



CONSTITUTIONAL AND LEGAL ETHICS

Presented by:

Honorable Peggy Davis Ret.

Disclosure

- This project was supported by Grant No. 2016-DC-BX-K007 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office.
- Points of views or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

SCOPE OF PRESENTATION



CONFIDENTIALITY



CONSTITUTIONAL



ETHICAL

CONFIDENTIALITY

- Title 42 pt2:
 - Protects against stigma of SUD treatment
 - Protects patient identifying information: referral , diagnosis, treatment information
 - Protects against redisclosure
 - Applied broadly to anyone or agency that receives federal funding; directly or indirectly



CONFIDENTIALITY

- HIPAA- electronically transmitted records
- Does not apply to legal system personnel
- But, applies to drug court team members
- Protects against redisclosure
- Cannot condition treatment upon signing the release
- Can be withdrawn
- But can condition participation in the drug court upon signing the release
- Must have a court order to release information if subpoenaed

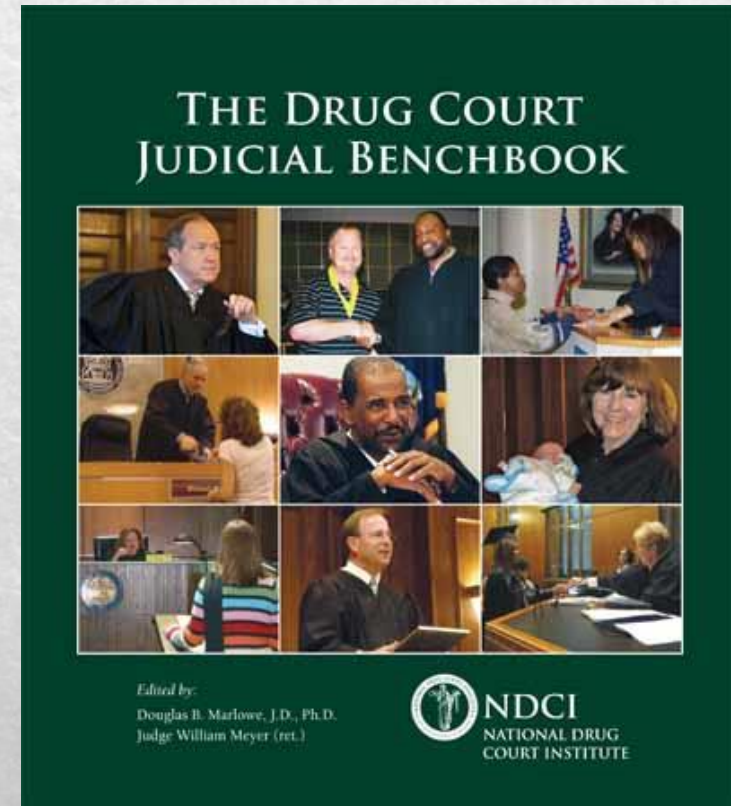


CONFIDENTIALITY— TITLE 42 PT. 2 HIPAA - DISCLOSURE

Sample Forms

Sample Consent Form

Sample Disclosure Court Order



CONFIDENTIALITY AND OPEN COURTROOM

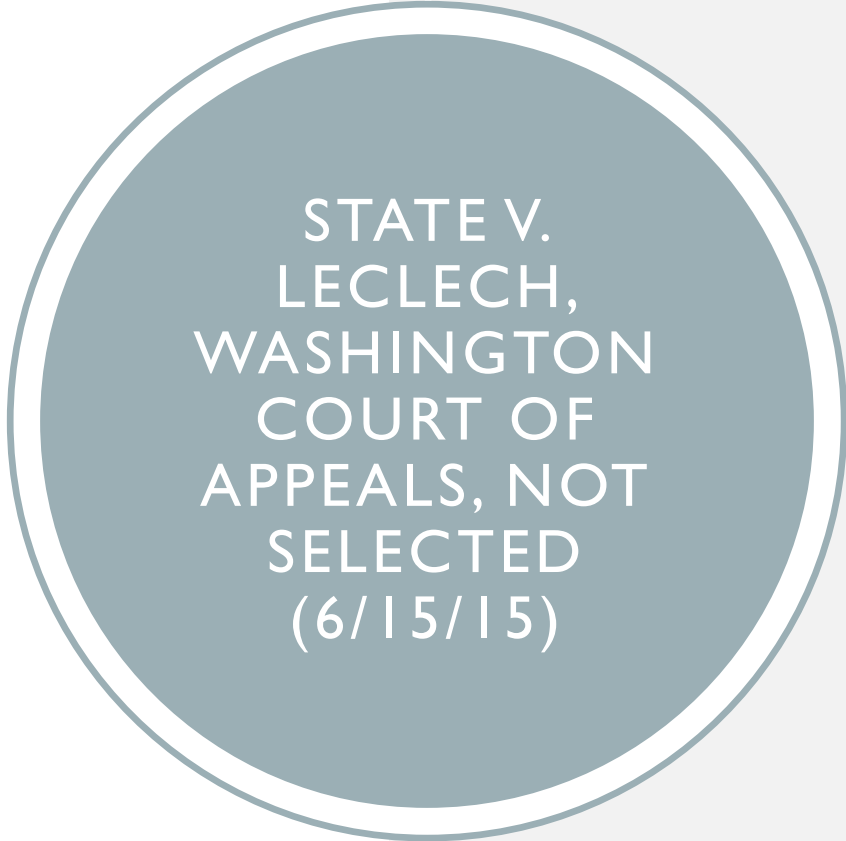
- The provisions of 42 CFR 2.35 and the need for open courtrooms required denial of motion to close proceedings.
Florida v. Noelle Bush, Florida Circuit Court (Oct. 2002)



OPEN PUBLIC COURTROOM DOES NOT EQUAL OPEN STAFFING

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


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



STATE V.
LECLECH,
WASHINGTON
COURT OF
APPEALS, NOT
SELECTED
(6/15/15)

The background of the slide is a scenic photograph of a sunset or sunrise over a body of water. The sky is filled with soft, pastel colors of orange, pink, and purple. In the foreground, several large, white icebergs are scattered across the water, their surfaces reflecting the ambient light. The overall mood is serene and contemplative.

CONSTITUTIONAL ISSUES



FIRST
AMENDMENT
ASSOCIATION
RESTRICTIONS

Reasonable when narrowly drawn:

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

See *People v. Rizzo*, 362 Ill.App. 3d 444 (2005); ***State v. Morgan***, 389 So. 2d 364, 364 (La. 1980) (prohibiting entrance into the French Quarter)



ASSOCIATION
RESTRICTIONS

Upheld when:

1. It is related to the crime for which the offender was convicted,
2. Is intended to prevent future criminal conduct, or
3. Bears a reasonable relationship to an offender's rehabilitation.

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

ASSOCIATION RESTRICTIONS

- Watch who you hang out with
- Not necessarily know that they are drug users or felons, look at what associates are doing and where they are
- *Jones v. State*, 41 P.3d 1247 (Wyo. 2001) (persons of disreputable character); *State v. Hearn*, 128 P.3d 139 (Wash.App. 2/6/06) (prohibition against associating with drug users or dealers constitutional); *Andrews v. State*, 623 S.E.2d 247, 247 (Ga. Ct.App. 2005) (restricting drug court participant from associating with drug users and dealers) *Malone v. State*, 2012 Ark.App. 280 (same)

FIRST AMENDMENT TWELVE STEPS

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

FIRST AMENDMENT TWELVE STEPS

Kerr v. Ferry, 95 F.3d 472, 479-80 (7th Cir. 1996) (prison violated Establishment Clause by requiring attendance at Narcotics Anonymous meetings which used “God” in its treatment approach);

Griffin v. Coughlin, 88 N.Y. 2d 674 (1996) cert. denied 519 U.S. 1054 (1997) (conditioning desirable privilege – family visitation – on prisoner’s participation in program that incorporated Alcoholics Anonymous doctrine was unconstitutional as violation of the Establishment Clause);

Inouye v. Kemna, 504 F.3d 705 (9th Cir. 9-7-2007, amended on 10/3/07)(Parole officer lost qualified immunity by forcing AA on Buddhist)

FIRST AMENDMENT TWELVE STEPS

- *Hanas v. Inter City Christian Outreach*, 542 F. Supp. 2d 683 (E.D. Mich. 2/29/08) (Drug Court program manager and drug court consultant held liable for actions related to referral to faith based program, where they knew of participant's objections while in the program and when the program denied the participant the opportunity to practice his chosen faith –Catholicism)).


- **LifeRing Recovery**
<http://www.unhooked.com>
- **Rational Recovery**
<http://www.rational.org>
- **Secular Organizations for Sobriety (SOS)**
<http://www.secularhumanism.org/sos>
- *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)



NOT ALL IS
LOST

FOURTH AMENDMENT SEARCH WAIVER

- In parole case, mandatory search waiver constitutional and totally suspicionless search is upheld.
- Like *Knights*, but goes further because does not make a finding of reasonableness, but notes cannot be harassment
- *Samson v. California*, 547 U.S. 843, 846; 126 S. CT. 2193 (2006)



FOURTH
AMENDMENT
SEARCH
WAIVERS
PRE-
SENTENCE

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

FIFTH AND
FOURTEENTH
AMENDMENT
DUE PROCESS

Procedural protections are due under the due process clause when the defendant will **potentially suffer** a loss to a **recognized liberty or property right** under the 14th Amendment.

If due process applies, the question remains what process is due.

Fuentes v. Shevin, 407 U.S. 67 (1972), *Morrissey v. Brewer*, 408 U.S. 471 (1972).

**DUE PROCESS-
PROBATION
REVOCATION**

Written Notice

Right to Appear

Cross-Exam and call witnesses

Independent magistrate

Written findings-reasons

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

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

- The drug-court program is a form of conditional liberty like supervision, probation, or parole. Each program requires the participant to comply with certain conditions or face the loss of the privilege. Revocation of that privilege may not be accomplished without inquiry.
- Society also had an interest in seeing defendant, who admittedly needed the drug-treatment program, successfully complete the program with the hope of restoring him to a drug-free lifestyle within the law. Like defendant, society had an interest in not having him dismissed from the program based on erroneous information.
- Even though defendant did not have the right to participate in the drug-court program, - due process should circumscribe summary dismissal from that program. *People v. Anderson*, 833 N.E.2d 390 (Ill.App. 2005).



TERMINATION

WEIGHT OF AUTHORITY

- **Harris v. Commonwealth, 689 S.E.2d 713 (Va. 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, 942 (Ind. Ct.App. 2010)** In termination from drug court, due process rights include: written notice of the claimed violations, disclosure of the evidence against him, an opportunity to be heard and present evidence, the right to confront and cross-examine witnesses, and a neutral and detached hearing body.

MENTAL HEALTH COURTS

- We find that this due process guarantee is also applicable to mental health court termination proceedings. Therefore, a mental health court participant must be sufficiently apprised as to the evidence and the grounds upon which his or her participation in the mental health court is terminated. *TATE v. STATE*, 2013 OK CR 18, 313 P.3d 274 (2013)

SANCTIONS AND HEARING

- **Hearing required:** *Brookman v. State*, Md. Court of Special Appeals (2017).
 - Court assumed a violation
 - Did not allow participant time to prepare
 - Predetermined schedule of program violations
- Drug court program participants are entitled to the **same due process protections as persons facing termination of parole or probation.** *State v. Shambley*, 281 Neb. 317 (2011)

WAIVER OF HEARING

- Program manual: “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 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.**
- *State v. LaPlaca*, 27 A.3d 719 Supreme Court of New Hampshire, (N. H. 2011)

DOUBLE JEOPARDY

- Imposition of sanction for drinking and driving in DUI Court did not bar subsequent prosecution for DUI offense on double jeopardy grounds. *DiMeglio v. State*, 29 A.3d 663 (Md. App. 2011)
- Imposition of drug court sanctions did not bar a subsequent prosecution and conviction for the identical conduct upon which the sanctions were based. *In re O.F. 773* N.W.2d 206 (N.D. 2009)

MEDICATION
ASSISTED
TREATMENT
(MAT)



This Photo by Unknown Author is licensed under [CC BY-NC](#)

WHEN, IF EVER, CAN THE DRUG COURT SAY NO & STILL KEEP FEDERAL FUNDING?

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

THE BOTTOM LINE

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

WHAT ABOUT MANDATING CESSATION AS A CONDITION OF DRUG COURT GRADUATION?

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

CHALLENGING BLANKET MAT PROHIBITIONS

- Americans with Disabilities Act (ADA)
Prohibits discrimination by state and local governments
- Rehabilitation Act of 1973 (RA)
Prohibits discrimination by federally operated or assisted programs
- Due Process protections of 14th Amendment
- 8th Amendment-cruel and unusual punishment

RECUSAL ISSUES

Appearance of Partiality

Personal Knowledge

Canons Of Judicial Conduct

Due Process

DUE PROCESS & JUDICIAL IMPARTIALITY

- Test:

Would the facts, as asserted, lead an objective reasonable observer to question the judge's impartiality?

U.S. v. Ayala, 289 F.3d 16, 27 (1st Cir. 2002)



KNOWLEDGE OF THE FACTS

- The statements the district court judge made were facts the judge learned while presiding over the case. Dailey had four prior DUI convictions, he requested specific judges not preside over the case because of his past relationship with the judges, and he had failed drug court. It is in the nature of the judicial process for a judge to assess the defendant's conduct and form an opinion on the merits of the case.
- *State v. Dailey*, 2006 ND 184, 721 N.W.2d 29 (August 24, 2006)
- See *State v. Crescenzo*, 114 R.I. 242, 332 A.2d 421, 432 (1975).

PERSONAL KNOWLEDGE OF FACTS

- A judge should recuse where the Court has personal knowledge of disputed facts.
- The basis of recusal is due to partiality or bias acquired outside the context of the proceedings – or from an “extrajudicial source”.
Liteky v. U.S., 510 U.S. 540, 555 (1994);
- 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).

CODE OF JUDICIAL CONDUCT

3. E. REMITTAL OF DISQUALIFICATION.

- A judge disqualified by the terms of Section 3D may disclose on the record the basis of the judge's disqualification, and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification **other than personal bias or prejudice concerning a party**, the parties and lawyers, Without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be incorporated in the record of the proceeding.

RECUSAL AT TERMINATION HEARING

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

RECUSAL CASE TREND

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

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

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

RECUSAL CASE TREND BUT SEE:

Minnesota v. Cleary, 882 N.W.2d 899 (Court of Appeals of Minnesota July 5, 2016.)
(When the sole basis for revoking probation is a probationer's termination from drug court and the drug court judge participated in the drug court team's decision to terminate the probationer from drug court, a probationer is entitled to have a judge other than the drug court judge preside over the probation revocation hearing, because of the appearance of lack of impartiality)

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



ETHICS

FreeFoto.com

MISCONDUCT IN OFFICE

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

Mississippi Commission on Judicial Performance v. Thompson, 169 So. 3d 857 (Miss Supreme Court 5/21/2015)

TIMELINESS OF TERMINATION/SANCTION HEARING

Magistrate Judge recommends class certification on 42 USC §1983 damages and injunctive relief suit against Drug Court Judge and team for incarcerating participants for lengthy periods of time, while awaiting placement in drug treatment facilities.

Plaintiffs allege that the decision to hold them in jail pending placement was made without counsel, hearing, consideration of bond, or other rights of due process. Later District Court denies certification b/c drug court discontinued and judge resigned.

Heffner v. Jacoby (S.D. Ind. 8/28/2015)



These men ask for just the same thing, fairness,
and fairness only. This, so far as in my power, they,
and all others, shall have.

(Abraham Lincoln)