CONSTITUTIONAL AND OTHER LEGAL ISSUES IN DRUG COURT[1]

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[1] There are certain policy statements in this document. These policy statements are solely the position of the author and are not necessarily the policies of the National Drug Court Institute or the National Association of Drug Court Professionals

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INTRODUCTION

The legal and constitutional issues arising in drug court are pervasive and complex: from First Amendment Establishment Clause prohibitions, to the scientific reliability of drug testing results, to the due process rights of drug court participants in termination proceedings and during the sanctioning process.

This monograph does not attempt to collect and analyze all the relevant law from each drug court jurisdiction. By highlighting significant issues, the author gives a starting point from which to begin the research applicable to that court. Additionally, the author is advocating certain best legal practices for operational drug courts. While all these practices may not be required in a particular jurisdiction, they reflect a standard of practice that merges the therapeutic benefits of drug court procedure and the highest legal standard of due process.

FIRST AMENDMENT

As an adjunct to treatment, Drug Courts frequently refer drug court participants to 12-step programs such as Alcoholics Anonymous (A.A.) or Narcotics Anonymous (N.A.). The treatment provider and/or the court expect the participant to "work" or complete the 12-steps of the program. While these 12-step programs declare a tolerance for each person's personal vision of God, the writings of A.A. and N.A. encourage the participant to commit to the existence of a Supreme Being.[2]

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[2] For example, working the twelve steps requires that the participant: Confess to God "the nature of our wrongs" (Step 5); appeal to God to "remove our short comings" (Step 7); by "prayer and meditation" to make "contact" with God to achieve the "knowledge of his will" (Step 11). In fact, the twelve steps basic text of Alcoholics Anonymous and Narcotics Anonymous mention God in five of the twelve tenets. See Alcohol Anonymous World Services Inc., Alcoholics Anonymous, (3rd Ed. 1976) p. 59-60; Narcotics

Citing the Establishment Clause[3] of the First Amendment to the Constitution, courts have consistently held that requiring an individual to participate in an A.A. or N.A. program is unconstitutional.[4]

Although court-mandated participation in A.A. and N.A. may run afoul of the First Amendment, such referrals are not prohibited where there are alternatives available. The Establishment Clause is violated when the state coerces the participant to engage in a religious activity.[5] Where there are other twelve step or secular self-help groups to which the drug court participant can readily be referred, use of A.A. or N.A. groups is constitutional for those individuals who do not object.[6] For offenders who do object to the deity-based 12-step programs, placement of a secular program is appropriate.[7]

Anonymous World Service Inc, Hospitals and Institutions Handbook, (2006) page 2, available at http://www.na.org/handbooks/H&I%20handbook.pdf

[3] "Congress shall make no law respecting an establishment of religion or prohibiting the full exercise thereof . . ." U.S. Constitution Amendment I applied to the states by the XIV Amendment of the U.S. Constitution. See also Lee v. Weisman, 505 U.S. 577, 587 (1992).

[4] Kerr v. Ferry, 95 F.3d 472, 479-80 (7th Cir. 1996) (prison violated Establishment Clause by requiring attendance at Narcotics Anonymous meetings which used "God" in its treatment approach); Griffin v. Coughlin, 88 N.Y. 2d 674 (1996) cert. denied 519 U.S. 1054 (1997) (conditioning desirable privilege – family visitation – on prisoner's participation in program that incorporated Alcoholics Anonymous doctrine was unconstitutional as violation of the Establishment Clause); Warner v. Orange County Dept. of Probation, 115 F.3d 1068 (2nd Cir. 1997) reaffirmed 173 F.3d 120 (2nd Cir.), cert. denied, 528 U.S. 1003 (1999) (county governmental agency violated Establishment Clause by requiring DUI probationer to participate in A.A.); Bausch v. Sumiec, 139 F. Supp. 2d 1029 (E.D. Wisc. 2001) (same); Arnold v. Tenn. Board of Trustees, 956 S.W. 2d 478, 484 (Tenn. 1997) (same); In Re Personal Restraint of Garcia, 24 P.3d 1091 (Wash. App. 2001) (same); Rauser v. Horn, 1999 U.S. Dist. Lexis 22580 (W.D. Pa. 1999) rev. other grounds 241 F.3d 330 (3rd Cir. 2001) (same); Alexander v. Schenk, 118 F. Supp. 2d 298, 300 N.1 (N.D. NY) (same); Yates v. Cunningham, 70 F. Supp. 2d 47, 49 (D. N. H. 1999) (same); Warburton v. Underwood, 2 F. Supp. 2d 306, 316-318 (W.D.N.Y 1998) (same).

[5] Kerr v. Farrey, supra, 95 F.3d at 479.

[6] 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, supra, 24 P.3d at 1093.

[7] Bausch v. Sumiec, supra, 139 F. Supp. 2d at 1036 (the choices need to be made known to the participant); see also De Stephano v. Emergency Housing Group, 247 F.3d 397 (2nd Cir. 2001).

Thus, where 12-step referrals are used, the author recommends the drug court judge should insure that the team surveys the community for the availability of secular 12-step programs.[8]

Drug court practices also implicate the First Amendment freedom of speech and association clause.[9] As a condition of program enrollment, judges often prohibit drug court participants from being in certain geographic locales (area restrictions) and/or associating with certain individuals (association restrictions). Area restrictions have survived constitutional attack when they are narrowly drawn.[10] The factors often used in determining whether the restriction is reasonable include whether the defendant has a compelling need to go through/to the area; a mechanism for supervised entry into the area; the geographic size of the area restricted and the relatedness between the restriction and the rehabilitation needs of the offender.[11]

Similarly, the courts have routinely upheld association restrictions as a condition of supervision. Constitutional attacks on such provisions are unavailing when the

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[8] A variety of programs usually exist, including: Smart Recovery – online and face to face groups in 300 locations http://www.smartrecovery.org; Agnostic A.A. – meetings in 11 different states; locations at http://www.agnosticaanyc.org; Rational Recovery – a private online 12-step recovery program that charges fees http://www.rational.org.

[9] Amendment I, U.S. Constitution, "congress shall make no law . . . abridging the freedom of speech." As applied to the states through the 14th Amendment. See Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984); Bd. of Directors v. Rotary Club, 481 U.S. 537, 544 (1987).

[10] Oyoghok v. Municipality of Anchorage, 641 P.2d 1267 (Alaska 1982) (prohibition against being in a two block radius); Johnson v. State, 547 So.2d 1048 (Fla. App. 1989) (excluded from one block area where high drug use); State v. Morgan, 389 So.2d 364 (La. 1980) (remain out of the French Quarter); State v. Stanford, 900 P.2d 157 (Hawaii 1995) (prohibition against entering Waikiki area); People v. Pickens, 186 Ill. App. 3d 456 (Ill. App. 1989) contrast with People v. Beach, 195 Cal. Rptr. 381, 385 (1983) (banishing defendant from the community where she lived for 24 years was unconstitutional); State v. Wright, 739 N.E.2d 1172 (Ohio App. 2000) (prohibition of entering any place where alcohol is distributed, served, consumed, given away or sold is too broad because it restricts defendant from grocery stores and the vast majority of all residences).

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

conditions are reasonably related to the purposes of probation, the prevention of crime and protection of the public.[12]

[12] Andrews v. State, 623 S.E.2d 247 (Ga. App. 2005) (restricting drug court participant from associating with inter alia, drug users and dealers); People v. Tungers, 127 Cal. App. 4th 698 (Cal. App. 2005) (prohibition against contact with wife) but see Dawson v. State, 894 P.2d 672 (Alaska App. 1995) (restricting any unsupervised contact with drug using wife was too broad); People v. Forsythe, 43 P.3d 652 (Colo. App. 2001) (prohibition against unsupervised contact with his own children); Jones v. State, 41 P.3d 1247 (Wyo. 2001) (persons of disreputable character); State v. Hearn, 131 Wash. App. 601 (Wash. App. 2/6/06) (prohibition against associating with drug users or dealers constitutional); Birzon v. King, 469 F.2d 1241, 1242 (2nd Cir. 1972); Commonwealth v. LaPointe, 759 N.E.2d 294 (Mass. 2001).

FOURTH AMENDMENT AND RELATED ISSUES

Drug Court participation is often contingent upon a defendant's agreement to execute a "search waiver," by which the participant consents to a physical and property search any time, often without cause, day or night. Under the Fourth Amendment, individuals cannot be arrested nor have their person and property searched without probable cause.

However, searches of probationers, without a warrant are upheld based upon reasonable suspicion.[13] Probable cause is not required because probation is a form of criminal sanction which subjects the probationer to reasonable restraints on liberty and the states' need to control the risk for recidivism that probationers present.[14] The U.S. Supreme Court recently upheld a search solely based upon a parolee's execution of a search waiver.[15] Previously several states have found that a search waiver alone justifies a suspicionless warrantless search – at least as it relates to cases where the offender's status is as a probationer or parolee.[16] The constitutionality of a search solely based upon a search waiver for offenders on bond, or other non-convicted status is in doubt.[17]

This same distinction arises when mandating random drug testing as a condition of probation or parole, contrasted with orders requiring drug testing as a condition of pre-

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[13] Griffin v. Wisconsin, 483 U.S. 868 (1987).

[14] U.S. v. Knights, 534 U.S. 112 (2001).

[15] Samson v. Calif., ____U.S.____, 126 S. Ct. 2193 (2006)

[16] State v. Kouba, 709 N.W. 2d 299 (Minn. App. 2006) (recognizing that a waiver is sufficient in probation case); State ex rel ACC, 44 P.3d 708 (Utah 2002) (recognizing waiver in juvenile case but limited case to the facts); State v. McAuliffe, 125 P.3d 276 (Wyo. 2005) (recognizing complete waiver, but search must be reasonable).

[17] Compare State v. Ullring, 741 A.2d 1065 (Me. 1999) (search waiver as condition of bond constitutional); and In Re York, 9 Cal. 4th 1133 (Calif. 1995) (same) with Terry v. Superior Court, 73 Cal. App. 4th 661 (Cal. App. 1999) (4th Amendment waiver improper condition in diversion case, without statutory authority) and U.S. v. Scott, 424 F.3d 888 (9th Cir. 2005) (search waiver probably improper when person on bond).

trial release.[18] A condition of bond or pre-trial release which requires drug testing implicates the 4th Amendment and must be reasonable, based upon an individualized assessment that a person may use drugs during pre-trial release.[19] The individualized suspicion can be based upon drug convictions or self-reported drug use.[20]

Related to the drug testing issue as a condition of release or sentence is a court order prohibiting the drug court participant from consuming a legal substance – alcohol. Where the defendant has been convicted, the alcohol abstinence condition must be reasonably related to the defendant's reformation and/or protection of the public.[21]

As noted in one case:[22]

> Empirical evidence shows that there is a nexus between drug use and alcohol consumption. It is well documented that the use of alcohol lessens self-control and thus may create a situation where the user has reduced ability to stay away from drugs. (See People v. Smith (1983) 145 Cal.App.3d 1032, 1034 [193 Cal.Rptr. 825], citing Pollack, Drug Use and Narcotic Addiction (1967) U. So. Cal. Inst. Of Psychiatry and L. for the Judiciary, pp. 1-2, 4-5.) Presumably for this very reason, the vast majority of drug treatment programs, including the one Beal participates in as a condition of her probation, require abstinence from alcohol use. (Am. U. Sch. Pub. Affairs, 1997 Drug Court Survey Report: Executive Summary, p. 49.)
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> Based on the relationship between alcohol and drug use, we conclude that substance abuse is reasonably related to the underlying crime and that alcohol use may lead to future criminality where the defendant has a history of substance abuse and is convicted of a drug-related offense.

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[18] U.S. v. Scott, 424 F.3d 888 (9th Cir. 2005) (drawing distinction).

[19] Steiner v. State, 763 N.E. 2d 1024 (Ind. App. 2002); Oliver v. U.S., 682 A.2d 186, 192 (D. 1996); State v. Ullring, 741 A.2d 1045 (Me. 1999).

[20] Berry v. Dist. Of Columbia, 833 F.2d 1031, 1035 (D.C. Cir. 1987).

[21] See for example: State v. Patton, 119 P.3d 250 (Ore. App. 2005); Payne v. State, 615 S.E. 2d 564 (Ga. App. 2005); State v. Williams, 801 N.E. 2d 804 (Mass. App. 2004); Martin v. State, 517 P.2d 1399 (Ala. 1974); Carswell v. State, 721 N.E.2d 1255 (Ind. App. 1999); People v. Balestra, 76 Cal. App. 4th 57 (Cal. App. 1999).

[22] People v. Beal, 60 Cal. App. 4th 84 (Cal. App. 1997).

In the pre-trial release context, alcohol prohibition clauses have been held to be valid as long as reasonably related to assuring defendant's future appearance in court.[23]

[23] Martell v. County Court, 854 P.2d 1327 (Colo. App. 1992) (if a condition of bail is to refrain from the use of alcohol or drugs, supervision may include drug or alcohol testing); State v. Magnuson, 606 N.W. 2d 536 (Wis. 2000).

DUE PROCESS

["Nor] shall any state deprive any person of life, liberty or property without due process of law."[24]

Because drug courts utilize non-confrontational, often streamlined procedures, the danger exists that drug court offenders will not be fully accorded their due process rights. In fact, commentators have cited the non-adversarial nature of drug courts as promoting a tension with participants' due process rights.[25] Despite certain informalities, and cooperation between counsel, Drug Courts must adhere to Key Component #2:

> Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.[26]

Procedural protections are due under the due process clause when the defendant will potentially suffer impairment to a recognized liberty or property right under the 14th Amendment.[27] If due process applies, the question remains what process is due.[28] Due process is flexible and requires the procedural protections that the situation demands.[29] Procedural due process obligations in drug court are usually identified with revocation of probation, termination from drug court and the imposition of sanctions, often involve an individual's liberty rights.[30]

Termination from drug court can involve the enforcement of pre-enrollment agreements by which the participant consents to a court trial based solely upon the police

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24 U.S. Constitution, amendment XIV.

25 See Boldt, Richard, "Rehabilitative Punishment and the Drug Court Movement," 76 Wash. U. Law Quarterly 1205, 1233-1234 (1998). See also In Re Hill, 9 Misc.3d 729 (N.Y. 2005).

26 U.S. Dept. of Justice, Drug Court Program Office, "Drug Courts: The Key Components" (1997).

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

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

29 Id.

30 Both due process and equal protection concerns can arise in cases involving access to justice. Due process is generally concerned with the opportunity to obtain a fair adjudication on the merits while equal protection is designed to insure no differential treatment to two similarly situated classes of offenders. See Evitts v. Lucey, 469 U.S. 387 (1985) (indigents right same as wealthy person's right to receive effective assistance of counsel for first appeal of right).

complaint. If the consent is knowingly, voluntarily and intelligently given, the stipulated fact trial does not violate due process.[31] However, a stipulation to a trial based solely upon the police report does not relieve the prosecution from its obligation to prove the charge beyond a reasonable doubt before the accused can be found guilty.[32] The same standards of a knowing intelligent waiver are applicable to a drug court participant foregoing, as part of a plea agreement, the right to appeal,[33] or the right to contest a search.[34] The obligation of all counsel and judges to educate themselves about drug courts, so as to properly advise clients was addressed by Judge May in Smith v. State:[35]

> Drug courts have been in existence since 1989, originating from the creativity, hard work, and ingenuity of Chief Judge Gerald T. Wetherington and Judge Herbert M. Klein. Since then the concept has spread throughout this country and the world. There are currently drug courts in forty-eight of our fifty states, and in England, Canada, Australia, South America, Bermuda, and the Caribbean. There are currently seventy-four drug courts (thirty-eight adult, twenty-two juvenile, twelve dependency, and two re-entry) in the State of Florida.
>
> It is essential that lawyers educate themselves as to the availability, requirements, and appropriateness of drug court programs. Only then can they effectively advise their clients. It is equally important for the institutions that educate future lawyers, as well as those that educate the other disciplines that play vital roles in the drug court process to incorporate drug courts into their curricula. For lawyers to do otherwise is for them to become legal dinosaurs. To ignore the need to learn about the

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[31] State v. Melick, 129 P.3d 816 (Wash. 2006). (see also cases cited therein); Adams v. Peterson, 968 F.2d 835 (9th Cir. 1992) (although the full Boykin v. Alabama, 395 U.S. 238 (1969) inquiry is not necessary to implement waivers to a stipulated fact trial, a showing of a knowing, voluntary and intelligent waiver must be present); In Re T.M., 765 A.2d 735 (NJ 2001) (same); People v. Anderson, 833 N.E.2d 390 (Ill. App. 2005).

[32] State v. Colquitt, 137 P. 3d 892 (Wash. App. 2006)

[33] People v. Byrnes, 813 N.Y.S. 2d 924 (3rd Dept. 2006); Wall v. State, ____ A.2d ____ (Del. 2005); State v. Bellville, 705 N.W.2d 506 (Iowa App. 2005) (defendant must know he has the right and is surrendering the right to appeal before it can be said that he waived the right to appeal)

[34] Wilkinson v. State, ____S. 2d_____(Ga. App. 12/20/06) (As part of her drug court contract the defendant waived her ability to contest a search and move for recusal of the drug court judge). State v. Jones, 131 Wash. App. 1021 (unpub.) (Wash. App. 2006) (search waiver).

[35] Smith v. State, 840 So.2d 404 (Fla. App. 4th Dist. 2003).

> drug court process is to ignore the evolution of the justice system. The sooner the Bar educates itself, the sooner the issue raised in this case will become extinct.

Terminations from drug court require notice, a hearing and a fair procedure. Many drug court participants are not on formal probation, but are on a diversion, deferred prosecution, deferred judgment or deferred sentencing status. However, the consequences of termination from drug court are comparable to those sustained in a probation revocation. Consistent with several state rulings on this issue, the author concludes that the best practice is to accord drug court participants the same due process rights enjoyed by probationers.[36] In Gagnon v. Scarpelli, the U.S. Supreme Court required a probationer be accorded a preliminary and final revocation hearing.[37] Before the preliminary hearing, the probationer must be notified of the hearing, its purpose and the alleged violation, the limited right to confront and call witnesses, the probationer's right to be present and a written report of the hearing.[38] At the probation revocation hearing, similar elements are required including: (a) written notice of the violation;[39] (b) disclosure of the evidence against the probationer; (c) opportunity to be present and testify; (d) the right to confront and cross-examine adverse witnesses; (e) a neutral magistrate; and, (f) a written finding of the evidence relied upon and the reasons for revocation. [40] Jurisdictions are divided on whether the drug court defendant can waive

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[36] See 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 (Okla. 1999) but see State v. Rogers, ____P. 3d ____ (Ida. App. 2006).

[37] Gagnon v. Scarpelli, 411 U.S. 778, 781-782 (1973).

[38] Id.

[39] Black v. Romano, 471 U.S. 606, 612 (1983).

[40] Gagnon v. Scarpelli, supra, 411 U.S. at 781-2.

some or all of these rights, in advance, by signing a contract.[41] In Staley v. State, a panel of the Florida Court of Appeals held that a drug court participant, upon entry to the drug court, could contractually waive the substantive due process rights attendant to a revocation hearing.[42] In State v. Rogers,[43] the Idaho Court of Appeals held that the terms of the drug court contract governed the process by which termination would occur. Holding that the full panoply of due process rights present in a probation revocation hearing were not required in a drug court revocation proceeding, if the truncation was voluntarily agreed to by the defendant, the Idaho appellate court recommended the trial court nonetheless grant the drug court participant the same rights accorded a defendant facing revocation of probation.[44]

Conspicuously absent from due process requirements is the right to counsel at probation preliminary and revocation hearings. Although the federal constitution does not mandate the right to counsel at probation preliminary and revocation hearings,[45] many states accord probationers facing revocation such a right.[46] The author endorses the right to counsel for drug court participants facing revocation or program termination,

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[41] Compare Staley v. State, 851 So.2d 805 (Fla. App. 2003) with State v. Rogers, ____P. 3d ____ (Ida. App. 2006).

[42] Staley v. State, 851 So.2d 805 (Fla. App. 2003)

[43] State v. Rogers, ____P. 3d ____ (Ida. App. 2006).

[44] Id., , ____P. 3d ____ at ____ (Ida. App. 2006). The Appellate court noted that the drug court judge did provide the drug court participant sufficient constitutional protections at the hearing. See id. , footnote 15.

[45] See Gagnon v. Scarpelli, supra, 411 U.S. at 790 (1973). However, where the probation revocation hearing is combined with an original sentencing, the defendant is entitled to counsel. Mempa v. Rhay, 389 U.S. 128 (1967). See also Dunson v. Kentucky, 57 S.W.3d 847 (Ky. App. 2001) (defendant contends that he had right to counsel at drug court termination proceeding – record reflects he had counsel).

[46] See Commonwealth v. Wilcox, 466 Mass. 61 (2006); State v. Kouba, 709 N.W.2d 299 (Minn. App. 2006); State v. Matey, 153 N.H. 263, ____ A.2d ____ (N.H. 2/15/06); State v. Yarborough, 612 S.E.2d 447 (N.C. App. 2005); Dunson v. Kentucky, 57 S.W.3d 847 (Ky. App. 2001).

where the underlying crime is a felony or where the potential penalty may include a jail sentence.[47]

At the probation revocation hearing, the full constitutional procedural protections do not apply.[48] There is no jury trial right[49] and double jeopardy does not apply[50] to a revocation hearing. In certain circumstances, the probationer cannot attack the underlying conviction or guilty plea.[51] In most jurisdictions, the 4th amendment does not apply to probation revocation proceedings[52] and the 5th amendment[53] and Miranda[54] are not fully applicable to probation revocation proceedings. Additionally, revocation allegations usually need not be proven beyond a reasonable doubt.[55] Finally, the rules of evidence do not apply at a probation hearing and hearsay is admissible.[56]

Despite the lessened procedural requirements for termination from drug court and/or probation revocation hearings, due process requires that these proceedings be conducted according to the Fourteenth Amendment's concept of fundamental fairness.[57] For example, in a recent opinion, a drug court judge adopted a five part test to determine

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[47] See Argersinger v. Hamlin, 407 U.S. 654 (1974) (for any misdemeanor or petty offense trial that results in a jail sentence the defendant must be represented by counsel); Scott v. Ill., 440 U.S. 367 (1979) (defendant not entitled to counsel at trial, where offense defendant is charged with authorizes jail, but incarceration never imposed); Alabama v. Shelton, 535 U.S. 654 (2002) (where defendant was not represented by counsel at trial, was convicted and received probation and suspended jail sentence, the jail sentence could never be imposed because defendant was not represented by counsel at trial).

[48] Minn. V. Murphy, 465 U.S. 420, 435 (1984).

[49] Morgan v. Wainwright, 676 F.2d 476 (11th Cir. 1982).

[50] Penn. V. Goldhammer, 474 U.S. 28 (1985).

[51] U.S. v. Steiner Warren, 335 F.3d 76 (2nd Cir. 2003).

[52] Compare State v. Foster, 782 A.2d 98 (Conn. 2001); U.S. v. Gravina, 906 F. Supp. 50, 53-54 (D. Mass. 1995) with State v. Scarlett, 800 So.2d 220, 222 (Fla. 2001).

[53] Minn. v. Murphy, 465 U.S. 420, 426-436 (1985).

[54] U.S. v. Mackinzie, 601 F.2d 221 (5th Cir. 1979).

[55] See for example: State v. Sylvia, 871 A.2d 954 (R.I. 2005); Wiede v. State, 157 S.W.3d 87 (Tex. Crim. App. 2005). Cf. People v. Harrison, 771 P.2d 23 (Colo. App. 1989) (revocation burden of proof is preponderance of the evidence unless allegation is a new crime and defendant has not been convicted of, in which case proof is beyond a reasonable doubt).

[56] U.S. v. Pierre, 47 F.3d 241 (7th Cir. 1995); State v. Johnson, 679 N.W.2d 169, 174 (Minn. App. 2004) (collecting cases).

[57] Black v. Romano, supra, 471 U.S. at 610-11; Bearden v. Ga., 461 U.S. 660 (1983) (fundamental fairness prohibited revoking probation for failure to pay restitution when defendant could not pay).

whether the evidence supporting termination from a treatment program was sufficiently reliable to meet due process requirements.[58] The factors the Court considered included:

1. Whether a hearsay report by the treatment provider was corroborated.
2. The reliability of the source of the information and, if by unnamed informants, the reason for identity non-disclosure.
3. The provision of a hearing with opportunity to fully cross-examine adverse witness.
4. Whether a preponderance of the evidence supported termination.
5. The disparity of the sentence upon completion and non-completion.

Issues of reliability are not just centered on the admission of hearsay evidence at termination/revocation proceedings. Frequently, termination/revocation is based upon the results of drug testing.

Drug Testing and Due Process

The reliability of drug test results under the Federal Rules of Evidence (FRE) is dependent upon the witness being qualified to opine about the matter at issue and whether the scientific testing meets the standards of Daubert v. Merrell Dow Pharmaceuticals.[59] While some states have adopted Daubert, others rely upon Daubert's predecessor Frye v. United States,[60] some states use an analysis based upon FRE 702[61] and yet others have their own formulation.[62]

The purpose of this section is not to be an exhaustive dissertation on the reliability of drug testing techniques, but rather a highlighting of some of the reliability issues and

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[58] People v. Joseph, 785 N.Y.S.2d 292 (Supreme Ct. N.Y. 2004) adopting Torres v. Berbary, 340 F.3d 63 (2nd Cir. 2003).

[59] Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 593-4 (1993) (The multi-factor analysis includes: whether the technique can and has been tested; whether the technique has been subject to peer review and testing; the techniques known or potential rate of error; whether there are standards controlling the technique's operation and whether the technique is generally accepted in the scientific field from which it arises).

[60] Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923).

[61] People v. Shreck, 22 P.3d 68 (Colo. 2001).

[62] Mitchell v. Mt. Hood Meadows, 99 P.3d 748 (Ore. App. 2004) (combining FRE 702; FRE 403; Daubert and other factors in determining the admissibility of urine testing results for marijuana and degree of impairment).

their potential impact on due process. The most common modalities of drug detection in drug court include testing samples from urine, hair and sweat.[63]

Urine drug detecting testing is usually done by instrumented testing or non-laboratory, on-site testing or a combination of both. One common methodology for urine testing is the enzyme multiple immunoassay technique (EMIT). The EMIT test does not measure the amount of drugs in the urine but instead measures the reaction of an enzyme to a particular drug.[64] EMIT results have been found to be reliable when confirmed with a second EMIT test.[65] Contentions that the EMIT results must be confirmed with an independent method of drug testing before the results meet due process reliability standards have been rejected.[66] Other urine testing such as the fluorescein polarization immunoassay test (FPIA) and thin layer chromatography have been found to be reliable, at least where the proponent has established the necessary foundation.[67]

To conserve costs and obtain rapid results, many drug courts rely upon non-instrumented on-site test cups or dip sticks. The reliability of such testing instruments has been the source of considerable debate,[68] particularly in the area of methamphetamine.[69] If on-site, non-instrumented testing is used and the drug court participant denies such use, the author recommends the urine specimen should be retested

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[63] Additional specimens collected for testing include blood and saliva. Eye scanning devices are occasionally used to determine impairment and recent use.

[64] See Matter of Lahey v. Kelly, 518 N.E.2d 924 (N.Y. 1987).

[65] Spence v. Furrier, 807 F.2d 753, 756 (8th Cir. 1986); People v. Whalen, 766 N.Y.S.2d 458 (2003); Jones v. State, 548 A.2d 35 (D.C. 1998) (citing 6 jurisdictions holding EMIT to be reliable).

[66] Louis v. Dept. of Corr., 437 F.3d 697 (8th Cir. 2006); Lahey v. Kelly, 518 N.E.2d 135 (1987); Peranzo v. Coughlin, 608 F. Supp. 1504 (S.D.N.Y. 1985); affirmed 850 F.2d 125, 126 (2nd Cir. 1988); but see State v. Kelly, 770 A.2d 908 (Conn. 2001) (blood stain analysis by EMIT should have been confirmed by gas chromatography/mass spectroscopy).

[67] Hernandez v. State, 116 S.W.2d 26 (Tex. Crim. App. 2003) (6 cases cited by Judge Keller, concurring upholding FPIA); People v. Toran, 580 N.E.2d 595, 597 (Ill. App. 1991) (thin layer chromatography).

[68] See for example: Grinstead v. State, 605 S.E.2d 417 (Ga. App. 2004); Anderson v. McKune, 937 P.2d 16, 18 (Kan. App. 1997); Black v. State, 794 N.E.2d 561 (Ind. App. 2003).

[69] Willis v. Bio Medical Laboratories, 61 F.3d 313 (5th Cir. 1995) (on-site test was false positive for methamphetamine due to cold medicine consumption).

by instrumented testing, preferably by gas chromatography/mass spectrometry (GC/MS).[70] If the retest returns another positive result, the drug court participant may be assessed the retest cost[71] and sanctioned for lack of candor.[72]

Some drug courts are employing the sweat patch to determine drug usage. The patch is composed of an absorbent pad with an outer membrane which is placed on the wearer's back or forearm. The patch is designed to collect the wearer's sweat and any drug or drug metabolite over the period that patch is attached – approximately one week.[73] Although generally held to be reliable, there is evidence that the patch can test positive from contamination or exposure to drugs not ingested by the wearer.[74]

Hair is also analyzed to determine drug usage. The obvious problem with hair testing for drug usage is the high potential for environmental contamination, and the reliability of the methodology used to determine the presence of drugs and/or drug metabolites in the hair specimen.[75]

As a preface to establishing the general reliability of the testing methodology to meet due process guarantees, the proponent must connect the specimen collected and tested to the person against whom it is offered.[76] Although hearsay is admissible at the revocation/termination/disciplinary hearing, due process requires that the proffered

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[70] GC/MS is almost always reliable assuming proper storage, handling, measurement and collection techniques. Treasury Union v. Von Raub, 489 U.S. 656 (1989).

[71] See for example Louis v. Dept. of Corr., 437 F.3d 697 (8th Cir. 2006).

[72] See for example U.S. v. Gatewood, 370 F.3d 1055 (10th Cir. 2004) (use of drugs on pretrial release relevant to defendant's acceptance of responsibility and lying about use of drugs is grounds for denying downward departure from presumptive sentence).

[73] See U.S. v. Bentham, 83 Cr. 328 (S.D.N.Y. 2/15/06).

[74] See detailed discussions in U.S. v. Alfonzo, 284 F.Supp.2d 193 (Mass. 2003); U.S. v. Snyder, 187 F.Supp.2d 52 (N.D.N.Y. 2002); U.S. v. Stumpf, 54 F.Supp.2d 972 (Nev. 1999); U.S. v. Gatewood, 370 F.3d 1055 (10th Cir. 2004).

[75] See Woods v. Wills, ____ F.Supp.2d ____, No. 1:03-CV105 (E.D. Mo. 2005); In Re S.W. 168 S.W. 3d 878 (Tex. App. 2005).

[76] Wykoff v. Resig, 613 F.Supp. 1504 (N.D. Ind. 1985) affirmed in unpub. opin. 819 F.2d 1143 (7th Cir. 1987); Thomas v. McBride, 3 F.Supp.2d 989 (N.D. Ind. 1998).

hearsay evidence have sufficient indicia of reliability before it can be relied upon to discipline.[77]

Judicial Impartiality and Due Process[78]

Due process requires that a judge possess neither actual nor apparent bias[79] in favor of or against a party. The standard for determining the appearance of bias or partiality is an objective one.[80] Usually the basis of recusal is due to partiality or bias acquired outside the context of the proceedings – or from an "extrajudicial source."[81] Additionally, a judge should recuse where the Court has personal knowledge of disputed facts.[82]

Judges sitting in drug court often have substantial information about drug court participants – some of which was gained through on the record colloquies and pleadings and other information from informal staffings with defense counsel, the prosecutor, treatment provider and probation, etc. The Oklahoma Supreme Court[83] recognized the potential for accusations of bias against a drug court judge for information obtained in the

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[77] Baxter v. Nebraska Dept. of Corr., 663 N.W.2d 136 (Neb. App. 2003); Noreault v. Coombe, 660 N.Y.S.2d 71 (N.Y. 1997). See also footnote 53
, supra.

[78] Judicial impartiality has not only due process ramifications but also potential disciplinary consequences for the Judge.

[79] In Re Murchison, 349 U.S. 133, 136-139 (1955) (judge recused when he could not detach himself from personal knowledge of secret grand jury proceedings – no ability to cross examine).

[80] 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).

[81] Liteky v. U.S., 510 U.S. 540, 555 (1994); see for example U.S. v. Microsoft, 253 F.3d 34, 117 (D.C. Cir. 2001) (judge demonstrated bias by his comments to press while case was pending); Youn v. Track, 324 F.3d 409, 423 (6th Cir. 2003) (court's comments and rulings do not show bias when they were based upon evidence acquired during proceedings).

[82] Compare U.S. v. Bailey, 175 F.3d 966, 969 (11th Cir. 1999) (where judge received facts from judicial source, recusal not required) with Edgar v. K.L., 93 F.3d 256, 259 (7th Cir. 1996) (judge who received off the record briefings had extra judicial personal knowledge of facts).

[83] Alexander v. State, 48 P.3d 110 (Okla. 2002) but see Wilkinson v. State, ____S. 2d_____(Ga. App. 12/20/06) (As part of her drug court contract the defendant waived her ability to move for recusal of the drug court judge).

Court's supervisory role and recommended an alternate judge handle termination proceedings:

> However, we recognize the potential for bias to exist in a situation where a judge, assigned as part of the Drug Court team, is then presented with an application to revoke a participant from Drug Court. Requiring the District Court to act as Drug Court team member, evaluator, monitor and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a Drug Court participant's program.
>
> Therefore, in the future, if an application to terminate a Drug Court participant is filed, and the defendant objects to the Drug Court team judge hearing the matter by filing a Motion to Recuse, the defendant's application for recusal should be granted and the motion to remove the defendant from the Drug Court program should be assigned to another judge for resolution.

The author recommends that the Drug Court judge not be the same judge as the judge conducting termination or probation revocation hearings, unless the participant and defense counsel specifically consent in writing to the judge hearing such matters.[84]

Drug Court Sanctions And Due Process

Closely related to the issue of terminations/revocation is the use of jail as a sanction for program non-compliance. Does due process mandate all the procedural requirements contained in a revocation/termination hearing, even where the defendant has consented the imposition of such sanctions as a condition to drug court participation? Undeniably, a person facing a probation revocation or drug court termination proceeding

[84] If continuing on the case would create an appearance of impropriety, such non-recusal would implicate Canon 2 of the Canons of Judicial Conduct. ABA Model Code of Judicial Conduct, (1990). Similarly, if the judge has personal knowledge of the facts, the Canons of judicial Conduct may be implicated. See Inquiry of Baker, 74 P.3d 1077 (Or. 2003)(judge censured for failing to disqualify herself from probation revocation hearing in which the events giving rise to the proceeding occurred at a restaurant in front of judge); Lozano v. State, 751 P.2d 1326 (Wyo. 1988)(the mere fact that probation revocation judge witnessed Defendant in bar drinking in violation of her probation was not error, where Defendant freely admitted she was drinking in violation of probation).

is constitutionally entitled to an array of due process rights including a hearing.[85] Similarly, a prison inmate must be accorded certain due process rights, including a hearing, if the disciplinary proceeding could jeopardize good or earned time credits.[86] It seems incongruous indeed, for a drug court participant to not be entitled to a hearing where jail is a possible sanction[87] but a prisoner or parolee would be so entitled. At least one jurisdiction has held that the drug court participant can, in advance, waive the right to be accorded the due process rights associated with a revocation hearing.[88] It is the position of the author that the best practice would dictate that, when the drug court participant contends that (s)he did not engage in the conduct that is subject to a jail sanction, the Court should give the participant a hearing with notice of the allegations, the right to be represented by counsel, the right to testify, the right to cross-examine witnesses and call his or her own witnesses. [89] The author believes that the hearing should be expedited (within 2 days), consistent with the participant's need to prepare for the hearing.[90]

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[85] See footnotes 33 and 34, supra.

[86] Wolff v. McDonnell, 418 U.S. 539, 557 (1974) overruled on other grounds Sandlin v. Conner, 515 U.S. 472 (1995).

[87] There is some debate, at least in one state, as to whether jail can be a sanction in a pre-plea "opt in" drug court program. Compare Diaz v. State, 884 So.2d 299 (Fla. App. 2004) (jail cannot be used as a sanction in pre plea, contractual drug court program, but left open issue of use of contempt power) and Mullin v. Jenne, 940 So.2d 543 (Fla. App. 2005) (jail can be used as a sanction when defendant wants to continue to opt in to the program).

[88] See Staley v. State, 851 So.2d 805 (Fla. App. 2003) (waiver of hearing rights in a drug court contract impugns the integrity of the justice system and undermines public confidence in the judiciary). See also T. N. v. Portesy, 932 So. 2d 267 (Fla. App. 2nd Dist. 2005) (Court cannot impose sanctions beyond those authorized by statute –even if agreed to by juvenile drug court participant upon entry into program)

[89] In Re Miguel, 63 P.3d 1065 (Ariz. App. 2003) (Arizona Appellate Court appeared to endorse a similar procedure when the juvenile defendants raised the due process issue and of the possibility of jail or detention sanctions at a review hearing.

[90] Resort to a revocation/termination petition with immediate remand may be appropriate, when the prosecutor feels that public safety may be jeopardized, if the drug court participant does not accept responsibility for the alleged non-compliant behavior.

EQUAL PROTECTION

["N]or [shall any state] deny any person within its jurisdiction the equal protection of the laws."[91]

Constitutional attacks on drug courts based upon equal protection grounds are usually based upon admittance or refusal to admit a defendant into the drug court program.

The Fourteenth Amendment equal protection clause guarantees that persons similarly situated with respect to a legitimate purpose of the law will receive like treatment. Three tests are used to determine whether a classification violates equal protection. When the legislation or governmental act involves a fundamental right or creates a suspect class, the strict scrutiny test is used.[92] An intermediate level of scrutiny is used when the classification impacts a liberty right and a semi-suspect class exists.[93] Under the third test, the classification must simply have a rational relationship to a legitimate governmental objective.[94]

The admission or exclusion of a defendant from a drug court program is analyzed under the rational basis equal protection test.[95] In State v. Harner,[96] the defendant complained that the absence of a drug court, where he was charged, violated his equal protection rights when such courts were available in adjacent counties. The Washington Supreme Court held that because each county needed to tailor its programs to meet fiscal

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[91] U.S. Constitution, Amendment XIV.

[92] See Adarand Constructors v. Pena, 515 U.S. 500 (1996); Johnson v. California, ____ U.S. ____, 125 S. Ct. 1141, 1152 (2005) (the strict scrutiny test requires that the classification must serve a compelling state interest and be narrowly tailored to meet that interest).

[93] Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

[94] McGowan v. Maryland, 366 U.S. 420, 425-426 (1961); Estelle v. Dorough, 420 U.S. 534 (1975).

[95] Participation in a drug court is not a fundamental right and drug offenders are not a part of any suspect or semi-suspect class. See Lomont v. State, 852 N.E. 2d 1002 (Ind. App. 8/22/06)

[96] State v. Harner, 103 P.3d 738 (Wash. 2005); Lomont v. State, 852 N.E. 2d 1002 (Ind. App. 8/22/06)

resources and community obligations, the decision not to fund a drug court was rationally related to a legitimate governmental purpose.[97]

Defendants have similarly argued that when a drug court is available in the local jurisdiction, it is a denial of equal protection to not make it available to all defendants. Appellate decisions have rejected such assertions because there is not right to enter drug court.[98] Similarly, constitutional attacks based upon a state's Privileges and Immunities clause have been rejected.[99]

Drug court participants have also averred that placing them in a drug court program constitutes a violation of equal protection. Applying the rational basis test, the New Mexico Court of Appeals held that juveniles could not reject the drug court term of probation because of strong rehabilitation goals in juvenile proceedings and the state's role of acting as parens patriae in the best interests of the child.[100]

As a related issue, courts have addressed whether illegal alien status is a proper consideration in determining eligibility for drug court status. Although not reaching the equal protection issue, the California Appellate Courts have held illegal status is a proper consideration in determining eligibility for drug court and probation.[101]

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[97] Id.; see also State v. Little, 66 P.3d 1099 (Wash. App. 2003).

[98] Jim v. State, 911 So.2d 658 (Miss. App. 2005); C.D.C. v. State, 821 So.2d 1021, 1025 (Ala. App. 2001) (analyzing issue under due process clause, with same result).

[99] Lomont v. State, 852 N.E. 2d 1002 (Ind. App. 8/22/06) (the lack of a drug diversion program in the relevant county does not treat the defendant unfairly or unequally, as compared to other defendants, because all defendants in that county do not have access to a drug diversion program)

[100] In Re Miguel, 63 P.3d 1065, 1074 (Ariz. App. 2003).

[101] People v. Cisneros, 84 Cal. App. 4th 352 (2000) (illegal alien status is not automatic disqualification for drug court); People v. Espinoza, 107 Cal. App. 4th 1069 (2003) (illegal alien status proper consideration for denial of Prop. 36 referral to treatment); see generally Yemson v. U.S., 764 A.2d 816, 819 (D.C. App. 2001) (probation).

CONCLUSION

Drug court legal obligations are dictated by state statutory and constitutional requirements and the minimum mandates of the United States Constitution. In some circumstances, the author's proffered legal standards exceed those required by the U.S. Supreme Court and state law. In particular, the author believes the following practices constitute the best practices in the drug court field:

(1) Determine the availability of non-deity based 12 step alternatives to AA/NA in the community and encouraging their development, if not available.

(2) Ensure that drug court participants are fully informed of the consequences of drug court enrollment, and that the surrender of any rights by the participant is done knowingly, voluntarily and intelligently.

(3) Provide drug court participants comprehensive due process rights at probation revocation hearings, drug court termination proceedings and sanction proceedings where jail is a potential sanction.

(4) When contested, sanctioning hearings should be expedited, of course, tempered by giving counsel and the drug court participant sufficient time to prepare.

(5) Require re-testing, by instrumented confirmation of any on-site, non-instrumented positive drug test, unless the drug court participant acknowledges use.

Adherence to constitutional and statutory requirements, as may be supplemented by the author's recommended enhancements, when coupled with effective therapeutic

drug court practices, will ensure the drug court participant has the best opportunity to obtain sobriety.