Legal Trends Impacting Specialized Dockets

Presented by Judge Margaret P. Spencer (Retired)
Circuit Court of the City of Richmond, Virginia

Adapted from Presentation by Judge William G. Meyer (Retired)
Senior Judicial Fellow
National Drug Court Institute

Objectives

- Identify the legal requirements involving use of MAT in drug courts
- Discuss the law relevant to drug court conditions that include participation in deity based groups
- Define the drug court due process mandates related to incarceration of participants

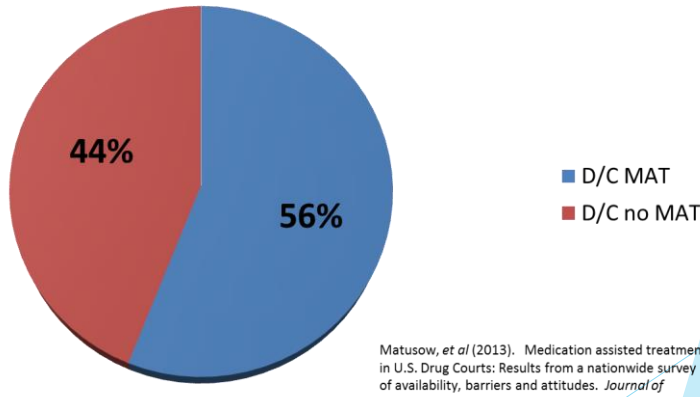
DRUG COURTS NEED TO KNOW . .. . .

- MAT
- NA/AA?
- Due Process – Terminations and Sanctions
- Incarceration / Preventive Detention

Can a treatment court prohibit medication-assisted treatment (MAT), such as methadone, because it substitutes one addiction for another?

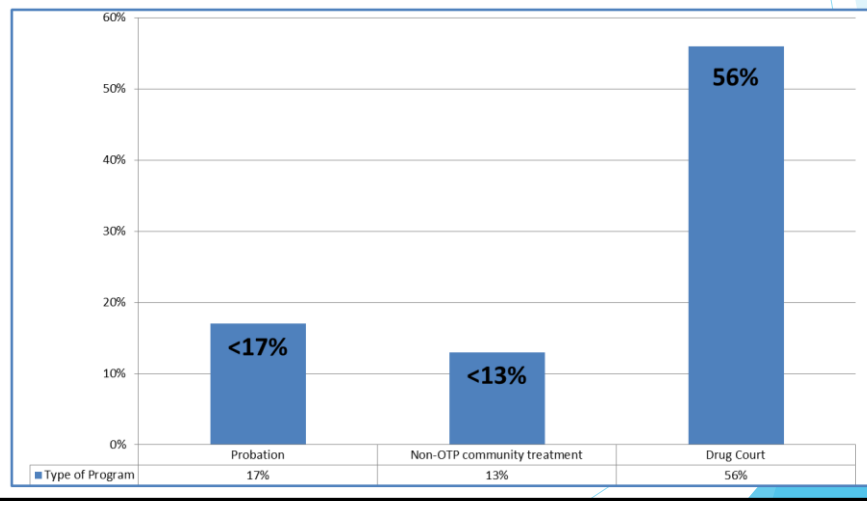
NO!

Prevalence of MAT Use in Treatment Courts



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

Treatment Court Use of MAT Compared with Other Criminal Justice Interventions



The Unequivocal Position of NDCI

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

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

When, if ever, can the treatment court say no and still keep federal funding?

Medications available by prescription must be permitted, **unless** the judge determines the existence of one of the following conditions:

1. The client is **not** receiving those medications as part of treatment for a diagnosed substance use disorder.
2. A licensed clinician, acting within their scope of practice, has **not** examined the client and determined that the medication is an appropriate treatment for their substance use disorder.
3. The medication was **not** appropriately authorized through prescription by a licensed prescriber.

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What about mandating cessation as a condition of treatment court graduation?

In all cases, MAT must be permitted to be continued for as long as the prescriber determines that the medication is clinically beneficial. Grantees must assure that a treatment court client will not be compelled to no longer use MAT as part of the conditions of the treatment court, if such a mandate is inconsistent with a licensed prescriber's recommendation or valid prescription. 9

The Bottom Line

Under no circumstances may a treatment court judge, other judicial official, correctional supervision officer, or any other staff connected to the identified treatment court deny the use of these medications when made available to the client under the care of a properly authorized physician and pursuant to regulations within an opioid treatment program or through a valid prescription. 10

Challenging Blanket MAT Prohibitions

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

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

- Due process protections of the Fourteenth Amendment
- Eighth Amendment—cruel and unusual punishment

Can your treatment court refer participants to 12-step fellowship programs like AA and NA?

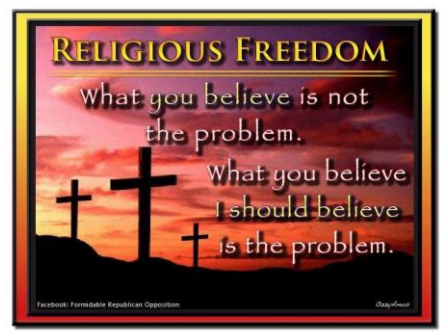
Yes, under certain circumstances.

FIRST AMENDMENT

- Working the 12 steps requires:
  - **Confess to God "the nature of our wrongs" (Step 5).**
  - **Appeal to God to "remove our shortcomings" (Step 7).**
  - **By "prayer and meditation" make "contact" with God to achieve the "knowledge of his will" (Step 11).**

FIRST AMENDMENT

- Congress shall make no law respecting an establishment of religion, or **prohibiting the free exercise thereof . . .**
  . . . . . .

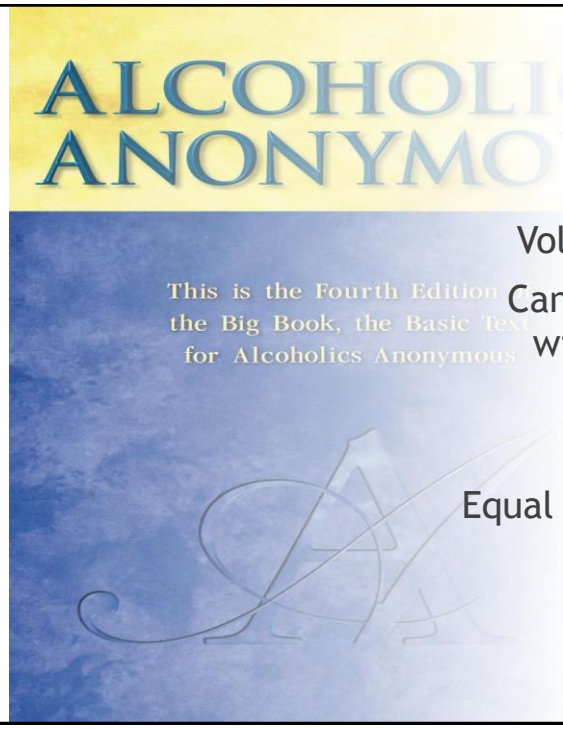


FIRST AMENDMENT CASES

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

Hanas v. Inner City Christian Outreach Inc. 542 F. 2d. Supp. 683 (E.D. Mich. 2008)

- §1983 case within the 6th Circuit [Ohio, Kentucky, Michigan, Tennessee]
- Drug court case manager was named defendant and found liable; not protected by absolute immunity or quasi-judicial immunity
- Catholic Drug Court Participant was in Pentecostal rehabilitation program, per Drug Court mandate, and not allowed to practice his religion
- Participant was terminated for noncompliance with Drug Court requirements
- Federal Court found Establishment Clause violation



Voluntary program:

Can you mandate AA without a secular alternative?

Equal Protection violation

Not All Is Lost

- *O'Conner v. California*, 855 F. Supp. 303, 308 (C. D. Calif.) (no Establishment Clause violation where DUI probationer had choice over program, including self-help programs that are not premised on monotheistic deity).
- *In Re Restraint of Garcia*, 24 P.3d 1091 (Wash. App. 2001) (same).
- *Americans United v. Prison Fellowship*, 509 F.3d 406 (8th Cir. 12/3/07) (state-supported noncoercive, nonrewarding faith-based program unconstitutional First Amendment Establishment Clause violation, where alternative not available).

- LifeRing Recovery http://lifering.org/
- Rational Recovery https://rational.org
- Secular Organizations for Sobriety http://www.sossobriety.org/

NOT ALL IS LOST

- Drug courts cannot offer a faith based requirement without offering a secular alternative [a religion neutral approach]
- LifeRing Secular Recovery -- lifering.org [meetings in Medina and Akron, Ohio]
- Rational Recovery – rational.org
- Secular Organizations for Sobriety – http://www.sosobriety.org

- SMART RECOVERY
  - Smartrecovery.org
    - In Worthington, Columbus, and Mansfield, Ohio

Due Process

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

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

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

Due Process

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

Due Process

What is required?

- Probable cause determination
- Written notice
- Right to appear
- Cross-examine and call witnesses
- Independent magistrate
- Written findings—reasons

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

- Right to counsel is a state mandate

Weight of Authority

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

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

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

  In termination from treatment court, due process rights include: written notice of the claimed violations, disclosure of the evidence against him, an opportunity to be heard and present evidence, the right to confront and cross-examine witnesses, and a neutral and detached hearing body.

- ***HUNT v. COMMONWEALTH*, 326 S.W.3d 437 (Ky. 2010)**
  Summary probation revocation proceeding when defendant sentenced to probation with treatment court as a condition of probation, where no evidence presented, but simple conclusory statements made and counsel appointed immediately prior to hearing violated due process.

- ***State v. Shambley***, 281 Neb. 317 (2011)
  Treatment court program participants are entitled to the same due process protections as persons facing termination of parole or probation.

Pre-Allegation Waiver of Hearing

- *Neal v. State*, 2016 Ark. 287 (Ark. Sup. Ct. 6/30/16) (citing *LaPlaca* and *Staley, infra* , Ark. Sup. Ct. holds: "[T]he right to minimum due process before a defendant can be expelled from a drug-court program is so fundamental that it cannot be waived by the defendant in advance of the allegations prompting the removal from the program.")

- *State v. LaPlaca*, 27 A.3d 719 (New Hampshire 2011) (even where program manual provided: "Any violation of the terms and conditions of the [Program] shall result in the imposition of sanctions, without hearing, by the court as deemed fair and appropriate, consistent with statutory authority and the descriptions as outlined in the [Program] policy manual. The defendant waives any right(s) to any and all hearings. Termination of participation in the [Program] shall result in the imposition of the suspended prison sentences and fines without hearing. The defendant shall affirmatively waive any and all rights to a hearing," waiver pre-notice of allegations was not enforceable.)
- Court relied on *Staley v. State*, 851 So.2d 805 (Fla. Dist. Ct. App. 2003) (failure to provide the participant a pre-termination hearing was a violation of due process in the context of removal from drug court and imposition of a suspended sentence). See *also Gross v. State of Maine*, Superior Court case # CR-11-4805 (2/26/13).

Due Process and Judicial Impartiality

TEST:

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

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

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

What is the trend on recusal?

Recusal Not Required

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

Recusal Required

1. Minnesota v. Cleary, No. A15-1493 (Court of Appeals of Minnesota July 5, 2016) (when the sole basis for revoking probation is a probationer's termination from treatment court and the treatment court judge participated in the treatment court team's decision to terminate the probationer from treatment court, a probationer is entitled to have a judge other than the treatment court judge preside over the probation revocation hearing, because of the appearance of lack of impartiality).

2. State v. Stewart, W2009-00980-CCA-R3-CD (Tenn. Crim. App. 8-18-2010) (not selected for publication).

Ethics Opinions

Tennessee Advisory Opinion 11-01

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

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

Kentucky 10/10/11 JE_122

- Recusal issues where a treatment court or mental health court judge presides in a revocation hearing based on defendant's violation of terms of participation in a treatment or mental health program.

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

- Canons of Judicial Conduct

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

Do infractions involving jail as a potential sanction require a hearing, when the participant denies the factual basis?

YES!

Due Process and Sanctions

Hearing vs. nonhearing—If the treatment court participant does not admit the violation and denies the factual basis of the alleged noncompliance, and jail is a possible sanction, ask yourself:

1. Will the defendant **potentially** suffer a loss to a **recognized liberty** or property right at the sanctioning hearing?
2. If the answer is yes, the due process clause is implicated.
3. Because due process is implicated, the issue becomes **what type of hearing** is the participant entitled to?

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

Key Component #2

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

NICELY v. COMMONWEALTH, 2007-CA-002109-MR (Ky. App. 4-24-2009)

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

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

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

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

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

Sanction Hearing

Taylor v. State, CR-15-0354 (Ala. Crim. App. 9/9/16) Sanctioning hearing using hearsay was not a due process violation. Concurrence: I realize that developing specific procedures for handling drug-court sanctions can be an arduous task — especially given the dearth of case law in this State addressing drug-court programs. I would encourage other drug-court judges in this State either to use or to develop a drug-court-sanction procedure similar to the one outlined in this Court's opinion (i.e., provision of a hearing). I would also recommend to other drug-court professionals that they take advantage of the vast training resources and educational opportunities available through the National Association of Drug Court Professionals.

Is it permissible to place a participant with a substance use disorder in jail while you are waiting for a placement bed to become available?

NO! Unless due process requirements are met.

"She is an addict, and if I release her, she will OD"

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

Preventive Detention

Hoffman v. Jacobi (S.D. Ind., 9/29/2015)

(Magistrate judge recommends class certification on 42 USC §1983 damages and injunctive relief suit against treatment court judge and team for incarcerating participants for lengthy periods of time, while awaiting placement in treatment facilities. Plaintiffs allege that the decision to hold them in jail pending placement was made without counsel, hearing, consideration of bond, or other rights of due process.) (Injunctive relief moot—court closed—judge forced to resign 4/22/16)

Preventive Detention

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

Civil Commitment

O'Conner v. Donaldson, 422 US 563 (1975) (cannot fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different).

Addington v. Texas, 441 US 418 (1979) (clear and convincing evidence).

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

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

Ohio Drug Court Case

- Ohio v. Orlando, 2013-Ohio-2335, No. 99299, Court of Appeals of Ohio, Eighth District, Cuyahoga County, June 6, 2013
  - Drug Court Judge cannot find defendant ineligible for drug court, after prior eligibility determination and drug court plea prepared pursuant to that determination, and then have defendant plead guilty – per Loc. R. 30.2(F). Judge violated court's local rules. Judge also abused discretion in denying motion to vacate plea because plea was not made knowingly, intelligently or voluntarily. Defendant's retained counsel was also not present.

The end