judges to weigh "considerations relating to public safety" when setting release conditions); State v. Ullring, 741 A.2d 1065, 1069 (Maine 1999) (quoting Maine's bail statute—15 M.R.S.A. § 1026(3)(A)—as permitting any bail condition "that is reasonably necessary to ensure the appearance of the defendant as required and to otherwise reasonably ensure the integrity of the judicial process").

318 United States v. Scott, 450 F.3d 863, 873 (9th Cir. 2006). The court also indicated that a "legislative finding" demonstrating that drug use by pretrial releasees "substantially impairs their tendency to show in court" may support these kinds of warrantless search conditions. Again, however, the court declined to explain what kind of legislative finding would be sufficient to justify these conditions under the Fourth Amendment.

319 State v. Ullring, 741 A.2d 1065, 1073 (Maine 1999); *see also* State v. Felch, 928 A.2d 1252, 1253 (Maine 2007) (relying on *Ullring* to uphold bail conditions authorizing random drug testing and random search of the defendant's person, vehicle, and residence).

- In *In re York*, the California Supreme Court held that defendants released on their own recognizance may be required to agree to submit to warrantless searches and random drug testing when the court makes an "individualized determination" that the conditions are reasonable "based upon all the circumstances" present in each defendant's case.[320]
- The Indiana Court of Appeals held, in *Steiner v. State*, that a bond condition requiring random drug testing was invalid because the trial court made no attempt "to determine whether the particular facts and circumstances of this case justified the imposition of random drug screens as a condition of bail." However, the court observed that a drug testing requirement would likely be permissible if the trial court makes such an individualized determination based on the defendant's prior drug-related convictions or self-reported drug use.[321]
- In *Oliver v. United States*, the defendant was on pretrial release, a condition of which was to abstain from illicit drug use. To monitor the defendant's compliance with this condition, the court also ordered the defendant to submit to weekly drug testing. On appeal, the Washington District Court held that the drug testing requirement was a valid exercise of the trial court's inherent authority to monitor compliance with the "no drugs" condition of release. In addition, the court found no Fourth Amendment violation given the "minimal intrusion" imposed by the drug test requirement.[322]

RECOMMENDATION

A pre-plea drug court may generally require a participant to submit to warrantless searches, random drug tests, or both if the court makes an individualized finding that such conditions are reasonably necessary to ensure the participant's appearance at future court dates. The court's determination should be based on the specific facts and circumstances of the case, such as the defendant's history of drug use or drug-related convictions.

JAIL SANCTIONS

There is surprisingly little case law addressing the authority of pre-plea drug courts to use jail as a sanction for noncompliance. Florida is the only state where appellate courts have grappled with this question, and the evolution of that state's court decisions and statutes is instructive.

In *Diaz v. State*, a drug court participant challenged a 60-day jail sanction imposed under the terms of the Drug Court Agreement, which provided, "Defendant agrees that noncompliance with the program may result in judicial sanctions to include county jail time."[323] The defendant argued that the drug court lacked statutory authority to impose a jail sanction despite the agreement. Florida's Second District Court of Appeal agreed, holding that "a trial judge may not impose a jail sentence for breach of contract when the party has never been convicted of a crime." Regarding the Drug Court Agreement, the court noted that "a criminal defendant may not agree to the imposition of an illegal sentence."[324]

Less than five months later, though, Florida's Fourth District Court of Appeal came to the opposite conclusion in *Mullin v. Jenne*.[325] There, a drug court participant was ordered into a jail-based treatment program after absconding from the program. When the defendant attempted to "opt out" of the drug court instead, the court denied the request, noting that the defendant's signed Deferred Prosecution Agreement provided that the court could order her to continue in treatment. The Fourth District Court of Appeal held that jail is a permissible sanction despite the pre-plea nature of the drug court. However, the court also held that the defendant had the right to opt out of the program—the administrative order that created the drug court program "unfortunately" stated that "[p]articipation is strictly on a voluntary basis."[326]

320 In re York, 892 P.2d 804, 806 (Cal. 1995).

321 Steiner v. State, 763 N.E.2d 1024, 1028 (Ind. Ct. App. 2002).

322 Oliver v. United States, 682 A.2d 186, 190 (D.C. Wash. 1996) (declining to decide whether "individualized suspicion" is required, finding that there clearly was a basis for such a condition in the instant case).

323 Diaz v. State, 884 So.2d 299 (Fla. Ct. App. 2004).

324 *Id.* at 300.

325 Mullin v. Jenne, 890 So. 2d 543 (Fla. Ct. App. 2005).

326 *Id.* at 546–47.

After these conflicting decisions, the Florida legislature amended the state's pretrial diversion statute to expressly permit the imposition of jail sanctions in pre-plea drug courts. In addition, the administrative order cited in *Mullin* was amended to remove the defendant's right to opt out of the program after voluntarily joining it and thereby avoid jail sanctions. As a result of these changes, the law is now clear in Florida that jail sanctions are permissible in pre-plea drug courts, a conclusion reached in *Walker v. Lamberti*.[327] There, the court confirmed the authority of pre-plea drug courts to impose jail sanctions as long as "the requirements and potential sanctions for violations . . . are set forth clearly, provided to, and agreed to by the defendant in writing."[328]

The key lesson from these Florida cases is that pre-plea drug courts must have clear statutory authority to impose jail sanctions. Such authority need not be contained in a pretrial diversion law as in Florida. Statutory authority might be found in the state's pretrial release laws, drug court enabling laws, or elsewhere. But without a firm statutory basis, a pre-plea drug court's authority to impose jail sanctions is questionable.

CONCLUSION

This chapter has briefly considered the major legal issues pertaining to pre-plea drug courts for which case law exists. However, the general dearth of cases dealing with the pre-plea model makes means that this chapter is not exhaustive. As case law continues to evolve, it is likely that courts will take up other issues and further clarify the unique legal status of pre-plea drug courts.

327 Walker v. Lamberti, 29 So. 3d 1172 (Fla. Ct. App. 2010).

328 *Id.* at 1175.

All Rise

Treatment Court Institute

Impaired Driving Solutions

Justice for Vets

Center for Advancing Justice

All Rise is the leading training, membership, and advocacy organization for advancing justice system responses to individuals with substance use and mental health disorders. All Rise impacts every stage of the justice system, from first contact with law enforcement to corrections and reentry, and works with public health leaders to improve treatment outcomes for justice-involved individuals. Through its four divisions—the **Treatment Court Institute, Impaired Driving Solutions, Justice for Vets,** and the **Center for Advancing Justice**—All Rise provides training and technical assistance at the local and national level, advocates for federal and state funding, and collaborates with public and private entities. All Rise works in every U.S. state and territory and in countries throughout the world.

Founded as the National Association of Drug Court Professionals (NADCP) in 1994, All Rise has been at the forefront of justice system transformation for nearly three decades. As the leader of the treatment court movement, All Rise helps prove that a combination of evidence-based treatment and accountability is the most effective justice system response to individuals with substance use and mental health disorders. All Rise has trained over 800,000 public health and public safety professionals, and the number of treatment courts in the United States has grown to more than 4,000, helping more than 1.5 million people access treatment.

Center for Justice Innovation

The Center for Justice Innovation (the Center) promotes new thinking about how the justice system can respond more effectively to issues like substance use, intimate partner violence, mental illness, and juvenile delinquency. The Center achieves its mission through a combination of operating programs, original research, and expert assistance. For over two decades, the organization has been intensively engaged in designing and implementing problem-solving courts, and each year, it responds to hundreds of requests for training and technical assistance and hosts hundreds more visitors at its operating programs. Its staff includes former prosecutors, defense counsel, probation officials, senior administrators of major criminal justice agencies, social workers, technology experts, researchers, victim advocates, and mediators. Under the Bureau of Justice Assistance's (BJA) Statewide Adult Drug Court Training and Technical Assistance Program, the Center provides training and technical assistance to statewide treatment court systems, helping state-level treatment court coordinators and other officials enhance the operation of drug courts and other treatment courts throughout their state.