Bureau of Justice Assistance (BJA) Drug Court Clearinghouse
Justice Programs Office, School of Public Affairs
American University

Excerpts from Selected Opinions of Federal, State and Tribal Courts Relevant to Drug court Programs

June 2015

DECISION SUMMARIES BY ISSUE AND JURISDICTION

VOLUME ONE: DECISION SUMMARIES BY ISSUE

[Preliminary/Partial Update]

Compiled by:

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This report was prepared by the Bureau of Justice Assistance (BJA) Drug Court Clearinghouse and Technical Assistance Project at American University, Washington D.C. These projects are supported by Grant Nos. 95-DC-MX-KOO2, 98-NU-VX-K018, 2002-DC-BX-K013, 2005-DC-BX-K047, 2007-DC-BX K003, 2009-DC-BX-K0022, and 2012-DC-BX-K005 awarded initially by the Drug courts Program Office and, subsequently, by the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice. The Bureau of Justice Assistance is a component of the 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, and the Office for Victims of Crime. Points of view or opinions in this document are those of the author and do not represent the official position or policies of the U.S. Department of Justice.

FOREWORD

This *Compilation* of selected federal, state and tribal court decisions relating to drug courts has been prepared and updated annually by the Bureau of Justice Assistance (BJA) Drug Court Clearinghouse and Technical Assistance Project at American University to highlight legal issues which are being raised relating to drug court programs. The current *Compilation* covers appellate court rulings on drug court cases[1] issued through December 31, 2014 with a partial update to reflect selected case opinions published through June 2015. A more comprehensive update with case decisions for the full 2015 calendar period will be published in December 2015.

The cases reported address a wide range of topics, ranging from constitutional issues (i.e., the application of due process rights to various aspects of drug court program operations), to sentencing issues (i.e., whether incarceration as a sanction entitles an unsuccessful drug court participant to time served credit in his/her sentence), to policy issues (i.e., who has authority to determine drug court eligibility). Case citations are provided for further reference.

Several cases decided during the past year and referenced in this Compilation desire particular note:

Sykes, decided in December 2014 by the Supreme Court of Washington, addressed the issue of whether staffings should be open to the public under Washington's Open Meeting Statute and held that they were not subject to the provisions of that statute. "Public access to staffings [would] interfere with a key feature of drug courts;"

Easley, decided by the Supreme Court of Idaho, found error in the District Court's sentencing process when the Court determined that the prosecutor had an absolute right to veto the court's desired decision to sentence Easley to the mental health court; and

Plouffe, decided by the Supreme Court of Montana in July 2014, holding that confidential information disclosed during the course of participation in drug treatment court cannot be used as a basis for prosecution of a new offense.

Several other cases which will be reported in the December 2015 Caselaw update, including those relating to a class action suit by drug court participants in Clark County, Indiana arising out of extended periods of incarceration in violation of a range of constitutional rights and judicial oversight, and a federal lawsuit filed against the state of Kentucky for its practice of prohibiting opiate addicts from receiving Medicated Assisted Treatment while under the supervision of the criminal justice system.

The case summaries are organized in two volumes: Volume One provides a summary of these cases by issue addressed; Volume Two presents a summary of the cases compiled by jurisdiction. Although in many instances only the principal holding is reported, in some instances a fuller excerpt from the opinion is included to provide the rationale for the decision where appropriate. As will be noted, for some topics the caselaw reflects a greater consensus than for others. Even within states, the caselaw is evolving and not necessarily following a consistent direction.

A large number of the case decisions address the appropriateness of various procedural elements of drug court program operations, particularly the voluntariness of agreements to participate, the implications of plea and other agreements required for program entry on the subsequent disposition of the case, including sentencing, and the legal requirements for terminating a participant's enrollment. A number of these cases each year also

[1] Only cases specifically referencing a drug court are included in this *Compilation*. Cases that may have relevance but do not specifically address a claim arising out of the operations of a drug court program are not included.

involve allegations of the denial of effective counsel which, up to this point, courts have generally dismissed on the grounds of failure to assert prejudice, premised generally upon a *Strickland*[2] analysis.

"To prevail on a claim of ineffective assistance of counsel, a defendant must be able to show deficient performance by counsel and prejudice. …A defendant's bare assertion of incompetent advice by counsel is not enough to establish deficient performance, as required for ineffective assistance of counsel…"[3]

While the large volume of caselaw that is developing regarding drug courts precludes inclusion of all cases in this *Compilation*, it should be noted that challenges to the legitimacy of drug court program requirements and operations are generally being dismissed at the appellate court level – often with reference to the program's operational manual, forms, or related documents or to the trial court record – or lack thereof indicating any objection-- and the drug court procedures upheld. Other aspects of drug court procedures, however, have not necessarily been consistently upheld, particularly those relating to challenges as to the legal sufficiency of guilty pleas entered as a prerequisite for drug court participation and the right of a defendant to withdraw a guilty plea premised on drug court participation if he/she is subsequently deemed ineligible.

The present volume includes a new section referencing eight cases relating to Veterans Treatment Courts, generally focusing on issues relating to eligibility.

The following issues noted in previous compilations continue to deserve particular note:

First: FEDERAL DISTRICT COURT DEFERRAL TO STATE DRUG COURT FOR PROCEEDING WITH HANDLING DRUG OFFENSE.

Following *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), which made the federal sentencing guidelines largely advisory," the issue of whether it is appropriate for federal sentencing judges to consider the disparity between state and federal sentences had become critical in some cases. It had been suggested that consideration during sentencing of "the disparity between state and federal sentences ... [would] help alleviate both the disparity [between state and federal sentences] and the concern that the federal courts are overwhelmed with matters that can and should be tried in the states." With these considerations, the January 2007 (post *Booker*) decision of the U.S. District Court for the Eastern District of New York (United States District Court, E.D. New York) in *United States of America, v. Robert Scott Brennan, Defendant.* No. 96-CR-793(JBW) suspended charges against Brennan for violations of his federal supervised release conditions and permitted his state drug possession charges to go forward in a state drug court treatment program.

"…Given the difference between the Federal and the New York State systems with regard to the assistance available to some offenders with substance abuse problems, the fact that the defendant has completed a detoxification program and is willing to be monitored in a state drug treatment program, family considerations, and the likelihood of more effective treatment out of as compared to in prison, justice would be better served within the state system…."

Second: THE RECURRING AND UNSUCCESSFUL "EQUAL PROTECTION" CHALLENGES RAISED BY OTHERWISE ELIGIBLE DEFENDANTS IN JURISDICTIONS WITHOUT DRUG COURT PROGRAMS.

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[2] *Strickland v. Washington*. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)

[3] Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Iris Lee BLACK, Defendant and Appellant. No. E046128. July 31, 2009. Review Denied Oct. 28, 2009.

An increasing number of state courts (currently Arkansas, Florida, Indiana, Mississippi and Washington) continue to hold that the absence of drug courts in all jurisdictions within the state is not a denial of equal protection even when the petitioning defendant would have been eligible had such a program existed in his/her locale. The holdings point to the absence of a showing that the right to participate in a drug court is a "fundamental right" or that state Legislatures, when they have created authority to establish a drug court within their state, are simply *creating the authority* rather than providing any policy direction regarding whether this authority is actually carried out.

Similarly, appellate courts are consistently maintaining that rejection of an applicant to a drug court is not a denial of due process since participation in a drug court is a privilege and not a right. (See cases cited under: "Constitutional Issues: Fifth (and Fourteenth) Amendments in Volume Two of this *Compilation*.). Similarly, claims of denial of due process under the Fifth and Fourteenth Amendments by defendants rejected for a drug court are also being dismissed.

Third: THE CONSISTENT PATTERN OF SUCCESSFUL TERMINATION OF PARENTAL RIGHTS (TPR) PETITIONS EVEN IN SITUATIONS WHERE THE PARENT SUCCESSFULLY COMPLETED A DRUG COURT PROGRAM.

There is a significant volume of cases each year – far too many to be included in this *Compilation* – entailing appeals of orders to terminate parental rights, many of which are premised, at least in part, on the parent's recovery, including completion of an adult or family drug court program. Invariably these appeals are being dismissed, noting the breakdown in the parental-child relationship that had occurred during the parent's period of drug use. (See, for example, In re COLLEEN M. et al., …. (Super. Ct. No. J510547F/G). March 25, 2003 which held the Mother's completion of dependency Drug Court and 396 days of sobriety not sufficient to warrant "changed circumstances" re termination proceedings). TPR petitions continue to be affirmed by appellate courts in other states as well, including Florida, Idaho, Indiana, Michigan, New Jersey, New York, North Carolina, and Utah, for example.

Fourth: DISMISSAL OF CLAIMS OF *DOUBLE JEAPARDY* WHILE CLAIMS RELATING TO ENTITLEMENT TO "TIME SERVED" CREDIT ARE IN SOME CASES BEING UPHELD

During the past several years, several "double jeopardy" challenges were raised for the first time, based on allegations that the same conduct that was subject to a drug court jail sanction was also the basis for termination and imposition of a subsequent jail/prison sentence. In all cases these challenges were dismissed, either on their merits or because no record had been developed at the trial court.

Related, although on different grounds, a number of unsuccessful drug court participants began to raise challenges – which continue to be raised – claiming entitlement to "time served" in the calculation of the sentences subsequently imposed. These challenges have generally been denied on their merits, based, in large part, on the waiver of credits purportedly agreed to by the defendant in the participation agreement he/she signed, as required for program entry. (In a number of instances, however, these cases were remanded for recalculation of the credits based on other factors.) Several courts have drawn distinctions between "time served" entailed in incarceration time for a defendant waiting to be admitted to a drug court and/or following termination vs. "time served" as a jail sanction, ordering credit for jail time served prior to and following drug court participation but not for jail time served as a sanction. Other courts have required time served credit for all periods of a defendant's incarceration during the period of drug court participation. (Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Maria Elaine AVERSA, Defendant and Appellant. No. E045240. (Super. Ct.No. FMB008464). Jan. 7, 2009.More recently, appellate courts reviewing these claims are distinguishing between drug court programs that were part of a probation sentence vs. those that were part of a community corrections sentence, finding the latter situation to permit

credit for time served. Currently, there does not appear to be an emerging consensus among state appellate courts on this issue.

Fifth: INCREASING CHALLENGES TO DRUG COURT TERMINATION AND SENTENCING OF DRUG COURT PARTICIPANTS RELATING TO CONSTITUTIONAL RIGHTS AND TO ADEQUACY OF THE TRIAL COURT RECORD

The past several years have seen an influx of cases raising three issues that had received little previous attention: (1) the adequacy of the record of drug court proceedings at the trial court; (2) the appropriateness of treating drug court failure as an aggravating factor justifying an enhanced sentence; and (3) whether a hearing is required on program termination that is different from a probation revocation hearing.

On the first issue – the adequacy of the record of the drug court proceeding – appellate courts, with much greater frequency, have remanded the case back to the trial court to create a record from which an appeal could be ruled upon. Previously, when the issue of an incomplete record emerged, the appellate courts more frequently declined to rule on the issue raised in the appeal, leaving in place the trial court decision. Apart from the substantive issues addressed in these cases, these more recent appellate court decisions highlight the need for developing a sound record at the trial court for numerous reasons, none the least of which are the provision for an adequate foundation for appeal should that be needed.

While the second issue – the propriety of treating failure in drug court as an aggravating factor justifying an enhanced sentence – has not been ruled on directly, in the two California cases in which it was raised, the appellate court affirmed the trial court's sentence on procedural grounds. It should be noted, however, that in recent years a number of challenges have been raised to sentences imposed on terminated participants, frequently in the upper or maximum ranges (e.g., ten or more years of incarceration) permitted by statute in the affected jurisdictions. These sentences have been almost invariably upheld and not indicative of an abuse of discretion in the absence of less severe terms or sentencing options that were documented in the plea agreement.

The third issue – whether a separate hearing is required on the issue of *termination from the drug court* from a subsequent *probation revocation hearing* – jurisdictions that have dealt with this issue at the appellate level appear split. (See, for example, *Kimmel* (New York) holding no separate hearing is required if a treatment program recommends termination, vs *Harris* (Virginia 2010) taking the opposite position. The issue is of particular import because, without the Court's consideration of the reasons a treatment counselor recommends that a participant be terminated from its program, and such additional issues as whether, rather than termination, a different mix of services and possibly service providers may be appropriate, the treatment counselor is, in effect, making a judicial decision since the de facto result of the recommendation is the imposition of whatever sentence had been suspended.

The issue of *termination* received special attention in 2011 in the Shambley[4] case in which the Nebraska Supreme Court held that a separate court hearing was required to terminate a drug court participant from a drug court in addition to any recommendation a treatment provider might make or the "team" might submit to terminate a participant from a drug court program. Cases raising the issue of termination that followed have further focused on the termination *process*, particularly in situations in which the drug court program was operating as part of the probation process. Among the issues raised included:

(a) whether to apply similar procedures and standard of proof as would be provided to for probation termination or whether drug court programs presented different requirements;

[4] *STATE Of Nebraska, Appellee, V. Samantha A. SHAMBLEY,* appellant. No. S–10–556. 281 Neb. 317, 795 N.W.2d 884. April 8, 2011.

(b) whether a drug court participant is entitled to the same due process protections as a probationer and the extent to which due process rights apply (see Court of Appeals of Kentucky. Jarrod L. NICELY, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2007-CA-002109-MR. April 24, 2009); and

(c) whether a subsequent plea bargain is permissible grounds for waiving a hearing (Supreme Court, Appellate Division, Third Department, New York. The PEOPLE of the State of New York, Respondent, v. Alexander L. STOKES, Appellant. July 1, 2010).

Although the facts and holdings in these various cases differ, there appears to be emerging consensus that treatment program termination alone is not an adequate grounds to terminate a participant from a drug court program and that a separate termination hearing is required with the participant having the right to call witnesses and the court to make an independent determination of the appropriateness of a participant's termination from a drug court.

It should also be noted that drug court program termination is frequently being made in a number of cases for reportedly several positive drug tests or other actions of the defendant which could be viewed as consistent with their addictive state at time of program entry[5]. There are also instances of termination for administrative reasons with no reference to the overall treatment goals of the program. (See, for example, *The People, Plaintiff and Appellant, v. Larry Thomas Reece, Defendant and Respondent.* Court of Appeal of California, Sixth Appellate District, 220 Cal. App. 4th 204; 162 Cal. Rptr.3d 879. October 4, 2013, where participant was terminated for use of a cell phone, with the suspended sentence of five years then imposed.) These cases highlight the urgent need for broad scale judicial training on addiction and the recovery process so that judges can recognize behavior that needs to be addressed through enhanced treatment as opposed to program termination, consistent with efforts to expand the outreach of drug court programs to the "high risk/high need" defendants.

One final observation regarding the sentences being imposed upon termination: unless there has been a plea agreement capping the sentence – which appears to be rarely the case – the sentences imposed on drug court participants who are terminated from the drug court program are frequently lengthy – five to ten years and longer, in some cases, running consecutively. This situation makes the urgency of expanding the outreach of drug court programs and promoting increased program retention all the more critical.

SIXTH: RULINGS ON CLAIMS FOR RECUSAL OF DRUG COURT JUDGE ARE INCONSISTENT WHILE CLAIMS TO EXCLUDE DRUG COURT PROGRAM INFORMATION AT SENTENCING BEING DISMISSED

A number of recent cases raised the issue of whether the drug court judge should recuse himself/ herself from sentencing a participant being terminated from the program as well as whether confidentiality provisions relating to drug court information precluded its reference in the sentencing determination. Regarding the issue of recusal, appellate court responses have been inconsistent. Recusal was mandated in *Court of Criminal Appeals of Tennessee, at Jackson. STATE of Tennessee v. Brent R. STEWART. No. W2009-00980-CCA-R3-CD. A*ug. 18, 2010 while not required in *Supreme Court of New Hampshire. The STATE of New Hampshire v. Jordan BELYEA.* No. 2009–038. Argued: Nov. 17, 2009. Opinion Issued: May 20, 2010. In Kentucky, it has been considered required in only limited circumstances. Kentucky Judiciary Ethics Committee. *Judicial Ethics Opinion Je-122.* October 10, 2011. Regarding reference to drug court program information at sentencing, however, appellate courts have consistently upheld cases in which it was referenced and, in a number of instances, noted its use was not precluded by federal confidentiality requirements.

[5] See discussion of "distal" vs. "proximal" goals. D. Marlowe. "Practical Guide to Incentives and Sanctions". National Drug Court Institute. http://cabhp.asu.edu/presentations/other-center-hosted-presentations/media-and-pdfs/carolyn-hardin-sanctions-incentives

In addition to the caselaw referenced in this *Compilation,* there have also been a number of Ethics cases brought, one of which in Utah involved excessive ($8,900) fees charged by private counsel to defendants seeking admission into the drug court and several relating to the use of funds to attend drug court conferences, particularly where no tracking of expenses was required.

One final observation: during the past several years a number of drug court participants terminated from the program and now serving sentences have challenged their termination and/or sentences on constitutional grounds through the filing of actions in federal district courts, rather than state courts, pursuant to Section 1983 of Title 42 of the U.S. Code, resulting in numerous federal court cases now providing rulings on drug court issues, in addition to those issued by state appellate courts

Readers interested in citing any of the holdings reported in this *Compilation* should refer to the case reports.

The *Compilation* is posted on the website of the BJA Drug Court Clearinghouse: www.american.edu/justice and is updated annually.

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June 2015

CONTENTS

VOLUME ONE: SUMMARY OF DECISIONS BY ISSUE

AMERICANS WITH DISABILITIES ACT (ADA)

(Relief under 42.U.S.C. Section 1983: many drug court cases filed as 1983 actions since 2011):

DENNIS MALIPURATHU, Plaintiff, v. RAYMOND JONES et al., Defendants. No. CIV-11-646-W. United States District Court, W.D. Oklahoma. September 4, 2012.

Malipurathu named multiple defendants and sought relief for alleged constitutional and statutory deprivations as well as for violations of the Americans with Disabilities Act of 1990 arising out of Malipurathu's unsuccessful participation in, and his termination from Washita/Custer County Drug court and his complaints about the conditions at the substance abuse treatment centers to which he was admitted during his participation in the Drug court program.

All complaints against drug court officials dismissed on grounds of immunity

United States District Court, E.D. Virginia, Alexandria Division. William G. THORNE, Plaintiff, v. Kelly HALE et al., Defendants. No. 1:08cv601 (JCC). March 26, 2009. William G. Thorne, Fredericksburg, VA, pro se.

Issues: Immunity of drug court officials in 1983 action

AA/NA –immunity/liability of drug court officials for requiring AA/NA participations

Due Process challenge to evidence/testimony admitted through team staffing should be made against the state and not one of the drug court team members

This decision presents a fairly extensive analysis of the official and personal liability of various state and local officials and agencies the appellant claims have deprived him of his first, fourth, fifth, sixth, eighth and eleventh, and fourteenth amendment constitutional rights; and their liability for alleged violations of the American with Disabilities Act and the Civil Rights Act of 1964 for his alleged denial of due process as a result of his drug court termination based on the drug court team's decision without the right for him to confront witnesses; and his failure to receive credit in his ultimate sentence for time served while serving jail sanctions; and also seeks injunctive relief, including the voiding of his conviction and an order for the U.S. Department of Justice to investigate the drug court program.

The Court held that (1) all of the officials sued had immunity from being sued except for the drug court program managers who operated the treatment program and had discretion regarding the establishment and enforcement of the requirements appellant challenged (e.g., mandatory AA/NA attendance) who had limited personal immunity; (2) challenges to drug court team decisions and court orders should be made at the time they were made, and not through a petition for injunctive relief to subsequently set them aside; and (3) the drug court was a specialized dockets within the normal structure of the state court system which is an arm of the state government and is therefore immune from suit under the 11th Amendment and Will. See 491 U.S. and 70.

In a recent Michigan case with closely analogous facts, the district court found that the case manager at a drug court that utilized a religious drug treatment program did not have qualified immunity from First Amendment claims. The court reasoned that the individual had a First Amendment right to be free from the state's coercion of him into a religious treatment program that conflicted with his own beliefs. Moreover, the court found that the right was clearly established at the time of the violation. Hanas v. Inner City Christian Outreach, Inc., 542 F.Supp.2d 683, 701 (E.D.Mich.2008) (citing Inouye v. Kemna for the proposition that the Free Exercise right to be free from similar religious coercion was established as early as 2001). The district court denied qualified immunity to the Drug court case manager serving Mr. Hanas, and held that the treatment group and the pastor running it were acting under color of state law, which made them potentially liable under § 1983.

United States Court of Appeals, Ninth Circuit. Charles W. THOMPSON; Stephen Bogovich, Plaintiffs-Appellants, v. Gray DAVIS, Governor State of California; Joseph Sandoval, Secretary of Youth and Corrections Agency; James Gomez, Director of the Dept. of Corrections; John W. Gillis, Commissioner of the Board of Prison Terms; James W. Nielsen, Chairman of the Board of Prison Terms, Defendants-Appellees. No. 01-

15091. Argued and Submitted Dec. 3, 2001. Filed March 8, 2002.*

Denial of petitioners' application for parole on the grounds of their substance addiction violates requirements of the Americans With Disability Act (ADA).

Court of Appeals of Georgia. EVANS v. The STATE. No. A08A1022. Aug. 22, 2008.

Defendant pled guilty to possession of methamphetamine in exchange for a referral to drug court program, but later was determined to be ineligible for drug court due to the prescription medications he took for HIV and depression. Defendant appealed claiming (1) denial of entry into drug court violated his equal protection rights and provisions of the Americans with Disabilities Act, and that subsequent resentencing for the offense constituted double jeopardy

Holdings:
(1) double jeopardy did not bar trial court from offering defendant a different sentence or the opportunity to withdraw his guilty plea; Agreeing to attend drug court is not a "sentence," such that double jeopardy would bar imposition of another sentence for the same offense; it is a pre-trial intervention contract in which the defendant agrees to attend drug court in exchange for the opportunity to avoid having a conviction on his record.

(2) State had a rational basis for excluding defendant from drug court program; State had a rational basis for excluding defendant who took multiple prescription medications for HIV and depression from drug court program, and thus such exclusion did not violate equal protection; defendant was excluded because drug court program was relatively new and ill-equipped to deal with defendant's complicated medical status, rather than because of his HIV status, and state's interest in preserving defendant's health was rationally related to its decision to exclude him from the drug court program; and

(3) defendant failed to establish that his exclusion violated Americans with Disabilities Act (ADA). failed to establish that his disabilities affected a major life activity, so as to make the ADA applicable; defendant in fact argued that he required no accommodation because his health issues were being adequately treated by his doctors.

AUTHORITY TO CREATE DRUG COURT PROGRAM/STANDING TO CHALLENGE CONSTITUTIONALITY OF DRUG COURT PROGRAM

United States Court of Appeals, Ninth Circuit. Andrew Peyton THOMAS, Maricopa County Attorney; Lorenzo Armenia; Timothy Willis; Barbara Willis, Plaintiffs-Appellants, v. Barbara MUNDELL, Judge of the Superior Court of Arizona; Carey Snyder Hyatt, Judge of the Superior Court of Arizona; Aimee Anderson, Commissioner, Superior Court of Arizona; Richard Nether, Commissioner, Superior Court of Arizona; Steven Lynch, Commissioner, Superior Court of Arizona; James T. Bloom, Commissioner, Superior Court of Arizona, Defendants-Apelles. No. 07-15388. Argued and Submitted Oct. 23, 2008. Filed July 15, 2009.

[County Attorney lacks standing to challenge constitutionality of drug court]
[*authority to create drug court program*]

County Attorney of Maricopa County, Arizona and victims of driving under the influence (DUI) offenses sued judges and commissioners of the Arizona Superior Court for injunctive and declaratory relief, alleging that special Spanish-speaking and Native American DUI courts instituted by the Superior Court violated the federal constitutional and statutory rights of these participants. The United States District Court for the District of Arizona dismissed the claims for lack of standing. Plaintiffs appealed. Circuit Court Affirms the District Court's Ruling

Even if county attorney could be considered representative of State of Arizona with respect to claim that special courts instituted by Arizona Superior Court for Spanish-speaking and Native American driving-under-the-influence (DUI) offenders were racially discriminatory, county attorney lacked standing as state agent to bring suit seeking judgment declaring special DUI court unconstitutional, and enjoining operation of special probation programs for offenders, since county attorney, representing either county or State, could not be considered party to proceedings before the separate DUI courts, which involved post-sentencing probation, rather than prosecutions for public offenses.

AFFIRMED.

Maurice Antonio Mann, et. Al., Petitioners, v. Chief Judge of the Thirteenth Judicial Circuit, et al., Respondents. No. 90498. Supreme Court of Florida. July 7, 1997.*

Creation of drug court division within circuit court could be done through administrative order and did not require a local rule.

AUTHORITY OF DRUG COURT COMMISSIONER

Mo.App. W.D.,1999. State v. Ralls. STATE of Missouri, Respondent, v. Bilah RALLS, Appellant. No. SC 81653. Supreme Court of Missouri, En Banc. Nov. 9, 1999. Rehearing Denied Dec. 7, 1999*

Court of Appeals held that question of whether S 478.466 granting authority to drug court commissioner all of the powers and duties of a circuit judge is in conflict with Art. II, S 1 and Art. V, SS 1 and 25(a) of the Missouri Constitution is a "real and substantial" issue and, thus, transferred the case to the Missouri Supreme Court. In STATE of Missouri, Respondent, v. Bilah RALLS, Appellant. No. SC 81653. Supreme Court of Missouri, En Banc. Nov. 9, 1999. Rehearing Denied Dec. 7, 1999, court held that statute which allowed the appointment of a drug commissioner and granted such commissioner all the powers and duties of a circuit judge, violated defendant's right to a jury trial to the extent that it allowed an individual other than a person selected in accordance with the constitution to exercise judicial power, preside over a jury trial and to determine an individual's guilt or innocence of a felony charge. V.A.M.S. Const. Art. 1 S 22(a); V.A.M.S. S 478.466. Reversed and remanded for trial.

AUTHORITY OF DRUG COURT JUDGE TO DISMISS CASE

District Court of Appeal of Florida, Fourth District. STATE of Florida, Appellant, v. R.B., a child, Appellee. No. 96-3231. May 27, 1998.

[statute giving trial courts discretion to dismiss charges against substance abuse impaired offender who successfully completes court referred drug treatment program applied to juveniles.]

State of Florida v. David Dugan and Noyes Green Burrough. No. 87, 109, Supreme Court of Florida. September 5, 1996.

The Court affirmed the drug court judge's authority to dismiss case of defendant who had successfully completed drug court program

The State of Florida, Appellant, v. William Turner, Appellee. No. 93-2836. District Court of Appeal of Florida. Third District. May 3, 1994*

Defendant was charged with felony possession of cocaine. Drug court judge ordered defendant to be placed in drug court program over the state's objection and, following successful completion of the program, dismissed the prosecution. Upon the state's appeal of the dismissal, the District Court of Appeal held that (1) the trial court erred in ordering the defendant's placement in the drug court program and dismissing the prosecution over the state's objection; and (2) the state's failure to petition immediately for probation or otherwise challenge the trial court's placing the defendant in the diversion program did not preclude the state from challenging the dismissal. Consent of prosecutor is statutorily required for placement in pretrial intervention program

The State of Florida, Appellant, v. Johnnie Mae Upshaw, Appellee. No. 94-1637. District Court of Appeal of Florida. Third District. Jan. 18, 1995.*

The state appealed the drug court judge's dismissal of case against defendant, charged with sale of cocaine, after defendant completed drug court program. The Appellate Court upheld the trial court's dismissal of the charges, even though sale of cocaine could have rendered defendant ineligible to enter the drug court program; the trial judge told defendant that he would dismiss the case against her if she completed the drug court program and the state did not object.

NAVAJO NATION

JUDICIAL DISTRICT OF CROWNPOINT, CROWNPOINT, ARIZONA

The Navajo Nation, Plaintiff v. Ethelyn Begay, a/k/a/ Ethelyn Peterson, Defendant. No. CP-CR-2750-96, No. CP-CR-2751-96. May 23, 1997*

Upholds court's authority to dismiss criminal case

upon showing of compliance with peacemaking agreement.

AUTHORITY OF JUDGE TO MODIFY ORDER OF DRUG COURT JUDGE

Court of Appeal, First District, Division 3, California. Julio Cesar ROMERO, Petitioner, v. The SUPERIOR COURT of Sonoma County, Respondent; The People, Real Party in Interest. No. A097916. (Sonoma County Super. Ct. No. MCR-340544). March 6, 2002.*

Modification by another judge of drug court judge's order to terminate appellant from drug court and impose suspended state prison sentence upheld because of a finding that drug court judge recused himself from further involvement in the matter.

Hewlitt v. The State of Florida. 661 So. 2nd 112, 4th DCA 1995*

Chief judge's (1) granting of state's motion to transfer defendant's case out of drug court division after motion had been denied by drug court judge and (2) declaring drug court judge's order "void as a nullity" based on defendant's arrest for DUI while in drug court program exceeded chief judge's authority; chief judge had no authority to exercise appellate jurisdiction and court's administrative order excluding defendants arrested for DUI from drug court program improperly attempted to amend pretrial intervention statute by adding terms and conditions for drug court eligibility.

CONFIDENTIALITY

State of Montana, Plaintiff and Appellee, v. KARLYLE STEVEN LEE PLOUFFE, Defendant and Appellant.

Appeal from: District Court of the Fourth Judicial District, In and For the County of Mineral, Cause No. DC 2011-21 (July 15, 2014)

Holding: Confidential information disclosed during the course of participation in drug treatment court cannot be used as a basis for prosecution of a new offense

"....We conclude that the State violated § 46-1-1111(4), MCA, by disclosing confidential drug testing information to law enforcement in order to investigate a new criminal offense. Absent evidence establishing that questioning by law enforcement occurred outside the context of Treatment Court proceedings, we conclude that Plouffe was impermissibly required to "choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent," Fuller, 276 Mont. at 166-67, 915 P.2d at 816 (citing Murphy, 465 U.S. at 436, 104 S. Ct. at 1147), because Plouffe believed that he had to answer questions honestly in order to comply with Treatment Court rules. As a result, the State may not use the information derived from the three interviews in a later criminal proceeding. The District Court erred in denying Plouffe's motions to dismiss and suppress. We reverse Plouffe's conviction and vacate the District Court's judgment. "

STATE of Arizona, Appellee, v. Terry Wayne TATLOW, Appellant. No. 1 CA-CR 11-0593. Court of Appeals of Arizona, Division 1, Department C. December 4, 2012.

Terry Wayne Tatlow appeals the superior court's revocation of his probation and its imposition of a 2.5 year prison sentence following his unsuccessful participation in a drug court program. He contends that federal law makes his drug court record confidential, and that the superior court erred when it relied on information concerning his drug court record to revoke his probation and refused to recuse itself from the revocation proceedings. We hold that federal law does not prohibit the superior court from considering its own drug court records in revocation proceedings. Federal Confidentiality Regulations do not preclude drug court judge from serving as sentencing judge and having access to drug court information.

IN RE ADMINISTRATIVE ORDER NO. 6(c). 2011 Ark. 317. Supreme Court of Arkansas. Opinion Delivered July 27, 2011. [exempts drug court hearings from being broadcasted]

. The committee "focused on whether Administrative Order No. 6 should be supplemented to include specific provisions relating to broadcasting drug court proceedings, or whether the proceedings should be excepted from being broadcast, as are juvenile, probate and domestic relations matters, among others." It left for future action any broader revisions to Administrative Order No. 6.

We excerpt the following points from the report:

The Committee considered and discussed a number of different considerations bearing on the broadcasting of drug court proceedings under Administrative Order No. 6….The considerations which tend to support broadcasting drug court proceedings included the following:

• Providing open and public courtroom proceedings. There is a strong public, statutory, and case law policy in Arkansas supporting open courtroom proceedings…

• Striking a balance between openness and confidentiality. The consideration here is to do whatever is reasonably possible to both protect those involved in drug court proceedings and to provide public access. Rather than limiting public access, perhaps a balance can be struck by crafting specific provisions for drug court proceedings within Administrative Order No. 6.

• Recognition of the fact that no defendant can have drug court proceedings broadcast over his or her objection. A witness, as well, can object to being broadcast as part of the proceedings.

• The educational effect on the public of viewing drug court proceedings…

The considerations tending to support a recommendation that there be no broadcasting of drug court proceedings included the following:

• The unique nature of drug court. Drug court is significantly different from other courts. It is a specialty court designed to promote and achieve substance abuse rehabilitation. A defendant who appears in drug court has already forfeited (voluntarily) a number of due process rights, and is hopeful both of becoming rehabilitated and having the drug-related charges in question expunged from his or her record. A real question arises, therefore, of whether any waiver of an objection to being broadcast is a knowing and voluntary one. The defendant could well be driven by a desire to please the court if he or she perceives the court favors broadcasting. Other issues within this topic also arise, such as the difficulty or impossibility of avoiding broadcasting the faces of juveniles or other family members during proceedings…

• The potential misuse of recordings of drug court broadcasts. The Committee believes there is a real risk involved in having individuals or entities use the drug court proceedings for their own purpose and profit. A related topic here is the concern that an individual who has successfully completed drug court and had his or her charges expunged could at some time in the future be faced with the embarrassment of some sort of public airing of the recording.

• The risk to the drug court judge of violating the Arkansas Code of Judicial Conduct. These risks are outlined in detail in Opinion No. 2010-01 of the Judicial Ethics Advisory Committee. They include the potential effect on public confidence in the integrity of the judiciary, as outlined in Canon 1, Rule 1.2, and the risk of violating Canon 1, Rule 1.3 relating to abusing the prestige of judicial office to advance the personal or economic interests of the judge or others.

• The difficulties involved in reviewing and overseeing the broadcasting of drug court proceedings.

• The difficulty of creating a set of procedures which would strike a balance between open court proceedings and those problems associated with the broadcasting of drug court proceedings. No Committee member was able to propose a satisfactory set of procedures which could achieve such a balance.

The most viable option, then, was to preclude such broadcasts by the appropriate exception within Administrative Order No. 6. …STATE of Arizona, Appellee, v. Terry Wayne TATLOW, Appellant. No. 1 CA-CR 11-0593.

Court of Appeals of Arizona, Division 1, Department C. December 4, 2012.

Terry Wayne Tatlow appeals the superior court's revocation of his probation and its imposition of a 2.5 year prison sentence following his unsuccessful participation in a drug court program. He contends that federal law makes his drug court record confidential, and that the superior court erred when it relied on information concerning his drug court record to revoke his probation and refused to recuse itself from the revocation proceedings. We hold that federal law does not prohibit the superior court from considering its own drug court records in revocation proceedings.

Based on its consideration of the foregoing factors, the committee made the following recommendation regarding the broadcasting of drug court proceedings:

The Committee recommends that Administrative

Order No. 6 be amended to except the broadcast of all drug court proceedings from its provisions, thereby effectively disallowing such broadcasts. Although the Committee wishes to emphasize it is acutely aware of the positive effects of broadcasting court proceedings, it has concluded that the negative effects of drug court broadcasts and the potential harm they could bring to individuals must take precedence here. The considerations discussed above for accepting such broadcasts from Administrative Order No. 6 simply outweighed the other considerations. In particular, matters of privacy, the special and unique nature of drug court proceedings, and the potential for the abuse of broadcast recordings have driven this Committee's decision.

The risk of violating certain portions of the Code of Judicial Conduct comes into serious play at this point as well, although there is general agreement among the Committee members that the Committee recommendations are directed toward drug courts in general, not a specific drug court.

United States District Court, E.D. Michigan, Southern Division. Joseph Raymond HANAS, Plaintiff, v. INNER CITY CHRISTIAN OUTREACH CENTER, INC., et al., Defendants. Civil Action No. 06-CV-10290-DT. Feb. 20, 2007.

[Motion to Compel Disclosure of Identity Drug court Participants Cannot be Denied on Basis of Confidentiality if information is relevant.]

Plaintiff filed civil rights action alleging defendant tried to indoctrinate him into Pentecostal faith and prevent him from practicing his religion while being treated at defendant's center. In the course of litigation, he filed a Motion to Compel requesting identify of persons enrolled at treatment center while he was there. Defendant objected claiming information was confidential.

Held: Defendant seeks to withhold this information because of its confidential nature. Although this is understandable, privacy or the need for confidentiality is not a recognized basis for withholding discovery.

(N.Y.A.D. 3 Dept.), 2005 N.Y. Slip Op. 03081 Supreme Court, Appellate Division, Third Department, New York. The PEOPLE of the State of New York, Respondent, v. Gary M. JUCKETT, Appellant. April 21, 2005.

[Defendant's termination from drug court based on admissions in drug treatment court program could be relied upon to terminate him from program; no confidentiality provided to participant's statements (no indication of whether statements were made in court hearing or at treatment session]

Court of Appeals of Washington, Division 3, Panel Three. STATE of Washington, Respondent, v. Elmer Blake DiLUZIO, Jr., Appellant. Nos. 22027-3-III, 22028-1-III. May 27, 2004.

[Prosecutor retained executive discretion to decide whether to recommend referral to drug court. Prosecutor retains discretion for referrals to drug courts; prosecutorial duty to determine the extent of society's interest in prosecuting an offense]

Court of Appeals of Washington, Division 2. STATE of Washington, Respondent, v. Terry L. STEPHENS, Appellant. No. 29950-0-II. April 13, 2004.

[Denies defendant's claim that attorney's failure to request drug court disposition denied her effective counsel; and county's lack of drug court denied her equal protection]

Court of Appeals of Washington, Division 2. STATE of Washington, Respondent, v. Scott Warren WHEAT, Appellant. No. 28413-8-II. Sept. 16, 2003.

[discussion of federal and state statutory provisions re release of treatment records and termination of consent when drug court jurisdiction ends]

Eight months after drug court dismissed drug and alcohol charges against defendant, the State, asserting newly discovered evidence and excusable neglect, sought to vacate the dismissal. The Superior Court, Kitsap County, granted State's request, held trial, and found defendant guilty of the underlying charges. Defendant appealed. The Court of Appeals held that defendant's consent to disclosure of his drug treatment records did not extend beyond the hearing date at which dismissal of the charges occurred, precluding a separate investigation of defendant's treatment records after dismissal.

Defendant's consent to disclosure of his drug and alcohol treatment records, executed in compliance with federal regulations before his entry into

treatment program through drug court, was given for the duration of the program, with the end result being a disposition of the criminal charges after a putative successful completion of the program, and thus, defendant's consent did not extend beyond the hearing date at which dismissal of the charges occurred, precluding a separate investigation of defendant's treatment records after dismissal, even though the records on which dismissal was based were false, and defendant discussed the false treatment records in drug court. Public Health Service Act, § 543(c), 42 U.S.C.A. § 290dd-2(c); 42 C.F.R. §§ 2.31(a)(9), 2.35.

[Scott Warren Wheat graduated from treatment in connection with a drug court diversion and had his charges dismissed with prejudice. Eight months later, an investigation into his treatment records without his consent revealed that Wheat had failed three urinalysis tests, contrary to the information given to the drug court judge. The trial court then vacated Wheat's previous dismissal and convicted him of the initial drug and alcohol charges. We hold that such use of Wheat's records expressly violates the applicable law with regard to disclosure of treatment records for use in the criminal justice system, and any consent that he had previously given would have expired upon the date of the hearing in which his charges were dismissed. We do not address the question of access to the records because the federal regulations specifically address use of the treatment records and that issue is dispositive. We reverse.

The issue here is one of statutory interpretation. "Our primary duty in interpreting any statute is to discern and implement the intent of the legislature." …Chapter 70.96A RCW addresses treatment for drug and alcohol addictions. It mandates that "registration and other records of treatment programs shall remain confidential," with disclosure allowed on patient consent or other exceptions. RCW 70.96A.150(1). Further, it invokes federal law: "Nothing contained in this chapter relieves a person or firm from the requirements under federal regulations for the confidentiality of alcohol and drug abuse patient records." RCW 70.96A.150(3). Both parties agree that 42 U.S.C. § 290dd applies and that it and Title 42 C.F.R. comprise the applicable law…

Federal law protects the identity and confidentiality of treatment records of any individual in a treatment program but permits disclosure with a proper consent. 42 U.S.C. S 290dd-2 …Specifically addressing the issue of use in criminal justice proceedings, 42 U.S.C. S 290dd-2(c) states: "Except as authorized by a court order [under another, inapplicable subsection], no record…may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient."

Other regulations deal specifically with disclosures to elements of the criminal justice system, such as the drug court. However, even when the disclosure is only to "those individuals within the criminal justice system who have a need for the information in connection with their duty to monitor the patients progress", there must be a valid consent that meets strict requirements. 42 C.F.R. 2.35(a)(1). One of those requirements is that the consent must state a reasonable period during which it remains in effect: that period must take into account the anticipated length of the treatment, as well as the type of criminal proceeding involved, the need for the information in connection with the final disposition of that proceeding, and when the final disposition will occur. 42 C.F.R. 2.35(b)(2). Another section reinforces the expiration of consent by mandating the expiration of consent upon a date, event, or condition, such that consent lasts no longer than reasonably necessary to serve the purpose for which it is given. 42 C.F.R. 2.31(a)(9). Thus, the State was required to obtain consent in proper form, which could only remain in effect for a reasonable time in connection with the final disposition of the criminal proceeding.

42 C.F.R. S 2.35 states:

a. A program may disclose information about a patient to those persons within the criminal justice system which have made participation in the program a condition of the disposition of any criminal proceedings against the patient or of the patients parole or other release from custody if:
    1) The disclosure is made only to those individuals within the criminal justice system who have a need for the information in connection with their duty to monitor the patients progress (e.g., a prosecuting attorney who is withholding charges against the patient, a court granting pretrial or posttrial release, probation or parole officers responsible for supervision of the patient); and
    2) The patient has signed a written consent meeting the requirements of Sec. 2.31 (except paragraph (a)(8)).
b. Duration of consent. The written consent must state the period during which it remains in effect. This period must be reasonable, taking into

account:

1) The anticipated length of the treatment;
2) The type of criminal proceeding involved, the need for the information in connection with the final disposition of that proceeding, and when the final disposition will occur.

42 C.F.R. S 2.31(a) states:
(a) Required elements. A written consent to a disclosure under these regulations must include:

(1) The specific name or general designation of the program or person permitted to make the disclosure.
(2) The name or title of the individual or the name of the organization to which disclosure is to be made.
(3) The name of the patient.
(4) The purpose of the disclosure.
(5) How much and what kind of information is to be disclosed.
(6) The signature of the patient and, when required for a patient who is a minor, the signature of a person authorized to give consent under Sec. 2.14; or, when required for a patient who is incompetent or deceased, the signature of a person authorized to sign under Sec. 2.15 in lieu of the patient.
(7) The date on which the consent is signed.
(8) A statement that the consent is subject to revocation at any time except to the extent that the program or person which is to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.
(9) The date, event, or condition upon which the consent will expire if not revoked before. This date, event, or condition must insure that the consent will last no longer than reasonably necessary to serve the purpose for which it is given.

The parties have agreed that, before entry into the program through drug court, Wheat had executed a consent to disclosure that complied with this provision. But the court made a finding that there was no release signed to obtain the treatment records in 2001 that disclosed the failed drug tests. Neither party assigned error to this finding; thus, it is a verity on appeal. State v. O'Neill, 148 Wash.2d 564, 571, 62 P.3d 489 (2003). The State asserts that Wheat bears the burden of showing a lack of valid consent because he is asserting a privilege; but we need not engage in a discussion or analysis of burdens where the court has made a finding that is not challenged as to there being no signed release.

The State urges that because there was a prior waiver of confidentiality and there was discussion in drug court of the false reports, Wheat cannot now assert a claim of confidentiality as to the true reports. We disagree. First, the reports discussed in drug court were not the same as the reports in Wheat's file. Second, that Wheat discussed the false treatment records in drug court does no more to waive Wheat's confidentiality to his treatment records than does his prior valid consent: the 2001 investigation was a separate investigation of his true records after his dismissal.

Further, the State urges that the consent that did conform to 42 C.F.R. S 2.31 should last for at least one year past the date of the dismissal of the criminal charges. We disagree. The consent is given for the duration of the program, with the end result being a disposition of the criminal charges after a successful completion of the program. We were not furnished with a copy of the proper consent because the drug court did not retain a copy of the consent. The State hypothesizes that the expiration date of the proper consent was well after the investigation in 2001, but there is no record of the consent.

Regardless, we hold that a consent signed under these circumstances cannot extend beyond the hearing date at which a dismissal of the charges occurs. There is sufficient time to examine the treatment records of a person sent to treatment by a court during his treatment. Thus, even if there had been a different date on the valid consent taken upon entry to the program, it must have expired upon the final hearing that was designed to dispose of the criminal prosecution. Had the records been reviewed during treatment, there would not have been this controversy. It is not a heavy burden to require review when there is a valid consent before the court enters a dismissal. We certainly do not condone Wheat's actions or those of the treatment center; but, Wheat's treatment records were inadmissible because their use violated the statutes creating their confidentiality.

District Court of Appeal of Florida, Fifth District. STATE of Florida, Petitioner, v. CENTER FOR DRUG-FREE LIVING, INC., Respondent. No. 5D02-3356. March 7, 2003.

State filed motion to compel employee of drug-treatment center to testify regarding a drug-related offense. The Circuit Court, Orange County, Belvin Perry, Jr., J., denied motion. State sought certiorari review. The District Court of Appeal, Sharp, W. J. held that: (1) program employees' observations of patients or clients in federally assisted alcohol or drug programs are "records" within meaning of confidentiality statute; (2) drug treatment confidentiality exception only authorizes disclosure of records for the purpose of conducting a criminal investigation if the crime is extremely serious; and (3) drug treatment confidentiality exception permitting disclosure of information to elements of the criminal justice system that referred patient does not authorize disclosure of information to the police. Petition denied.

Circuit Court of the Ninth Judicial Circuit for Orange County, Florida. State of Florida v. Noelle L. Bush. Case No. 48-02-CF-6371-0. October 10, 2002.

Denies Defendant's Motion to Close Drug court Proceedings and holds that drug court status hearings must be open to the public. "The Florida Supreme Court has stated that "public access to the courts is an important part of the criminal justice system, as it promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system [and] the people have a right to know what occurs in the court." …Open access is critical so that the public can see that drug court is working to reduce the recidivism rate and to return individuals to a productive state. Open access is necessary in order to demonstrate that the program is worthy of public support. It is vital that the community realize that drug court works so that its graduates can become productive members of society, that jobs will be available to them, and that other community support will be forthcoming.

Additionally, and equally as important, drug court status hearings must be open to all participants so that all participants can observe each other's successes and failures. If drug court were closed to the public that would also mean that no other drug court participant could be in the hearing, nor could the participant's family be involved without special consent. Every participant must be able to observe other participants' status hearings because the hearings and the interaction with the drug court judge are an essential part of the treatment program. The drug court participants, who are observing, gain encouragement by seeing that other participants can become drug free and that the program works. The hearings also give the participants the opportunity to see what sanctions may be imposed and thereby help them to avoid the same behavior…

United States District Court, S.D. New York. Paul Cox, Petitioner, v. David MILLER, Supt., etc., Respondent. No. 01 CIV. 3751(CLB). July 30, 2001.

Communications in AA meetings entitled to the same confidentiality protections as other forms of religious communication.

Supreme Court of Wyoming. Kilen Patrick DYSTHE, Appellant (Defendant), v. The STATE of Wyoming, Appellee (Plaintiff). No. 01-125. Feb. 19, 2003.

Drug court employees can be compelled to testify regarding participant's conduct in matter involving another defendant [drug court participant previously granted transactional immunity.]

Defendant was convicted following jury trial in the District Court, Sheridan County, of delivery of a controlled substance. Defendant appealed.

The Supreme Court ruling including findings that: (1) trial court abused its discretion in precluding defendant, based on failure to meet pre-trial deadline for identifying witnesses, from presenting testimony either in case-in-chief or rebuttal by two DRUG COURT employees about whether alleged buyer had recently been in trouble for his conduct in DRUG COURT and whether he had received favorable treatment for testifying against defendant; and (2) that error was not harmless beyond a reasonable doubt.

Facts: Defendant was charged with selling cocaine to Daniel Luke Jacquot (Jacquot) in June 2000. Eric Stone (Stone), a mutual friend, testified that he processed the cocaine into a smokeable form and Jacquot testified that Dysthe, Jacquot, Stone, and Jacquot's brother, John, smoked the cocaine. Jacquot was a participant in DRUG COURT, and Jacquot's urine tested positive for cocaine the day after the group allegedly smoked the cocaine. Jacquot testified that he was booked into jail after telling DRUG COURT personnel that he had used cocaine. Jacquot told a Division of Criminal Investigation (DCI) agent

that Dysthe had sold him the cocaine. An Information charged Dysthe with one count of delivery of a controlled substance, in violation of Wyo. Stat. Ann. § 35- 7-1031(a)(ii). Both Stone and Jacquot were granted transactional immunity for their testimony. Defendant filed a notice of additional witnesses after the deadline established in the Scheduling Order, naming Ray Olson and Jodie Bear, DRUG COURT employees, as witnesses to testify about Jacquot's conduct in DRUG COURT, specifically that he conspired with other DRUG COURT participants to deliver hallucinogenic mushrooms. The next day, the State listed Honorable J. John Sampson as a witness, to counter any defense accusations concerning Jacquot's conduct in DRUG COURT. The district court prohibited either party from calling additional witnesses because it was not notified of these witnesses by the court's November 13th deadline. The matter proceeded to trial and a jury found Dysthe guilty. Defendant appealed his conviction on grounds which included whether the trial court erred in excluding two of his named witnesses, who were drug court employees, thereby denying him his right to a fair trial and his right to compulsory process in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution. Conviction reversed and case remanded. The factors to be weighed in the balance include, but are not limited to the "integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process…"

CONSTITUTIONAL ISSUES

1. FIRST AMENDMENT

a. ISSUES RELATING TO AA/NA PARTICIPATION[6]

United States District Court, E.D. Virginia, Alexandria Division. William G. THORNE, Plaintiff, v. Kelly HALE et al., Defendants. No. 1:08cv601 (JCC). March 26, 2009. William G. Thorne, Fredericksburg, VA, pro se.

Issues: Immunity of drug court officials in 1983 action

AA/NA –immunity/liability of drug court officials for requiring AA/NA participations Due Process challenge to evidence/testimony admitted through team staffing should be made against the state and not one of the drug court team members.

[This decision presents a fairly extensive analysis of the official and personal liability of various state and local officials and agencies the appellant claims have deprived him of his first, fourth, fifth, sixth, eighth and eleventh, and fourteenth amendment constitutional rights; and their liability for alleged violations of the American with Disabilities Act and

[6] See also: *Miner v. Goord*, No. 09-0674-cv, 2009 WL 4072085 (2d Cir. Nov. 25, 2009) (holding that the twelve steps of AA are religious in nature). *Inouye v. Kemna*, 504 F.3d 705 (9th Cir. 2007) (holding that AA has substantial religious components and that compelling individuals to participate in AA violates the Establishment Clause). *Cox v. Miller*, 296 F.3d 89 (2d Cir. 2002) (finding that AA's activities must be treated as religious for purposes of the Establishment Clause). *DeStafano v. Emergency Hous. Group, Inc.*, 247 F.3d 397 (2d Cir. 2001) (finding that the AA program is a religion for Establishment Clause purposes). *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068 (2d Cir. 1997) (concluding that the AA program has substantial religious components and AA meetings are intensely religious events). *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996) (holding that the twelve-steps underlying AA programs are based on the monotheistic idea of a single God or Supreme Being, or, in other words, a religious concept of a Higher Power). *Care Net Pregnancy Ctr. of Windham County v. U.S. Dep't of Agric.,* No. 11-2082 (RBW), 2012 WL 4801777 (D.D.C. Oct. 10, 2012) (upholding a hearing officer's determination that a faith-based applicant for U.S. Department of Agriculture (USDA) funding would violate the USDA's regulations, Equal Opportunity for Religious Organizations, 7 C.F.R. § 16.3, where it intended to use USDA financial assistance to fund the complete acquisition cost of a facility to be used for both secular and religious activities). *Hazle v. Crofoot*, No. 2:08-cv-00295-GEB-KJM, 2010 WL 1407966 (E.D. Cal. Apr. 7, 2010) (concluding that a twelve-step recovery program based on the principles of AA and NA contained religious components). *Freedom from Religion Found., Inc. v. McCallum*, 179 F.Supp.2d 950 (W.D. Wis. 2002) (concluding that while AA is not a traditional form of religious worship the content of AA is religious in nature, and finding that an agency's ability to estimate how much time counselors spend on religious versus non-religious matters does not mean that it is possible to make a clear distinction between the two roles that counselors play). *Warburton v. Underwood*, 2 F.Supp.2d 306 (W.D.N.Y. 1998) (finding that the emphasis placed on God, spirituality, and faith in a Higher Power by twelve-step programs such as AA and NA supports this determination)

the Civil Rights Act of 1964 for his alleged denial of due process as a result of his drug court termination based on the drug court team's decision without the right for him to confront witnesses; and his failure to receive credit in his ultimate sentence for time served while serving jail sanctions; and also seeks injunctive relief, including the voiding of his conviction and an order for the U.S. Department of Justice to investigate the drug court program.

The Court held that (1) all of the officials sued had immunity from being sued except for the drug court program managers who operated the treatment program and had discretion regarding the establishment and enforcement of the requirements appellant challenges (e.g., mandatory AA/NA attendance) who had limited personal immunity; (2) challenges to drug court team decisions and court orders should be made at the time they were made, and not through a petition for injunctive relief to subsequently set them aside; and (3) the drug court was a specialized dockets within the normal structure of the state court system which is an arm of the state government and is therefore immune from suit under the 11th Amendment and Will. See 491 U.S. at 70].

This matter presents three motions to dismiss a civil rights lawsuit filed against a number of individuals and entities involved in administering a "drug court" program in the Rappahannock area. The motions were filed by: Defendant Karl Hade, the Executive Secretary of the Supreme Court of Virginia ("Hade"); Defendant Judith Alston, a former Virginia Department of Corrections employee ("Alston"); Defendants Kelly Hale ("Hale") and Sharon Killian ("Killian"), both of whom allegedly served as managers or directors of the drug court; the Rappahannock Area Community Services Board (the "RACSB"), the Rappahannock Regional Jail (the "Regional Jail"), and the Rappahannock Regional Jail doing business as the Rappahannock Regional Drug court (collectively, the "Defendants").Also before the Court is a motion by Hade and Alston to strike certain supplemental evidentiary filings.

I. Background: Pro se plaintiff William G. Thorne ("Thorne") brought this suit against several individuals and entities that took part in treating him for his drug and alcohol addictions through Virginia's drug court program. His experience with the drug court stems from a state criminal proceeding for the possession of a controlled substance. Thorne filed his original complaint (the "Complaint") in June 2008. At oral argument on the motions to dismiss filed by Defendants, the Court granted Thorne leave to amend the Complaint. He did so on October 22, 2008…

In March 2006, Thorne entered into a plea agreement on a possession of a controlled substance charge. As part of the plea deal, he agreed to undergo treatment for drug and alcohol addiction. Pursuant to his plea, the Virginia court in which he pled guilty placed Thorne under the supervision of the Regional Jail/Drug court, which required him to participate in the Alcoholics Anonymous ("AA") and Narcotics Anonymous ("NA") addiction treatment programs. Had Thorne successfully completed the Regional Jail/Drug court program, the state would have dropped the charge against him. The RACSB served as the substance abuse and mental health treatment provider for the Regional Jail/Drug court.

Thorne complains that the practices of the AA and NA programs contravened his religious beliefs. He claims that the AA and NA programs are state-sponsored religions that violate the Free Exercise clause of the First Amendment. Among numerous other allegations, Thorne appears to have been offended by the public recitation of the Lord's Prayer at AA meetings. Other allegations include being subjected to "mind control" and being "forced to pray to pagan gods with individuals of dissimilar and contradictory beliefs."

Thorne, who was involved in a religious liberties lawsuit against AA in 1998, now claims that he would never have entered into a plea agreement if he had known that it would entail mandatory AA or NA participation. He also claims that Defendants refused to allow him to participate in other drug treatment programs more amenable to his religious beliefs.

Asserting that the responsibility for informing him about the practices of the Regional Jail/Drug court prior to his plea lay with the Virginia court and the Commonwealth's Attorney rather than with his counsel, Thorne states that he never waived his constitutional rights as part his plea. He claims that he was unlawfully incarcerated for various periods of time as "sanctions" for his failures to participate in the Regional Jail/Drug court program and that, because these "sanctions" were not deducted from his prison term, they improperly extended Thorne's "actual and potential incarceration." Thorne asserts that he was denied the right to counsel during hearings held to determine whether to levy "sanctions" against him. He also claims that several

defendants presented evidence against him in a way that prevented him from defending himself.

Thorne believes that these and other practices related to the Regional Jail/Drug court treatment program violated his First, Fourth, Fifth, Sixth, Eighth, Thirteenth, and Fourteenth Amendment rights. He also alleges violations of the Americans with Disabilities Act, the Civil Rights Act of 1964, and the Civil Rights Act of 1871, 42 U.S.C. § 1983 (through which, the Court will presume, he brings his constitutional claims).

Finally, Thorne argues that Defendants violated Virginia statutory law and various sections of the Virginia Administrative Code related to the provision of mental health services. In recompense, Thorne asks: (1) for $60,000,000 in damages; (2) that the Court declare his state court plea agreement null and void; and (3) that the Court order the Civil Rights Division of the Department of Justice to launch an investigation into the Regional Jail/Drug court.

II. Holding:

(1) ADA claims barred by statute of limitations as well as failure to state a cause of action.

(2) Claims for Equitable and Injunctive Relief are denied because (1) none of the requested remedies are available through this court action. [. First, this Court cannot order the Department of Justice to investigate the Regional Jail/Drug court, or, for that matter, to take any action whatsoever in the context of this case. The Department of Justice, a division of the executive branch of the federal government, is not a party to this suit…Under the same rationale, it is clear that the Court would have no basis to vacate Thorne's plea agreement and declare it unconstitutional and null and void. Setting aside the host of comity, federalism, and jurisdictional concerns that would preclude a Court declaration that Thorne's plea, or the conviction that followed, is "null and void," the Court cannot grant Thorne's request because he does not allege that any of the named Defendants caused the constitutional violation…

(3) Section 1983 Claims against entities are dismissed because only allegation of deprivation of a right under the Constitution or federal law must be caused by a "person" acting "under color of state law." States, and state government entities that are considered arms of the state under the Eleventh Amendment, are not "persons" under § 1983.

1. Regional Jail/Drug court

Thorne's Amended Complaint replaces references to the "Rappahannock Regional Drug court", apparently because Thorne intended to sue the Regional Jail for its role in hosting or otherwise facilitating the drug court rather than the drug court entity itself Had Thorne brought § 1983 claims against the Drug court, they also would have been subject to dismissal. In Virginia, Drug Treatment Courts are specialized dockets within the normal structure of the state court system...The state court system is an arm of the state government and is thus immune from suit under the 11th Amendment and Will. See 491 U.S. at 70.

The Regional Jail, is not a "person" who can be sued under § 1983. See Preval v. Reno, 203 F.3d 821 (4th Cir.2000)

2. State officials (Hade and Alston) cannot be sued under Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989), where the Supreme Court held that the "person[s]" who can be sued for damages under § 1983 do not include states and state officials acting in their official capacity.

3. Section 1983 Claims-Defendants Hade and Alston-Personal Capacity
Although § 1983 claims for damages cannot lie against state officers in their official capacities under Will, the Supreme Court, in Hafer v. Melo, 502 U.S. 21, 27 (1991), made it clear that state officials could be sued for damages in their personal capacities for actions they took as state officials. Defendants Hade and Alston claim that, to the extent that Thorne sued them in their personal capacities, he has failed to state cognizable claims under § 1983.

(3)(a). Defendant Hade (Supreme Court Ex Secretary)
The Court agrees that Thorne has failed to state a claim against Hade through § 1983. …It is clear from the context of these allegations that none applies to Hade in his personal capacity. Hade was not individually involved in forcing Thorne into any particular drug treatment program. He did not affirmatively require the use of AA or NA in the local drug treatment program at issue. Letting the case to proceed against Hade based on these allegations would allow vague drafting, whether done intentionally or not, to subject Hade to the burdens of further litigation in a suit in which he has no

legitimate place. The Court will not sanction such a result. It will dismiss Hade from this lawsuit.

(3)(b). Defendant Alston (probation officer)

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

It is axiomatic that the judge, not any of the witnesses, regulates the manner in which evidence is presented in court. If the Commonwealth's Attorney solicited and used "secret" evidence, or if the judge in question accepted and relied upon such evidence, then any remedy would lie against the state, not the witness who provided so-called "secret testimony." Likewise, if Thorne was not allowed to defend himself in court, the blame does not lie with Alston as a witness. It is apparent from the face of the Amended Complaint that Thorne has failed to state a Sixth Amendment claim against Alston in her personal capacity. [Additionally, witness immunity shields Alston from suit based on her actions as a witness against Thorne. See Burke v. Miller, 580 F.2d 108, 109 (4th Cir.1978).]

While she may have been responsible for monitoring his compliance with its requirements, there is no indication that Alston had any authority to alter the program that Thorne agreed to complete as part of his plea deal. The Court will dismiss Alston from this case.

(3)(c) Section 1983 Claims-Defendants Hale and Killian (drug court managers)

Defendants Hale and Killian assert that qualified immunity blocks Thorne's § 1983 claims against them. Government officials sued under § 1983 may be entitled to qualified immunity, which protects them from civil suits when their performance of discretionary functions "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

…At this preliminary stage of the proceedings, the Court will not dismiss the claims against either Hale or Killian, both of whom are alleged to be "directors" of the drug court program for the RACSB. The Amended Complaint states that both Hale and Killian were to some extent responsible for implementing the treatment regimen to which Thorne was subjected, which included mandatory participation in AA/NA.

While the precise allegations against them are not stated with the precision that might be required of a complaint drafted by counsel, either Hale or Killian may have violated Thorne's rights by forcing him into a constitutionally-impermissible treatment scheme. The Court acknowledges that the allegations in the Amended Complaint are broadly phrased, inaccurately worded, and sometimes contradictory. But the gist of Thorne's allegations is that the policies put into action by the Drug court and the RACSB-which were purportedly overseen by Hale and Killian at the time in question-resulted in religious discrimination. Given Thorne's status as a pro se litigant and the preliminary nature of the motion to dismiss, the Court finds that Thorne has adequately alleged constitutional violations by Hale and Killian.

In a recent Michigan case with closely analogous facts, the district court found that the case manager at a drug court that utilized a religious drug treatment program did not have qualified immunity from First Amendment claims. The court reasoned that the individual had a First Amendment right to be free from the state's coercion of him into a religious treatment program that conflicted with his own beliefs. Moreover, the court found that the right was clearly established at the time of the violation. Hanas v. Inner City Christian Outreach, Inc., 542 F.Supp.2d 683, 701 (E.D.Mich.2008) (citing Inouye v. Kemna for the proposition that the Free Exercise right to be free from similar religious coercion was established as early as 2001). The district court denied qualified immunity to the Drug court case manager serving Mr. Hanas, and held that the treatment group and the pastor running it were acting under color of state law, which made them potentially liable under § 1983.

Supreme Court, Appellate Division, Third Department, New York. The PEOPLE of the State of New York, Respondent, v. Kyle Frederick SANDER, Appellant. Jan. 10, 2008.

[Claim of constitutional violation moot if not raised on the record]

Background: Defendant appealed from judgment of the County Court of Delaware County, Becker, J., which revoked defendant's probation and imposed a sentence of imprisonment.

Holdings: The Supreme Court, Appellate Division, Spain, J., held that:

(1) defendant failed to preserve for appellate review claim that drug court's requirement that he attend alcoholic treatment meetings violated the Constitution, and

(2) County Court's alleged error in failing to order a second presentence report when revoking defendant's probation and imposing a sentence of imprisonment was not an abuse of discretion.

Defendant failed to preserve for appellate review claim that drug court's requirement that he attend alcoholic treatment meetings violated the Constitution; defendant failed to raise this challenge during the probation violation hearing or at resentencing.

United States District Court, S.D. New York. Paul Cox, Petitioner, v. David MILLER, Supt., etc., Respondent. No. 01 CIV. 3751(CLB). July 30, 2001.

Communications in AA meetings entitled to the same confidentiality protections as other forms of religious communication.

U.S. 2nd Circuit Court of Appeals. DESTEFANO v. EMERGENCY HOUSING. UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. August Term, 1999. (Argued: March 16, 2000 Decided: April 20, 2001. Errata Filed: May 7, 2001) . Docket No. 99-9146.

[treatment program receiving tax revenues cannot "coerces clients to attend such sessions nor itself indoctrinates clients in A.A. principles."]

JOSEPH M. DESTEFANO, as taxpayer of the County of Orange, State of New York, and of the State of New York, and in his official capacity as Mayor of Middletown, Plaintiff-Appellant, CITY OF MIDDLETOWN, NEW YORK, Plaintiff, - v. - EMERGENCY HOUSING GROUP, INC., JOSEPH RAMPE, County Executive of the County of Orange, New York, COUNTY OF ORANGE, NEW YORK, JEAN SOMERS MILLER, Commissioner of the New York State Department of Mental Health, BRIAN WING, Commissioner of the New York State Department of Social Services, STATE OF NEW YORK and GLENN S. GOORD, Commissioner of the New York State Department of Correctional Services,

Appeal from a judgment of the United States District Court for the Southern District of New York (Colleen McMahon, Judge) granting summary judgment in favor of the defendants on the plaintiff DeStefano's taxpayer claims brought pursuant to 42 U.S.C. § 1983 asserting that the payment of State funds in connection with an Alcoholics Anonymous program violated the Establishment Clause of the First Amendment. Vacated and remanded.

Plaintiff-Appellant Joseph M. DeStefano, Mayor of Middletown, New York, and a New York State taxpayer, appeals from a judgment of the United States District Court for the Southern District of New York). DeStefano brought the underlying action pursuant to 42 U.S.C. § 1983 claiming that the allocation of New York State tax revenues to a private alcoholic treatment facility that includes Alcoholics Anonymous ("A.A.") in its program violates the Establishment Clause of the First Amendment to the United States Constitution. On cross motions for summary judgment, the district court concluded that the State's provision of funds to the facility did not run afoul of the Establishment Clause and therefore entered summary judgment for the State of New York and the individual administrators of various State agencies (the "State defendants").[1] This appeal followed, requiring us to plunge into the thicket of Establishment Clause jurisprudence. When we emerge, we vacate the judgment of the district court.

We conclude principally that the State's funding of the treatment facility does not violate the Establishment Clause despite the facility's inclusion in its program of A.A. sessions -- which this Court has previously held to be religious in nature -- if, among other things, the facility's staff neither coerces clients to attend such sessions nor itself indoctrinates clients in A.A. principles. DeStefano concedes the absence of coercion. We therefore remand the case to

the district court for it to determine whether, as a matter of fact, the staff of the facility inculcates clients in A.A. doctrine.

United States Court of Appeals, Second Circuit. Robert WARNER, Plaintiff-Appellee, v. ORANGE COUNTY DEPARTMENT OF PROBATION, Defendant-Appellant. Docket No. 95-7055. Submitted Oct. 16, 1997. Decided April 19, 1999.*

Probationer brought S 1983 action against county probation department, alleging that probation condition requiring his attendance at Alcoholics Anonymous (A.A.) meetings violated First Amendment establishment clause. The United States District Court for the Southern District of New York (see below) found probation department liable for nominal damages of one dollar, and department appealed. The Court of Appeals (see below) remanded for determination as to whether probationer's failure to object to religious content of A.A. at sentencing resulted in waiver of First Amendment claim. On remand, the District Court determined that probationer did not waive his constitutional claim. The department appealed. The Court of Appeals held that: (1) district court's factual findings were supported by evidence, and (2) damages award of one dollar was appropriate.

In the matter of David Griffin, Appellant v. Thomas A. Coughlin, III., as Commissioner of the New York State Department of Correctional Services, et al. Court of Appeals of New York, June 12, 1996.

This (non-**drug court**) case challenges the prison's authority to impose, as a condition for a prisoner's eligibility for a family reunion program, the requirement that he participate in a prison treatment program that incorporated religious aspects of a 12-step treatment program. Appellant challenged this requirement on the grounds that it (1) violated the establishment clause; and (2) that the inclusion of a 12-step program that contains expressions and practices constitutes an endorsement of religion. His challenge was upheld, with dissents.

United States Court of Appeals, Second Circuit. Robert WARNER, Plaintiff-Appellee, v. ORANGE COUNTY DEPARTMENT OF PROBATION, Defendant-Appellant. Docket No. 95-7055. Submitted Oct. 16, 1997. Decided April 19, 1999.*

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b. ISSUES RELATING TO CLAIM OF FREE SPEECH WHILE IN DRUG COURT

Court of Appeals of Virginia, Virginia. Judson Jeffrey HARRIS v. COMMONWEALTH of Virginia. Record No. 0208-08-2. May 12, 2009.

Appellant claims that termination from drug court, which is a liberty interest, requires the same procedural protections as a person facing revocation of probation, including notice, the opportunity to challenge the case against him, and the opportunity to be heard and that his termination violated his the Due Process clause of the Fourteenth Amendment. Appellant also claimed that the reasons for his termination related to comments he made on a

MySpace page which were protected under the First Amendment and that he could not be terminated d from the program or incarcerated for these comments.

Holding: Claims of Due process violations barred because not raised at time of termination and request to reverse termination never made. [See Also *Harris v. Commonwealth,* Record No. 2927-07-2 (Va.Ct.App. Mar. 10, 2008 above where appellant alleged that his termination from drug court violated his due process rights and had made this argument to the trial court during his motion for bond and during his sentencing hearing. However, he never sought reversal of his termination from the drug court program because of an alleged violation of his due process rights. This Court held that Rule 5A:18 barred our consideration of the issue because the specific objection he made on appeal was not timely made in the trial court.
Here, appellant argued during his sentencing hearing that he should not be sent to jail because to do so violated his due process rights. In support of this argument, appellant asserted that he was entitled to due process prior to his termination from the drug court program. However, appellant did not ask the circuit court to reverse his termination on this ground. Therefore, due process argument was not presented to the circuit court and now barred by Rule 5A:18.

Appellant also contends that the circuit court erred in refusing to consider evidence of the reasons he was terminated from the drug court program. The record clearly shows that Harris never offered, nor did he seek to offer, any evidence of the reasons he was terminated from the drug court program. While Harris advised the court that people were present to address the issue, he never sought to call any witnesses or to present any evidence. Therefore, cannot be determined that circuit court erred in refusing evidence when no evidence was offered nor was any refused.

Appellant also claims circuit court erred in not considering alternatives to incarceration. Here, the terms of the plea agreement accepted by the circuit court explicitly stated that if appellant failed to successfully complete the drug court program, he would be returned to the circuit court for determination of his guilt and imposition of a sentence. The circuit court accepted the order terminating appellant's participation in the drug court program, found appellant guilty, and imposed the sentence appellant accepted in the plea agreement. Thus, the circuit court cannot be deemed to have erred in not considering alternatives to incarceration.

2. FOURTH AMENDMENT (SEE ALSO "DRUG TESTING" AND "SEARCHES") SEARCHES OF PARTICIPANTS' HOMES/VEHICLES

United States Court of Appeals, Ninth Circuit. UNITED STATES of America, Plaintiff-Appellant, v. Raymond Lee SCOTT, Defendant-Appellee. No. 04-10090. Argued and Submitted Dec. 10, 2004. Filed Sept. 9, 2005. Amended June 9, 2006.

[warrantless searches, including drug testing, imposed as a condition of pretrial release, required showing of probable cause, despite defendant's pre-release consent]
[drug testing – random drug tests pre trial]
[Effect of pretrial release agreement for random drug tests for defendant on pretrial release]

Defendant, indicted for unlawfully possessing unregistered shotgun, moved to suppress shotgun and his statements concerning it.

Held:
(1) as a matter of first impression, warrantless searches, including drug testing, imposed as a condition of pretrial release, required showing of probable cause, despite defendant's pre-release consent, and [in this instance]

Affirm District Court Order's Motion to Suppress.

One who has been released on pretrial bail does not lose his or her Fourth Amendment right to be free of unreasonable seizures; …Warrantless searches, including random drug testing, imposed as condition of pretrial release in state prosecution, required showing of probable cause, even though defendant had signed pre-release consent form; protecting community from further crime committed by defendant did not amount to "special need," since crime prevention was quintessential general law enforcement purpose, there was no showing that problem of releasees failing to appear in court as result of drug use justified intruding on privacy rights of every releasee, nor that defendant in particular was likely to engage in future drug use that would decrease likelihood of his appearance, and governing

state code did not recognize connection between drug use and nonappearance at trial.

[Probation is form of criminal punishment, so probationers have sharply reduced liberty and privacy interests.]

Nevada's decision to test Scott for drugs without probable cause does not pass constitutional muster under any of the three approaches: consent, special needs or totality of the circumstances. Since the government concedes there was no probable cause to test Scott for drugs, Scott's drug test violated the Fourth Amendment. Probable cause to search Scott's house did not exist until the drug test came back positive.
* * *
[also dissents]

Court of Appeals of Kentucky. Kelvin Lee WHITE, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2004-CA-002189-MR. Oct. 28, 2005. Rehearing Denied Jan. 18, 2006.

Appellant, a participant in the Fayette County Drug court, had signed a "Drug Court Program Consent to Search Form" in connection with his participation in the Fayette County Drug Court. The form stated:

I, Kelvin White, in consideration for the privilege of entry into the Fayette County Drug Court program, to consent to allow any law enforcement agency to search my person, automobile, or residence when acting on drug court procedures. This search will be for the purpose of ensuring my compliance with the agreement of participation I have executed with the drug court. However, I acknowledge that any contraband which may be found may be used against me. This search may be without probable cause. I understand that I have a constitutional right to not have my person, automobile, or residence searched by law enforcement without probable cause, but I waive that right only for the period I am participating in the drug court program.

Police searched a car appellant was driving (but did not own) and to which he had just deposited a box on the seat. The search of the passenger area, including the box, produced no drugs but additional search of the trunk detected cocaine in the trunk. Appellant states he gave consent to search the passenger compartment only although he told the officer he was a member of the Fayette County Drug court. The officer subsequently stated that the appellant's drug court consent form authorized the search.

Held: Search was illegal because officer was unaware of the Drug court Consent to Search Form when conducting the search.

"…We view the officer's lack of knowledge of the consent form prior to the search to be pivotal… If an officer is unaware of a consent form or search condition, a search may not be retroactively justified by the subsequent discovery of such form or condition. In so holding, we are persuaded by the reasoning of People v. Sanders, 31 Cal.4th 318, 2 Cal.Rptr.3d 630, 73 P.3d 496 (2003):

Thus, the admission of evidence obtained during a search…that the officer had no reason to believe was lawful merely because it later was discovered that the suspect was subject to a search condition would legitimize unlawful police conduct… In sum, we now hold that a search condition cannot justify an otherwise unlawful search if a law enforcement officer was unaware of the condition at the time the search was conducted. Accordingly, we are of the opinion the search of appellant's trunk was unlawful and the circuit court erred by denying appellant's motion to suppress the evidence seized therefrom…"

Matthew Terry, Petitioner, v. The Superior Court of San Luis Obispo County, Respondent, The People, Real Party in Interest. No. B127801. Court of Appeal, Second District, Division 6, California. July 15, 1999.

The Court of Appeal held that: (1) imposition of search term on first-time drug offender was unlawful…Grant of diversion from entry of judgment of conviction may not depend upon a waiver of Fourth Amendment rights…. Consent to a search is not provided for by statute and may not be imposed as a condition of diversion-deferred sentencing on first-time drug offender. West's Ann.Cal.Penal Code S 1000.

In Re David Anthony York, et al. Court of Appeal, Sixth District, California. February 22, 1994; review granted May 26, 1994.

Upholds authority of the trial court to order drug testing and warrantless searches of persons, residence and/or vehicles of defendants on pretrial release if order made on an individual, case by case basis.

Drug testing and warrantless search and seizure conditions may be imposed in conjunction with OR [personal recognizance] release if, after considering the specific facts and circumstances in a particular case, the judge or magistrate determines that those facts and circumstances justify the condition or conditions.

3. FIFTH AMENDMENT (and Fourteenth amendments where applicable)

a. DUE PROCESS

(1) DRUG COURT JUDGE SERVING AS SENTENCING JUDGE

State Of Wisconsin, Plaintiff-Respondent, V. Armando Garcia, Defendant-Appellant. Appeal Nos. 2012ap2818-Cr, 2012ap2819-Cr, 2012ap2820-Cr. Court Of Appeals Of Wisconsin, District One. September 17, 2013, Decided. September 17, 2013, Filed.

Upholds Defendant's agreement to be sentenced by drug court judge if unsuccessful Supreme Court Committee Recommendation that drug court judge should not be sentencing judge; counsel's failure to object to sentencing by drug court judge not indicative of ineffective counsel.

STATE of Arizona, Appellee, v. Terry Wayne TATLOW, Appellant. No. 1 CA-CR 11-0593. Court of Appeals of Arizona, Division 1, Department C. December 4, 2012.

Terry Wayne Tatlow appeals the superior court's revocation of his probation and its imposition of a 2.5 year prison sentence following his unsuccessful participation in a drug court program. He contends that federal law makes his drug court record confidential, and that the superior court erred when it relied on information concerning his drug court record to revoke his probation and refused to recuse itself from the revocation proceedings. We hold that federal law does not prohibit the superior court from considering its own drug court records in revocation proceedings.

STATE OF ARIZONA, Appellee, v. VICTOR PEREZ CANO, Appellant. No. 1 CA-CR 11-0473. Court of Appeals of Arizona, Division One, Department B (AUGUST). Filed September 20, 2012.

The Court Properly Took Judicial Notice of Its Order Terminating Cano from the Drug court Program…

There is no evidence to support Cano's claim that the federal confidentiality laws apply. We reject the notion that even under federal confidentiality laws, a trial judge must ignore the content of his or her own orders—such a holding would defy logic and render the courts toothless to perform their function.

II. THE JUDGE DID NOT ERR BY FAILING TO RECUSE HERSELF FROM THE REVOCATION PROCEEDINGS.

Reject's appellant's contention that the superior court judge should have recused herself from the revocation proceedings because she had personal knowledge of the proceedings in the Drug court and the reasons why Cano was terminated from the Drug court program… The Court found no error. "The reasons that the court terminated Cano from the Drug court program and the evidence to support those reasons were available for use in subsequent proceedings, and the judge was not privy to any information not known by Cano and his counsel."

Effect of Drug court prohibition on "consorting with felons' applied to sentencing for subsequent offense was not an abuse of discretion:

Denies drug court graduate probation for subsequent offense based on violation of drug court prohibition on "consorting with felons."

Court of Criminal Appeals of Tennessee, at Jackson. State of Tennessee v. Brent R. Steward. No. W2009-00980-CCA-R3-CD. August 18, 2010.

Defendant claimed due process rights violated because judge presiding over probation revocation hearing had previously served as member of drug court team and received ex parte information regarding the defendant's conduct at issue.

Held: Due process clause requires defendant's probation revocation to be adjudicated by a judge who has not previously reviewed the same or related subject matter as part of the drug court team. Reversed decision and remanded case for new hearing before a different judge.

Court of Criminal Appeals of Tennessee, at Jackson. State of Tennessee v. Brent R. Steward. No.

W2009-00980-CCA-R3-CD.

Defendant claimed due process rights violated because judge presiding over probation revocation hearing had previously served as member of drug court team and received ex parte information regarding the defendant's conduct at issue.

Held: Due process clause requires defendant's probation revocation to be adjudicated by a judge who has not previously reviewed the same or related subject matter as part of the drug court team. Reversed decision and remanded case for new hearing before a different judge.

Supreme Court of New Hampshire. The STATE of New Hampshire v. Jordan BELYEA. No. 2009–038. Argued: Nov. 17, 2009. Opinion Issued: May 20, 2010.

Defendant appealed a decision by the Superior Court, Grafton County, Vaughan, J., denying his motion to recuse the judge, who was a member of the drug court team, from presiding over the hearing to determine whether the defendant's participation in the Grafton County Drug court Sentencing Program should be terminated.

Held: recusal of judge was not warranted.

Defendant failed to establish that an objective, disinterested observer who was fully informed of the operation of the Sentencing Program and of the judge's participation as member of the drug court team would entertain significant doubt about the judge's ability to fairly and impartially judge the issues presented at the defendant's termination hearing; nothing demonstrated that judge acted as investigator or prosecutor when participating with the drug court team, and the record showed that the judge remained an impartial judicial officer. Const. Pt. 1, Art. 35; Sup.Ct.Rules, Rule 38, Code of Jud.Conduct, Canon 3(E)(1).

Court of Appeals of Kentucky. Mary E. FORD, Appellant v. COMMONWEALTH of Kentucky, Appellee
and William E. Flener, Appellant v. Commonwealth of Kentucky, Appellee. **Nos. 2008-CA-001990-MR, 2009-CA-000889-MR, 2009-CA-000461-MR. April 30, 2010.**

Defendants were not denied a "detached" hearing when the same judge presided over their termination from drug court program hearing and the hearing on revocation of probation and diversion, since the defendants did not show that the judge was not impartial and detached. The defendants alleged that the same judge presiding over both courts gave rise to an inference that he was not "detached" However, one's termination from a drug court treatment program was not subject to due process protection applicable in a prosecutorial situation and probation was a privilege rather than a right. Rules Crim.Proc., Rule 10.26; KRS 533.030.

State of Nevada. Standing Committee on Judicial Ethics and Election Practices. Opinion JE06-009.August 17, 2006.

Issue: Propriety of a judge who dealt with an offender in drug court later adjudicating the same defendant in non-drug court criminal proceeding. Issue raised by judge in less populous area where same judge may preside over drug court and criminal docket.

FCanon 3E of the Nevada Supreme Court Rules provides: A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questions…The commentary to 3E gives substantial weight the judge's opinion of his or her ability to be fair and impartial.

The request letter asks whether a judge who has become familiar with details of the life of an individual through drug court is prohibited from subsequently presiding over a criminal case for the same offender. From the drug court process, the jurist may become familiar with the participant's drug and/or alcohol use and other alleged criminal acts, plus employment and family issues. Should this same judge later adjudicate the individual's case as a criminal defendant? The judge requesting this opinion is concerned, because in less populous counties the same judge often presides over both courts. … However, even if judge believes no basis for disqualification exists, must disclose any recollection of defendant going through drug court.

(2) REQUIREMENT FOR JUDICIAL AND NOT TEAM DECISION-MAKING

TENNESSEE V. STEWART, CT. OF CRIM. APPEALS AT NASHVILLE. 2008 TENN. CRIM. APP. OCTOBER 6, 2008. [COURT ORDERED NEW TERMINATION HEARING UPON FINDING JUDGE DELEGATED DECISION MAKING AUTHORITY TO TEAM].

"…In Tennessee, the 'neutral and detached hearing body' is statutorily prescribed to be the trial judge. The statute does not give the trial judge the authority to consult outside entities or persons in making its determination or to delegate the decision-making authority to another entity or person, other than another trial judge. Based upon the statute, we hold that the trial judge violated the defendant's due process protections in allowing the drug court team to deliberate and make a recommendation to the court about the disposition of a matter that was statutorily vested in the trial judge's authority. Further, the record in this case reflects that the trial judge not only received the recommendation from the drug court team, it delegated the decision-making authority to the team. In this regard, it is telling that the trial judge instructed the drug court team at the hearing, 'I have no thoughts or opinions on what you should do, should you decide that [the defendant] should come back with no sanctions whatsoever, or if he should be revoked and dismissed from the program or anything between, I do not care what your opinion is. I trust your judgment.' Thereafter, the judge's order stated that he 'affirms the recommendation of the team.' Neither the transcript of the hearing nor the order reflect that the trial judge engaged in its own deliberation of the proper disposition of the case. The procedure followed in this case was outside the statutory procedure and authority of the judge and deprived the defendant of due process. We hold that the defendant is entitled to a new hearing…"

(3) DOUBLE JEOPARDY

Joseph Julian Dimeglio V. State. Pet. Docket No. 432. Court Of Appeals Of Maryland. Denied January 23, 2012. Petition For Writ Of Certiorari Denied. 35 A.3d 488 (2012)424 Md. 292.

Sanctions for noncompliance with drug court program requirements do not constitute double jeopardy if defendant is subsequently sentenced.

NEVIEZ ARRIAGA, JR., Petitioner, v. JUSTIN JONES, et al., Respondents. No. Civ-09-1320-C. United States District Court, W.D. Oklahoma. August 16, 2011.
[Request for writ of habeas corpus claiming that sanctions imposed while in drug court and subsequent sentence on termination constitutes double jeopardy]

Termination from drug court based on factors other than offenses (e.g., failure to make timely payment of fines) for which he had already been sanctioned and therefore double jeopardy does not apply.

Superior Court of New Jersey, Appellate Division. STATE of New Jersey, Plaintiff-Respondent, v. Richard DELCRISTO, Defendant-Appellant. Submitted Dec. 7, 2010. Decided Feb. 16, 2011.

On appeal from Superior Court of New Jersey, Law Division, Warren County, Indictment No. 07-12-502.

Defendant was sentenced to three years in prison after pleading guilty to a violation of probation following drug court termination. The State subsequently moved to correct an "illegal sentence." Because, pursuant to the "Brimage Guidelines" for sentencing upon drug court termination, a five year sentence was required, rather than the three years that would otherwise have been applicable. After granting that motion, the court resentenced defendant to five years in prison with an eighteen-month parole disqualifier. Defendant appealed that resentencing, arguing that the resentencing violated the Double Jeopardy clauses of the state and federal constitutions.

Held: appeal granted; case remanded and for the re-imposition of the three year sentence imposed.

[T]he touchstone of the double jeopardy analysis lies in the expectation of finality that a defendant vests in his sentence." It is true that *N.J.S.A.* 2C:35-12 requires the imposition of a mandatory minimum term higher than the twenty-two month period imposed here. However, that same section also provides that a lesser minimum term can be imposed when "the defendant has pleaded guilty pursuant to a negotiated agreement." *N.J.S.A.* 2C:35-12. That is precisely the situation here. Thus, the sentence imposed is not illegal.

Court of Appeals of Maryland. Robert Calvin BROWN, III v. STATE of Maryland. No. 118, Sept. Term, 2008. May 18, 2009.

Defendant challenged (1) jurisdiction of Baltimore City Adult Felony Drug Treatment Court because it was not a court created pursuant to the Maryland Constitution.

Holding: As the Baltimore City Adult Felony Drug Treatment Court was a division of the Circuit Court for Baltimore City, it had fundamental jurisdiction to try persons charged with felonious violations of the

Maryland Controlled Dangerous Substances Act; if the procedures established by the Felony Drug Treatment Court erroneously violated the rights of a defendant, there were well-developed mechanisms for correcting any violations.
Defendant also claimed jail sentence of 35 days following termination from the drug court constituted double jeopardy in violation of his fifth amendment constitutional rights because he had already served a jail sanction for the conduct while still a drug court participant.

Holding: Defendant failed to preserve on appeal his double jeopardy argument, where he failed to raise the issue in the circuit court at the alleged inception of the second prosecution.

Court of Appeals of Arkansas. Ian Hunter DOYLE, Appellant v. STATE of Arkansas, Appellee. No. CACR 08-530. Feb. 18, 2009.

Appellant challenges termination from drug court claiming that, based on the program handbook, trial court was not "authorized" to send him to a regional correctional facility; and that revoking his probation because of the same allegations for which he served a jail sanction constituted double jeopardy under the fifth amendment.

Holding: Where multiple offenses are alleged as justification for revocation of probation, the trial court's finding that revocation is justified must be affirmed if the evidence is sufficient to establish that the appellant committed any one of the offenses.

As to Doyle's arguments concerning the trial court's failure to abide by the **drug-court** handbook, failure to have the handbook admitted into evidence precludes review of the issue.

Court of Appeals of Georgia. EVANS v. The STATE. No. A08A1022. Aug. 22, 2008.

Defendant pled guilty to possession of methamphetamine in exchange for a referral to drug court program, but later was determined to be ineligible for drug court due to the prescription medications he took for HIV and depression. Defendant appealed claiming (1) denial of entry into drug court violated his equal protection rights and provisions of the Americans with Disabilities Act, and that subsequent resentencing for the offense constituted double jeopardy

Holdings:
(1) double jeopardy did not bar trial court from offering defendant a different sentence or the opportunity to withdraw his guilty plea; Agreeing to attend drug court is not a "sentence," such that double jeopardy would bar imposition of another sentence for the same offense; it is a pre-trial intervention contract in which the defendant agrees to attend drug court in exchange for the opportunity to avoid having a conviction on his record.

(2) State had a rational basis for excluding defendant from drug court program; State had a rational basis for excluding defendant who took multiple prescription medications for HIV and depression from drug court program, and thus such exclusion did not violate equal protection; defendant was excluded because drug court program was relatively new and ill-equipped to deal with defendant's complicated medical status, rather than because of his HIV status, and state's interest in preserving defendant's health was rationally related to its decision to exclude him from the drug court program; and
(3) defendant failed to establish that his exclusion violated Americans with Disabilities Act (ADA). failed to establish that his disabilities affected a major life activity, so as to make the ADA applicable; defendant in fact argued that he required no accommodation because his health issues were being adequately treated by his doctors.

(4) OTHER

Supreme Court of Nebraska. In re Interest of TYLER T., a child under 18 years of age. State of Nebraska, appellee, v. Tyler T., appellant. No. S-09-631, S-09-632, S-09-633. April 29, 2010.

[Fifth (and fourteenth) Amendments: Due Process Drug court Proceeding – Requirement of a Written Record for case decisions, including orders affecting probation]

After juvenile had been adjudicated delinquent in three prior cases and placed on probation, the State filed petitions to revoke probation in all three cases. The Madison County Court extended the probation for one year and added the condition that juvenile attend and successfully complete the DRUG TREATMENT COURT program. Juvenile appealed, contending that the county court, sitting as a juvenile problem-solving court, ordered his detention without legal authority and in violation of his due process rights.

Held: Appellate Court cannot undertake a meaningful appellate review of this claim because of the complete absence of a verbatim record of the hearing or the resulting order.

Reversed and remanded.
[no adequate record for review]

Given the therapeutic component of problem-solving-court programs, we are not prepared to say that each and every action taken in such a proceeding must be a matter of record. But we have no difficulty in concluding that when a judge of a problem-solving court conducts a hearing and enters an order affecting the terms of the juvenile's probation, the proceeding must be on the record. We agree with other courts which have held that where a liberty interest is implicated in problem-solving-court proceedings, an individual's due process rights must be respected.

Superior Court of New Jersey, Appellate Division. STATE of New Jersey, Plaintiff-Respondent, v. Anthony SAXON, Defendant-Appellant. Submitted Feb. 24, 2010. Decided March 23, 2010.

[Also: Fourteenth Amendment – equal protection; right to enter drug court program]

Defendant voluntarily entered into a plea agreement covering both indictments, which ultimately resulted in his conviction for third-degree possession of heroin with intent to distribute within 1000 feet of school property; second-degree possession of heroin with intent to distribute within 500 feet of a public housing facility, and third-degree possession of cocaine. In exchange for the entry of the plea, the State agreed to recommend a maximum aggregate sentence of five years incarceration with two and one-half years of parole ineligibility, which was imposed by the sentencing judge.

Defendant appeals sentence of incarceration following plea agreement because he was denied admission to and the opportunity to benefit from Drug court Treatment, which he claims would have resulted in an alternative sentence consisting of rehabilitation instead of incapacitation.

Trial court's sentence affirmed because no abuse of discretion or harmful error detected; [no constitutional right to participate in a drug court program.]

The PEOPLE of the State of New York, Respondent, v. Jeffrey J. FORKEY, Appellant. April 8, 2010.

[held: defendant not entitled to hearing before being rejected for drug court]

Defendant was convicted in the County Court, Clinton County of criminal possession of forged instrument in second degree and burglary in third degree, and he appealed.

Held:
(1) failure to hold hearing before rejecting defendant's application for admission into county Drug court program did not violate due process, and
(2) defendant's sentence was unduly harsh, and would be modified by directing that sentences run concurrently.

County court's failure to hold hearing before rejecting defendant's application for admission into county Drug court program to determine whether defendant had violated conditions of his plea agreement did not violate due process, where defendant was provided opportunity to be heard and admitted to number of circumstances surrounding rejection of his Drug court application, including his consumption of alcohol at bar while on community walk and his failure to meet certain program expectations. U.S.C.A. Const.Amend. 14.

After waiving indictment and consenting to be prosecuted by superior court information, defendant pleaded guilty to criminal possession of a forged instrument in the second degree and three counts of burglary in the third degree and waived his right to appeal in exchange for a recommended sentence of six months in jail to be followed by five years of probation. The terms of the plea included defendant's acceptance into the Clinton County Drug court. County Court advised defendant that, in the event that he was not accepted into the Drug court program, he could be sentenced "to any sentence set forth under the law." Thereafter, defendant entered an inpatient treatment center but was discharged due to noncompliance. As a result, his application for admission into the Drug court program was rejected. After finding that defendant violated the terms of the plea agreement, County Court sentenced him to concurrent terms of six months in jail for the criminal possession of a forged instrument conviction and 2 to 6 years each in prison on two of the burglary convictions, to run consecutively to a prison term of

2 to 6 years on the third burglary conviction. Defendant now appeals.

Defendant's assertion that he was denied his right to due process when County Court failed to hold a hearing to determine whether he had violated the conditions of his plea agreement is unpreserved, since he neither requested a hearing nor moved to withdraw his plea on this ground.

Court of Appeals of Mississippi. Darrell W. PHILLIPS, Appellant v. STATE of Mississippi, Appellee. No. 2009-CP-00252-COA. Jan. 12, 2010.

Defendant convicted as a habitual offender for felony shoplifting filed motion for post-conviction relief, including transfer of case to Drug court.

Held: Defendant had no right to participate in drug court – no equal protection claim since drug court is discretionary sentencing alternative.

Defendant charged with felony shoplifting had no right to participate in drug court, since no one had a right to attend drug court pursuant to alternative sentencing eligibility criteria and conditions statute. Whether Phillips had a right to participate in drug court.

Phillips claims that he had a right to have his case transferred to the Seventeenth Judicial District drug court. Again, he fails to offer any authority in support of this argument. Even so, his claim fails because this Court has held that there is no right to attend drug court, stating:

The Mississippi Legislature created the Drug courts in part to "reduce the alcohol-related and [other] drug-related court workload." Miss.Code Ann. § 9-23-3. However, the Code intentionally refrained from creating a right by expressly stating, "A person does not have a right to participate in drug court under this chapter." Miss.Code Ann. § 9-23-15(4). Thus, [the defendant] does not have a right to transfer his case to drug court nor does he have a[n] equal protection claim since no one has the right to attend the drug court.

United States District Court, W.D. North Carolina. Brent JACOBY, Plaintiff, v. BUNCOMBE COUNTY Drug treatment PROGRAM et., al, Defendants. No. 1:09CV304-03-MU. Aug. 13, 2009.

[program termination]

[Also: Fourteenth amendment – no constitutional right to participate in a drug court]
[Equal protection]

Plaintiff pro se sued the Drug court Program for conspiring against him in violation of the 1st, 4th, 6th and 14th amendments to kick him out of the Drug Treatment Court program."

Dismissed for failure to state a claim for relief; Plaintiff does not have a constitutional right to participate in the drug treatment program.

Court of Appeals of Virginia, Virginia. Judson Jeffrey HARRIS v. COMMONWEALTH of Virginia. Record No. 0208-08-2. May 12, 2009.

Appellant claims that termination from drug court, which is a liberty interest, requires the same procedural protections as a person facing revocation of probation, including notice, the opportunity to challenge the case against him, and the opportunity to be heard and that his termination violated his the Due Process clause of the Fourteenth Amendment. Appellant also claimed that the reasons for his termination related to comments he made on a MySpace page which were protected under the First Amendment and that he could not be terminated d from the program or incarcerated for these comments.

Holding: Claims of Due process violations barred because not raised at time of termination and request to reverse termination never made. [See Also *Harris v. Commonwealth,* Record No. 2927-07-2 (Va.Ct.App. Mar. 10, 2008 above where appellant alleged that his termination from drug court violated his due process rights and had made this argument to the trial court during his motion for bond and during his sentencing hearing. However, he never sought reversal of his termination from the drug court program because of an alleged violation of his due process rights. This Court held that Rule 5A:18 barred our consideration of the issue because the specific objection he made on appeal was not timely made in the trial court.

Here, appellant argued during his sentencing hearing that he should not be sent to jail because to do so violated his due process rights. In support of this argument, appellant asserted that he was entitled to due process prior to his termination from the drug

court program. However, appellant did not ask the circuit court to reverse his termination on this ground. Therefore, due process argument was not presented to the circuit court and now barred by Rule 5A:18.

Appellant also contends that the circuit court erred in refusing to consider evidence of the reasons he was terminated from the drug court program. The record clearly shows that Harris never offered, nor did he seek to offer, any evidence of the reasons he was terminated from the drug court program. While Harris advised the court that people were present to address the issue, he never sought to call any witnesses or to present any evidence. Therefore, cannot be determined that circuit court erred in refusing evidence when no evidence was offered nor was any refused.
Appellant also claims circuit court erred in not considering alternatives to incarceration. Here, the terms of the plea agreement accepted by the circuit court explicitly stated that if appellant failed to successfully complete the drug court program, he would be returned to the circuit court for determination of his guilt and imposition of a sentence. The circuit court accepted the order terminating appellant's participation in the drug court program, found appellant guilty, and imposed the sentence appellant accepted in the plea agreement. Thus, the circuit court cannot be deemed to have erred in not considering alternatives to incarceration.

Court of Appeals of Washington, Division 1. STATE of Washington, Respondent, v Lorenzo BELL, Appellant. No. 59784-1-I. April 27, 2009.

Defendant was terminated from the King County drug court program because he falsified his sober support group verification slip and lied to the court about it, in violation of drug court policies. Bell contends that his termination violated due process because there was no evidence that he violated the drug court policies and procedures. He also appeals his conviction for delivery of an uncontrolled substance in lieu of a controlled substance, arguing that the stipulated evidence was insufficient to support the conviction. Because the court clearly stated the reasons for the termination based on the evidence and the drug court policies set forth in the drug court handbook which he had received, the record demonstrates that Bell received due process. And because the State submitted police reports establishing the essential elements of the crime charged, pursuant to the provisions of the drug court program, sufficient evidence supports the conviction.

Drug court participants are entitled to the same minimal due process rights as persons facing alleged probation, parole, SSOSA, or conditions of sentence violations.. A decision to terminate participation in drug diversion court requires an exercise of discretion similar to that involved in a decision to revoke a suspended or deferred sentence. Bell's termination from drug court having been reviewed for an abuse of discretion, his conviction was affirmed.

Supreme Court of Virginia. Judson Jeffrey HARRIS v. COMMONWEALTH of Virginia. Record No. 091177. Feb. 25, 2010.

Following defendant's plea of guilty to possession of heroin, and his subsequent termination from drug court treatment program, commonwealth moved to impose terms of plea agreement. The Circuit Court, City of Fredericksburg, sentenced defendant to incarceration, pursuant to plea agreement, and defendant appealed. The Court of Appeals, affirmed.

Held: trial court was required to consider the reasons that defendant had been terminated from program before imposing plea agreement terms. Reversed and remanded.

…Like a person on probation or parole, Harris enjoyed a conditional liberty interest dependant on his observing certain conditions and, like the probationer or parolee, before that interest can be revoked, Harris was entitled to an orderly process providing him notice and an opportunity to be heard. In this case, there is no transcript or other record of what specifically transpired when the decision to terminate Harris from the drug treatment court program was made. As the trial court noted, the circuit court judge designated as the "drug court judge" made the final decision terminating Harris from the program. Nothing in the record suggests, however, that the process was a formal hearing before the drug court judge in which Harris had the opportunity to address the issue…. The drug treatment court program termination decision itself, however, did not constitute a revocation of the liberty interest created pursuant to acceptance of the plea agreement. Harris' liberty interest could be revoked only by order of the circuit court... [B]ecause Harris had no opportunity to participate in the termination decision, the trial court's refusal to consider evidence of the reasons for termination from the program 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. That decision was error…

Court of Appeals of Virginia, Richmond. Judson Jeffrey HARRIS v. COMMONWEALTH of Virginia. Record No. 2927-07-2. March 10, 2009.

Appellant was convicted of possession of heroin after he failed to meet the conditions of drug court participation that deferred the trial court's finding of guilt. On appeal, appellant contends the trial court erred (1) in failing to reverse his termination from the Rappahannock Area Regional Drug Treatment Court (drug court) because the termination violated his due process rights under the Fourteenth Amendment; (2) in refusing to consider evidence of the reasons for his termination from drug court; and (3) in refusing to consider alternatives to incarceration.

Held: Appellant's claim of denial of due process was barred because raised for the first time on appeal. Appellant's claim that the trial court erred in refusing to consider evidence of the reasons for his termination from drug court and in refusing to consider alternatives to incarceration were rejected because (1) challenge to reasons for his termination should have been raised with the drug court; and (2) pursuant to his plea agreement, if appellant failed to successfully complete the drug court program, he would be found guilty and sentenced.

Supreme Court of Idaho, Boise, September 2007 Term. STATE of Idaho, Plaintiff-Respondent, v. Paul Lawrence ROGERS, Defendant-Appellant. No. 33935. Oct. 22, 2007.

[Drug court judge can also serve as sentencing judge]
[Drug court termination hearing requires same due process protections as parole or probation revocation hearing.]
[Drug court participation is a liberty interest under the 5th and 14th amendment.]

[also extensive discussion of Idaho drug court history and provisions; recognizes drug courts are different in each locale and no uniform process throughout the state]

Defendant plead guilty in return for admission into a diversionary drug court program, was terminated from the drug court program and convicted in the District Court, Fourth Judicial District, Ada County, of possession of a controlled substance. Defendant appealed, alleging that he was terminated from the drug court program without due process of law in violation of the Fourteenth Amendment.

Held: As a matter of first impression, drug court termination proceedings where defendant has pled guilty required the same restricted due process protections provided to parolees and probationers. Defendant who plead guilty in return for admission into a diversionary drug court program had a protected liberty interest in remaining in the program, entitling him to the restricted due process protections provided to parolees and probationers. U.S.C.A. Const.Amend. 14. Because Rogers was required to plead guilty in order to enter ACDCP he had a liberty interest in remaining in that diversionary program.

Parolees and probationers have a liberty interest under the Fifth and Fourteenth Amendments and cannot be terminated from parole or probation without due process of law. U.S.C.A. Const.Amends. 5, 14. Due process required for termination of drug court participation is to be flexible, does not need to be equated to a separate criminal prosecution and may be informal, on the condition that the safeguards are provided. U.S.C.A. Const.Amend. 14.

Drug court judge may preside over drug court termination proceedings and may consider evidence which might not necessarily be admissible in a criminal trial, if such evidence is disclosed prior to the hearing, is reliable and would assist the court in making its determination.

Drug court judge presiding in drug court termination proceedings may serve as the sentencing judge, since information from the termination proceedings would be admissible in a sentencing hearing.

Court of Appeals of Kentucky. Jerel Patrick HARPRING, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2004-CA-000898-MR. Aug. 12, 2005.

Appellant's probation was terminated for (1) failure to report his arrest to his probation officer; and (2) his termination from the drug court. Appellant contended (1) that the drug court judge should have recused herself from presiding over probation revocation hearing; and that (2) the court erred by relying on "unverified assertions" to remove Harpring from DRUG COURT and "privileged communications" to revoke his probation.

"…It is well settled "that probation is a privilege rather than a right. One may retain his status as a probationer only as long as the trial court is satisfied he has not violated the terms or conditions of the probation." This Court has held that "[i]t is not necessary that the Commonwealth obtain a conviction in order to accomplish revocation of probation"; therefore, "[o]ur review is limited to a determination of whether, after a hearing, the trial court abused its discretion in revoking the appellant's [probation]."

"…We do not believe the fact that the same judge presided over Harpring's trial proceedings, DRUG COURT sessions, and probation revocation hearing necessarily violates the requirement for an unbiased judge, nor do we believe Harpring was denied due process. There is no evidence in the record to suggest that the judge harbored any personal bias or prejudice against Harpring, had personal knowledge of disputed evidentiary facts outside the record, or expressed any opinions showing pre-judgment of Harpring's case. In fact, there is nothing that draws the judge's impartiality into question.

…Harpring's second argument is that the court erred by removing him from the DRUG COURT program and then by relying on that removal as a basis to revoke his probation. Specifically, Harpring claims "[i]t is clear from reading the transcripts of the DRUG COURT Proceedings and the probation revocation hearing that the trial court was strongly influenced in its decisions to terminate [him] from DRUG COURT and, then, to revoke his probation by the allegation that [he] said he was a drug dealer." Again, we disagree.

While DRUG COURT is a program operated through Kentucky's Court of Justice, it "is not a 'court' in the jurisprudence sense." Rather, "it is a drug treatment program administered by the court system." Accordingly, a participant's termination from the DRUG COURT program is "not subject to due process protections any more than his participation in a private drug treatment program would have been, or his participation in any other rehabilitation program such as anger management counseling or a job training program."

Court of Appeals of Utah. STATE of Utah, Plaintiff and Appellee, v. Tommy Lee ANGELOS, Defendant and Appellant. No. 20010509-CA. May 22, 2003.

[due process applies to drug court, even if hearings informal and errors can be corrected at any time, even after drug court jurisdiction terminates]

MEMORANDUM DECISION: Angelos's appeal requests that his sentence be vacated, claiming the **Drug court** committed two constitutional errors when he was sentenced on May 15, 2001, after he failed to comply with his prior Plea in Abeyance: (1) he was not represented by counsel and (2) he was denied due process. The State responded that any error on May 15th was moot because the court realized its errors and corrected them by affording Angelos a new sentencing hearing on November 13, 2001.

…We agree that Angelos's claim is moot because he had adequate notice and counsel present at the resentencing hearing. Thus, the constitutional infirmities were corrected. See State v. Martinez, 925 P.2d 176, 177 (Utah Ct.App.1996). Utah courts recognize an exception for an issue that "although technically moot as to a particular litigant at the time of appeal, is of wide concern, affects the public interest, is likely to recur in a similar manner, and because of the brief time any one person is affected, would otherwise likely escape judicial review." Wickham v. Fisher, 629 P.2d 896, 899 (Utah 1981). Because the record here is inadequate, we cannot reach the public interest exception. Nevertheless, we note that the constitutional rights of defendants in Drug court are not diminished by the informal nature of the proceeding Angelos asserts, however, that the Drug court was divested of jurisdiction when he filed a notice of appeal with this court on June 14, 2001, after his first hearing. Thus, he argues that the Drug court could not hold a rehearing to correct its prior errors.

Neither of the parties' briefs cited us to rule 22(e) of the Utah Rules of Criminal Procedure, which provides: "The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." The parties agree that the sentence at Angelos's first hearing was imposed in an illegal manner. Because the statute authorizes the court to correct this kind of sentence "at any time," the court had jurisdiction to do so in November 2001 regardless of the appeal. Since the November sentence was imposed in a legal manner, i.e., without legal error, the May errors were corrected. Accordingly, Angelos's November sentence is affirmed.

Court of Appeals of Arizona, Division 1, Department E. In re MIGUEL R.In re Jose J. Nos. 1CA-JV 02-0016, 1CA-JV 02-0072. Feb. 25, 2003.

Juveniles appealed from decisions of the Superior Court, Maricopa County, which required them to participate in the county Juvenile drug court program as a special term of standard probation. Held that: (1) involuntary placement was reasonably related to purpose of probation, even though juveniles did not wish to participate; (2) issue of whether imposition of 365 days in the drug court was abuse of discretion was not ripe; (3) juveniles could be required to participate in the drug court (4) involuntary placement did not violate due process rights; (5) requirement that juveniles participate in the drug court did not violate Fifth Amendment rights against self-incrimination; and (6) placement did not violate equal protection.

Court of Appeals of Arizona, Division 1, Department E. In re MIGUEL R.In re Jose J. Nos. 1CA-JV 02-0016, 1CA-JV 02-0072. Feb. 25, 2003.

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Supreme Court of Wyoming. Kilen Patrick DYSTHE, Appellant (Defendant), v. The STATE of Wyoming, Appellee (Plaintiff). No. 01-125. Feb. 19, 2003.

Drug court employees can be compelled to testify regarding participant's conduct in matter involving another defendant [drug court participant previously granted transactional immunity.]

Defendant was convicted following jury trial in the District Court, Sheridan County, of delivery of a controlled substance. Defendant appealed. The Supreme Court ruling including findings that: (1) trial court abused its discretion in precluding defendant, based on failure to meet pre-trial deadline for identifying witnesses, from presenting testimony either in case-in-chief or rebuttal by two DRUG COURT employees about whether alleged buyer had recently been in trouble for his conduct in DRUG COURT and whether he had received favorable treatment for testifying against defendant; and (2) that error was not harmless beyond a reasonable doubt.

Facts: Defendant was charged with selling cocaine to Daniel Luke Jacquot (Jacquot) in June 2000. Eric Stone (Stone), a mutual friend, testified that he processed the cocaine into a smokeable form and Jacquot testified that Dysthe, Jacquot, Stone, and Jacquot's brother, John, smoked the cocaine. Jacquot was a participant in DRUG COURT, and Jacquot's urine tested positive for cocaine the day after the group allegedly smoked the cocaine. Jacquot testified that he was booked into jail after telling DRUG COURT personnel that he had used cocaine. Jacquot told a Division of Criminal Investigation (DCI) agent that Dysthe had sold him the cocaine. An Information charged Dysthe with one count of delivery of a controlled substance, in violation of Wyo. Stat. Ann. § 35- 7-1031(a)(ii). Both Stone and Jacquot were granted transactional immunity for their testimony. Defendant filed a notice of additional witnesses after the deadline established in the Scheduling Order, naming Ray Olson and Jodie Bear, DRUG COURT employees, as witnesses to testify about Jacquot's conduct DRUG COURT, specifically that he conspired with other DRUG COURT participants to deliver hallucinogenic mushrooms. The next day, the State listed Honorable J. John Sampson as a witness, to counter any defense accusations concerning Jacquot's conduct in DRUG COURT. The district court prohibited either party from calling additional witnesses because it was not notified of these witnesses by the court's November 13th deadline. The matter proceeded to trial and a jury found Dysthe guilty. Defendant appealed his conviction on grounds which included whether the trial court erred in excluding two of his named witnesses, who were drug court employees, thereby denying him his right to a fair trial and his right to compulsory process in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution. Conviction reversed and case remanded. The factors to be weighed in the balance include, but are not limited to the "integrity of the adversary process,

which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process ...."

Court of Criminal Appeals of Oklahoma. L.B. ALEXANDER, Appellant, v. STATE of Oklahoma, Appellee. No. F-2000-472. May 30, 2002.

Denies defendant's appeal of termination from drug court as (1) abuse of discretion by not recognizing the "relapses and restarts that commonly occur with drug addicts"; and denial of fair and impartial trial because judge "removed himself as an adjudicatory body when he became a participant in drug court "team," particularly since defendant did not request recusal.

United States Court of Appeals, Tenth Circuit. Kenneth HILL, Petitioner-Appellant, v. STATE of Oklahoma; Susan Casswell, Oklahoma County District Judge; Lisa Hammond, Respondents-Appellees. No. 99-6454. April 7, 2000.

Dismisses Defendant's suit against Drug court Judge and others alleging constitutional rights violated when he was not accepted into the Oklahoma County Drug court Program in contravention of his plea agreement. Holding "should not be read as unsympathetic to the serious due process concerns raised when a plea agreement is reached. Rather…simply hold that [he] cannot obtain the relief he seeks by bringing a suit...against the named defendants."

The Blackfeet Tribe vs. Deamarr Rutherford, Defendant. Case No. 00-AC-41. Opinion/Order. August 16, 2000.*

The defendant filed a writ of habeas corpus alleging that she was being unlawfully detained by the Blackfeet Alternative Court. The Court found that the defendant's civil rights were violated by the alternative court not following its manual of procedures in terms of incarcerating the defendant for 24 hours on a first offense positive drug test when the penalty should have been a $ 10.00 fine. The court also found that (1) without proper notice of the intent to revoke, the due process provisions of the Indian Civil Rights Act are violated; and (2) the bond schedule adopted by the Blackfeet Tribal Business Council is excessive and in violation of the Constitution and By-Laws for the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana.

The Blackfeet Tribe vs Clayton Sharp, Defendant. Case No. 20-AP-18. Opinion/Order. September 5, 2000.*

Since the policy and procedure manual for the Blackfeet Alternative Court, which allows fines and incarceration, was not approved by the Blackfeet Tribal Business Council, it is not a valid document. Until such time as the policy and procedure manual is adopted by resolution by the Blackfeet Tribal Business Council it cannot be used by the Blackfeet Alternative Court. Any and all persons being detained by the alternative court shall therefore be released.

4. SIXTH AMENDMENT

a. RIGHT TO TRIAL/ RIGHT TO EFFECTIVE COUNSEL

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, V. JOSE A. DAVILA, DEFENDANT-APPELLANT. NO. A-3383-10T4. SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION. SUBMITTED MARCH 13, 2013; DECIDED MARCH 20, 2013.

Dismisses defendant's of ineffective assistance of counsel when not advised of potential deportation consequences of plea since admitted on record he was a U.S. citizen. (Pre-*Padilla*)

THE PEOPLE, Plaintiff and Respondent, v. DANIEL NEIL HURD, Defendant and Appellant. No. C068665.Court of Appeals of California, Third District, Tehama. Filed September 25, 2012.
[Claim of ineffective assistance of counsel: should be raised in 1983 action]:

The trial court denied defendant's request for drug court or further Proposition 36 probation; he was sentenced to an aggregate term of four years eight months in state prison. Defendant appeals his sentence.

In this case, defendant had two attorneys representing him at sentencing, neither objected to the sentence imposed and neither offered any explanation for their silence. Counsel also offered no explanation for the pleas negotiated, the decision to request drug court, or why defendant was not asking for Proposition 36 probation. Thus, defendant's claim that trial counsel was ineffective for failing to object to the prison

sentence imposed, is better asserted in habeas corpus proceedings. (See *People v. Mendoza Tello, supra,* 15 Cal.4th at pp. 266-267.)

Court of Appeals of Mississippi. Christopher THOMAS, Appellant v. STATE of Mississippi, Appellee No. 2010–CP–00054–COA. June 21, 2011.

Defendant, pro se, appeals the Circuit Court of Panola County's dismissal of his motion for post-conviction relief alleging ineffective assistance of counsel regarding his plea of guilty and entry into the a drug court with the maximum sentence of eight years in prison to be imposed if he did not complete the drug court.

STANDARD OF REVIEW: will not disturb the court's factual decisions unless they are clearly erroneous. Judgment affirmed.

Mary E. FORD, Appellant v. COMMONWEALTH of Kentucky, Appellee and William E. Flener, Appellant v. Commonwealth of Kentucky, Appellee. Nos. 2008-CA-001990-MR, 2009-CA-000889-MR, 2009-CA-000461-MR. April 30, 2010.

[Credit for time served: abuse of discretion for court to not require complete record regarding time served]

[Having same judge preside over drug court and revocation hearing is not a denial of right to impartial hearing/due process]

Defendants appeal revocation of probation alleging (1) denial of due process because not provided an impartial hearing since the same judge presided over drug court and revocation hearing; and (2) failure to properly credit time served.

[Agree to hear the appeal on this issue even though not clear issue preserved on the record because of the due process implications]

First, on probation termination: Standard of review is whether trial court abuse its discretion in revoking appellants' probation and diversion.

Held: having the same judge preside over the drug court and the revocation hearing does not necessarily violate the requirement for an unbiased judge; no evidence in the record to suggest personal bias or prejudice, etc.

Probation is a privilege rather than a right.

Both DRUG COURT programs and revocation hearings are subject to different due process requirements than the prosecution of cases. Trial practice in prosecutorial cases has allowed judges to preside over the same case upon remand and in successive trials involving the same defendant.

Therefore, can find no error in the judge here presiding over both the DRUG COURT and the revocation proceedings, and hence, the court did not abuse its discretion.

Second on credit for time served: -found Court abused its discretion by relying on incomplete record.

The court based its order on an admittedly incomplete record of the case and the Office of Probation and Parole's assurance that Ford had received appropriate jail time credit. If confusion existed as to the amount of jail time credit, a hearing should have been held. Accordingly, we determine that it was an abuse of discretion for the trial judge to fail to adequately explore the Ford's correct amount of jail time credit in the instant case.

Held: vacated court's order denying appellant's motion to reconsider its previous order regarding custody credit, and remanded to the Muhlenberg Circuit.

Supreme Court of the United States. PADILLA *v.* KENTUCKY . CERTIORARI TO THE SUPREME COURT OF KENTUCKY . No. 08–651. Argued October 13, 2009—Decided March 31, 2010 .

[effective counsel requires advice as to whether plea carries risk of deportation]

Petitioner Padilla, a lawful permanent resident of the United States for over 40 years, faces deportation after pleading guilty to drug distribution charges in Kentucky. In postconviction proceedings, he claims that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived in this country so long. He alleges that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla postconviction relief on the ground that the Sixth Amendment's effective assistance-of-counsel

guarantee does not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction.

Held: Because counsel must inform a client whether his plea carries a risk of deportation, Padilla has sufficiently alleged that his counsel was constitutionally deficient.

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Iris Lee BLACK, Defendant and Appellant. No. E046128. July 31, 2009. Review Denied Oct. 28, 2009.

[credit for time served; Sixth amendment – right to effective counsel]

Defendant's Drug court probation for the offense of identity theft was revoked in the Superior Court, San Bernardino County and she was sentenced to the aggravated term of three years. Defendant appealed, stating (1) her waiver of credit for time served was not knowing and intelligent; and (2) her counsel had been ineffective by not advising her that her waiver of custody credits as condition to enter drug court could not be revoked.

To prevail on a claim of ineffective assistance of counsel, a defendant must be able to show deficient performance by counsel and prejudice. …A defendant's bare assertion of incompetent advice by counsel is not enough to establish deficient performance, as required for ineffective assistance of counsel. The better practice is for sentencing courts to expressly admonish defendants who waive custody credits that such waivers will apply to any future prison term should probation ultimately be revoked and a state prison sentence imposed.

Held: Defendant's waiver of custody credits as a condition of admittance to a DRUG COURT treatment program was knowing and intelligent, even though the court did not admonish her as to the effect of the waiver, where defendant signed the "DRUG COURT Application and Agreement" and initialed the paragraph stating that defendant agreed to "waive all credits as a condition of participating," defendant initialed the paragraph stating that she could read in English and had sufficient time to read the agreement, and defendant told the court that she had no questions about the agreement.

Case remanded for the limited purpose of calculating conduct credits under section 4019 for time spent in local custody or in a residential drug treatment program after September 24, 2007.

District Court of Appeal of Florida, Third District. Samson LOUIS, Appellant, v. The STATE of Florida, Appellee. No. 3D08-506. Nov. 12, 2008.

[Defendant entitled to hearing on eligibility for drug court since counsel failed to request his eligibility and defendant would appear to be eligible]

Reverses and remands case for evidentiary hearing on defendant's eligibility for drug court. The defendant claims on appeal that his trial counsel was ineffective for failing to request to place him in drug court for which the defendant was apparently qualified. The State has acknowledged that the defendant was qualified for drug court. Because the record fails to conclusively refute the defendant's claim that his trial counsel failed to request he be placed in drug court, we reverse the order and remand for an evidentiary hearing or other appropriate relief.

Court of Appeals of Washington, Division 2. STATE of Washington, Respondent, v. Patrick Boyd DRUM a/k/a Tim Jones, Appellant. In re Personal Restraint Petition of Patrick Boyd Drum a/k/a Tim Jones, Petitioner. Nos. 35947-2-II, 34377-1-II. March 25, 2008.

Defendant charged with residential burglary entered into a drug court contract, under which he agreed to undergo drug treatment. After seeking release from the contract, defendant was convicted in the Jefferson Superior Court, of residential burglary, and he appealed on various grounds.

Held:

(1) defendant waived his right to raise any evidentiary issues by entering into drug court contract, and
(2) drug court contract was not equivalent to a guilty plea, and thus contract was not required to meet same due process standards as guilty pleas
(3) Judge was not biased because a member of the drug court "team" since no showing of actual or potential bias
(4) Defense counsel's advice to enter into drug court contract did not reflect ineffective counsel since reasonable strategy to further

defendant's own goals; defendant's stipulation to guilt by entering into drug court contract was not ineffective counsel since court made independent finding of guilt.

Supreme Court, Appellate Division, Third Department, New York. The PEOPLE of the State of New York, Respondent, v. Alan G. BIGWARFE, Appellant. Dec. 7, 2006.

[allegation of Ineffective assistance of counsel because counsel member of drug court team]

Defendant, having pled guilty in the Schuyler County Court to fourth-degree grand larceny, appealed on the grounds that (1) the judge's participation as a drug court team member resulted in his bias at drug court termination hearing; and (2) denied effective assistance of counsel at termination hearing because his attorney's participation in the Drug court team created conflict of interest that was detrimental to his defense.

Held: Claim not preserved for appellate review. Defendant failed to "make a motion or otherwise request County Court to recuse itself from the case."

Supreme Court of Arkansas. George AYDELOTTE, Appellant v. STATE of Arkansas, Appellee. No. CR 04-822. Nov. 10, 2005.

Appellant's claim that counsel's failure to argue he was denied equal protection because he was not transferred to the drug court did not constitute ineffective counsel. Drug court did not exist in the county where he was tried until one year following his conviction and he was not denied equal protection by not having his case transferred to a county that had a drug court.

Court of Appeals of Washington, Division 2. STATE of Washington, Respondent, v. Terry L. STEPHENS, Appellant. No. 29950-0-II. April 13, 2004.

[Denies defendant's claim that attorney's failure to request drug court disposition denied her effective counsel; and county's lack of drug court denied her equal protection]

Supreme Court of Iowa. STATE of Iowa, Appellee, v. James Craig THOMAS, Appellant. No. 01-1463. April 2, 2003.

Defendant was convicted in the District Court, Pottawattamie County, of two counts of delivery of methamphetamine, and his sentence was held "in abeyance" while he was transferred to treatment facility under supervision of drug court. Defendant later absconded from the Drug court and was sentenced by the court without allocution by counsel. Defendant appealed, claiming his plea was not voluntary and intelligent.. The Court of Appeals affirmed defendant's conviction, but vacated his sentence, and remanded for resentencing. Defendant appealed. The Supreme Court held that defendant's guilty plea was knowingly and voluntarily entered but that Defendant was entitled to allocution by counsel at sentencing hearing.

Supreme Court of Hawai'i. STATE of Hawai'i, Plaintiff-Appellee, v. Anthony ROBERTS, Defendant-Appellant. No. 24721. Aug. 9, 2002.

Defendant, who entered no contest pleas to first-degree burglary, unlawful entry into a motor vehicle, third-degree theft, promoting a dangerous drug, and unlawful possession of drug paraphernalia, filed motion to withdraw plea. The Second Circuit Court denied motion and convicted defendant. He appealed. The Supreme Court held that: (1) defendant was provided with requisite advice necessary to ensure that his plea was knowing and voluntary, and (2) defense counsel's alleged representation that, by tendering pleas, defendant would become eligible, or at least be considered, for participation in drug court program was not ineffective assistance.

Court of Appeals of Kentucky. Keith Aaron DUNSON, Appellant, v. COMMONWEALTH of Kentucky, Appellee. No. 1999-CA-001253-MR. Aug. 3, 2001. Case Ordered Published by Court of Appeals Oct. 5, 2001.

[probationer's due process rights not violated by not having counsel represent probationer at drug court termination hearing; " drug court" is not a "court" in the jurisprudence sense; it is a drug treatment program administered by the court system; termination from drug treatment program not subject to due process protections any more than participation in a private drug treatment program would have been; probationer was represented by counsel at probation revocation hearing and had opportunity cross-examine coordinator of drug treatment program and to present probationer's side of case]

STATE of Washington, Respondent, v. Ronald Wayne MARSHALL, Appellant. No. 22609-0-II. Court of Appeals of Washington, Division 2. Jan. 29, 1999.*

Defendant's claim of ineffective assistance of counsel because of not being informed of a fourth amendment defense to his charge prior to entering a plea of guilty and entering drug court program not sustained because defendant's written statement on plea of guilty conformed fully to the requirements of statute. …When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness.

District Court of Appeal of Florida, Fourth District. Kelli S. SMITH, Appellant, v. STATE of Florida, Appellee. No. 4D01-3710. March 19, 2003.

Reversed trial court's denial of defendant's plea to withdraw her no contest plea to drug charges. Plea of no contest to drug charges not voluntary absent evidence showing defendant understood consequences of having her case transferred to drug court and in light of plea counsel's admission he didn't know enough about drug court to advise defendant on particulars.

b. RIGHT TO COUNSEL ON APPEAL

The People Of The State Of New York, Respondent, V Joseph A. March, Appellant. 104887. Supreme Court Of New York, Appellate Division, Third Department. 107 A.D.3d 1160; 966 N.Y.S.2d 696; 2013 N.Y. App. Div. 2013 NY Slip Op 4376. June 13, 2013, Decided; June 13, 2013, Entered.

Requires counsel to be appointed for appeal of drug court termination, including determination of validity of waiver of right to appeal.

The People Of The State Of New York, Respondent, V Brandon J. Empie, Appellant. 104127 Supreme Court Of New York, Appellate Division, Third Department. 108 A.D.3d 864; 968 N.Y.S.2d 406; 2013 N.Y. App. Div.; 2013 NY Slip Op 5239.

July 11, 2013, Decided; July 11, 2013, Entered.

Relieves counsel of representation in appeal of drug court termination since no 'frivolous issues to be raised."

c. RIGHT TO CONFRONT WITNESSES

Court of Appeals of Washington, Division 1. STATE of Washington, Respondent, v. Eddie James FRANCIS, Appellant. Nos. 59771-0-I, 59772-8-I, 59773-6-I. July 21, 2008.

Francis appeals his conviction in the King County Drug court for three drug offenses, arguing that the introduction of hearsay evidence at his drug court termination hearing violated his right to due process. He also requests dismissal or remand for entry of findings of fact and conclusions of law on charges for which he was convicted. Because Francis did not object to the introduction of hearsay evidence at the termination hearing and has not demonstrated prejudice from the post-appeal entry of findings of fact and conclusions of law, conviction is affirmed.

Termination: Standard of Review: When the State seeks to terminate an individual's participation in drug court, the State must prove noncompliance with the drug court diversion agreement by a preponderance of the evidence.[FN1] Due to the similarity between the court's function in a drug court termination proceeding and those involving alleged probation, parole, SSOSA, or conditions of sentence violations, Washington courts have held that drug court participants are entitled to the same minimal due process rights. Revocation of a suspended or deferred sentence rests within the discretion of the court A decision to terminate participation in a drug diversion court requires a similar exercise of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds.

Hearsay Evidence: At a termination hearing the minimal due process rights an offender possesses include the right to confront adverse witnesses, unless good cause exists not to allow the confrontation. A court may nevertheless consider alternatives to live testimony in these settings, including affidavits and other documentary evidence that would otherwise be considered hearsay. However, hearsay evidence should be considered only if there is good cause to forgo live testimony. Good cause is defined in terms of "difficulty and expense of procuring witnesses in combination with

'demonstrably reliable' or 'clearly reliable' evidence."

A defendant's failure to object to hearsay evidence and his own use of it during argument constitute a waiver of any right of confrontation and cross-examination.

d. RIGHT TO SPEEDY TRIAL

Court of Appeals of Kentucky. Dale SCHINDEWOLF, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2004-CA-001343-MR. Feb. 10, 2006.

Delay in sentencing defendant resulting from his unsuccessful participation in a drug court program, pursuant to his plea agreement, is not unreasonable delay soas to deprive the sentencing court of jurisdiction.

State of Florida, Appellant, v. Mark Furst, Appellee. No. 92-2503. District Court of Appeal of Florida. Fourth District. July 28, 1993*

The Court upheld drug court judge's decision discharging on speedy trial grounds the case of defendant, whose case had been transferred to the drug court, where state had actual notice of and intentionally ignored defendant's prematurely filed demand for reciprocal discovery and wanted to wait to see "what transpired with defendant's transfer to the drug court division" before complying with his discovery request.

STATE of Washington, Respondent. Lamar Dathen WARREN, Appellant. Nos. 22269-8-II, 22390-2-II. Court of Appeals of Washington, Division 2. July 9, 1999. Court of Appeals of Washington, Division 2. Lamar Dathen WARREN, Appellant. v. STATE OF Washington, Respondent, Nos. 22269-8-II, 22390-2-II. Dec. 10, 1999. ORDER AMENDING PUBLISHED OPINION.

While participating in drug court program, defendant was convicted in the Superior Court, Pierce County of unlawful delivery of controlled substance, resulting in his expulsion from drug program. Defendant appealed. The Court of Appeals held that grant of two-day continuance based on courtroom unavailability on last day of speedy trial period was not based on good cause, absent court's consideration of length of likely actual delay or provision of detailed explanation of why individual superior court departments were unavailable. Amended order deleted the following sentence of the opinion: Warren should also be reinstated to the Drug court program if it still exists."

5. FOURTEENTH AMENDMENT: (EQUAL PROTECTION)

Superior Court of New Jersey, Appellate Division. STATE of New Jersey, Plaintiff-Respondent, v. Anthony SAXON, Defendant-Appellant. Submitted Feb. 24, 2010. Decided March 23, 2010.

[Fourteenth Amendment – equal protection; right to enter drug court program]

Defendant voluntarily entered into a plea agreement covering both indictments, which ultimately resulted in his conviction for third-degree possession of heroin with intent to distribute within 1000 feet of school property; second-degree possession of heroin with intent to distribute within 500 feet of a public housing facility, and third-degree possession of cocaine, . In exchange for the entry of the plea, the State agreed to recommend a maximum aggregate sentence of five years incarceration with two and one-half years of parole ineligibility, which was imposed by the sentencing judge.

Defendant appeals sentence of incarceration following plea agreement because he was denied admission to and the opportunity to benefit from Drug court Treatment, which he claims would have resulted in an alternative sentence consisting of rehabilitation instead of incapacitation.

Trial court's sentence affirmed because no abuse of discretion or harmful error detected; [no constitutional right to participate in a drug court program.]

Court of Appeals of Mississippi. Darrell W. PHILLIPS, Appellant v. STATE of Mississippi, Appellee. No. 2009-CP-00252-COA. Jan. 12, 2010.

Defendant convicted as a habitual offender for felony shoplifting filed motion for post-conviction relief, including transfer of case to Drug Court.

Held: Defendant had no right to participate in DRUG COURT – no equal protection claim since drug court is discretionary sentencing alternative.

Defendant charged with felony shoplifting had no right to participate in DRUG COURT, since no one had a right to attend DRUG COURT pursuant to alternative sentencing eligibility criteria and conditions statute.

Whether Phillips had a right to participate in DRUG COURT.

Phillips claims that he had a right to have his case transferred to the Seventeenth Judicial District DRUG COURT. Again, he fails to offer any authority in support of this argument. Even so, his claim fails because this Court has held that there is no right to attend DRUG COURT, stating:

The Mississippi Legislature created the DRUG COURTs in part to "reduce the alcohol-related and [other] drug-related court workload." Miss.Code Ann. § 9-23-3. However, the Code intentionally refrained from creating a right by expressly stating, "A person does not have a right to participate in DRUG COURT under this chapter." Miss.Code Ann. § 9-23-15(4). Thus, [the defendant] does not have a right to transfer his case to DRUG COURT nor does he have a[n] equal protection claim since no one has the right to attend the DRUG COURT.

United States District Court, W.D. North Carolina. Brent JACOBY, Plaintiff, v. BUNCOMBE COUNTY Drug Treatment PROGRAM et., al, Defendants. No. 1:09CV304-03-MU. Aug. 13, 2009.

[program termination]
[Fourteenth amendment – no constitutional right to participate in a drug court]
[Equal protection]

Plaintiff pro se sued the Drug court Program for conspiring against him in violation of the 1st, 4th, 6th and 14th amendments to kick him out of the Drug Treatment Court program."

Dismissed for failure to state a claim for relief; Plaintiff does not have a constitutional right to participate in the Drug treatment program.

Court of Appeals of Indiana. Daniel F. LOMONT, Appellant-Defendant, v. STATE of Indiana, Appellee-Plaintiff. No. 17A03-0512-CR-617. Aug. 23, 2006.

The trial court accepted defendant's plea agreement but did not enter judgment of conviction, and pursuant to Ind.Code § 11-12-3.7-11(b), stayed the conviction and ordered him to participate in the Steuben County Forensic Diversion Program for 36 months. Two weeks later, the trial court learned that Steuben County does not have such a program and therefore scheduled a hearing to resentence him.

At the April 11, 2005, hearing the trial court explained that it had reset the matter for sentencing because the original sentence could not be carried out. The trial court asked Lomont if he wanted to proceed with sentencing or withdraw his guilty plea. Lomont initially responded that he wanted to withdraw his plea. He later told the trial court that he did not want to withdraw his plea. Rather, he asked the trial court for thirty to forty-five days to determine the availability of a forensic diversion program in a nearby county. The trial court granted Lomont time to investigate other programs and scheduled a trial for September 7, 2005.

Lamont found that only the following five counties and cities have implemented forensic diversion programs: Marion County, Bartholomew County, Vanderburgh County, Shelbyville, and Lafayette. The morning of the scheduled trial, Lomont objected to the trial and complained that the lack of a forensic diversion program in Steuben County violated his constitutional rights where five other Indiana counties and cities have implemented such programs.

The trial court proceeded to trial and convicted Lomont of operating a vehicle while intoxicated with a prior conviction, driving left of center, and failure to use a turn signal. Thereafter, the court sentenced Lomont to three years with two years suspended. The court ordered that Lomont could serve his one-year sentence in the Steuben County Work Release Program, if he qualified for the program, and placed Lomont on probation for two years.

Held:

> (1) trial court was not bound to provision of plea agreement requiring it to sentence defendant to forensic diversion program, and
> (2) lack of forensic diversion program in county, although five other counties and cities had such a program, did not deny defendant equal protection.

Defendant was treated no differently than other similarly situated offenders in county since no

defendants had access to forensic diversion program in county at time of defendant's prosecution, and enabling statute did not create court to which all citizens had right of access.
There is no law mandating forensic diversion programs in all counties, especially when there is limited funding available. Lomont, like Little, has failed to carry his burden of establishing an equal protection violation. See, e.g., Little, 66 P.3d at 1102.

Appellant also contended that the "preferential treatment of being able to avoid a felony conviction by taking part in the forensic diversion program is not available to all repeat OUI offenders, only to those who commit offenses in counties that have created such programs." The legislature has not singled out one class of persons to receive a privilege or immunity that it not equally provided to others. On the contrary, no defendants had access to a forensic diversion program in Steuben County at the time of Lomont's prosecution. Lomont was therefore treated no differently than other similarly situated offenders in that county.

Supreme Court of Arkansas. George AYDELOTTE, Appellant v. STATE of Arkansas, Appellee. No. CR 04-822. Nov. 10, 2005.

Rejects appellant's claim that trial counsel's failure to argue that appellant would be denied equal protection if he was not transferred to drug court, even though drug courts under the Arkansas Drug court Act of 2003, were not available at the time of his conviction, constituted denial of effective counsel. Appellant contended drug court programs were available elsewhere at the time of his conviction although provided no information regarding their location, requirements, etc.

Court of Appeals of Mississippi. Michael JIM, Appellant v. STATE of Mississippi, Appellee. No. 2004-KA-01235-COA. Sept. 20, 2005.

Defendant found guilty of possession of more than thirty grams of marijuana and sentenced to two years custody and participation in the Regimented Inmate Discipline Program. Appellant appealed this conviction based on (1) the circuit court failing to consider sending the case to the Eighth Circuit Drug court violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and other grounds.

On the day of trial, appellant filed a motion to transfer his case to the Eighth Circuit Drug court. The circuit court refused to transfer because the motion was untimely and because the defendant did not have a right to a transfer to drug court.

Held: "An application for a change of venue is addressed to the discretion of the trial judge, and his ruling thereon will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion or that the discretion has not been justly and properly exercised under the circumstances of the case.

A person does not have a right to participate in drug court under this chapter." Miss.Code Ann. § 9-23-15(4). Thus, Jim does not have a right to transfer his case to drug court nor does he have a equal protection claim since no one has the right to attend the drug court.

Supreme Court of Washington, En Banc. STATE of Washington, Respondent, v. Melody Ann HARNER, Petitioner. State of Washington, Respondent, v. Kathryn S. Keithley, Appellant. Nos. 74460-2, 75337-7. Argued Sept. 14, 2004. Decided Dec. 23, 2004. As Amended on Denial of Reconsideration Feb. 17, 2005.

[absence of a drug court in county where defendants were charged did not violate their right to equal protection or due process – no showing of existence of a "fundamental right" or that drug offenders were a "suspect or semi-suspect class"; no showing that Legislature required a drug court in each county]

Court of Appeals of Arizona, Division 1, Department E. In re MIGUEL R.In re Jose J. Nos. 1CA-JV 02-0016, 1CA-JV 02-0072. Feb. 25, 2003.

Juveniles appealed from decisions of the Superior Court, Maricopa County, which required them to participate in the county Juvenile drug court program as a special term of standard probation. Held that: (1) involuntary placement was reasonably related to purpose of probation, even though juveniles did not wish to participate; (2) issue of whether imposition of 365 days in the drug court was abuse of discretion was not ripe; (3) juveniles could be required to participate in the drug court (4) involuntary placement did not violate due process rights; (5) requirement that juveniles participate in the drug court did not violate Fifth Amendment rights against self-incrimination; and (6) placement did not violate

equal protection.

Court of Appeals of Washington, Division 2. STATE of Washington, Respondent, v. Seth C. LITTLE, Appellant. No. 28262-3-II. April 1, 2003.

Denies Defendant's appeal from order of the Superior Court, Grays Harbor County contending that the lack of a drug court in Grays Harbor County denied him equal protection of the law. Legislation provides that Counties may establish drug courts; Denial of "equal protection" requires that "persons similarly situated with respect to the legitimate purpose of the law be similarly treated." In this case: (1) No showing of a government-established discriminatory classification. The drug court enabling statute, RCW 2.28.170, does not create classifications; nor does the statute create a "court" to which all state citizens have a right of access. Use of the discretionary verb "may" means that the statute empowers counties to create drug courts if they so choose; (2) no showing that the Grays Harbor County Superior Court or Prosecuting Attorney created separate classifications of alleged drug offenders, some with access to drug court and some without.

[FACTS: Having been charged with unlawful possession of a controlled substance (methamphetamine), Little asked the Grays Harbor Superior Court either (1) to provide him with access to a drug court program, which Grays Harbor County did not have; or (2) to dismiss the information with prejudice because the lack of a drug court program violated his right to equal protection. The trial court denied Little's motion and, following a bench trial on stipulated facts, convicted him as charged.]

John Mark Pennington v. State of Florida. Appellate Case No. 96-03750. Lower Case No. CRC 95 09947 CFNO-D. Supreme Court No. 975261. Oral Argument October 27, 1998. Decision. December 1998. Cert. Denied.

Petition for Writ of Certiorari appealing trial court's denial of petitioner's motion for admission to statutorily provided pretrial Substance Education and Treatment Intervention Program because none existed in the Circuit.

Appellant, a physician whose license was revoked because of conviction for drug possession, filed a motion to dismiss the information charging him with violation of F.S. 893, claiming that he was denied his constitutional right to equal protection because, despite statutory authorization for the establishment of a drug court program in each circuit, no drug court program had been established in the circuit in which he was charged. Had such a program been established, he would have been afforded the opportunity to have his charges dismissed upon successful program completion and therefore have no criminal record or consequent loss of his medical license. His motion to dismiss was denied by the trial judge and, on November 14, 1997 he entered a conditional nolo contendere plea conditions upon his ability to bring this appeal.

The appellate court upheld the trial court's conviction in a per curiam opinion. The Florida Supreme Court denied the Appellant's Petition for Writ of Certiorari.

DRUG COURT ELIGIBILITY/ ENTRY/ RETENTION

State of Idaho v. Krystal Lynn Easley. Supreme Court of the State of Idaho. Docket Nos. 39710/39711. March 28, 2014.

Error in sentencing process when District Court determined that prosecutor had an absolute right to veto the court's desired decision to sentencing Easley to the mental health court.

STATE OF FLORIDA, Appellant, v. BRIAN JEAN, Appellee. No. 4D12-1979. District Court of Appeal of Florida, Fourth District. June 5, 2013.

Despite the court's findings re benefits of pre-trial drug court for participant, section 775.08435(1)(c) prohibits the trial court from withholding adjudication in this circumstance. Sentence reversed and case remanded.

STATE OF NEW JERSEY, Plaintiff-Respondent, v. MARK POPE, Defendant-Appellant. No Superior Court of New Jersey, Appellate Division. Argued December 18, 2012. Decided March 18, 2013.

Eligibility Determination: Judge must comply with statutory requirements for drug court eligibility; if defendant eligible for drug court under statute, judge could not find he was ineligible on other grounds.

The PEOPLE of the State of Illinois, Plaintiff-Appellee, v. Rodney McKINNEY, Defendant-Appellant.

Appellate Court of Illinois, First District, Third Division. August 8, 2012.

Defendant pled guilty to burglary based on erroneous advice that he was ineligible for participation in a veterans court because he was not eligible for probation, he was entitled to withdraw his plea and pursue his request for admission to the program. Rejects prosecutor's objection to the Defendant's entering the Veterans Drug Treatment program because he did not "demonstrate a willingness to participate in a treatment program" since the record, did not show this issue came up "It is clear from the record that defendant never had the opportunity to explore such a possibility." Remanded for further proceedings.

Lionell Marlo Brouhton, Appellant, vs. The State of Nevada, Respondent. No. 60827. Supreme Court of Nevada.2013 Nev. Unpub. January 16, 2013.

Reject's Appellant's contention that district court abused its discretion by ignoring his drug addiction and mental health condition and inappropriately sentenced him to a lengthy prison term (60-216 months) to run consecutively to his sentencing in another case – under the guise of protecting society and should have been placed on probation with special condition to completed Drug court; defendant committed offenses while on parole and district court concerned about protecting public; Defendant had also sustained multiple prior felony convictions and probation revocations; "A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution."

THE PEOPLE, Plaintiff and Respondent, v. JANET REBECCA WEISS, Defendant and Appellant. No. C069563. Court of Appeals of California, Third District, Yolo. Filed December 28, 2012.

[Eligibility Determination: Can Be Delegated to Drug court Coordinator- Denied For "High Risk/High Need" – Impose Seven Year Prison Term]

Drug court coordinator testified that defendant was not suitable for drug court based on her history and current readiness. Defendant contacted the Delancey Street Foundation only because she had been ordered to do so by the court. According to the drug court coordinator, defendant's willingness to participate in the Delancey Street program did not indicate her suitability for drug court.

Defendant contends it was an abuse of discretion to deny probation, and that the seven-year term was an abuse of discretion. She argues that the trial court erred by failing to consider probation, improperly delegated authority to the drug court coordinator…

Defendant's criminal record includes four prior felony convictions for drug-related offenses, each in a separate proceeding. She failed probation in three of her prior cases. She has an extensive history of failed treatment programs, including drug court. The drug court coordinator stated that she was not appropriate for that program. It was not an abuse of discretion for the trial court to deny probation under these circumstances.

STATE OF NEW JERSEY, Plaintiff-Appellant, v. LAMAR WOODWARD, Defendant-Respondent. No. A-5980-09T1. Superior Court of New Jersey, Appellate Division. Argued June 8, 2011. Decided September 23, 2011.

[Eligibility: Determined By Statute; Prosecutor Cannot Overrule Provisions] - Affirms drug court judge's finding of appellant 's eligibility for drug court, in accordance with statutory provisions over prosecutor's objection over prosecutor's objection on grounds of purported gang membership.

Court of Appeal, Fourth District, Division 1, California. The PEOPLE, Plaintiff and Respondent, v. Ray Earl WEBB, Defendant and Appellant. No. D056735. (Super.Ct.No. SCE285445). March 15, 2011. As Modified on Denial of Rehearing April 14, 2011.

APPEAL from a judgment of the Superior Court of San Diego County.

[court did not abuse discretion in denying defendant drug court entry]

Defendant appeals the sentence entered on his guilty plea to felony cocaine possession and misdemeanor resisting arrest on grounds that court failed to properly assess his eligibility for drug court probation and Proposition 36 probation.

Defendant's screening for drug court participation had been continued four times due to his "medical

conditions" When finally screened for the drug court found to be "unsuitable" due to his "medical conditions" relating to pain medication taken for knee surgery and inability to travel to drug court hearings. Judge ordered a presentence report which defendant did not complete. Court sentenced him to the upper three-year term.

There is no showing the court's finding was factually unsupported or otherwise improper.

To the extent Webb is arguing he was denied due process, the argument is without merit.

Court of Appeals of Kansas. STATE of Kansas, Appellee, v. Sandra PERRY–COUTCHER, Appellant. No. 104,222. May 6, 2011.

[court's authority to order defendant to drug treatment court limited by specific offenses enumerated in statute]

Defendant, convicted in the Shwaneee County District Court of attempted possession of opiates, was ordered to participate in a drug treatment court. Defendant appealed on the grounds that the court lacked authority to order her to participate in the program.

Held: Court lacked authority under Kansas statute to order defendant to participate in the drug treatment program. By its clear language, its application is limited to offenders convicted of crimes under K.S.A.2007 Supp. 65–4160 and K.S.A.2007 Supp. 65–4162. Defendant was convicted of a violation of a crime under K.S.A. 21–3301 (attempted possession of opiates) which is not covered in K.S.A. 21–4729.

Court of Appeals of Kansas. STATE of Kansas, Appellee, v. Sandra PERRY–COUTCHER, Appellant. No. 104,222. May 6, 2011.

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Held: Court lacked authority under Kansas statute to order defendant to participate in the drug treatment program. By its clear language, its application is limited to offenders convicted of crimes under K.S.A.2007 Supp. 65–4160 and K.S.A.2007 Supp. 65–4162. Defendant was convicted of a violation of a crime under K.S.A. 21–3301 (attempted possession of opiates) which is not covered in K.S.A. 21–4729.

Superior Court of New Jersey, Appellate Division. STATE of New Jersey, Plaintiff–Respondent, v. Corey R. NELSON a/k/a Carl Nelson, Defendant–Appellant. Argued May 16, 2011. Decided June 1, 2011. **On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 08–09–0809.**

[reaffirms prosecutorial discretion re admission to drug court]

Defendant plead guilty to pending charges in two counties (Union and Middlesex County. Sentencing in the Middlesex County case was deferred until sentence was imposed in this Union County case. The defendant's application to be admitted into the Drug court program in Union County was denied because of the nature and extent of his prior convictions while his application to participate in the Middlesex County Drug court was being considered as part of his plea agreement. The defendant was sentenced first in the Union County case to two concurrent eight-year prison terms on the school zone and public housing CDS offenses, subject to a forty-four-month period of parole ineligibility. Defendant appealed on the grounds that, pursuant to the terms of the plea agreement in Middlesex County, he should be allowed to re–apply to drug court without the state's objection.

Held: Union County prosecutor is not obligated to recommend defendant for drug court because of a recommendation from the prosecutor in Middlesex County for a different case involving the defendant.

Superior Court of New Jersey, Appellate Division. STATE of New Jersey, Plaintiff–Respondent, v. Bryan L. MORRISON, Defendant–Appellant. Submitted March 28, 2011. Decided May 13, 2011.

[reaffirms prosecutorial discretion re admission to drug court – must show patent and gross abuse of discretion to overcome prosecutorial decision]

Defendant appeals his denial of admission into the Ocean County Drug court Program.

Recognizing that admission into Drug court is a privilege and not a right, the court found the prosecutor's rejection of defendant was a reasonable

exercise of discretion. …As our Supreme Court has previously explained, drug courts are a "creature of the judiciary." *State v. Meyer,* 192 *N.J.* 421, 430 (2007). Admission into the program is based upon "uniform statewide eligibility criteria." *Id.* at 431. Under the first track, as defined in the Drug court Manual, an applicant such as defendant who is mandatory extended-term-eligible as a multiple-time drug distributor must satisfy the eligibility requirements for special probation under *N.J.S.A.* 2C:35–14. *Id* . at 431–32.

To succeed on an appeal from a Drug court rejection, a defendant must establish a patent and gross abuse of discretion. *State v. Hestor*, 357 *N.J.Super.* 428, 443 (App.Div.2003). In order to meet the applicable patent and gross abuse of discretion standard, however, a defendant must show the prosecutor's decision was premised upon considerations of irrelevant or inappropriate factors, incomplete consideration of relevant factors, or a clear error in judgment.

No patent and gross abuse of discretion having been established; denial of drug court admission affirmed.

County Court, Sullivan County, New York. The PEOPLE of the State of New York, v. Tyler WHITE, Defendant. No. 53–2011. April 26, 2011.

[defendant eligible to participate in the drug court over the prosecutor's objections because he satisfies the statutory requirements for participation]

Defendant applied for admission to the Sullivan County Drug Treatment Court and accepted into the program. Prosecutor objected based on defendant's prior convictions, offering the Defendant a sentence of two years in state's prison, with two years of post-release supervision, in exchange for a guilty plea to one of the felony drug charges.

Held: A defendant is eligible to participate in Judicial Diversion if he is charged with a Class B, C, D, or E drug felony and is not otherwise excluded based upon other pending criminal charges or a prior criminal history.

District Court of Appeal of Florida, Fifth District. STATE of Florida, Petitioner, v. Ta'Quieta Beyunka Lanae PUGH, Respondent. No. 5D10-386. Aug. 20, 2010.

Background: State filed petition for writ of certiorari, challenging an order of the Circuit Court, Orange County, authorizing the placement in a pretrial intervention program of defendant who was charged with battery on a law enforcement officer, resisting without violence, and providing false identification to law enforcement officers.

Held: trial court could not place defendant in the program over State's objection absent statutory authority.

Section 948.08(2) provides that any first-time offender or any person previously convicted of not more than one nonviolent misdemeanor, who is charged with any misdemeanor or felony of the third-degree, is eligible for release to a pretrial intervention program. However, the section requires the consent of the administrator of the program, victim, state attorney, and judge who presided at the initial appearance hearing. Without the State's consent, the court could only place Pugh in the program if she were charged with one of the offenses enumerated in section 948.08(6)(a), which reads as follows:

(6)(a) Notwithstanding any provision of this section, a person who is charged with a felony of the second or third degree for purchase or possession of a controlled substance under chapter 893…., and who has not previously been convicted of a felony nor been admitted to a felony pretrial program referred to in this section is eligible for voluntary admission into a pretrial substance abuse education and treatment intervention program, including a treatment-based drug court program established pursuant to s. 397.334, approved by the chief judge of the circuit, for a period of not less than 1 year in duration, upon motion of either party or the court's own motion, except:

That is not the case here. Pugh was not charged with purchase or possession of a controlled substance under Chapter 893… Thus, the trial court exceeded its authority when it placed Pugh in the program despite the State's objection. Certiorari relief is warranted. PETITION GRANTED.

Supreme Court of New Jersey. STATE of New Jersey, Plaintiff-Appellant, v. Richard CLARKE, Defendant-Respondent. State of New Jersey, Plaintiff-Appellant, v. William T. Dolan, Defendant-Respondent. Argued Feb. 23, 2010. Decided July 21, 2010.

[nature of hearing required to determine eligibility]

In separate cases, a defendant who was indicted for theft and a defendant who was indicted for theft, burglary, and attempted burglary applied for admission into the Drug court probationary sentencing program. Prosecutor objected in each case, and each defendant appealed. Following hearings in each case, the Drug court judge rendered written decisions denying relief. In each case, the Superior Court, Appellate Division, granted motions for leave to appeal and summarily remanded for Drug court to conduct "plenary" hearings. The Supreme Court granted leave to appeal in both cases and consolidated the appeals.

Held: a plenary hearing involving testimony and cross-examination of Drug court team members is not required on a Drug court appeal.

The PEOPLE of the State of New York, Respondent, v. Jeffrey J. FORKEY, Appellant. April 8, 2010.

[held: defendant not entitled to hearing before being rejected for drug court]

Defendant was convicted in the County Court, Clinton County of criminal possession of forged instrument in second degree and burglary in third degree, and he appealed.

Held:
(1) failure to hold hearing before rejecting defendant's application for admission into county Drug court program did not violate due process, and
(2) defendant's sentence was unduly harsh, and would be modified by directing that sentences run concurrently.

County court's failure to hold hearing before rejecting defendant's application for admission into county Drug court program to determine whether defendant had violated conditions of his plea agreement did not violate due process, where defendant was provided opportunity to be heard and admitted to number of circumstances surrounding rejection of his Drug court application, including his consumption of alcohol at bar while on community walk and his failure to meet certain program expectations. U.S.C.A. Const.Amend. 14.

After waiving indictment and consenting to be prosecuted by superior court information, defendant pleaded guilty to criminal possession of a forged instrument in the second degree and three counts of burglary in the third degree and waived his right to appeal in exchange for a recommended sentence of six months in jail to be followed by five years of probation. The terms of the plea included defendant's acceptance into the Clinton County Drug court. County Court advised defendant that, in the event that he was not accepted into the Drug court program, he could be sentenced "to any sentence set forth under the law."Thereafter, defendant entered an inpatient treatment center but was discharged due to noncompliance. As a result, his application for admission into the Drug court program was rejected. After finding that defendant violated the terms of the plea agreement, County Court sentenced him to concurrent terms of six months in jail for the criminal possession of a forged instrument conviction and 2 to 6 years each in prison on two of the burglary convictions, to run consecutively to a prison term of 2 to 6 years on the third burglary conviction. Defendant now appeals.

Defendant's assertion that he was denied his right to due process when County Court failed to hold a hearing to determine whether he had violated the conditions of his plea agreement is unpreserved, since he neither requested a hearing nor moved to withdraw his plea on this ground.

Superior Court of New Jersey, Appellate Division. STATE of New Jersey, Plaintiff-Respondent, v. Kendall L. JONES, Defendant-Appellant. Submitted May 6, 2009. Decided May 19, 2009.

Defendant appeals from the Ocean County Superior Court's denial of his application for entry to the Drug court Program, upholding the prosecutor's determination to deny him entry and finding no patent and gross abuse of prosecutorial discretion, pursuant to statutory requirements. The prosecutor's rejection form listed various reasons for rejection, including weapons history, profit motive and a significant threat to the community. Defendant admitted he was a narcotics abuser but claimed any profit gained was to fund his own **drug habit** and perhaps the habits of his friends. The defense emphasized the thirty-three year old was never given the opportunity to participate in rehabilitation, and requested a Task evaluation by the **Drug court** team to determine whether defendant was an appropriate candidate to move forward in the program. Defendant conceded that the "danger to the community" lies more in failing to admit defendant into **drug court**

and **treatment** than in rejecting him from the program and by denying him entry into the program, the prosecutor created a greater potential that upon defendant's release from state prison he will be undeterred, as his drug addiction will not have been addressed, creating a further likelihood that he will spiral out of control and engage in an endless cycle of violating the laws of the State, including the drug laws.

Holding: Judgment Affirmed. To succeed on this appeal, "defendant must show that the prosecutor's decision '(a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment.' "Moreover, to rise to the level of "patent and gross abuse of discretion," it must be shown "that the prosecutorial error complained of would clearly subvert the goals underlying" the Drug court program. Thus, "a prosecutor's decision to reject a [Drug court] applicant 'will be rarely overturned.'"

District Court of Appeal of Florida, Third District. Samson LOUIS, Appellant, v. The STATE of Florida, Appellee. No. 3D08-506. Nov. 12, 2008.

[Defendant entitled to hearing on eligibility for drug court since counsel failed to request his eligibility and defendant would appear to be eligible**]**

Reverses and remands case for evidentiary hearing on defendant's eligibility for drug court. The defendant claims on appeal that his trial counsel was ineffective for failing to request to place him in drug court for which the defendant was apparently qualified. The State has acknowledged that the defendant was qualified for drug court. Because the record fails to conclusively refute the defendant's claim that his trial counsel failed to request he be placed in drug court, we reverse the order and remand for an evidentiary hearing or other appropriate relief.

United States District Court, S.D. Florida. Kirk W. KRAUEL, Plaintiff, v. State of FLORIDA, Judge Dan Vaughn, Bruce Colton, States Attorney, Defendants. No. 08-14093 CIV. July 15, 2008.

[Participation in a Drug court program is discretionary and does not create a right which involves a liberty interest]

Denies Petitioner's request for Writ of Habeas Corpus pursuant to 28 U.S.C. §§ 2254, 2241 and Motion for Stay of Court Proceedings Pending Determination of Petition for Writ of Habeas Corpus.

Background: Petitioner was arrested for possession of cocaine and driving on a suspended license. In connection with these charges, Petitioner requested that he be referred to "drug court" in accordance with Administrative Order 2002-06. The State Attorney declined to refer Petitioner to "drug court." Petitioner then filed a motion asking the trial court to refer him to "drug court;" however, the trial court ruled that it did not have the authority to refer Petitioner to drug court, finding that Administrative Order 2002-06 assigned the responsibility for making eligibility decisions solely to the State Attorney. Petitioner then filed an Emergency Petition for Writ of Prohibition and Mandamus asking the Fourth District Court of Appeals to order that he be admitted to "drug court." The Fourth District Court of Appeals denied this writ on the merits. Petitioner then filed a Motion for Clarification and Certification to the Florida Supreme Court, which was also denied. Petitioner then filed this petition, arguing that the State Attorney and the trial court violated his due process and equal protection rights by denying him access to the "drug court." He also filed a motion to stay the court trial pending this Court's resolution of his petition. The Magistrate recommended that both of these motions be denied on the grounds that the District Court lacked jurisdiction to consider Petitioner's premature petition.

Two state court statutes, sections 397.334 and 948.08(6)(a) of the Florida Statutes, and Administrative Order 2006-11 issued by the chief judge of Indian River County relate to the drug-court treatment program at issue. Section 397.334(1) does not require a county to operate a treatment-based drug court program. It states that a county "may fund a treatment-based drug court program," leaving the decision of whether to establish such a program within the discretion of each particular county. While section 948.08(6)(a) provides that only certain defendants are eligible to participate in a drug-court program, it leaves a determination as to which eligible defendants are allowed to participate in this program within the discretion of the court and in some special instances, the state attorney. ..Where as in this case, the decision to admit a defendant to a drug-court program whether he be eligible or not is discretionary, it cannot find that the state has created

a liberty interest by establishing this drug-court treatment program.

Superior Court of New Jersey, Appellate Division. STATE of New Jersey, Plaintiff-Respondent, v. Barrett YOUNG, Defendant-Appellant. Submitted March 5, 2008. Decided April 1, 2008.

[Drug court eligibility – post conviction]
[determination of right to participate: can be made by judge under sentencing authority]
[also discussion of history and importance of state's drug courts]

Appellant appealed conviction of third-degree burglary on several grounds, including denial of entry into drug court following conviction.

Held: Trial court has the discretion to admit a non-violent substance dependent defendant into Drug court as a condition of probation, despite the defendant's ineligibility for special probation pursuant to *N.J.S.A.* 2C:35-14 but defendant never applied for admission into Drug court and *State v. Meyer,* 192 *N.J.* 421 (2007) *r* provides no authority to allow consideration to enter Drug court post-conviction.

District Court of Appeal of Florida, Fifth District. TATE of Florida, Petitioner. Jeffrey LEUKEL, Respondent. No. 5D07-2031. Feb. 29, 2008. Rehearing Denied April 11, 2008.

[authority to determine eligibility for pretrial intervention program is solely within prosecutor's discretion]

State petitioned for certiorari Review of order from the Circuit Court, Seminole County, Court authorizing movant's entry into a pretrial intervention **drug court** program, after he was charged with repeat offense of driving while his license was permanently revoked.

Held: Trial court exceeded its authority in authorizing movant's entry into a pretrial intervention **drug court** program pending charge of driving while his license was permanently revoked, which offense was not specifically recognized, in statute permitting trial courts to admit defendants into pretrial drug intervention programs, as an eligible offense. If a defendant is not eligible for **drug court**, he or she still may be admitted to a pretrial intervention program, but only with the consent of the prosecutor.

SUPREME COURT OF NEW JERSEY A-121 September Term 2005A 43 September Term 2006 STATE OF NEW JERSEY, Plaintiff-Appellant, v. JASON G. MEYER, Defendant-Respondent. Argued March 20, 2007 – Decided September 19, 2007.

On appeal from and certification to the Superior Court, Law Division, Warren County.

The issue in this appeal is whether non-violent, drug-dependent defendants who do not meet the eligibility requirements for "special probation" under N.J.S.A. 2C:35-14 may be admitted into a drug court program under the general sentencing provisions of the Code of Criminal Justice and the admission criteria specified in the Drug court Manual of the Administrative Office of the Courts (AOC).

Defendant Jason G. Meyer was indicted for possession with intent to distribute a controlled dangerous substance (CDS) and shoplifting. Meyer applied for admission into the Warren County Drug court Program. The Warren County Prosecutor's Office objected because Meyer did not qualify for "special probation" under N.J.S.A. 2C:35-14 based on his four prior convictions of third-degree offenses. Relying on State v. Matthews, 378 N.J. Super. 396 (App. Div.), certif. denied, 185 N.J. 596 (2005), the prosecutor tied eligibility for Drug court to N.J.S.A. 2C:35-14's criteria for "special probation." Meyer appealed the prosecutor's rejection of his Drug court application to the Law Division. He argued that the AOC's Drug court Manual governed admission into Drug court and that the Manual does not limit Drug court to "special probation" cases. He argued that his prior convictions did not bar him from a probationary term under the general sentencing provisions of N.J.S.A. 2C:45-1 or from enrollment in Drug court pursuant to the criteria in the Manual.

HELD: "Special probation" under N.J.S.A. 2C:35-14 is a type of disposition for certain non-violent drug offenders, but it is not the exclusive route to admission into Drug court. Consistent with the Drug court Manual and the general sentencing provisions of the Code of Criminal Justice, N.J.S.A. 2C:45-1, a trial court has discretion to admit non-violent drug-dependent offenders into Drug court.

District Court of Appeal of Florida, Fourth District. Daniel BATISTA, Appellant, v. STATE

of Florida, Appellee. No. 4D05-4315. March 21, 2007.

[offer of pretrial intervention program solely within discretion of the state**]**
[state not required to prove reasons for terminating pretrial drug court participant in evidentiary hearing]

Defendant filed motion for an evidentiary hearing following state's unilateral termination of his pre-trial intervention (PTI) program. The Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Edward Garrison, J., denied motion. Defendant appealed.

Held: state was not required to prove, in an evidentiary hearing, that its reasons for unilaterally electing to terminate PTI were valid.

Affirmed; conflict certified. The issue on appeal is whether the trial court erred in denying a motion for an evidentiary hearing following the state's unilateral termination of Batista's pre-trial intervention (PTI). We affirm.

After Batista was charged, he entered into a deferred prosecution agreement placing him in a PTI program. The terms of the agreement allowed the state attorney, during the period of deferred prosecution, to revoke or modify the conditions of Batista's deferred prosecution by:

> (1) Changing the period of deferred prosecution.
> (2) Prosecuting him for this offense if he violated any of these conditions.
> (3) Voiding this agreement should it be determined that he had a prior record of adult criminal felony convictions.

The agreement required Batista to submit to random drug testing, maintain his employment, pay his supervision costs, refrain from possessing or carrying weapons, and avoiding drugs and ingesting intoxicants in excess. If Batista complied with all conditions, no criminal prosecution would be instituted for the charged offense. Upon signing the agreement, Batista admitted guilt.

The state's motivation for revoking Batista's participation in the PTI program is not disclosed in the record.
Batista sought a "full" evidentiary hearing to require the state to prove that he had "willfully and materially" violated PTI. Batista claimed a right to such a hearing based on principles of due process, the applicable Florida Statute providing for PTI, and principles of contract law.

Denial of a hearing on a matter concerning termination of pre-trial intervention is not a dispositive order and, thus, not appealable under Florida Rule of Appellate Procedure.

The Florida Supreme Court has recognized that a decision regarding admission to a PTI program is at the sole discretion of the state, is a prosecutorial function, and is non-reviewable.

Superior Court of New Jersey, Appellate Division. STATE of New Jersey, Plaintiff-Appellant/Cross-Respondent, v. Wilfredo HODGESON, Defendant-Respondent/Cross-Appellant. Submitted April 25, 2006. Decided Aug. 7, 2006. [See Jason G. Meyer decided September 19, 2007 which overrules holding]
[Determination by prosecutor, not judge]

Reversed trial judge order of defendant into post adjudication drug court over prosecutor's objections, which he found "represents a gross and patent abuse of prosecutorial discretion."

(1) Prosecutor's focus on rejecting based upon the quantity of controlled dangerous substance is misplaced. To focus on the quantity of controlled dangerous substance involved in this case, in a vacuum, ignores the ideology of drug abuse which has its causes the cycles of poverty, lack of economic opportunity in a depressed area like Paterson, New Jersey as is involved in the case here.

The applicable statute reads as follows:
A person convicted of ... an offense under [2C:35-7] ... shall not be eligible for sentence in accordance with this section if the prosecutor objects to the person being placed on special probation. The court shall not place a person on special probation over the prosecutor's objection except upon a finding by the court of a gross and patent abuse of prosecutorial discretion.

[However…] [T]o rise to the level of "patent and gross abuse of discretion," it must be shown "that the prosecutorial error complained of will clearly subvert the goals underlying the Drug court

program. [Citations omitted.] Thus, "a prosecutor's decision to reject a [Drug court] applicant 'will be rarely overturned.'"

In the instant case, the decision of the sentencing judge to overrule the prosecutor's decision was unwarranted under the "gross and patent" statutory standard. The prosecutor could properly consider the substantial nature of the drug operation and defendant's active participation to conclude that he was not merely a drug user but a drug dealer. The prosecutor also noted that defendant had no record of employment to underscore defendant's participation in the business of drug distribution as well as defendant's inconsistent statements to the TASC evaluator as to the extent of his addiction. Given those contradictory statements, the prosecutor's position-that defendant was exaggerating his drug use in an attempt to avoid incarceration-was reasonable.

Accordingly, we hold that the decision of the sentencing judge overruling the prosecutor's objection and sentencing defendant to a term of special probation was erroneous.
Reversed and remanded.

District Court of Appeal of Florida, Fourth District. Efrain PENA, Appellant, v. STATE of Florida, Appellee. No. 4D04-2991. Oct. 12, 2005.

Denial of motion to participate in pre trial drug court program does not constitute a legally dispositive order that can be appealed to the District Court of Appeal.

Court of Appeals of Mississippi. Michael JIM, Appellant v. STATE of Mississippi, Appellee. No. 2004-KA-01235-COA. Sept. 20, 2005.

Defendant was not entitled to transfer his case involving charge of possession of more than 30 grams of marijuana to DRUG COURT; no one had right to participate in DRUG COURT.

Superior Court of New Jersey, Appellate Division. STATE of New Jersey, Plaintiff-Respondent, v. Stanley MATTHEWS, Defendant-Appellant. Argued May 25, 2005. Decided June 22, 2005. A.2d , 2005 WL 1458212 (N.J.Super.A.D.)

Affirms decision by Superior Court in Ocean County that statute regarding entry into Drug court mandates who qualifies for program, not manual designed to define program's structure. Defendant's prior convictions for offenses similar to manufacturing, distributing, or dispensing a controlled dangerous substance triggered prosecutor's right under statute permitting admission into rehabilitation program under certain conditions to object to defendant's admission into DRUG COURT program, in prosecution for burglary and theft. N.J.S.A. 2C:35-5, 2C-35-7, 2C:35-14, subd. c, 2C:45-1.

While not all admissions to a DRUG COURT program necessarily take place under specific statute governing imposition of a sentence of special probation only under certain circumstances, if defendant is barred from participation in a DRUG COURT program by this statute, or the prosecutor has a right to object to defendant's admission into DRUG COURT program under the statute, the court cannot override those legislative directives simply by proclaiming that a defendant be sentenced under general statute granting court authority to impose a variety of conditions on probation. N.J.S.A. 2C:35-14, 2C:45-1.

Court of Appeals of Washington, Division 3, Panel Three. STATE of Washington, Respondent, v. Elmer Blake DiLUZIO, Jr., Appellant. Nos. 22027-3-III, 22028-1-III. May 27, 2004.

[Prosecutor retained executive discretion to decide whether to recommend referral to **DRUG COURT**. Prosecutor retains discretion for referrals to drug courts; prosecutorial duty to determine the extent of society's interest in prosecuting an offense]

District Court of Appeal of Florida, Fourth District. Vincent A. LLOYD, Appellant, v. STATE of Florida, Appellee. No. 4D03-184. June 9, 2004.

[Drug defendant failed to preserve for appellate review his claim that trial court erred in denying his motion for admission into DRUG COURT, where defendant did not raise such issue prior to sentencing or by a post-sentencing motion.]

Court of Criminal Appeals of Alabama. Geoffrey Richard BOSTWICK v. ALABAMA Court of Criminal Appeals of Alabama. Geoffrey Richard BOSTWICK v. ALABAMA BOARD OF PARDONS AND PAROLES. CR-01-2238. March 21, 2003. BOARD OF PARDONS AND PAROLES. CR-01-2238. March 21, 2003.

[reaffirms prosecutor's discretion to refer a defendant

to Drug court: "We believe that, like the prosecutor's decision to permit a defendant to complete a treatment program, the prosecutor's decision to refer a defendant to Drug court is solely within the prosecutor's discretion. That decision is not subject to appellate review." C.D.C. v. State, 821 So.2d 1021, 1025 (Ala.Crim.App.2001)]

Court of Criminal Appeals of Alabama. C.D.C. v. State. CR-00-0067. Aug. 31, 2001.

Defendant's denial of admission to drug court program is not subject to appellate review.

Superior Court of New Jersey, Appellate Division. STATE of New Jersey, Plaintiff-Appellant, v. Anthony HESTER, Defendant-Respondent. Submitted Dec. 17, 2002. Decided Feb. 13, 2003.

Defendant, who was charged with various drug offenses, appealed from rejection of his application to DRUG COURT program. The Superior Court, Law Division, Morris County, overruled rejection, accepted defendant's guilty plea, and sentenced defendant to DRUG COURT. State appealed. The Superior Court, Appellate Division, Stern, P.J.A.D., held that prosecutor's decision to deny defendant's application for admission into DRUG COURT program did not constitute patent and gross abuse of discretion.

Remanded.

Supreme Court of Louisiana. State of Louisiana v. Alton A. TAYLOR. State of Louisiana v. Jesse Clark. State of Louisiana v. Joseph Duplessis, III Nos. 99-K-2935, 99-KP-2937 and 99-K-2938. Oct. 17, 2000. Rehearing Denied Dec. 8, 2000.

Supreme Court held that defendant may not enter **drug court** probation program unless first recommended by the district attorney.

State of Louisiana vs. Nicholas Guagliardo. No. 98-K-0997. Court of Appeal, Fourth Circuit. State of Louisiana. 1998.

Upon application for Writ of Certiorari and Prohibition to review ruling, court held that the ultimate determination of participation in **drug court** program rests with the trial judge, not the district attorney.

David Woodward, Petitioner, v. Honorable Linda Morrissey, Special Judge, and Honorable Thomas C. Gillert, District Judge, Tulsa County, Respondents. No. M-99-170. Court of Criminal Appeals of Oklahoma. Nov. 19, 1999. As Corrected Nov. 30, 1999.

Drug Court Act provision allowing a district attorney to veto a defendant's application for diversion to **Drug Court** did not violate separation of powers or the right of access to the courts under the state Constitution.

In the Matter of H.M., DOB: 4/21/81, Minor Indian Child Under the Age of 18 Years. DW-JV-001-98 and DW-JV-004-98. Duckwater Juvenile Court. June 19, 1998. [Cite 1998 D. Supp. 0006,*1]

Court denied motion for reconsideration of its placement of juvenile in drug court program, holding that treatment court session concept for both the juvenile and tribal adult courts are not foreign to Western Shoshone and Northern Paiute Tribes, that they are a blending of traditional, treatment oriented, jurisprudence, that the juvenile has been making progress in the program**.**

DRUG COURT PARTICIPATION CONDITIONS/REQUIREMENTS

1. AVOIDING PEOPLE OR PLACES OF DISREPUTABLE CHARACTER/ASSOCIATED WITH DRUG USE

276 Ga.App. 428, 623 S.E.2d 247, 5 FCDR 3596. Court of Appeals of Georgia. ANDREWS v. The STATE. No. A05A2267.Nov. 17, 2005.

Rejects appellant's contention that drug court requirement to "avoid people or places of disreputable or harmful character, including drug users and drug dealers" was void for vagueness and finds that trial court termination of appellant from drug court program on these (and other) grounds was supported by evidence in the record.

2. IMPOSITION OF SANCTIONS/INCENTIVES (See Also "Double Jeopardy")

District Court of Appeal of Florida, Fourth District. John WALKER, Petitioner, v. Al LAMBERTI, as Sheriff of Broward County, Florida, and the State of Florida, Respondents. No. 4D10-400. March 8, 2010.

[drug court participation conditions - imposition of sanctions
[termination from drug court – right of defendant to withdraw from pretrial program]

[Defendant who voluntarily agreed to participate in Drug court cannot subsequently opt out to avoid jail sanction]
Defendant who was charged with possession of cocaine entered into a deferred prosecution agreement (DPA) and entered the Drug court felony pretrial intervention (PTI) program. After defendant failed a drug test, the Seventeenth Judicial Circuit Court, Broward County placed defendant in a jail-based drug treatment program. Defendant filed petition for writ of habeas corpus.

Held: Defendant who agreed to participate in Drug court felony pretrial intervention (PTI) program after being charged with possession of cocaine could not subsequently opt out of program so as to avoid placement in jail-based drug treatment program after failing a drug test, even though entry into program was voluntary; continued participation after entry was not voluntary, defendant agreed to be subject to the terms and conditions of program for between 12 and 18 months or until terminated by the court, and deferred prosecution agreement (DPA) signed by defendant placed him on notice that he could be subjected to sanctions such as pretrial detention in a jail-based drug treatment program…

Court of Appeals of Kentucky. Jarrod L. NICELY, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2007-CA-002109-MR. April 24, 2009.

[use of contempt power]

Appellant appeals from the Magoffin Circuit Court's denial of his motion for post judgment relief pursuant to Kentucky Rules of Civil Procedure contending that the trial court erred when it denied him credit for time served in the county jail while he participated in the Magoffin Drug court Program.

Held: sentence reversed and sentence to be recalculated to reflect time served; [though another panel of the court came to opposite conclusion in a similar case.] Concurring opinion disagrees with the use of contempt for probation violations.

Appellant was discharged from the Drug court on April 26, 2007, but not sentenced until August 2, 2007. He requested a calculation and credit for the time he served awaiting sentencing, believing he was entitled to 301 days. However, the court advised him he would not receive credit for any time served while in Drug court as he had been found in contempt of the trial court order to complete the program. The court then sentenced him to serve five years and directed the Department of Probation and Parole to calculate the appellant's jail time without including any time served for the Drug court violations.

We cannot decide if the trial court acted on sound legal principles without considering whether a court may find a defendant in contempt for violating the conditions of probation as opposed to only modifying the conditions of or revoking probation. This issue has not been directly addressed by our courts. The Kentucky Supreme Court did find that a juvenile may be subject to contempt for a probation violation. However, the majority opinion did not address the issue as to adults:

We find no statute, administrative procedure or Kentucky caselaw that prohibits the court's use of either its civil or criminal contempt powers as opposed to revoking a defendant's probation or modifying the previously imposed conditions of probation. Adopting the logic of the Tennessee and Alaska courts, we conclude a Kentucky court should be free to pursue either contempt or revocation proceedings as may be appropriate. However, we do not believe that a trial court may impose contempt sanctions for the same violations of the conditions of probation which are used to revoke probation.
When Appellant violated the terms and conditions of Drug court, the trial court could have either found him in contempt or revoked the probation granted on December 1, 2005. Having previously incarcerated Nicely for violating the conditions of Drug court, and the defendant having stipulated to those violations, the court failed to follow the mandates of KRS 532.120(3) and afford him the appropriate credit for time served waiting final sentencing.

[We are aware in the unpublished case, *Green v. Commonwealth,* 2008 WL 4822514 (Ky.App.2008), another panel of this court reached the conclusion that, upon a finding of contempt, credit should not be given to the original sentence for time served as a result of the finding of contempt.]

BUCKINGHAM, Senior Judge, Concurring:

Agrees with the majority to the extent it holds that the trial court erred in revoking Appellant's probation and also sentencing him for contempt for the same actions that violated the conditions of his probation. In other respects, however disagrees -- especially with adopting a rule that a court is free to choose between probation revocation and contempt punishment where there is no statute or regulation, as in the present case and the possibility that sometimes, perhaps frequently, probation violations will not be contemptuous, such as in this case. Appellant's failure to comply with Drug court requirements did not constitute contempt, either civil or criminal.

"As the majority states, civil contempt applies when one refuses to abide by a court order, and it is designed to coerce or compel a course of conduct. But a contempt proceeding was not used here to force Nicely to comply; rather, it was used to punish. Thus, civil contempt was not applicable. Furthermore, criminal contempt did not apply because Nicely's noncompliance with Drug court requirements did nothing to obstruct justice, insult the court, degrade the court's authority, or bring the court in disrepute. Nicely's actions were simply violations of the terms of his probation."

Court of Appeals of Arkansas. Ian Hunter DOYLE, Appellant v. STATE of Arkansas, Appellee. No. CACR 08-530. Feb. 18, 2009.

Appellant challenges termination from drug court claiming that, based on the program handbook, trial court was not "authorized" to send him to a regional correctional facility; and that revoking his probation because of the same allegations for which he served a jail sanction constituted double jeopardy under the Fifth Amendment.

Holding: Where multiple offenses are alleged as justification for revocation of probation, the trial court's finding that revocation is justified must be affirmed if the evidence is sufficient to establish that the appellant committed any one of the offenses.

As to Doyle's arguments concerning the trial court's failure to abide by the **drug-court** handbook, failure to have the handbook admitted into evidence precludes review of the issue.

District Court of Appeal of Florida, Second District. T.N., Petitioner, v. Gary PORTESY, Detention Superintendent, Hillsborough Regional Juvenile Detention Center, Respondent. No. 2D05-01. Oct. 7, 2005.

Trial court was not statutorily authorized to order detention of juvenile at drug treatment facility. Petition granted. Trial court was not authorized to order detention of juvenile at drug treatment facility, as sanction for juvenile's violation of agreement to participate in drug program in lieu of adjudication for drug charges, which resulted in finding of indirect contempt; such detention was not within specified possible statutory sanctions that a trial court may impose for indirect criminal contempt.

As part of the agreement to participate in the juvenile drug court, T.N. was subject to mandated drug treatment and testing to ensure that he remained drug free. Additionally, the agreement specified that if T.N. failed to comply with the terms of the agreement, the trial court could find him in contempt and impose one or more of several enumerated sanctions. The list of possible sanctions included placement in a secure facility and placement in a residential treatment program.

"Although we do not find the trial court's finding that T.N. was in indirect criminal contempt of court to be error, we conclude that the sanction that the trial court imposed was in error. …The legislature has specified the possible sanctions that a trial court may impose for indirect criminal contempt. See § 985.216(2)-(3). Because the trial court's use of the ACTS Addiction Receiving Facility and the residential drug treatment program as sanctions for indirect criminal contempt are not contemplated within the statute, those sanctions were improperly imposed…. Accordingly, we quash that portion of the trial court's order that imposed these sanctions. On January 25, 2005, this court granted T.N.'s petition for writ of habeas corpus and ordered his immediate release."]

District Court of Appeal of Florida, Fourth District. Brooke Nicole MULLIN, Petitioner, v. Ken JENNE, as Sheriff of Broward County, Florida, Michael J. Satz, as State Attorney, James V. Crosby, as Secretary of Florida Department of Corrections, Respondents. No. 4D04-2315. Jan. 12, 2005.

[defendant cannot be compelled to remain in a drug court program if entry to the program is voluntary; incarceration as a sanction in such a program can be

imposed only on participants who voluntarily remain in the program**]**

N.Y. Opinion 02-77: September 12, 2002. Advisory Committee on Judicial Ethics. New York State Unified Court System.

A judge presiding in a Drug court…should not reward defendants with gifts from commercial enterprises

A City Court judge who presides in a Drug court…asks as to the propriety of providing defendants who are reported to be making progress with incentives such as movie passes or coupons from a local fast food restaurant…

As to providing rewards, the Committee regards it as inappropriate. In effect, the judge would be appearing to be lending the prestige of judicial office to advance the private interests of the commercial interests involved. Under Section 100.2© of the Rules Governing Judicial Conduct, such conduct should be avoided.]

Darrell Ray v. U.S. (District of Columbia Court of Appeals: Nos. 97-CO-615, 907 CO-718) May 23, 1997:

Appellant's Emergency Motion for Summary Reversal of **drug court** Sanctions Order

[The defendant maintained that the Court's power to imprison arose under its statutory or inherent powers, with the statutory authority for the Court to detain or release a defendant pretrial is provided only under D.C. Code Section 23-1329. Applying detention as a sanction for the Drug court therefore must occur either pursuant to Section 23-1329 or under the Court's contempt powers. Under either alternative, an appropriate show cause hearing must be held with representation, notice, and other due process protections afforded (pp. 9 ff.).

The defendant rejected the claim that the Release Order constituted a contract between him and the court, maintaining that the order did not constitute a contract because there was no "meeting of the minds" between the two parties; and that the defendant signed the Release Order only because he was required to in order to be released. He also noted that the Release Order didn't state that the defendant could be imprisoned for noncompliance and there was no indication of a waiver of due process rights in the record or on the Order.

Note: Before the court could rule on these issues, the Defendant terminated his participation in the drug court program for reasons unrelated to the issues raised in this matter. D.C. Drug court Officials, however, subsequently reviewed and revised program procedures, which included developing a participant contract to address issues raised.

In addition to the Defendant's Motion, the following pleadings and materials relate to this case:
Appellee's Motion to Vacate Sanctions (filed by U.S. Attorney because appellant was no longer enrolled in the program); and D.C. Legal Times. Week of June 30, 1997. Sam Skolnik. "Superior Court Watch: Drug court vs. Due Process."

Paul Gay v. U.S. (District of Columbia Court of Appeals No. 97-CO-989)

(Issues and facts are similar to *Ray* above)

Appellant's Emergency Motion for Summary Reversal of Drug court Sanction
Order (filed by U.S. Attorney because appellant was no longer enrolled in program).

Appellee's Motion to Dismiss as Moot Appellant's Emergency Motion for Summary Reversal of **drug court** Sanction Order.

3. PROHIBITION OF USE OF ALCOHOL

Court of Appeal, Fourth District, Division 1, California. The PEOPLE, Plaintiff and Respondent, v. Gloria Elizabeth BEAL, Defendant and Appellant. No. D027755. Dec. 18, 1997. Review Denied April 1, 1998. As Modified on Denial of Rehearing Jan. 7, 1998.
The defendant challenged the restriction of her use of alcohol, imposed by the trial judge as a condition of probation after conviction of a drug offense, as having no basis on any rational nexus between the use of alcohol, which is a legal substance, and her refraining from drugs that were illegal. The trial court held that imposition of an alcohol condition is appropriate in any case where the defendant has a history of drug use and is convicted of a drug-related offense. In this situation the defendant must either submit to the condition or, if she considers the condition "more harsh than the sentence the court would otherwise impose, [exercise] the right to refuse probation and undergo the sentence. "That the use of

alcohol is not otherwise illegal does not render the defendant's decision to accept such a condition subject to challenge on appeal." The Court of Appeal affirmed the trial court's decision.

In re Ross Children. Nos. CA98-12-253, CA98-12-255. Court of Appeals of Ohio, Twelfth District, Butler County. Aug. 30, 1999.

The trial court erred when it ordered in a family **drug court** civil proceeding that an adult may not possess or use alcohol

4. VEHICLE FORFEITURE

Supreme Court of Alabama. Ex parte Kevin Glenn Kelley. (Re Kevin Glenn Kelley v. State of Alabama). 1971725. June 11, 1999. Rehearing Denied Jan. 28, 2000.

Forfeiture of claimant's $30,000 vehicle as punishment for one adjudged youthful offender and sentenced to participate in drug-court program without a fine was excessive and grossly disproportionate to offense charged; claimant was charged with Class C felony, an offense carrying maximum $5,000 fine, no fine was imposed, state sought forfeiture in amount six times maximum fine legislature allowed courts to impose in such case, such forfeiture would be grossly disproportional to gravity of offense, and forfeiture sought bore no articulable correlation to any injury suffered by state. Reversed and remanded.

S.H.J. v. State Department of Revenue. No. 2940684. Court of Civil Appeals of Alabama. October 27, 1996. Rehearing Denied Dec.15, 1995. Certiorari Quashed Oct. 18, 1996. Alabama Supreme Court 1950551.

Defendant who completed **drug court** program challenged application of drug tax on several grounds, including that it constituted double jeopardy. Court upheld the imposition of the tax.

DRUG COURT PLEA AGREEMENT

1. EFFECT ON SENTENCING

Court of Appeals of Indiana. Amanda May DULWORTH, Appellant-Defendant, v. STATE of Indiana, Appellee-Plaintiff. No. 48A05-0905-CR-267. Sept. 24, 2009. Transfer Denied Nov. 12, 2009.

[termination standard of review: "Regarding abuse of discretion;: so long as the proper procedures have been followed in conducting a probation revocation hearing, the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence.."
[effect of plea agreement on sentencing: "…The Agreement that Dulworth entered into with the State was tantamount to a plea agreement. And plea agreements "are in the nature of contracts entered into between the defendant and the [S]tate."

Appellant-defendant Amanda May Dulworth appeals the trial court's decision to order her to serve a previously stayed eighteen-month sentence in the DOC after she failed to complete a Drug court program because she was eligible to complete her sentence in a work release center. Dulworth also maintains that her rights under the Equal Protection provision of the Fourteenth Amendment to the United States Constitution were violated because there is a work release center in Madison County for men but no such facility exists for women. Concluding that Dulworth was properly sentenced, we affirm the judgment of the trial court.

At a hearing that commenced on March 24, 2009, the trial court stated that it was bound by the Agreement to impose the eighteen-month executed sentence.

Regarding abuse of discretion; so long as the proper procedures have been followed in conducting a probation revocation hearing, the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence.

As noted above, although Dulworth was originally placed on probation following the suspension of the eighteen-month sentence, she subsequently committed forgery and admitted the probation violation. The State and Dulworth then agreed that she could-in lieu of serving an executed sentence-enroll in, and successfully complete, a program through the Madison County Drug court Program. The Agreement made it clear that if Dulworth failed to complete the program, was removed, or voluntarily withdrew from the Drug court program, she would be taken into custody and remanded to the original trial court.

When Dulworth withdrew from the Drug court after submitting five "dirty screens" and missing several

treatment meetings, she immediately sought a sentence modification but the trial court declined to consider any lesser sanction than the eighteen-month executed sentence that had been agreed upon.

The Agreement that Dulworth entered into with the State was tantamount to a plea agreement. And plea agreements "are in the nature of contracts entered into between the defendant and the [S]tate." As a result, the trial court did not abuse its discretion when it ordered Dulworth to serve the previously stayed eighteen-month sentence in the DOC.

Regarding her claim of denial of. Equal Protection because no female work release center in Madison County: Claim is moot because court bound by the terms of the agreement.

Court of Appeals of Indiana. Roscoe CLARK, Appellant-Defendant, v. STATE of Indiana, Appellee-Plaintiff. No. 49A02-0809-CR-819. March 27, 2009.

[open plea agreement permits imposition of up to maximum statutorily permitted sentence]

Appellant challenges his sentence imposed upon termination from drug court pursuant to an open plea agreement to three Class C and four Class D felony and misdemeanor charges on the grounds that the trial court abused its discretion in imposing consecutive rather than concurrent sentences and that the sentences were inappropriate. Sentence affirmed. Court found aggravating factors to justify sentence and aggregate sentence was less than the maximum statutorily permitted sentence which would have been permissible under the Appellant's open plea agreement...

Background: On February 21, 2006, the State and Clark filed a plea agreement with the Marion County Drug Treatment Court (the "Drug court"), whereby Clark agreed to plead guilty to class D felony theft under Cause No. 736; class C felony forgery and class D felony theft under Cause No. 079; class A misdemeanor possession of paraphernalia under Cause No. 141; and two counts of class C felony forgery and two counts of class D felony theft under Cause No. 485. The plea agreement provided that failure to complete the Drug court's requirements would result in Clark being "convicted of the charges as filed and sentenced," with the sentence to be open. . The plea agreement also provided that "failure to appear for court dates, treatment appointments, urinalysis testing, and the testing positive for illegal substances constitutes a violation of the conditions of the agreement."

Upon termination for failure to appear for several court dates, the court imposed an aggregate sentence of six years and an executed sentence of four years, stating, that it had found as aggravating factors the defendant's criminal history and the fact that there were victims in the case.

Holding: "When sentencing a defendant on multiple counts, an Indiana trial judge may impose a consecutive sentence if he or she finds at least one aggravator." The existence of multiple victims is a valid aggravator. Here, the trial court found Clark's criminal history to be an aggravating circumstance. The trial court also twice referred to the fact that there were "victims," meaning more than one, to be an aggravating circumstance. It therefore cannot be found that the trial court abused its discretion in imposing consecutive sentences when it set forth two valid aggravators. Furthermore, Clark pleaded guilty to several crimes, including three class C felonies and four class D felonies, for which he received an aggregate sentence of six years --significantly less than the maximum possible under the plea agreement, which provided for an open sentence. Based on the above, the sentence imposed by the trial court was not inappropriate.

Supreme Court, Appellate Division, Third Department, New York. The PEOPLE of the State of New York, Respondent, v. Brian R. McLUCAS, Appellant. Jan. 15, 2009.

[for defendants successfully completing drug court, issues not included in drug court plea agreement will not be addressed in subsequent disposition of the case.]

Affirms judgment of County Court finding Defendant successfully completed drug court program but denying defendant's request to be adjudicated as a youthful offender, holding that, while the possibility of a youthful offender adjudication was discussed at the time the plea agreement and **drug treatment court** contract were entered into, it was not a condition of defendant's plea or the drug treatment court contract.

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Kari Lynn SUKANE, Defendant

and Appellant. Nos. E042078, E042952. (Super.Ct.Nos. FMB6438, FMB6551). July 29, 2008.

Affirms sentence imposed without probation violation hearing since Defendant waived right to hearing in Drug Court Agreement she executed.

Defendant was placed on probation in two separate cases and ordered to complete the Drug court Treatment Program, in lieu of going to prison. After numerous program violations, the trial court sentenced her at the same time on both cases. The court imposed the upper term in each case, for a total term of seven years in state prison. The two cases have been consolidated on appeal, and defendant now argues: 1) she was deprived of her right to a formal probation violation hearing, 2) the court abused its discretion when it imposed the upper term because it failed to consider or weigh her mitigating circumstances, and 3) the imposition of the upper term violated her right to a jury trial under *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*).

Hold: (1). Defendant Waived Her Right to a Probation Revocation Hearing Twice when she executed agreement to participate in the Drug court Treatment Program; (2) The Trial Court Properly Imposed the Upper Term in Sentence even though mitigating factors not considered since it is not reasonably probable that a more favorable sentence would have been imposed in the absence of error.

Court of Appeals of Washington, Division 1. STATE of Washington, Respondent, v. Bobbi Jo TWETEN, Appellant. Nos. 55430-1-I, 55433-6-I. Feb. 27, 2006.

Upholds sentence to the top end of the standard range for each offense imposed on defendant who failed to complete drug court program pursuant to agreement to enter Drug court. Court is not obligated to exercise discretion.

Supreme Court, Appellate Term, New York, 9th and 10th Judicial Districts. The PEOPLE of the State of New York, Respondent, v. Noah SAUNDERS, Appellant. No. 2004-1570 W CR. Sept. 30, 2005.

Upheld (1) appellant's termination from City of Mount Vernon Drug Treatment Court for violating condition of probation requiring appellant to notify his probation officer if he was arrested or questioned by any law enforcement official and (2) imposition of a more severe sentence (two one-year terms of incarceration) pursuant to his drug court plea agreement than his original term of probation (three years for each count).

Supreme Judicial Court of Maine. STATE of Maine v. Trevis CALDWELL. Docket No. Cum-02-658. Submitted on briefs: May 29, 2003. Decided: July 3, 2003.

Defendant moved to withdraw his guilty plea that allowed him to enter the drug court after failing to comply with drug court program. The Superior Court, Cumberland County, denied motion, and defendant appealed. The Supreme Judicial Court, held that defendant's waiver of his right to withdraw his guilty plea in order to be admitted into the drug court program was knowing and intelligent. Affirmed conviction.

During the hearing, the court explained the two sentencing options that could be imposed once Caldwell entered the drug court program. If Caldwell successfully completed drug court, he would be sentenced to five months in prison, which he had already served. If he did not complete drug court, he would be sentenced to substantially more jail time. Caldwell signed a form acknowledging his waiver of rights to trial, to appeal from the entry of sentence, and to withdraw his guilty plea. The form was also signed by Caldwell's attorney, the prosecutor, and the judge.

The court told Caldwell that he would be ordered to serve consecutive sentences of four months for the case that involved two counts of forgery, receiving stolen property, and theft by deception, six months for eluding an officer, and thirty months with all but six months suspended, three years probation, and the requirement to pay restitution of up to $3,525.50 for the theft case if he failed to complete the program. Regarding the violation of probation, Caldwell was also sentenced at the April 5 drug court plea hearing to five months, time served, and probation continued.

The record reflects that the court was assured that Caldwell understood the length of the sentence he would receive if he failed to complete the program. …The sentence imposed was consistent with the alternate sentence set out at the time of the plea agreement, and included an additional six months resulting from the additional violation of probation…

" If drug court waivers were not strictly enforced once the motion court has been assured that the waiver was entered into knowingly and intelligently, the entire process of the drug court would be eviscerated, thereby eliminating a promising program and removing the opportunity for some of Maine's most troubled citizens to find help.

The question then is whether Caldwell's waivers were entered into knowingly and intelligently. Caldwell had the assistance of counsel; he sought the benefits of the drug court program; he was fully informed of the sentences that would be imposed should he fail; he signed the documents waiving his rights; and he did not assert before the motion court, and does not assert here, that his waivers were not knowing and intelligent.

Court of Appeals of Iowa. STATE of Iowa, Plaintiff-Appellee, v. Theresa Lynne LOYE, Defendant-Appellant. No. 01-1456. Jan. 29, 2003.

[Upheld plea agreement which included waiver of appeal and dismissed subsequent appeal of 64 year sentence when appellee was terminated from drug court.]

Theresa Loye appealed sentence of 64 years for burglary, marijuana and related charges after being terminated from drug court. At trial, she admitted her underlying problem was drug addiction and pled guilty to the charges against her, waived her right to appeal with the understanding she would be sent to "Drug court." After accepting Loye's plea, the court transferred jurisdiction of the case from criminal district court to Drug court. Loye was not successful in the Drug court program. On August 30, 2001, she appeared before the district court and was sentenced to a term of imprisonment not to exceed sixty-four years, plus six months in the county jail on the marijuana charge. She appealed on September 19, 2001. Loye was sentenced to six months in the county jail on the marijuana charge, a term of imprisonment not to exceed two years on each of the two charges of possession of burglar's tools, a term of imprisonment not to exceed twenty-five years on the charge of ongoing criminal conduct, and a term of imprisonment not to exceed five years on each of the seven counts of third-degree burglary, all to be served consecutively.

Because Loye waived her right to appeal, her appeal was dismissed.

2. EFFECT ON CHARGE

Court of Appeals of Washington, Division 2. STATE of Washington, Respondent, v. Mack Clarance COLQUITT, Appellant. No. 32129-7-II. June 29, 2006.

[Effect of agreement to enter drug court not tantamount to plea of guilty]

Held: Police report and field test were not sufficient evidence of a controlled substance to sustain a conviction. Defendant's agreement to participate in drug court was not a stipulation that the substance underlying the charge was, in fact, a controlled substance nor to the sufficiency of the evidence against him.

Court of Appeals of Kansas. STATE of Kansas, Appellee, v. Ricky E. CULLUM, Appellant. No. 93,498. Feb. 17, 2006.

Appellant claimed plea entered in Oklahoma Court pursuant to drug court agreement constituted diversion under Kansas law and should not constitute a criminal conviction absent his termination from Oklahoma drug court.

"What matters, …is whether the foreign state concluded the defendant did the crimes, not whether he or she ultimately had to do the time… No matter what lenience another state may wish to show, once we are satisfied that a defendant's factual guilt was established in a foreign state, that prior crime will count in Kansas." Macias, 30 Kan.App.2d at 83.

Court of Appeal, Fourth District, Division 1, California. The PEOPLE, Plaintiff and Respondent, v. Roy Thomas RAVER, Defendant and Appellant. No. D038823. (Super.Ct.No. SCS160347). Jan. 29, 2003.
Drug court plea agreement to enter drug court and subsequent violation of drug court agreement not to possess firearm did not justify sentencing under the convicted felon statute since drug court plea did not constitute a felony conviction and he had not other felony convictions.

Supreme Court of Kentucky. Robert E. THOMAS, Appellant, v. COMMONWEALTH of Kentucky, Appellee. No. 2001-SC-0806-DG. Jan. 23, 2003.

Defendant became "convicted felon" when he entered

plea of guilty to possession of controlled substance and was subsequently placed in the drug court.

3. LEGALITY IF DEFENDANT DOES NOT FULLY DISCLOSE FACTORS THAT WOULD MAKE HIM/HER INELIGIBLE FOR PROGRAM

United States Court of Appeals, Tenth Circuit. Gregory Allen CARPENTER, Petitioner-Appellant, v. James L. SAFFLE, Director of the Department of Corrections, Respondent-Appellee. No. 00-6459. May 2, 2001.

Denies appellant's appeal to overturn conviction for drug possession based on plea agreement conditioned on drug court program entry for which Defendant was actually not eligible because of criminal history but did not disclose prior history. Appellant sought appeal of District Court's denial of habeas corpus petition challenging conviction on charges of drug possession based on plea agreement entered pursuant to the Oklahoma Drug court Act wherein he agreed that the charges against him would be dropped if he successfully completed drug court program but would besentenced to term of 25 years if he failed the program. Defendant was terminated from the program, sentenced, and subsequently appealed on grounds of having two prior felony convictions and therefore not being eligible for the drug court program. Appeal denied.

4. RIGHT TO RESCIND DRUG COURT PLEA AGREEMENT IF NOT ACCEPTED INTO DRUG COURT

STATE OF OHIO, PLAINTIFF-APPELLEE, v Jonathan R. Orlando, DEFENDANT-APPELLANT. No. 99299. Court of Appeals of Ohio, Eighth District, Cuyahoga County. Released and Journalized: June 6, 2013.

On December 12, 2012, Defendant was deemed eligible for drug court and his cases were administratively transferred to the drug court docket pursuant to Local Rule 30.2(F) of the Court of Common Pleas of Cuyahoga County, General Division. The following day, defendant appeared at drug court with the understanding that he would be admitted into the drug court program. After the trial judge stated that Defendant had been assessed eligible, the judge advised him of his rights prior to accepting his guilty pleas to all charges contained in both indictments. Immediately after accepting defendant's guilty pleas, the trial court summarily determined that Defendant's "attitude throughout the plea, convinced [the court] that he would not be a good candidate for drug court." The court then imposed a six-month prison sentence on each count, ordering them to run concurrent with each other. Defendant moved to vacate his pleas, arguing that his guilty pleas were made "as a condition to enter into drug court with the belief and understanding that he would be admitted into the drug court following his `guilty' plea." The trial court denied Defendant's motions to vacate his pleas, to stay the execution of his sentence, and request for appellate bond. In the court's written journal entry denying Defendant's motions to vacate and stay, the court stated:

Held: (1) Drug court judge violated local rules by not returning case to original judge prior to accepting plea if deemed defendant ineligible for drug court and (2) defendant entitled to withdraw plea on grounds trial court (1) deviated from the plea agreement, (2) failed to advise him that he was ineligible for drug court, (3) failed to advise him that it could proceed straight to judgment and sentencing; and (4) failed to inquire whether defendant waived the presence of his retained counsel and consented to the representation of the public defender… Trial court accepted the plea agreement, and Defendant had a reasonable expectation that he would be placed on community control sanctions in admittance into drug court. Defendant's case was transferred to drug court because he was assessed as eligible. Both the state and Defendant understood that he would be placed into drug court. Moreover, the judge stated that Defendant was eligible immediately prior to advising him of his rights. Accordingly, Defendant had an expectation of participating in drug court and being placed on community control when he entered his pleas of guilty to all charges contained in both indictments.

The PEOPLE of the State of Illinois, Plaintiff-Appellee, v. Rodney McKINNEY, Defendant-Appellant.

Appellate Court of Illinois, First District, Third Division. August 8, 2012.

Defendant pled guilty to burglary based on erroneous advice that he was ineligible for participation in a veterans court because he was not eligible for probation, he was entitled to withdraw his plea and pursue his request for admission to the program. Rejects prosecutor's objection to the Defendant's entering the Veterans Drug Treatment program because he did not "demonstrate a willingness to participate in a treatment program" since the record, did not show this issue came up "It is clear from the record that defendant never had the opportunity to

explore such a possibility." Remanded for further proceedings.

Court of Appeals of Mississippi. Michael A. BLISS, Appellant, v. STATE of Mississippi, Appellee. No. 2008-CP-00288-COA. Feb. 10, 2009.

Background: Defendant who was rejected from the drug court program following guilty plea to possession of precursor chemicals with the intent to manufacture methamphetamine was thereafter sentenced to 20 years in the custody of the Mississippi Department of Corrections (MDOC) with four years suspended and 16 years to serve followed by five years of post-release supervision. Defendant filed motion for post-conviction relief to set aside his plea on the grounds it was premised upon acceptance into the drug court.

Holdings:
(1) guilty plea was voluntary even if defendant believed he would be placed in the drug court program, and
(2) counsel did not render ineffective assistance by leading defendant to believe he would be placed in drug court program.

Court of Appeals of Kentucky. Shaun HENRY, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2007-CA-000504-MR. Dec. 7, 2007.

[Validity of plea agreement conditioned on acceptance by drug court upheld despite defendant's rejection for drug court participation.]

Appeal from Muhlenberg Circuit Court.

Appellant denied motion to withdraw his guilty plea to first-degree possession of a controlled substance and second-degree persistent felony offender after rejected from drug court because he was a parole violator. Appellant argues that his plea was not made knowingly and intelligently because he did not know parole violators were excluded from the drug court, and, therefore, he should be allowed to revoke it.

Held: Denial of motion to withdraw plea affirmed.
(1) Appellant not guaranteed acceptance by drug court; rejection based on status as parole violator, not state action.

Court of Appeal, Fifth District, California. The PEOPLE, Plaintiff and Respondent, v. Brian Christopher CARLSEN, Defendant and Appellant. No. F051626. (Super. Ct. Nos. VCF129503, VCF140569 and VCF150697). Oct. 11, 2007.

[Defendant permitted to withdraw plea conditioned on drug court entry when not accepted by drug court]

APPEAL from a judgment of the Superior Court of Tulare County.

Appellant, Brian Christopher Carlsen, contends the trial court violated his plea agreement by imposing a sentence greater than indicated in the original negotiated disposition.

Initial plea summarized as follows: "Now what the court has indicated, if you want to go ahead and plead today and take Drug court, is I'm going to place you on probation, give you 180 days for all three of these cases, and then as part of your probation you're going to go into the Drug court program and successfully complete that program." However, appellant was found ineligible and not accepted into the drug court program. The court then sentenced appellant to an aggregate term of 240 days. Appellant argues that the court erred in unilaterally increasing the sentence. Appellant initially asserted that the appropriate remedy was specific performance of the plea agreement. Nevertheless, in his reply brief, appellant concedes that under these circumstances, the proper remedy is to allow him to withdraw his no contest plea and go to trial on the original charges. This is correct. "Courts find withdrawal of the plea to be the appropriate remedy when specifically enforcing the bargain would have limited the judge's sentencing discretion in light of the development of additional information or changed circumstances between acceptance of the plea and sentencing." (*People v. Mancheno* (1982) 32 Cal.3d 855, 861.) Here, the circumstances changed, i.e., appellant was not accepted into the drug court program.

Since this case will be remanded and appellant allowed to withdraw his no contest plea, appellant concedes that the balance of his claims relating to restitution fines are moot.

42 A.D.3d 751, 840 N.Y.S.2d 635, 2007 N.Y. Slip Op. 06126 Supreme Court, Appellate Division, Third Department, New York. The PEOPLE of the State of New York, Respondent, v. John W. EMERSON, Appellant. July 19, 2007.

[withdrawal of plea agreement permitted if made with understanding participant to enter drug court and subsequently deemed ineligible]

Defendant pled guilty in the St. Lawrence County Court to first-degree aggravated unlicensed operation of a motor vehicle and misdemeanor driving while intoxicated and representation that he would be permitted to participate in drug court in order to have charge reduced if he successfully completed the drug court. Subsequently, the court denied his request to participate in drug court. Defendant appealed claiming a right to withdraw his guilty plea.

Held: The Supreme Court, Appellate Division, held that defendant was entitled to withdraw his guilty plea prior to being sentenced to prison since the opportunity to participate in drug court treatment was withdrawn.

Reversed and remitted.

Court of Appeal, First District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Wendy MARTIN, Defendant and Appellant. No. A104038. (Napa County Super. Ct. No. CR100614). March 2, 2005.

Plea agreements must be enforced to effect "fulfillment of the bargain." …Pursuant to a plea agreement defendant entered into in 2000, she pled guilty to the one count in a complaint charging her with possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a). and, pursuant to the same plea agreement, she was referred to drug court from which she "graduated ." According to the plea agreement, once that happened, the case against her was to be dismissed. Nevertheless, thereafter, the court purported to revoke her probation in this case and, later, sentenced her to the mitigated term of 16 months in prison for repeated, and admitted, violations of probation.

United States Court of Appeals, Tenth Circuit. Kenneth HILL, Petitioner-Appellant, v. STATE of Oklahoma; Susan Casswell, Oklahoma County District Judge; Lisa Hammond, Respondents-Appellees. No. 99-6454. April 7, 2000.

Dismisses Defendant's suit against Drug court Judge and others alleging constitutional rights violated when he was not accepted into the Oklahoma County Drug court Program in contravention of his plea agreement. Holding "should not be read as unsympathetic to the serious due process concerns raised when a plea agreement is reached. Rather…simply hold that [he] cannot obtain the relief he seeks by bringing a suit under 42.U.S.C.section 1983…against the named defendants."

5. ENFORCEABILITY OF AGREEMENT: OTHER REQUIREMENTS

STATE OF NEW JERSEY, Plaintiff-Respondent, v. JOSE A. DAVILA, Defendant-Appellant. No. A-3383-10T4. Superior Court of New Jersey, Appellate Division. Submitted March 13, 2013; Decided March 20, 2013.

Dismisses defendant's claim that he lacked capacity to enter a voluntary and knowing plea because he was intoxicated, finding claim unsupported by the record;

Denied claim of ineffective assistance of counsel when not advised of potential deportation consequences of plea since admitted on record he was a U.S. citizen. (Pre-*Padilla*)

Court of Appeals of Washington, Division 2. STATE of Washington, Respondent, v. Patrick Boyd DRUM a/k/a Tim Jones, Appellant. In re Personal Restraint Petition of Patrick Boyd Drum a/k/a Tim Jones, Petitioner. Nos. 35947-2-II, 34377-1-II. March 25, 2008.

Defendant charged with residential burglary entered into a drug court contract, under which he agreed to undergo drug treatment. After seeking release from the contract, defendant was convicted in the Jefferson Superior Court, of residential burglary, and he appealed on various grounds.

Held:

(1) Defendant waived his right to raise any evidentiary issues by entering into drug court contract, and
(2) Drug court contract was not equivalent to a guilty plea, and thus contract was not required to meet same due process standards as guilty pleas,
(3) Judge was not biased because a member of the drug court "team" since no showing of actual or potential bias,
(4) Defense counsel's advice to enter into drug court contract did not reflect ineffective counsel since reasonable strategy to further defendant's own goals; defendant's stipulation to guilt by entering into drug

court contract was not ineffective counsel since court made independent finding of guilt.

Slip Copy, 2007 WL 4118388 (Table) (N.Y.Sup.App.Term), 2007 N.Y. Slip Op. 52199(U)
Unreported Disposition Supreme Court, Appellate Term, New York, 9th and 10th Judicial Districts. The PEOPLE of the State of New York, Respondent, v. Joseph SHARPE, Appellant. No. 2006-1284WCR.

[Termination by Caseworker constitutes termination from program]
[Finding of a "willing and voluntary plea"]
[Sufficiency of the drug court contract in alerting participant to consequences of termination from treatment program]

Defendant entered into a Drug Treatment program after having pleaded guilty to two charges of criminal possession of a controlled substance in the seventh degree with the understanding that if he completed the one-year program successfully, this would satisfy his sentences, whereas if he did not, he would receive consecutive one-year jail terms. Defendant was "kicked out" of the drug treatment program for "arguing with the caseworker". Upon appeal, defendant contends that defendant's unintentional, forced termination from the Drug court Treatment Program (1) did not sufficiently establish that he failed the program; (2) that a "Drug court Contract" signed by defendant and the attorneys fails to show the consequences of being thrown out of the program at the whim of a caseworker and allows it to be "concluded" that defendant unsuccessfully completed the program; and (3) defendant's mental health was never examined more fully to determine if his pleas were knowingly, voluntarily and intelligently entered.

Supreme Court, Appellate Division, Third Department, New York. The PEOPLE of the State of New York, Respondent, v. Robert H. CONWAY Jr., Appellant. Nov. 15, 2007.

[waiver of appeal on condition of drug court program entry was knowing and voluntary]

Waiving his right to appeal, defendant pleaded guilty to one count of felony driving while intoxicated in satisfaction of a three-count indictment. As part of the plea bargain, defendant was placed on interim probation for a period of one year with the requirement that he successfully complete a drug court program at an addiction treatment facility. At the time of the plea, County Court informed defendant: "If you complete the program, when you are on Probation, I will sentence you to 6 months and 5 years Probation. If you don't, if you come back in the next year for anything, it is going to be [2 1/3 to 7]." Thereafter, defendant violated the terms of his interim probation and was sentenced to 2 1/3 to 7 years in prison, prompting this appeal.

Held:

(1) defendant's plea was knowing and voluntary and appeal waiver was valid, and
(2) defendant was precluded from arguing that his sentence was harsh and excessive.
Defendant's appeal waiver was knowingly, intelligently, and voluntarily entered, where defendant waived his right to appeal on the record, and executed a written appeal waiver which set forth his appellate rights and indicated that he had discussed the waiver with his attorney and was relinquishing his right to appeal knowingly and intelligently.

Supreme Court, Appellate Division, Third Department, New York. The PEOPLE of the State of New York, Respondent, v. James J. BYRNES Jr., Appellant. May 18, 2006. 813 N.Y.S.2d 924, 2006 N.Y. Slip Op. 03932.

Appeal from a judgment of the County Court of Chemung County (Buckley, J.), rendered March 8, 2004, convicting defendant upon his plea of guilty of the crime of driving while intoxicated and imposing sentence of imprisonment of 1 to 3 years pursuant to guilty plea prior to drug court entry…"Inasmuch as the record discloses that defendant entered a knowing, voluntary and intelligent plea and waiver of the right to appeal, we will not review his challenge to the severity of the sentence…"

Court of Appeal, Sixth District, California. The PEOPLE, Plaintiff and Respondent, v. Maurice DAVENPORT, Defendant and Appellant. No. H028755. (Santa Clara County Super. Ct. No. SS042021A). May 12, 2006.

Affirms Defendant's sentence pursuant to plea agreement following failed referral to drug court. Defendant appealed from a judgment of conviction of possession of a controlled substance based upon his plea of guilty and admission of three prior prison term enhancements pursuant to a plea bargain

providing for a referral to DRUG TREATMENT COURT. Defendant was later sentenced to a six-year prison term after he tested positive and his referral to DRUG TREATMENT COURT was terminated. Defendant asserts on appeal that he was entitled to Proposition 36 drug treatment as a matter of law after his failed referral to DRUG TREATMENT COURT.

"A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles. [Citations.] 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ.Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ.Code, § 1638.) … Despite certain factual distinctions between this case and People v. Chatmon, supra, 129 Cal.App.4th 771, defendant Davenport, like defendant Chatmon, received the benefit of avoiding a potentially harsher disposition and "dismissal of a charge that, were he convicted, would have disqualified him from treatment under Proposition 36. We reject defendant's efforts to better his plea bargain through the appellate process.

The judgment is affirmed.

Supreme Court of Georgia. The STATE v. STINSON. No. S04G0742. Sept. 13, 2004.

[Reverses Court of Appeals; defendant did not have the right to withdraw plea conditioned on drug court completion four years following entry when subsequently terminated from the drug court and about to be sentenced; a defendant who has pled guilty and utilized the benefits of a rehabilitative option in order to avoid an adjudication of guilt may not withdraw the plea as a matter of right under]

District Court of Appeal of Florida, Fifth District. STATE of Florida, Petitioner, v. CENTER FOR DRUG FREE LIVING, INC., Respondent. No. 5D02-3356. March 7, 2003. District Court of Appeal of Florida, Fourth District. Kelli S. SMITH, Appellant, v. STATE of Florida, Appellee. No. 4D01-3710. March 19, 2003.

Reversed trial court's denial of defendant's plea to withdraw her no contest plea to drug charges. Plea of no contest to drug charges not voluntary absent evidence showing defendant understood consequences of having her case transferred to drug court and in light of plea counsel's admission he didn't know enough about drug court to advise defendant on particulars.

Supreme Judicial Court of Maine. STATE of Maine v. Trevis CALDWELL. Docket No. Cum-02-658. Submitted on briefs: May 29, 2003. Decided: July 3, 2003.

Defendant moved to withdraw his guilty plea that allowed him to enter the drug court after failing to comply with drug court program. The Superior Court, Cumberland County, denied motion, and defendant appealed. The Supreme Judicial Court, held that defendant's waiver of his right to withdraw his guilty plea in order to be admitted into the drug court program was knowing and intelligent. Affirmed conviction.

During the hearing, the court explained the two sentencing options that could be imposed once Caldwell entered the drug court program. If Caldwell successfully completed drug court, he would be sentenced to five months in prison, which he had already served. If he did not complete drug court, he would be sentenced to substantially more jail time. Caldwell signed a form acknowledging his waiver of rights to trial, to appeal from the entry of sentence, and to withdraw his guilty plea. The form was also signed by Caldwell's attorney, the prosecutor, and the judge.

The court told Caldwell that he would be ordered to serve consecutive sentences of four months for the case that involved two counts of forgery, receiving stolen property, and theft by deception, six months for eluding an officer, and thirty months with all but six months suspended, three years probation, and the requirement to pay restitution of up to $3,525.50 for the theft case if he failed to complete the program. Regarding the violation of probation, Caldwell was also sentenced at the April 5 drug court plea hearing to five months, time served, and probation continued.

The record reflects that the court was assured that Caldwell understood the length of the sentence he would receive if he failed to complete the program. …The sentence imposed was consistent with the alternate sentence set out at the time of the plea agreement, and included an additional six months resulting from the additional violation of probation… "If drug court waivers were not strictly enforced once the motion court has been assured that the waiver was entered into knowingly and intelligently, the entire process of the drug court would be eviscerated, thereby eliminating a promising program and removing the opportunity for some of Maine's most

troubled citizens to find help.

The question then is whether Caldwell's waivers were entered into knowingly and intelligently. Caldwell had the assistance of counsel; he sought the benefits of the drug court program; he was fully informed of the sentences that would be imposed should he fail; he signed the documents waiving his rights; and he did not assert before the motion court, and does not assert here, that his waivers were not knowing and intelligent.

Ex parte Alissa Pfalzgraf. (In re State of Alabama v. Alissa Pfalzgraf). CR-98-1194. Court of Criminal Appeals of Alabama. May 19, 1999.

The Court of Criminal Appeals, Long, P.J., held that petitioner, who made application to drug court and agreed to plead guilty to charges and undergo extensive drug treatment program, which was initially accepted by district attorney, had binding and enforceable negotiated plea agreement that could not subsequently be repudiated by district attorney.

Curtis Williams, alias Gatha Lee Carlisle v. State. CR-97-0341. Court of Criminal Appeals of Alabama. Aug. 14, 1998.

Defendant was arrested under false name, and convicted in the Circuit Court, Mobile County, Nos. CC-97-72 and CC-97-73, Braxton L. Kittrell, Jr., J., on his plea of guilty to drug offenses, and the trial court deferred sentencing pending the appellant's completion of drug court. The appellant's parole officer then testified that the appellant's real name was Gatha Carlisle and that he had been on parole for five felony offenses when he absconded from her supervision. The trial court then sentenced defendant to two consecutive life sentences. Defendant appealed. Defendant contended that his guilty plea was not entered knowingly and intelligently because it was entered with the understanding he would enter the drug court. The Court of Criminal Appeals held that: (1) defendant waived right to have claim that his guilty plea was involuntary considered on appeal; (2) defendant waived right to have claim that trial court erred in sentencing him to two consecutive life sentences considered on appeal; and (3) error in minute entries of case action summaries were to be corrected by trial court on remand. Remanded with instructions.

Court of Appeals of Iowa. State of Iowa, Appellee, v. Kristen Wen PAUL, Appellant. No. 99-1592. April 11, 2001. Appeal from the Iowa District Court for Decatur County.

Upholds Defendant's waiver of right to appeal as condition of plea agreement to enter drug court. [Defendant subsequently terminated from drug court and sentenced to term of imprisonment "not to exceed sixty-four years".]

The Blackfeet Tribe vs. Leeta Old Chief, Incarcerated Person. Case No. 00AC57, 20AP20. Order. August 29, 2000.*

Since policy and procedure manual for the Blackfeet Alternative Court, which allows fines and incarceration of defendants, was not duly approved by the Blackfeet Tribal Business Council, the defendant was permitted to withdraw her guilty plea and the trial court should continue the proceedings upon her entering of a new plea.

DRUG COURT PROCEEDINGS AND PROCEDURES

1. ADEQUACY OF COURT RECORD

Plea of Guilty with Entry to Drug Court Could Not Be Withdrawn When Defendant Denied Admission To Drug Court.

STATE OF NEW JERSEY, Plaintiff-Respondent, v. WILLIAM JACKSON, Defendant-Appellant. No. A-5072-09T2. Superior Court of New Jersey, Appellate Division. Submitted October 16, 2012. Decided January 10, 2013.

Defendant's plea agreement included application to drug court and, if denied, stipulated sentence; defendant was denied drug court admission and sentenced consistent with the agreement.

Upholds plea agreement providing for defendant to apply to drug court even though prosecutor subsequently determined defendant ineligible. Trial court record does not address situation

Mary E. FORD, Appellant v. COMMONWEALTH of Kentucky, Appellee and William E. Flener, Appellant v. Commonwealth of Kentucky, Appellee. Nos. 2008-CA-001990-MR, 2009-CA-000889-MR, 2009-CA-000461-MR. April 30, 2010.

[credit for time served: abuse of discretion for court to not require complete record regarding time served] Having same judge preside over drug court and revocation hearing is not a denial of right to impartial hearing/due process]

Defendants appeal revocation of probation alleging (1) denial of due process because not provided an impartial hearing since the same judge presided over drug court and revocation hearing; and (2) failure to properly credit time served.
[agree to hear the appeal on this issue even though not clear issue preserved on the record because of the due process implications]

First: On probation termination: Standard of review is whether trial court abuse its discretion in revoking appellants' probation and diversion.

Held: having the same judge preside over the drug court and the revocation hearing does not necessarily violate the requirement for an unbiased judge; no evidence in the record to suggest personal bias or prejudice, etc.
Probation is a privilege rather than a right.

Both DRUG COURT programs and revocation hearings are subject to different due process requirements than the prosecution of cases. Trial practice in prosecutorial cases has allowed judges to preside over the same case upon remand and in successive trials involving the same defendant.

Therefore, can find no error in the judge here presiding over both the DRUG COURT and the revocation proceedings, and hence, the court did not abuse its discretion.

Second on credit for time served: -found Court abused its discretion by relying on incomplete record.

The court based its order on an admittedly incomplete record of the case and the Office of Probation and Parole's assurance that Ford had received appropriate jail time credit. If confusion existed as to the amount of jail time credit, a hearing should have been held. Accordingly, we determine that it was an abuse of discretion for the trial judge to fail to adequately explore the Ford's correct amount of jail time credit in the instant case.

Held: vacated court's order denying appellant's motion to reconsider its previous order regarding custody credit, and remanded to the Muhlenberg Circuit.

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Marty L. DEROWITSCH, Defendant and Appellant. No. E045600. (Super.Ct.No. FMB006490). June 9, 2009.

[computation of time served credits; Requirement of adequate record]

Defendant had been accepted into San Bernardino County Drug court as a condition of probation after revocation of previous order of probation under which defendant had agreed to waive credit for time served. Defendant's subsequent violation of drug court probation (1) while in drug court or, if that request is denied, for time in jail (2) before entering drug court and awaiting termination hearing since he was already terminated from the drug court if determined that waiver only referred to past time served.

Held: nothing in record indicates defendant waived time served credits as condition of participating in drug court; state asks court to take judicial notice of defendant's application for admission to drug court waiving credit for time served though application not part of court record; court relies on probation officer's report referencing application and defendant's waiver of credits; also not clear from record as to the date of termination from the Drug court (e.g., record refers to "removed" from drug court, "failed drug court", etc.); waiver also not clear as to whether ALL credits were waived or just those for time served while in drug court;

Remanded to trial court to revise order to determine number of days of credit defendant entitled to.

Supreme Court of Nebraska. In re Interest of TYLER T., a child under 18 years of age. State of Nebraska, appellee, v. Tyler T., appellant. No. S-09-631, S-09-632, S-09-633. April 29, 2010.

*[Fifth (and fourteenth) Amendments: Due Process Drug court Proceeding – Requirement of a Written Recor*d for case decisions, including orders affecting probation]

After juvenile had been adjudicated delinquent in three prior cases and placed on probation, the State filed petitions to revoke probation in all three cases.

The Madison County Court extended the probation for one year and added the condition that juvenile attend and successfully complete the DRUG TREATMENT COURT program. Juvenile appealed, contending that the county court, sitting as a juvenile problem-solving court, ordered his detention without legal authority and in violation of his due process rights.

Held: Appellate Court cannot undertake a meaningful appellate review of this claim because of the complete absence of a verbatim record of the hearing or the resulting order.

Reversed and remanded. [no adequate record for review]

Given the therapeutic component of problem-solving-court programs, we are not prepared to say that each and every action taken in such a proceeding must be a matter of record. But we have no difficulty in concluding that when a judge of a problem-solving court conducts a hearing and enters an order affecting the terms of the juvenile's probation, the proceeding must be on the record. We agree with other courts which have held that where a liberty interest is implicated in problem-solving-court proceedings, an individual's due process rights must be respected.

Patin Earl HARRIS, Appellant-Defendant, v. STATE of Indiana, Appellee-Plaintiff. No. 53A04-0912-CR-702. April 13, 2010.
[*adequacy of court record – prevented ruling on issue*]
[*sentencing*]

Defendant pled guilty to theft, a Class D felony, to being a habitual offender, and to burglary, a Class C felony and agreed to participate in the Monroe County Drug Treatment Court Program and, if he completed the drug treatment program, the charges pled to would be dismissed; if he failed to complete the program, sentencing would be left to the trial court.

Defendant was terminated from the drug treatment program in April of 2008 after numerous violations. The trial court accepted the plea agreement and, after citing Harris's criminal history, sentenced Harris to maximum terms of three years for theft, four and one half years for the habitual offender finding, and eight years for burglary, all to be served consecutively. Defendant appealed on grounds (1) that the fifteen and one half year sentence was inappropriate because he pled guilty and was starting to show progress in turning his life around at the time of sentencing.

Held; sentence appropriate; record is inadequate in terms of showing substantial progress by defendant in treatment; affirms trial court termination.

Supreme Court of Virginia. Judson Jeffrey HARRIS v. COMMONWEALTH of Virginia. Record No. 091177. Feb. 25, 2010. Va.,2010. 279 Va. 541, 689 S.E.2d 713.

[termination]- requires hearing regarding termination from drug court in addition to hearing on termination from probation]
[adequacy of record – must show reasons for termination from drug court as well as probation revocation]
[court required to consider reasons defendant had been terminated from drug court, not simply to hold a probation revocation hearing- recognizing liberty interest]

Following defendant's plea of guilty to possession of heroin, and his subsequent termination from DRUG COURT treatment program, commonwealth moved to impose terms of plea agreement. The Circuit Court, City of Fredericksburg, sentenced defendant to incarceration, pursuant to plea agreement, and defendant appealed claiming trial court required to consider the reasons for his termination and to conduct a hearing in which he had right to participate before imposing plea agreement terms.

Held: Defendant, whose successful completion of DRUG COURT treatment program was a condition for dismissal of drug possession charges against him, had a liberty interest in continued participation in the program, and thus, after defendant had been terminated from program and commonwealth moved for execution of sentence pursuant to plea agreement, trial court was required to consider the reasons that defendant had been terminated from the program, before imposing plea agreement terms and sentencing defendant to incarceration.

Reversed and remanded.

2. DRUG TESTING (SEE ALSO FOURTH AMENDMENT)

Court of Criminal Appeals of Tennessee, at Jackson. STATE of Tennessee v. Justin VAULX.

No. W2008-00772-CCA-R3-CD. Assigned on Briefs Jan. 6, 2009. May 13, 2009.

Direct Appeal from the Circuit Court for Madison County challenging the defendant's removal from community corrections and drug court participation and order for him to serve his sentence in confinement, based on positive test results from analysis of his drug patch which he claims was unreliable and noted further that he had never failed a urinalysis test during his entire time in drug court.

Holding: Affirms sentence; No abuse of discretion by the trial court. Like probation, the trial court may revoke a community corrections sentence upon finding by a preponderance of the evidence that the defendant has violated the conditions of the sentence. The court specifically found the defendant's testimony not to be credible in light of the prior violations of his sentence for using cocaine and marijuana. The court noted: "I've sent him to drug treatment twice. I put him in drug court and each and every time, [the defendant] has continued to use illegal drugs, specifically cocaine and marijuana."

United States Court of Appeals, Ninth Circuit. UNITED STATES of America, Plaintiff-Appellant, v. Raymond Lee SCOTT, Defendant-Appellee. No. 04-10090. Argued and Submitted Dec. 10, 2004. Filed Sept. 9, 2005. Amended June 9, 2006.

[*warrantless searches, including drug testing, imposed as a condition of pretrial release, required showing of probable cause, despite defendant's pre-release consent*]
[drug testing – random drug tests pretrial]
[Effect of pretrial release agreement for random drug tests for defendant on pretrial release]

Defendant, indicted for unlawfully possessing unregistered shotgun, moved to suppress shotgun and his statements concerning it.

Held:
(1) as a matter of first impression, warrantless searches, including drug testing, imposed as a condition of pretrial release, required showing of probable cause, despite defendant's pre-release consent, and [in this instance]

Affirm District Court Order's Motion to Suppress.

One who has been released on pretrial bail does not lose his or her Fourth Amendment right to be free of unreasonable seizures; …Warrantless searches, including random drug testing, imposed as condition of pretrial release in state prosecution, required showing of probable cause, even though defendant had signed pre-release consent form; protecting community from further crime committed by defendant did not amount to "special need," since crime prevention was quintessential general law enforcement purpose, there was no showing that problem of releasees failing to appear in court as result of drug use justified intruding on privacy rights of every releasee, nor that defendant in particular was likely to engage in future drug use that would decrease likelihood of his appearance, and governing state code did not recognize connection between drug use and nonappearance at trial.

[Probation is form of criminal punishment, so probationers have sharply reduced liberty and privacy interests.]

Nevada's decision to test Scott for drugs without probable cause does not pass constitutional muster under any of the three approaches: consent, special needs or totality of the circumstances. Since the government concedes there was no probable cause to test Scott for drugs, Scott's drug test violated the Fourth Amendment. Probable cause to search Scott's house did not exist until the drug test came back positive…

* * *
[also dissents]

Court of Appeals of Washington, Division 3. STATE of Washington, Respondent, v. Lynne ADAMS, Appellant. No. 23377-4-III. Feb. 9, 2006.

Appellant claimed due process rights violated when she was sanctioned for having a diluted urine test without a hearing. Court dismisses appeal as moot because appellant already graduated from the Benton County Drug court. Appellant claimed the examiner did not seal her urine sample as was typically done. Subsequently, Benton County Drug court amended its procedures requiring participants to seal and initial their own urine samples so that the issue raised by appellant is not likely to reoccur.

Misc.3d 1011(A), 2004 WL 2495849 (N.Y.Sup.), 2004 N.Y. Slip Op. 51326(U) Supreme Court, New York County, New York. The PEOPLE of

the State of New York v. Luis DIAGO, Defendant. No. 6252/03.
Nov. 3, 2004.

[Denies due process violation claim of defendant, who was using multiple legal drugs, that he was denied due process because his positive drug test using the Roche Varian On Trak TesTcup test while in a drug court program was not confirmed by a gas chromatography/mass spectrometry test(GC/MS); court finding that defendant not denied due process based upon preponderance of the evidence presented by expert that medications taken by defendant could themselves have caused a false positive and defendant, when offered residential treatment, chose to be sentenced.]

United States Court of Appeals, Tenth Circuit. Brett D. Wheeler, Petitioner-Appellant, v. Robert D. HANNIGAN; No. 01-3289. March 19, 2002.

Dismisses Petitioner's claim that request for second urinalysis after first urinalysis was negative and acceptance of testimony from a corrections officer concerning a prison pharmacist's statements regarding possible causes for a false positive test violated his rights to due process and confrontation.

In Re David Anthony York, et al. .Court of Appeal, Sixth District, California. February 22, 1994; review granted May 26, 1994.

Upholds authority of the trial court to order drug testing and warrantless searches of persons, residence and/or vehicles of defendants on pretrial release if order made on an individual, case by case basis.

Drug testing and warrantless search and seizure conditions may be imposed in conjunction with OR [personal recognizance] release if, after considering the specific facts and circumstances in a particular case, the judge or magistrate determines that those facts and circumstances justify the condition or conditions.

Edwin T. Oliver v. U.S., No. 95-CO-434. District of Columbia Court of Appeals. August 29, 1996. (Non-drug court case)

Trial court has authority to order pretrial drug testing as a condition of release; pretrial drug testing was statutorily permissible condition of release and did not violate Fourth Amendment.

Court of Appeals of Indiana. Elizabeth STEINER, Appellant-Defendant, v. STATE of Indiana, Appellee-Plaintiff. No. 47A05-0103-CR-123. March 7, 2002.

Trial court's imposition of random drug screens as pretrial condition for defendant charged with possession of marijuana not reasonable condition of bail and an abuse of discretion.

3. STAFFINGS

State of Washington v. Adonijah Lacroy Sykes. No. 87946-0. December 18, 2014.

Public access to staffings interferes with a key feature [of drug courts] – the appearance and fact of collaboration – that differentiates adult drug courts from ordinary criminal adjudications. Public access to staffings therefore does not play a significant positive role in adult drug court functioning. …Article I, section 10 of the Washington Constitution does not require adult drug court staffings to be presumptively open. We remand to the trial court for further proceedings consistent with this opinion.

EFFECT OF DRUG COURT PARTICIPATION ON SENTENCING:

1. CONSIDERATION OF DRUG COURT PARTICIPATION AS PRIOR OFFENSE FOR PURPOSE OF FEDERAL SENTENCING GUIDELINES (See also "Confidentiality")

United States Court of Appeals, Fourth Circuit. UNITED STATES of America, Plaintiff-Appellee, v. Antonio Alfredo MARTINEZ-MELGAR, a/k/a Alfredo Antonio Martinez-Melgar, Defendant-Appellant. No. 08-4569. Argued: Dec. 4, 2009. Decided: Jan. 20, 2010.

[Sentencing - participation in state drug court program that doesn't require admission of guilt does not constitute prior offense for purpose of federal sentencing guidelines]

Defendant pled guilty in the United States District Court for the Western District of North Carolina of drug trafficking and possession of firearm during and in relation to drug trafficking. Defendant appealed sentence as procedurally infirm because prior participation in North Carolina Drug court did not

constitute a prior sentence for purpose of computing criminal history.

Held: prior participation in state drug supervision program did not constitute prior sentence under criminal history Sentencing Guidelines because participation did not constitute an admission of guilt as required by the Guidelines and participation in the Drug court (Mecklenburg County) did not require an admission of guilt.

Vacated and remanded for resentencing.

2. EFFECT ON CREDIT FOR TIME SERVED

A. TIME FOR PROGRAM PARTICIPATION INCLUDING JAIL TIME SERVED AS SANCTION

State of West Virginia, Plaintiff, Respondent vs. Scott L. Davis, Defendant Petitioner. No. 12-1294. Supreme Court of Appeals of West Virginia. November 26, 2013.

Denies Petitioner's request for credit for time served while participating in drug court program because " …he was not subject to the minimum mandatory requires in West Virginia Code Section 62-11B-5 and therefore did not serve a period of home incarceration pursuant to that statute that would entitle him to credit for time serviced…petitioner's schedule while participating in the drug court program was not prepared by a probation officer…because he was under the supervision of the drug court team; he was not required to pay the home incarceration fee required by West Virginia Code…because the drug court paid his incarceration fees; and the drug court program allows days off for good behavior and performing community service, neither of which are exceptions permitted under the Home Incarceration Act…."

STATE OF TENNESSEE, v. Kelly Ruth Osteen. No. M2012-02327-CCA-R3-CD.Court of Criminal Appeals of Tennessee, at Nashville.May 15, 2013 Session. Filed August 1, 2013.

[Denies credit for time served as condition of probation rather than community corrections.]

The record is clear in this case that the trial court did not impose a community correction sentence but rather required the participation and completion of drug court as a *condition of probation,* as is evidenced in the Probation Revocation Order. Therefore, because the Defendant's drug court participation was a condition of probation rather than a community corrections sentence, the trial court properly denied credit based on Tennessee Code Annotated section 40-36-104(e).

Court of Appeal, Third District, California. The PEOPLE, Plaintiff and Respondent, v. Trevor Michael HOFFMAN, Defendant and Appellant. No. C060911. (Super.Ct.No. CRF050006707). Jan. 25, 2011.

Defendant contends that denial of custody credits in sentencing him after termination from drug court violated due process as it was not based on an individualized determination of defendant's circumstances.

Held: Sentence Affirmed. …The idea behind conditioning probation on a waiver of the section 2900.5 custody time credit is that if a defendant knows that the only benefit he will obtain from a residential **drug treatment** program is the successful completion of that program, he is more apt to be successful, as opposed to simply obtaining custody credit under section 2900.5 by serving "easy" time in a failed effort at the residential **drug treatment** facility…

Supreme Court of Kentucky. COMMONWEALTH of Kentucky, Appellant, v. Jarrod L. NICELY, Appellee. No. 2009–SC–000313–DG. Nov. 18, 2010.

Defendant whose probation was revoked following his removal from drug court program based on his failure to improve, was entitled to custody credit for days served in jail as drug court program sanctions, notwithstanding claim that drug court sanctions were imposed under trial court's contempt powers and not because of defendant's probation status; defendant would not have been in drug court without the underlying criminal conviction, trial court's authority to impose incarceration to defendant on probation was governed by statute, and defendant's incarcerations were specifically tied to drug court program violations for drug use or drug-seeking behavior, not for any separate disrespect directed at the judge or the courts in general. KRS 533.020(2), 532.120(3).

Mary E. FORD, Appellant v. COMMONWEALTH of Kentucky, Appellee and

William E. Flener, Appellant v. Commonwealth of Kentucky, Appellee. Nos. 2008-CA-001990-MR, 2009-CA-000889-MR, 2009-CA-000461-MR. April 30, 2010.

[credit for time served: abuse of discretion for court to not require complete record regarding time served] [Having same judge preside over drug court and revocation hearing is not a denial of right to impartial hearing/due process]

Defendants appeal revocation of probation alleging (1) denial of due process because not provided an impartial hearing since the same judge presided over drug court and revocation hearing; and (2) failure to properly credit time served.

[Agree to hear the appeal on this issue even though not clear issue preserved on the record because of the due process implications]

First: On probation termination: Standard of review is whether trial court abuse its discretion in revoking appellants' probation and diversion.

Held: having the same judge preside over the drug court and the revocation hearing does not necessarily violate the requirement for an unbiased judge; no evidence in the record to suggest personal bias or prejudice , etc.
Probation is a privilege rather than a right.

Both DRUG COURT programs and revocation hearings are subject to different due process requirements than the prosecution of cases. Trial practice in prosecutorial cases has allowed judges to preside over the same case upon remand and in successive trials involving the same defendant.

Therefore, can find no error in the judge here presiding over both the DRUG COURT and the revocation proceedings, and hence, the court did not abuse its discretion.

Second on credit for time served: -found Court abused its discretion by relying on incomplete record.

The court based its order on an admittedly incomplete record of the case and the Office of Probation and Parole's assurance that Ford had received appropriate jail time credit. If confusion existed as to the amount of jail time credit, a hearing should have been held. Accordingly, we determine that it was an abuse of discretion for the trial judge to fail to adequately explore the Ford's correct amount of jail time credit in the instant case.

Held: vacated court's order denying appellant's motion to reconsider its previous order regarding custody credit, and remanded to the Muhlenberg Circuit

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Iris Lee BLACK, Defendant and Appellant. No. E046128. July 31, 2009. Review Denied Oct. 28, 2009.

[credit for time served; Sixth amendment – right to effective counsel]

Defendant's Drug court probation for the offense of identity theft was revoked in the Superior Court, San Bernardino County and she was sentenced to the aggravated term of three years. Defendant appealed, stating (1) her waiver of credit for time served was not knowing and intelligent; and (2) her counsel had been ineffective by not advising her that her waiver of custody credits as condition to enter drug court could not be revoked.

To prevail on a claim of ineffective assistance of counsel, a defendant must be able to show deficient performance by counsel and prejudice. …A defendant's bare assertion of incompetent advice by counsel is not enough to establish deficient performance, as required for ineffective assistance of counsel. The better practice is for sentencing courts to expressly admonish defendants who waive custody credits that such waivers will apply to any future prison term should probation ultimately be revoked and a state prison sentence imposed.

Held:
Defendant's waiver of custody credits as a condition of admittance to a DRUG COURT treatment program was knowing and intelligent, even though the court did not admonish her as to the effect of the waiver, where defendant signed the "DRUG COURT Application and Agreement" and initialed the paragraph stating that defendant agreed to "waive all credits as a condition of participating," defendant initialed the paragraph stating that she could read in English and had sufficient time to read the agreement, and defendant told the court that she had no questions about the agreement.

Case remanded for the limited purpose of calculating conduct credits under section 4019 for time spent in local custody or in a residential drug treatment program after September 24, 2007.

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Marty L. DEROWITSCH, Defendant and Appellant. No. E045600. (Super.Ct.No. FMB006490). June 9, 2009.

[computation of time served credits; Requirement of adequate record]

Defendant had been accepted into San Bernardino County Drug court as a condition of probation after revocation of previous order of probation under which defendant had agreed to waive credit for time served. Defendant's subsequent violation of drug court probation (1) while in drug court or, if that request is denied, for time in jail (2) before entering drug court and awaiting termination hearing since he was already terminated from the drug court if determined that waiver only referred to past time served.

Held: nothing in record indicates defendant waived time served credits as condition of participating in drug court; state asks court to take judicial notice of defendant's application for admission to drug court waiving credit for time served though application not part of court record; court relies on probation officer's report referencing application and defendant's waiver of credits; also not clear from record as to the date of termination from the Drug court (e.g., record refers to "removed" from drug court, "failed drug court", etc.); waiver also not clear as to whether ALL credits were waived or just those for time served while in drug court;

Remanded to trial court to revise order to determine number of days of credit defendant entitled to.

Court of Appeals of Kentucky. Jarrod L. NICELY, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2007-CA-002109-MR. April 24, 2009.

Appellant appeals from the Magoffin Circuit Court's denial of his motion for post judgment relief pursuant to Kentucky Rules of Civil Procedure contending that the trial court erred when it denied him credit for time served in the county jail while he participated in the Magoffin Drug court Program.

Held: sentence reversed and sentence to be recalculated to reflect time served; [though another panel of the court came to opposite conclusion in a similar case.] Concurring opinion disagrees with the use of contempt for probation violations.

Appellant was discharged from the Drug court on April 26, 2007, but not sentenced until August 2, 2007. He requested a calculation and credit for the time he served awaiting sentencing, believing he was entitled to 301 days. However, the court advised him he would not receive credit for any time served while in Drug court as he had been found in contempt of the trial court order to complete the program. The court then sentenced him to serve five years and directed the Department of Probation and Parole to calculate the appellant's jail time without including any time served for the Drug court violations.

We cannot decide if the trial court acted on sound legal principles without considering whether a court may find a defendant in contempt for violating the conditions of probation as opposed to only modifying the conditions of or revoking probation. This issue has not been directly addressed by our courts. The Kentucky Supreme Court did find that a juvenile may be subject to contempt for a probation violation. However, the majority opinion did not address the issue as to adults:

We find no statute, administrative procedure or Kentucky caselaw that prohibits the court's use of either its civil or criminal contempt powers as opposed to revoking a defendant's probation or modifying the previously imposed conditions of probation. Adopting the logic of the Tennessee and Alaska courts, we conclude a Kentucky court should be free to pursue either contempt or revocation proceedings as may be appropriate. However, we do not believe that a trial court may impose contempt sanctions for the same violations of the conditions of probation which are used to revoke probation.

When Appellant violated the terms and conditions of Drug court, the trial court could have either found him in contempt or revoked the probation granted on December 1, 2005. Having previously incarcerated Nicely for violating the conditions of Drug court, and the defendant having stipulated to those violations, the court failed to follow the mandates of KRS 532.120(3) and afford him the appropriate credit for time served waiting final sentencing.

[We are aware in the unpublished case, *Green v. Commonwealth,* 2008 WL 4822514 (Ky.App.2008), another panel of this court reached the conclusion that, upon a finding of contempt, credit should not be given to the original sentence for time served as a result of the finding of contempt.]

BUCKINGHAM, Senior Judge, Concurring:

Agrees with the majority to the extent it holds that the trial court erred in revoking Appellant's probation and also sentencing him for contempt for the same actions that violated the conditions of his probation. In other respects, however disagrees -- especially with adopting a rule that a court is free to choose between probation revocation and contempt punishment where there is no statute or regulation, as in the present case and the possibility that sometimes, perhaps frequently, probation violations will not be contemptuous, such as in this case. Appellant's failure to comply with Drug court requirements did not constitute contempt, either civil or criminal.

"As the majority states, civil contempt applies when one refuses to abide by a court order, and it is designed to coerce or compel a course of conduct. But a contempt proceeding was not used here to force Nicely to comply; rather, it was used to punish. Thus, civil contempt was not applicable. Furthermore, criminal contempt did not apply because Nicely's noncompliance with Drug court requirements did nothing to obstruct justice, insult the court, degrade the court's authority, or bring the court in disrepute. Nicely's actions were simply violations of the terms of his probation."

Court of Appeals of Indiana. Thomas Allen HOUSE, Appellant-Defendant, v. STATE of Indiana, Appellee-Plaintiff. No. 48A02-0806-CR-537. Feb. 24, 2009.

Defendant challenges sentence imposed following drug court termination claiming entitlement to credit for time served as sanctions while in the drug court.

Held: Defendant was entitled to credit time for the five months he spent in custody or on work release during his participation in the Drug court, in proceeding to revoke defendant's suspended sentence; defendant knowingly and voluntarily waived his right to credit time by entering into written Drug court agreement, and thus he was only entitled to credit for the days of imprisonment incurred prior to date he signed the agreement

Given the requirements of drug court and the punishment imposed for violating those requirements, we find participating in a drug court analogous to being on probation for purposes of receiving credit time under Indiana Code section 35-50-6-3. "Probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment." Defendants serving time in jail while awaiting sentencing on probation revocations are entitled to credit time. *See Senn v. State,* 766 N.E.2d 1190, 1194 (Ind.Ct.App.2002) (determining credit time to which defendant was entitled for time he was incarcerated on a probation violation). We therefore find that defendants imprisoned for violating the terms of a **drug court** also are entitled to credit time, particularly given that one of the consequences of violating a **drug court's** requirements is the imposition of a suspended sentence.

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Maria Elaine AVERSA, Defendant and Appellant. No. E045240. (Super.Ct.No. FMB008464). Jan. 7, 2009.

[Defendant entitled to credit for time served unless waived in drug court application]

Defendant and appellant appealed revocation and termination of her probation, based on contentions including: that the trial court erred when it relied on her poor performance on probation to justify imposing an aggravated term of three years for her offense of possession of methamphetamine and by not awarding her conduct credits under Penal Code section 4019 for time spent in the drug court program.

Holding: Having raised no specific objection to the probation department's recommendation for upper term based on her performance on probation, including Proposition 36 drug court program, defendant forfeited her right to contest any failure by the trial court to state adequate reasons for its selection of the upper term on the record. Failure to object to the recommended upper term did not constitute ineffective assistance of counsel since we accord great deference to trial counsel's tactical decisions, counsel's failure to object rarely provides a basis for finding incompetence of counsel.

In regard to conduct credits, under Penal Code section 4019, a defendant or pretrial detainee

confined in local custody may be eligible to earn credits for good conduct from the date of arrest and prior to the imposition of sentence for a felony conviction at the rate of two additional days for every four of actual custody. (Pen.Code, § 4019, subds.(a), (b), (f).) The sentencing court is responsible for calculating the number of days the defendant has been in custody. In a "Drug court Application and Agreement" signed January 29, 2007, defendant agreed to "waive all [Penal Code section] 4019 credits as a condition of participating in the DRUG COURT TREATMENT PROGRAM." She was instructed by the court to begin participating in the drug court treatment program on May 7, 2007.

Court of Criminal Appeals of Tennessee, at Nashville. STATE of Tennessee v. Noah Chris RUSS.No. M2007-00676-CCA-R3-CD. Assigned on Briefs Aug. 14, 2007. March 10, 2008.

Appeal from the Circuit Court for Lawrence County

Appellant, Noah C. Russ, pled guilty in Lawrence County to nineteen counts of TennCare Fraud and twenty counts of Obtaining Drugs by Fraud. The trial court placed Appellant on probation. His probation was subsequently revoked and reinstated with the condition that Appellant attend the drug court program. Appellant failed to meet the drug court program requirements and was terminated from the program. The trial court revoked Appellant's probation and ordered him to serve his original six-year sentence in incarceration. Two years later, Appellant filed a motion requesting that the trial court give him sentencing credits for the time he spent in the drug court program. The trial court denied the request. On appeal, Appellant argues that the trial court erred in denying his request. Because the denial of a request for sentencing credits is not a proper ground for appeal under Rule 3(b) of the Tennessee Rules of Appellate Procedure, appeal is dismissed.

The trial court's denial of Appellant's request for sentence credits does not fall under the enumerated actions from which an individual may appeal as of right.

Court of Criminal Appeals of Tennessee, at Nashville. STATE of Tennessee v. Jimmy CANTRELL. No. M2007-00048-CCA-R3-CD. Assigned on Briefs Aug. 15, 2007. Dec. 18, 2007.

Appeal from the Circuit Court for Rutherford County, No. F-47455

[Grounds for appeal must be provided in court rule]

Appellant, Jimmy Cantrell, pled guilty to two counts of sale of cocaine. He was sentenced to serve ninety days of the sentence in incarceration prior to being released to probation. Later, Appellant pled guilty to a new charge of sale of cocaine. Appellant's probation was revoked. Appellant was sentenced on the new charge, and the trial court suspended the sentence after the service of a certain number of days and furloughed Appellant to the Rutherford County Drug court Program. Subsequently, Appellant was discharged from the program for violating its terms and conditions. The trial court then entered an order terminating Appellant's furlough and ordering Appellant to serve his sentences in their entirety. Appellant sought credit for time served in the Drug court Program. The trial court denied the request. Appellant appealed the trial court's decision denying his request for credit for time served in the Drug court Program.

Held: Because an appeal of the denial of a motion to award jail credit is not a proper ground for appeal under Tennessee Rule of Appellate Procedure 3(b), we dismiss the appeal.

Superior Court of Pennsylvania. COMMONWEALTH of Pennsylvania, Appellee v. Jeremy Dylan FOWLER, Appellant. Submitted Oct. 30, 2006. Filed July 23, 2007.

Defendant appealed convictions of drug offenses on various grounds, including allegation that sentencing court abused its discretion in denying him 25 months credit for time served in drug treatment court program.

Conviction and Sentence affirmed.

The plain and ordinary meaning of imprisonment [under Pennsylvania law] is confinement in a correctional or similar rehabilitative institution....Our Supreme Court has concluded that the Legislature intended imprisonment and intermediate punishment to be mutually exclusive and to be treated differently….the Legislature provides that nothing in this chapter shall be construed as creating an enforceable right in any person to participate in an intermediate punishment program in lieu of incarceration. ..Thus, the Legislature now clearly

distinguishes between incarceration, i.e., imprisonment, and intermediate punishment.

Generally, 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." Clearly, our acceptance of this type of inpatient institutional rehabilitation in no way entitles one ... to a credit for such rehabilitative commitment as of right. Rather, it is only an express approval of credits for such commitment that the sentencing court in its discretion deems to be sufficient. …An abuse of discretion will not be found based on a mere error of judgment, but rather exists where the court has reached a conclusion which overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

…Importantly, it was [Appellant] who requested the opportunity to participate in the Erie County Drug court. [Appellant's] motivation, in part, was to avoid incarceration. [Appellant] faced sentencing for five different felony counts of delivering heroin to an undercover officer…

Equally as important was the fact [that Appellant's] participation in the Drug court Program was voluntary. This program is not a mandated program. Instead, it was [Appellant] who requested to participate. [Appellant] could opt out of the program at any time.

Defendant seeks credit for the following jail time served prior to being terminated from drug court program: In addition to 59 days' jail-time credit he received for the time following his May 11, 2006, arrest on a drug court warrant when he remained in the county jail awaiting his July 3, 2006, commitment to the Arkansas Department of Correction, he seeks additional jail-time credit for a total of 505 days. In addition to the 59 days credit that he had already received, Laxton claimed entitlement to 53 days for November 17, 2003 through January 8, 2004, which encompassed the time from his arrest until his transfer to drug court; 26 days for April 2, 2004 through April 27, 2004, for a drug court "sanction"; 28 days for May 5, 2004 through June 1, 2004, while he was awaiting commitment to a regional-punishment facility; and 339 days for June 1, 2004 through May 5, 2005, when he was actually committed to the regional-punishment facility.

Held: Decline to hold that Laxton is entitled to any jail-time credit during the time that his case was assigned to drug court; however, judgment is modified to give defendant credit for the time he spent in jail prior to his transfer to drug court.

Laxton argues that because our drug court statute is silent on the issue of jail-time credit and drug court is essentially a type of probation, he is entitled to all of the jail time that he seeks pursuant to Arkansas Code Annotated section 5-4-404 (Repl.2006). We disagree. A defendant who has volunteered for drug court is not on probation; rather, he or she is being given the opportunity to avoid punishment in the criminal-justice system. Ark.Code Ann. § 16-98-201 (Repl.2006).

Court of Appeals of Georgia. STINSON v. The STATE. No. A06A0274. April 7, 2006. Cert denied October 2, 2006.

Holds that time in drug court cannot be credited toward sentence for defendant terminated from drug court program.

Appellant alleged that time spent in drug court should be credited toward sentence subsequently imposed following appellant's termination from the drug court. The Court's opinion included holding that, as matter of first impression, probationer was not entitled to credit against sentence for time spent in drug court treatment program, following his termination from such program and sentencing on his original crime…

The statute is not clear whether the legislature intended that drug court participation should be credited against an offender's sentence. OCGA § 16-13-2(a) provides that upon a guilty plea and the participant's consent, the court defers further proceedings and places the participant "on probation upon such reasonable terms and conditions as the court may require… Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed accordingly." If Stinson had pled guilty as a First Offender and spent time on probation before his First Offender status was revoked, he clearly would have to be given credit for time served on probation, and could not have been given a sentence that exceeded the maximum allowed for his offense. ….But for all its similarities, drug court participation is not First Offender participation. ….Stinson was given the option at the beginning: (1)

he could suspend his criminal case, choose to sign a drug court contract, and enter a rehabilitation program, or (2) he could be sentenced and begin serving his time. He chose the first option, to suspend his criminal case, knowing that if he did not complete his program, he would return to the beginning of the process and start all over. …If time spent in drug court rehabilitation equals time spent serving a sentence, the choice between drug court and traditional sentencing is meaningless.

Court of Appeals of Indiana. Elliott Scott STAPLETON, Appellant-Defendant, v. STATE of Indiana, Appellee-Plaintiff. No. 48A02-0508-CR-786. Sept. 11, 2006.

On May 10, 2002, the State charged Stapleton with six counts of drug-related offenses. Stapleton pleaded guilty to all six counts, and the trial court imposed an eighteen-month sentence. The sentence was suspended, and Stapleton was placed on probation. On July 10, 2003, the State filed a notice of probation violation, and Stapleton admitted the violation and agreed to enter a program administered by the Madison County Drug court. Stapleton later withdrew from the program, and on October 12, 2004, the State filed a second notice of probation violation. At the July 26, 2005, probation hearing, Stapleton testified that he spent 15 days in jail from September 24, 2002 to October 8, 2002; 53 days in jail from January 9, 2004 to March 3, 2004; 49 days from March 31, 2004 to May 19, 2004; 116 days from October 13, 2004 to January 27, 2005; and 54 days from June 2, 2005 to July 26, 2005. Stapleton further testified that the total time of incarceration was 287 days, and he requested the court to award him good time credit for a total of 574 days (2 x 287) pursuant to Ind.Code § 35-50-6-3. The trial court sentenced Stapleton to 18 months in the Department of Correction and denied Stapleton's request for 574 days, instead stating that he was entitled to 218 days (2 x 109) against his sentence, with no credit for jail time spend during drug court participation. Stapleton appealed.

The State argues that Stapleton waived his right to time served and good time credit when he agreed to participate in the Drug court program. The State analogizes Stapleton's agreement to a guilty plea agreement whereby a defendant contractually agrees to give up certain rights in exchange for a favorable outcome, and that Stapleton waived time served and good time credit when he signed the drug program agreement. The State specifically points to provisions in the agreement stating that if Stapleton failed to finish the program (1) sentencing would be reset and (2) any delays would be charged to Stapleton.

Held: Neither of these provisions evinces a waiver by Stapleton of his right to time served or good time credit under Ind.Code § 35-50-6-3. Case reversed with instructions to credit him with 574 days.

Court of Appeals of Kentucky. Lavette PATTERSON, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2004-CA-002118-MR. Oct. 28, 2005.

Appellant, Lavette Patterson (Patterson), appealed the Jefferson Circuit Court's denial of her motion for custody time credit for time spent in a rehabilitation facility while in the drug court program. Trial court's denial of credit affirmed.

The Commonwealth argues that the drug court residential treatment facility is not a halfway house, such that confinement therein can properly be considered custody. A halfway house is a placement designed to assist a prisoner in the adjustment from prison to civilian life. …Such facilities house prisoners, and are operated under the Corrections Cabinet. Id. New Beginnings is not operated by the state or under corrections cabinet purview. The sentencing court in this case gave Patterson the opportunity to avoid time spent in custody by attending a residential treatment program. That privilege cannot properly be considered equivalent to jail. Persons at New Beginnings can visit with family, shop and cook meals, work, and even go on leave outside the facility.

STATE of Washington, Respondent, v. Sarah Eileen POSTON, Appellant. No. 28307-7-II. Aug. 5, 2003.

[Defendant entitled to credit for time served while in drug court]

Defendant charged with six counts of forgery was, following her expulsion from drug court, convicted in the Superior Court of Cowlitz County, of five counts of forgery, and denied credit for days she had served in jail and on electronically monitored home detention. Defendant appealed. The Court of Appeals, Morgan, J., held that defendant was entitled to credit for time spent in jail and on electronic monitoring. Reversed.

Defendant who was admitted to a drug court program, but failed to successfully complete that program, should have, at sentencing on the underlying forgery charges, been credited with time spent in jail and on electronic monitoring; statute that required credit for confinement time, if that confinement was "solely in regard" to the offense for which the offender was being sentenced, did not distinguish between presentence confinement imposed by a drug court from presentence confinement imposed by any other court, and confinement was "solely in regard" to forgeries, even if it was for contempt, as contempt proceeding would not have been separate from the initial charges if based solely on violation of program rules.

The question is whether 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, pursuant to the drug court's order. The answer is yes.

B. IN RESIDENTIAL TREATMENT/HALF WAY HOUSE

STATE OF IOWA, Plaintiff-Appellee, v. DAVID HAL CALVIN, Defendant-Appellant. No. 2-1189/12-0618. Court of Appeals of Iowa. Filed February 27, 2013.

"We agree with Calvin that he is entitled to credit for the time he spent in the Mount Pleasant residential treatment center… The facility at Mount Pleasant is a correctional facility pursuant to Iowa Code sections 904.102(6) and 904.204, and also serves as a state mental health institute as provided by section 226.1 under the supervision of the department of corrections**."**

The State of New Hampshire v. Derrick C. DIMAGGIO. 44 A.3d 468 (2012) 163 N.H. 497. No. 2011-156. Supreme Court of New Hampshire. Argued: March 8, 2012; Opinion Issued: April 10, 2012.

Drug court Program was neither a "day reporting" program nor "home confinement." RSA 651:19, 19-a;and therefore not entitled to pretrial confinement credit for days he was at liberty while a Program participant.

Court of Appeals of Iowa. STATE of Iowa, Plaintiff-Appellee, v. Nathan Allen MOORE, Defendant-Appellant. No. 10-1162. Feb. 23, 2011.

Appeal from the Iowa District Court for Polk County denying jail credit for time spent in residential group homes prior to revocation of probation. AFFIRMED.

The Harbor of Hope and Farrell House do not qualify as correctional or mental health facilities. Further, the Court did not order the Defendant to be confined at these locations. These were conditions of release under the Drug court program to facilitate the drug treatment which the Defendant was receiving as part of the program. For this reason, the Defendant is not entitled to credit for the time he spent at either facility.

C. OTHER

Terry Penola, Appellant, vs. The State of Nevada, Respondent. No. 59346. 2012 Nev. Unpub. March 7, 2012.

Reverses District Court failure to provide credit for time served. Although Drug court Handbook for Sixth Judicial District Court (Humboldt County) provides: "Drug court sanctions shall not be credit for time served on underlying sentence." No indication defendant agreed to these provisions and waived right to receive credit.

(one of numerous cases arising from defendant's failure to sign participant agreement acknowledging conditions relating to credit for incarceration time or other program conditions where trial record did not indicate participant had notice of conditions at issue).

3. FOR OFFENSES COMMITTED SUBSEQUENT TO SUCCESSFUL DRUG COURT PARTICIPATION

STATE OF IDAHO, Plaintiff-Respondent, v. JAMES EDWARD BRIDGES, Defendant-Appellant. Docket No. 40331 2013 Unpublished Opinion No. 500. COURT OF APPEALS OF IDAHO. 2013 Ida. App. Unpub. LEXIS 209. May 22, 2013 Filed.

Affirms Court sentence revoking probation following defendant's completion of drug court and two subsequent offenses and imposition of original suspended sentence prior to drug court participation. No clear abuse of discretion shown.

SHAVONNA GAIL MALONE, Appellant, v. STATE OF ARKANSAS, Appellee. 2012 Ark.App. 280. No. CACR 11-1073.Court of Appeals of Arkansas, Division I. Opinion Delivered April 25, 2012.

[Effect of Drug court prohibition on "consorting with felons' applied to sentencing for subsequent offense was not an abuse of discretion: denies drug court graduate probation for subsequent offense based on violation of drug court prohibition on "consorting with felons"]

"The trial court gave the request for an alternative instruction more than proper consideration. The court noted that Malone had previously been afforded leniency and ordered to drug court. As a condition of that sentence she was prohibited from consorting with felons. However, as the trial court noted, after completing the alternative program, she once again involved herself with known felons, such as Sparks. The court then concluded that because "she put herself back in a position to be involved with people that she was already trained and educated on through Drug court not to be with...she does not earn the right to get a probationary sentence."

EFFECT OF FAILURE TO APPEAR IN DRUG COURT ON STATUTE OF LIMITATIONS

District Court of Appeal of Florida, Second District. Michael Norris, Appellant, v. State of Florida, Appellee. No. 2D00-1744. April 11, 2001.

Defendant was charged with possession of drug paraphernalia and possession of methamphetamine and diverted to drug court but failed to appear. A capeas was issued and an arraignment was set but no summons was issued. Several years later, the defendant was arrested and brought to a first appearance at which time he moved to dismiss the charges, alleging they were barred by the statute of limitations. The trial court denied his motion. The District Court of Appeal reversed the trial court and found that the statute of limitations barred prosecution for these offenses.

STATE of Washington, Respondent, v. Lamar Dathen WARREN, Appellant. Nos. 22269-8-II, 22390-2-II. Court of Appeals of Washington, Division 2. July 9, 1999. Court of Appeals of Washington, Division 2. Lamar Dathen WARREN, Appellant. V. STATE OF Washington, Respondent, Nos. 22269-8-II, 22390-2-II. Dec. 10, 1999. ORDER AMENDING PUBLISHED OPINION.

While participating in drug court program, defendant was convicted in the Superior Court, Pierce County of unlawful delivery of controlled substance, resulting in his expulsion from drug program. Defendant appealed. The Court of Appeals held that grant of two-day continuance based on courtroom unavailability on last day of speedy trial period was not based on good cause, absent court's consideration of length of likely actual delay or provision of detailed explanation of why individual superior court departments were unavailable. Amended order deleted the following sentence of the opinion: Warren should also be reinstated to the drug court program if it still exists."

EFFECT OF JUVENILE DRUG COURT PARTICIPATION ON DRIVER'S LICENSE STATUS

District Court of Appeal of Florida, Second District. STATE of Florida, Appellant, v. R.D.H., a minor, Appellee. No. 2D99-1999. Oct. 25, 2000.

Even if trial court withholds adjudication of delinquency, the court is statutorily mandated to suspend the juvenile's driver's license.

State of Florida, Appellant, v. J.V.W., a child, Appellee. No. 98-01751. District Court of Appeal of Florida, Second District. Sept. 1, 1999 .

Acceptance of juvenile's no contest plea to possession of alcoholic beverages by a minor constituted finding of delinquency, triggering mandatory suspension of juvenile's driver's license, even though juvenile court withheld adjudication pending juvenile's participant in Juvenile Arbitration **Drug court**…

EFFECT OF DRUG COURT PARTICIPATION ON ATTORNEYS LICENSE

Supreme Court, Appellate Division, Second Department, New York. In the Matter of Marshall Oakes CROWLEY, Jr., a suspended Attorney. Grievance Committee for the Tenth Judicial

District, Petitioner; Marshall Oakes Crowley, Jr., Respondent. June 25, 2001.

[For purposes of attorney disciplinary proceeding, attorney's plea to a felony, with agreement that he would be permitted to plea to a misdemeanor following completion of drug court, constituted conviction for a felony, resulting in disbarment.]

In Re Bell. No. 96-2830. Supreme Court of Ohio. Jan. 24, 1997*. (Disciplinary docket)

Attorney submitted certified copy of drug court judgment entry of treatment in lieu of conviction as grounds for withholding imposition of an interim suspension of his license to practice law. Matter referred to Disciplinary Counsel for further investigation without imposition of an interim suspension against respondent.

EFFECT OF WAIVERS TO ENTER DRUG COURT PROGRAM

1. ON RIGHT TO APPEAL

Supreme Court, Appellate Division, Third Department, New York. The PEOPLE of the State of New York, Respondent, v. Albert WILSON, Appellant. July 24, 2008.

Defendant was convicted, upon a plea of guilty, in the Albany County Court of criminal possession of a controlled substance and attempted criminal sale of a controlled substance following termination from drug court program and sentenced to two consecutive five year terms of imprisonment. Defendant claims sentence was harsh and excessive, and that he had not knowingly, intelligently, and voluntarily waived his right to appeal.

Holding: Defendant's waiver of appeal was valid and precludes him from now arguing sentence imposed is harsh and excessive.

Court of Appeals of Iowa. STATE of Iowa, Plaintiff-Appellee, v. John Ira BELLVILLE, Defendant-Appellant. No. 04-1634. Aug. 31, 2005.

Although Court finds that appellant did not knowingly waive his right to appeal when entering the drug court, based on the colloquy between the appellant and the court, upholds District Court's imposition of consecutive prison terms totaling 52 years pursuant to drug court plea agreement after appellant is terminated from drug court, finding no abuse of discretion.

Supreme Judicial Court of Maine. STATE of Maine v. Trevis CALDWELL. Docket No. Cum-02-658. Submitted on briefs: May 29, 2003. Decided: July 3, 2003.

Defendant moved to withdraw his guilty plea that allowed him to enter the drug court after failing to comply with drug court program. The Superior Court, Cumberland County, denied motion, and defendant appealed. The Supreme Judicial Court, held that defendant's waiver of his right to withdraw his guilty plea in order to be admitted into the drug court program was knowing and intelligent. Affirmed conviction.

During the hearing, the court explained the two sentencing options that could be imposed once Caldwell entered the drug court program. If Caldwell successfully completed drug court, he would be sentenced to five months in prison, which he had already served. If he did not complete drug court, he would be sentenced to substantially more jail time. Caldwell signed a form acknowledging his waiver of rights to trial, to appeal from the entry of sentence, and to withdraw his guilty plea. The form was also signed by Caldwell's attorney, the prosecutor, and the judge.

The court told Caldwell that he would be ordered to serve consecutive sentences of four months for the case that involved two counts of forgery, receiving stolen property, and theft by deception, six months for eluding an officer, and thirty months with all but six months suspended, three years probation, and the requirement to pay restitution of up to $3,525.50 for the theft case if he failed to complete the program. Regarding the violation of probation, Caldwell was also sentenced at the April 5 drug court plea hearing to five months, time served, and probation continued.

The record reflects that the court was assured that Caldwell understood the length of the sentence he would receive if he failed to complete the program. …The sentence imposed was consistent with the alternate sentence set out at the time of the plea agreement, and included an additional six months resulting from the additional violation of probation… " If drug court waivers were not strictly enforced once the motion court has been assured that the waiver was entered into knowingly and intelligently,

the entire process of the drug court would be eviscerated, thereby eliminating a promising program and removing the opportunity for some of Maine's most troubled citizens to find help.

The question then is whether Caldwell's waivers were entered into knowingly and intelligently. Caldwell had the assistance of counsel; he sought the benefits of the drug court program; he was fully informed of the sentences that would be imposed should he fail; he signed the documents waiving his rights; and he did not assert before the motion court, and does not assert here, that his waivers were not knowing and intelligent.

Court of Appeals of Iowa. State of Iowa, Appellee, v. Kristen Wen PAUL, Appellant. No. 99-1592. April 11, 2001. Appeal from the Iowa District Court for Decatur County.

Upholds Defendant's waiver of right to appeal as condition of plea agreement to enter drug court. [Defendant subsequently terminated from drug court and sentenced to term of imprisonment "not to exceed sixty-four years."]

United States Court of Appeals, Tenth Circuit. Gregory Allen CARPENTER, Petitioner-Appellant, v. James L. SAFFLE, Director of the Department of Corrections, Respondent-Appellee. No. 00-6459. May 2, 2001.

Denies appellant's appeal to overturn conviction for drug possession based on plea agreement conditioned on drug court program entry for which Defendant was actually not eligible because of criminal history but did not disclose prior history.. Appellant sought appeal of District Court's denial of habeas corpus petition challenging conviction on charges of drug possession based on plea agreement entered pursuant to the Oklahoma Drug court Act wherein he agreed that the charges against him would be dropped if he successfully completed drug court program but would be sentenced to term of 25 years if he failed the program. Defendant was terminated from the program, sentenced, and subsequently appealed on grounds of having two prior felony convictions and therefore not being eligible for the drug court program. Appeal denied.

2. <u>ON RIGHT TO JURY TRIAL</u>

Court of Appeals of Washington, Division 2. STATE of Washington, Respondent, v. Ryan D. ANDERSON, Appellant. In re Personal Restraint Petition of, Ryan D. Anderson, Petitioner. Nos. 34027-5-II, 35255-9-II. Feb. 27, 2007.

[validity of jury trial waiver]

The State charged Anderson with eight counts: (1) third degree possession of stolen property; (2) first degree possession of stolen property, other than a firearm; (3) second degree identity theft; (4) another count of second degree identity theft; (5) unlawful possession of payment instruments; (6) residential burglary; (7) second degree burglary; and (8) second degree taking a motor vehicle without permission.

In lieu of trial, Anderson signed a Drug court contract after discussing the matter with his attorney. Anderson then twice escaped from drug treatment facilities, so the trial court terminated his participation in Drug court and held a stipulated fact trial. The trial court found Anderson guilty on all but count five, sentencing him to 50 months total confinement.

Appellant appealed on various grounds, including that the Drug court contract is invalid because Anderson did not knowingly and intelligently waive his rights and because there is no mechanism for opting out of the court;

Held:

> (3) Anderson knowingly and intelligently waived his jury trial right by signing the contract after consulting with his attorney. A written waiver is not determinative but is strong evidence that the defendant validly waived the jury trial right. The record reveals that Anderson knowingly, voluntarily, and intelligently waived his right to a jury trial. The contract states, **"Defendant acknowledges an understanding of, and agrees to waive ...** [t]he right to a public trial by an impartial jury." Suppl. Clerk's Papers (CP) at 5. The trial court noted that Anderson had read the contract and that his attorney also read it to him. And both Anderson and his attorney signed the contract.
>
> (4) Issue of impact of whether opt out provisions were clarified moot since he didn't try to opt out

In the Interest of S.W., mother of M.W., J.W.,

M.B., S.G., Appellant v. State of Florida, Appellee. Case No. 96-4697.

On appeal from the Circuit Court for the First Judicial Circuit In and For Escambia County, Florida.

Appellant, who had been terminated from the Pensacola Dependency Drug court, had been charged with indirect criminal contempt and sentenced to one year in jail, suspended, and one year of probation prior to entry into the drug court, asserted (a) her waiver of a jury trial was invalid and, without a jury trial, the maximum sentence the trial court could impose following her drug court termination was six months incarceration; (b) the trial court erred by not specifying the number of days credit for time served the appellant should be allowed at sentencing.

The Court of Appeals denied both claims.

3. ON RIGHT TO TRIAL ON CHARGES/CONTEST EVIDENCE IF TERMINATED FROM DRUG COURT

Supreme Court of Washington, En Banc. STATE of Washington, Respondent, v. Patrick Boyd DRUM, Petitioner. In the Matter of the Personal Restraint Petition of Patrick Boyd DRUM a/k/a Tim Johnes, Petitioner. No. 81498-8. Argued June 25, 2009. Decided Jan. 21, 2010.

Holdings: The Supreme Court, En Banc, Stephens, J., held that:
(1) defendant's stipulation to the sufficiency of the evidence in DRUG COURT contract was not binding on either the trial court or the Court of Appeals; (2) DRUG COURT contract was not the equivalent of a guilty plea.

By entering a DRUG COURT contract, a defendant is not giving up his right to an independent finding of guilt beyond a reasonable doubt; a trial court still has the authority to find the defendant not guilty if it determines that the stipulated evidence does not establish all elements of the crime beyond a reasonable doubt.

[Background: Following Drum's termination from the Drug court, trial was held on January 21, 2005. Over the objection of the State, Judge Verser asked for argument and also allowed Drum to address the court. Drum's counsel argued that Drum's intoxication negated the intent element of residential burglary and that, at most, Drum was guilty of first degree criminal trespass. In support of his attorney's contention that he lacked the necessary criminal intent, Drum told the trial court that when he broke into the residence, he was intoxicated and simply wanted to use the phone. The Court found evidence of intent and Drum guilty of residential burglary and imposed a midrange sentence of 13 months. On February 4, 2005, the court filed findings of fact and conclusions of law, which stated that Drum entered the victim's residence without permission with the intent to commit a crime therein…"

Issues:

1. Does a Criminal Defendant's Stipulation to the Sufficiency of the Evidence in a Drug Court Contract Bind a Court?

> Drum is correct that courts are not bound by stipulations to legal conclusions, and the State appears to concede this point.
> Drum is also correct in noting that whether the evidence is sufficient to support a conviction is an issue of law. …

2. Is There Sufficient Evidence to Sustain Drum's Conviction?

> Relying on the evidence and the statutes, the trial court found Drum guilty beyond a reasonable doubt.

3. Was Drum's Drug Court Contract Tantamount to a Guilty Plea?

> We have previously held that a stipulated facts trial, where the trial court independently reviews the evidence and makes its own findings, is not the equivalent of a guilty plea.

Held: Affirms Conviction:

[Dissent: reverse the conviction and remand for further proceedings.

Supreme Court, Appellate Division, Third Department, New York. The PEOPLE of the State of New York, Respondent, v. Stacey MASON, Appellant. Oct. 29, 2009. (66 A.D.3d 1225, 887 N.Y.S.2d 363, 2009 N.Y. Slip Op. 07692.

[drug court plea agreement waiving right to appear precluded subsequent challenge to sentencing; and effectiveness of counsel in absence of record showing move to withdraw plea]

Defendant pled guilty in the County Court, Albany County, Herrick, J., to criminal nuisance in the first degree. After being found to have violated plea agreement including drug court participation, defendant was sentenced as predicate offender, in accordance with agreement, to prison term of 2 to 4 years. Defendant appealed.

Affirmed.

Defendant's argument that she did not knowingly, voluntarily, and intelligently waive her right to appeal her underlying conviction or sentence for criminal nuisance in the first degree was unpreserved for appellate review, as she failed to move to withdraw her guilty plea or to vacate judgment of conviction.

Defendant, who pled guilty to criminal nuisance in the first degree, did not preserve for appellate review her argument that she participated in DRUG COURT program for period exceeding 18-month maximum set forth in her plea agreement, even discounting periods of time in which defendant was allegedly in violation of agreement, before being charged with violating such agreement, as she never objected to her continued participation in that program or raised that argument during violation hearing or at her resentencing.

Defendant's challenge to effectiveness of counsel, in prosecution for criminal nuisance in the first degree, was precluded by her valid appeal waiver set forth in her plea agreement, except insofar as alleged ineffectiveness could be construed to have impacted upon voluntariness of plea and, to that extent, absence of motion to withdraw plea or vacate judgment of conviction rendered matter unpreserved.

Court of Appeals of Washington, Division 3, Panel Three. STATE of Washington, Respondent, v. William Orville JONES, Appellant. Nos. 23459-2-III, 23460-6-III. Jan. 26, 2006.

Rejects appellant's contention of improper denial of his motion to suppress drugs seized when he was arrested, charged with drug possession and other offenses, and agreed to stipulate to the admissibility and accuracy of the evidence against him and waive any right 'to contest the stop and/or search' which led to his arrest pursuant to his agreement to enter the Drug court from which he was subsequently terminated… Appellant's stipulation to not contest the stop and/or search was a knowing, intelligent waiver of all factual, procedural, or legal issues he might try to assert if his participation in DRUG COURT was terminated. Thus, Mr. Jones waived his right to contest the search that produced the methamphetamine. . . . .

Court of Appeals of Washington, Division 1. STATE of Washington, Respondent, v. Matthew M. MELICK, Appellant. No. 54925-1-I. March 6, 2006. 131 Wash.App. 835, 129 P.3d 816

…By stipulating to use of police reports when he agreed to enter DRUG COURT, defendant, charged with taking of a motor vehicle (TMV) and possession of stolen property (PSP), waived any challenge to use of police reports to convict him following termination from drug court

4. EFFECT OF WAIVER IF DEFENDANT IS SUBSEQUENTLY DETERMINED INELIGIBLE FOR DRUG COURT

Court of Appeals of Virginia. Tello J. ANGELINA v. COMMONWEALTH of Virginia. Record No. 1852-04-2. June 14, 2005.

Upholds defendant's waiver of preliminary hearing for his drug charge when defendant executed a "Wavier of Preliminary Hearing and Request for DRUG COURT Even though defendant was subsequently determined to be ineligible for DRUG COURT.

The waiver was in writing and signed by appellant, as well as by his attorney. By signing the waiver, appellant affirmed that he understood the consequences of waiving his preliminary hearing and that those consequences had been fully explained to him by the judge and his attorney. While at the time appellant waived his preliminary hearing he expected to be admitted into the DRUG COURT program, the later determination that he was not eligible for that program did not render his waiver of a preliminary hearing invalid.

ETHICS

1. EX PARTE COMMUNICATIONS

N.Y. Opinion 04-88: March 10, 2005. Advisory Committee on Judicial Ethics. New York State Unified Court System.

A judge presiding over a drug court (may) engage in ex parte communications with court personnel pursuant to 22 NYCRR 100.3(B)(6)(c) concerning information obtained by such personnel, whether outside of or at drug court staffings or other appearances, but should give notice to and inform the defendant's attorney of the content and nature of these communications; (2) is authorized under 22 NYCRR 100.3(b)(6)(e) to consider ex parte communications at staffing and court appearances from drug court team members provided there has been consent as required under Administrative Order 142/03; (3) should consult with his/her administrative authority for the purpose of revising the current drug court participation agreement used in the judge's court so that it is in conformity with Administrative Order 142/03.

2. JUDGES' INVOLVEMENT WITH NONPROFIT ORGANIZATIONS

Maryland Judicial Ethics Committee. Judge serving as director of non-profit corporation formed to solicit funds for local drug court. Opinion Request Number 2005-11. September 23, 2005.

May a judge serve as director of a nonprofit corporation formed to solicit funds for local Drug court? Yes, subject to requirements of Canon 4C of Maryland Code of Judicial Conduct, which precludes active or passive fundraising activity**.**

N.Y. Opinion 05-144: January 26, 2005. Advisory Committee on Judicial Ethics. New York State Unified Court System.

A full-time judge may serve in an uncompensated advisory position as regional coordinator of the National Association for Drug court Professionals.

N.Y. Opinion 02-33: April 18, 2002. Advisory Committee on Judicial Ethics. New York State Unified Court System.

A judge may attend and receive an award at an awards dinner sponsored by a local not-for-profit organization that is a member of a drug court team in the drug court over which the judge presides.

Illinois Judicial Ethics Committee Opinion No. 01-10. October 9, 2001.

A judge may serve on a board of directors of a not-for-profit organization for "Drug court" professionals organized pursuant to Supreme Court direction. References: Illinois Supreme Court Rules 62A, 64C and 65B; Illinois Judicial Ethics Committee Opinion Nos. 93-5, 93-7, 94-20, 95-11, 95-13, 96-14, 97-3, 97-6, 97-13, 97-15, 98-1, 98-5, 98-15 and 99-4.

"Drug court" was established in Illinois pursuant to a grant by the federal government under the Omnibus Crime Control and Safe Streets Act of 1968 and at the direction of the Illinois Supreme Court. It reflects the Court's desire to help rehabilitate drug addicted offenders and to keep them out of the correctional system.

Illinois Supreme Court Rule 64C states in part that a judge may serve as a member, officer or director of an organization devoted to the improvement of the law, the legal system, or the administration of justice. Illinois Supreme Court Rule 65B states in part that a judge may serve as an officer or director of an educational or civic organization.

Both Rules 64C and 65B contain certain limitations. These limitations include that: (1) the activity does not cast doubt on the judge's capacity to decide impartially any issue that may come before him or her; (2) the activity does not interfere with the judge's judicial duties; (3) the judge does not participate in public fundraising activities or allow his or her name to be used in any solicitation of funds; (4) the activity is not to be conducted for the member's economic or political advantage; (5) the judge does not act as a legal advisor; and (6) the organization will not likely be engaged in adversarial proceedings that would ordinarily come before the judge or the organization would not regularly be engaged in adversarial proceedings in any court.

CONCLUSION: Rules 64C and 65B permit a judge to serve as a board member of an organization whose purpose is to enhance the quality and the operation of the judicial system and the expertise of the people who work in that system…

N.Y. Opinion 98-10: March 12, 1998. Advisory Committee on Judicial Ethics. New York State Unified Court System.

A full-time judge who presides over a drug treatment court may not be a member of the Board of Directors

of one of the drug treatment facilities that is assigned cases by the courts.

N.Y. Opinion 97-125: December 18, 1997. NY Advisory Committee on Judicial Ethics.

Whether a drug court coordinator can serve as an officer of a foundation supporting a drug court does not involve a judge and therefore will not be ruled on by the Committee on Judicial Ethics.

N.Y. Opinion 97-83; September 11, 1997 Advisory Committee on Judicial Ethics. New York State Unified Court System.

A judge who serves as the presiding judge of a County Drug Treatment Court may not serve as an officer or director or assist in the formulation of a not-for-profit corporation or foundation, the sole purpose of which would be to solicit funds and services or the benefit of the program for which the court was established.

NY. Opinion 88-121: October 17, 1988. Advisory Committee on Judicial Ethics. New York State Unified Court System.

A judge may serve as a member of the board of directors of a civic group devoted to helping disadvantaged people develop skills necessary to secure employment, provided the judge in no way allows his or her name to be used in connection with fundraising or grant applications.

3. USE OF CAMPAIGN FUNDS FOR DRUG COURT PROGRAM

N.Y. Opinion 05-132: December 8, 2005. Advisory Committee on Judicial Ethics. New York State Unified Court System.

A recently re-elected judge who presides over a drug treatment court may not use excess campaign funds to purchase congratulatory gifts, such as dinners or theater tickets, for graduates who have successfully completed the drug court treatment program. [campaign funds cannot be used for private, including charitable purposes]

4. LEGAL FEES

Supreme Court of Utah. Larry N. LONG, Petitioner, v. ETHICS AND DISCIPLINE COMMITTEE OF THE UTAH SUPREME COURT, Respondent. Nos. 20091018, 20091019, 20091020. June 21, 2011.

[entails fees charged by private attorney to represent drug court participants]

Attorney brought original proceeding challenging two orders of public reprimand and an order of nonpublic admonition issued by the Utah Supreme Court's Ethics and Discipline Committee (EDC) arising out of complaints by clients of excessive fees, including a client charged $ 8,900.00 for two hearings resulting in drug court entry.

Held: Screening Panel of Ethics and Discipline Committee did not violate due process, rules of lawyer discipline and disability rights, or governing precedent by failing to provide detailed findings of fact when recommending sanctions; attorney charged or collected excessive fees…

5. OTHER

In re JAMES. 821 N.W.2d 144 (2012) 492 Mich. 553. Docket No. 143942. Calendar No. 1.Supreme Court of Michigan. Argued July 18, 2012; Decided July 31, 2012.

Use of public funds to attend drug court conferences: Judicial Tenure Commission finding that judge misappropriated public funds intended for crime victims through a number of actions, including funds used to attend drug court conferences with no tracking or documentation of expenses.

KENTUCKY JUDICIARY ETHICS COMMITTEE. JUDICIAL ETHICS OPINION JE-122. October 10, 2011. Recusal Issues Where A Drug Court Or Mental Health Court Judge Presides In A Revocation Hearing Based On Defendant's Violation Of Terms Of Participation In Drug Or Mental Health Program.

"The Kentucky Supreme Court has recognized the importance and value of addressing drug and mental health issues that often contribute to crime and recidivism, and the benefits to society from alternatives to incarceration. …The Ethics Committee of the Kentucky Judiciary has been asked for opinions regarding the ethical duties of judges who serve on these court-supervised alternatives to incarceration. The sense of the Committee is that those who serve as "drug court" or "mental health court" judges throughout the Commonwealth would benefit by a formal opinion regarding recusal when

the drug or mental health court judge will be the same judge presiding over a probation revocation hearing. To paraphrase a recent inquiry to the Committee, the subject of this Opinion is:

"May a drug court judge or mental health court judge, who has decided to terminate a defendant's participation in drug court or mental health court, preside as the sentencing judge over a subsequent probation revocation hearing conducted in a criminal action in which the termination serves as a basis for the revocation?"

The Committee has decided that the answer to the foregoing question is a qualified "yes," and that recusal would only be required in certain circumstances…." (See *Commonwealth v. Nicely,* 326 S.W.3d 441 (Ky. 2010) discussing philosophy and operation of drug courts, also applicable to mental health courts. " which focused on the punishment levied against Nicely, not whether the presiding judge should or should not have recused. However, *Stewart v. Commonwealth*, 2007-CA-000252-MR, 2008 WL 399626 (Ky.App., Feb. 15, 2008), dealing with Stewart's probation revocation hearing at which he argued that the sentencing judge should have recused from the probation revocation proceedings since he also presided over Stewart's drug court, citing provisions of KRS 26A.015, requiring a judge to recuse from proceedings "in which he has personal knowledge of disputed evidentiary facts concerning the proceedings, and in which he has knowledge of any other circumstances in which his impartiality might reasonably be questioned." The Court of Appeals held:
[I]t was essentially undisputed that Stewart violated the terms of his probation. Thus, regardless of whether Judge Jernigan indicated, when issuing his oral ruling, that there had been "other problems" with Stewart in drug court, there is no indication that Judge Jernigan had any "personal knowledge of disputed evidentiary facts concerning the proceedings," or that he was "likely to be a material witness in the proceeding." KRS 26A.015(2)(a) and (d)4.

The Court of Appeals went on to state:
Further, no reasonable basis exists for questioning Judge Jernigan's impartiality simply because he presided over both Stewart's drug court proceedings and his probation revocation proceedings. As the United States Supreme Court has explained, "[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant." *Liteky v. United States,* 510 U.S. 540, 551, 114 S.Ct. 1147, 1155, 127 L.Ed.2d 474 (1994). The same rationale applies here, where Judge Jernigan presided over both of Stewart's proceedings.

The Kentucky Supreme Court has stated that drug court "is a **court function**, clearly laid out as an alternative sentencing program under the applicable statutes." *Nicely,* 326 S.W.3d at 444 (emphasis added). Ordinarily, "recusal is appropriate only when the information is derived from an extra-judicial source. Knowledge obtained in the course of earlier participation in the same case does not require that a judge recuse." *Marlowe v. Commonwealth,* 709 S.W.2d 424, 428 (Ky. 1986) (citation and quotation omitted). *See also Harpring v. Commonwealth,* 2004-CA-000898-MR, 2005 WL 1924728 (Ky.App., Aug. 12, 2005) (rejecting defendant's claim that due process was violated by same judge presiding over trial proceedings, drug court, and probation revocation absent evidence in the record to suggest judge harbored personal bias or prejudice against defendant, had personal knowledge of disputed evidentiary facts outside of the record, or expressed any opinion showing pre-judgment).

The Committee has considered non-Kentucky authority, some of which holds that a judge in the circumstances at hand should recuse, but nonetheless finds the reasoning of the Kentucky Supreme Court and Court of Appeals to be more persuasive. The Committee has concluded that a drug court or mental health court judge, by the very nature and purpose of the program, must remain familiar with the status of the participant, who has voluntarily elected to enter the program. If the judge receives the reason for the termination from the program in the course of his or her official duties, and no part of the evidence at a subsequent revocation hearing is dependent on the judge's personal knowledge of any pertinent circumstances, no recusal is required. However, recusal may be required in situations where information on which the revocation may be based comes from the judge's "personal knowledge," *i.e.,* information learned by the judge outside the regular drug or mental health court process. For example, if the judge personally observed the drug court participant committing some act that would form or support the basis for termination from the program, and that act formed the basis of probation revocation, then recusal would be required."

Florida Supreme Court. Judicial Ethics Advisory

Committee. *Whether Judge May Allow Juveniles To Perform Community Service Hours By Participating In A Jogging Program With Him*. Opinion Number 2010 37. November 18, 2010.

Such an action, even if well-intentioned, reasonably could place the judge in situations undermining the impartiality of the judge's judicial office.

United States District Court, M.D. Pennsylvania.UNITED STATES of America, v. Michael T. Conahan and Mark A. Ciavarella, Jr., Defendants. No. 3:-09-CR-28. July 31, 2009.

[*Case involves allegations against two Luzerne County, Pennsylvania judges, at least one of whom had served as the drug court judge, for sending juveniles, brought before the judges without a lawyer in very brief hearings, to privately run youth detention centers which gave them financial kickbacks for these referrals. Luzerne County does not have a juvenile drug court and there was no allegation in these proceedings that this practice was used for defendants in the County's adult drug court. Current memorandum deals with Court's rejection of plea offer regarding sentencing]*

Each defendant, after waiving indictment pursuant to a plea agreement, pled guilty to Counts One and Two of an Information. Count One charges a violation of 18 U.S.C. §§ 1343 and 1346, in that the defendants aided and abetted each other and used wires to defraud the citizens of Pennsylvania of the right to honest services by an elected official. Count Two charges a violation of 18 U.S.C. § 371, in that the defendants generally conspired to defraud the United States by impeding, impairing, obstructing and defeating the lawful government function of the Internal Revenue Service in failing to report income from their fraudulent activities. The total maximum penalty on both charges is 25 years of imprisonment as well as a substantial fine.

The pleas of guilty were entered as a result of plea agreements negotiated by the defendants, their counsel and the United States Attorney. As a condition, each defendant was to affirmatively accept responsibility to benefit his case. Each was a beneficiary of a binding provision for a sentence of 87 months, subject to acceptance or rejection of the binding provision by the Court after the Court's review of the defendants' conduct giving rise to the offenses. The parties stipulated that the sentence of incarceration was substantial and reasonable in light of the other considerations such as the characteristics of the defendants, the legal complexity of the offenses, and the need for closure in the community. Each defendant was to resign his position as judge and submit to disbarment. The agreement preserved the right of the Government, as well as the defense, to disagree with any findings of the probation department, subject to a final determination of disputed items by the Court…

The defendants were charged with defrauding the citizens of Pennsylvania, by depriving them of their right to honest services through deceit, self-dealing and conflict of interest, when the defendants accepted compensation in millions of dollars in exchange for particularized official actions and anticipated official actions, in violation of their fiduciary duty as judges and as required by law. The Pennsylvania Constitution, which is the ultimate binding legal authority, art. V, § 17(b) and 17(c), as well as the Code of Judicial Conduct and Administrative Order adopted by the Supreme Court of Pennsylvania, are state-created fiduciary duties…

We cannot accept the binding plea agreements' stipulation and terms as to the sentence to be imposed, pursuant to the Court's right of discretion as the sentencing court. *See* Fed.R.Crim.P. 11(c) & advisory committee's note. Our rejection affords the defendants and the Government a right to withdraw, including the defendants' pleas of guilty; a right which they are herewith advised to exercise in writing within ten (10) days from the date of this Memorandum and Order.

In re Johnson 1 So.3d 425 La.,2009. January 21, 2009.

In judicial discipline proceedings, the Judiciary Commission found misconduct and recommended that district court judge be publicly censured.

Held:

(1) judge presiding over drug court was not authorized to order defendants to pay fines to various civic or charitable organizations in cases where the organizations were not themselves the crime victims;
(2) judge's conduct in ordering such fines violated Code of Judicial Conduct;
(3) judge violated Code of Judicial Conduct in permitting his judicial assistant to take dual employment with the federal government; and

(4) public censure was warranted as a sanction.

Public censure ordered.

Conduct of district court judge presiding over drug court, in ordering as unauthorized conditions of probation that defendants pay fines to various civic or charitable organizations in cases where the organizations were not themselves the crime victims, violated canon of Code of Judicial Conduct prohibiting a judge from using his office for the purpose of soliciting funds for civic or charitable organizations.

Conduct of district court judge in permitting his judicial assistant to engage in legally inappropriate dual employment with the federal government violated Code of Judicial Conduct provisions requiring a judge to uphold the integrity and independence of the judiciary, requiring a judge to avoid impropriety and the appearance of impropriety in all activities, and requiring a judge to respect and comply with the law and shall act at all times in a manner that promotes confidence in the integrity and impartiality of the judiciary.

Public censure was warranted as a sanction for district court judge who violated Code of Judicial Conduct by ordering as unauthorized conditions of probation that drug defendants pay fines to various civic or charitable organizations in cases where the organizations were not themselves the crime victims, and by permitting his judicial assistant to take a second job with the federal government; actions were not with dishonorable intent, nor for any type of personal gain.
Held: Judge Donald R. Johnson of the 19th Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, be publicly censured and ordered to reimburse the Commission for costs incurred in the investigation and prosecution of this case.

Background: "…By en banc order of November 15, 1992, the 19th Judicial District Court created a drug court, to which all drug offenses were assigned. This court was supervised by a succession of District Judges, including Judges Foster Sanders, Robert Downing, Frank Saia, and William Morvant, before Judge Johnson was assigned the drug court in 2003. The drug court was originally created to facilitate the progression of drug cases through the judicial system, and developed into a court that focused on rehabilitation as well as judicial economy.

This drug court was not formally set up as a "treatment court," but there was evidence that Judge Johnson, and some of his predecessors did attempt to emphasize drug counseling or treatment as a condition of probation. This division of court has now been terminated by subsequent rule of the 19th Judicial District judges, and a drug treatment court program as envisioned under La. R.S. 13:5301, et seq. , has been established. That court is now presided over by Judge Anthony Marabella.

In January 2005, Doug Moreau, the District Attorney for East Baton Rouge, Parish, reported to the Office of Special Counsel ("OSC") that Judge Johnson had established a pattern of ordering defendants in drug court to pay fines to third parties unrelated to their cases, as opposed to ordering that defendants' fines be paid into the Criminal Court Judicial Expense Fund (the District Attorney's Office was a recipient of money from the fund). …In February 2005, Leu Anne Lester Greco, General Counsel for the East Baton Rouge Parish Sheriff's Office, reported to the OSC that Judge Johnson was diverting fines from the Judicial Expense Fund's statutorily designated recipients (including the Sheriff and District Attorney), to other entities designated by Judge Johnson…

Judge Johnson submitted a response to the complaint, wherein he advised OSC that his predecessors on the 19th Judicial District Court had assessed fines, or awarded financial assessments as conditions of probation to non-profit organizations and/or public agencies." He opined that the complaints were "susceptible to racial, personal and subjective overtures," in that he is the only former drug court Judge whom the District Attorney has charged with wrongful conduct and violations of the Canons of the Code of Judicial Conduct.

On February 15, 2006, Judge Timothy Kelley, Chief Judge of the 19th Judicial District Court for the Parish of East Baton Rouge, reported to the Commission's Chief Executive Officer, Dr. Hugh M. Collins, that between October 17, 2005, and February 15, 2006, Sarah Holliday was a full-time employee of the 19th Judicial District Court, designated as Judge Johnson's judicial assistant. During that same time period, Ms. Holliday was also employed on a full-time basis by the Field 4 Operations Department of the United States Small Business Administration, Disaster Assistance Office. Further, Judge Kelley advised that Judge Johnson knew of Ms. Holliday's

employment outside of the court and authorized it. In response to Judge Kelley's inquiry, Judge Johnson admitted that he "approved a flexible documented work schedule for Ms. Holliday."

Judge Kelley suggested that Ms. Holliday's dual employment violated La. R.S. 42:63,FN2 which makes it illegal for any employee of the State or a political subdivision of the State to simultaneously maintain employment with an agency of the federal government. Additionally, Judge Kelley opined that because Judge Johnson had been signing monthly verifications stating that Ms. Holliday had worked sufficient time at her state job to qualify for payment of her salary, that this could be violative of La. R.S. 14:134 (Malfeasance in Office) and/or La. R.S. 14:138 (Public Payroll Fraud).

[one dissenting judge who would impose a more serious sanction.]

Supreme Court of Mississippi. MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE v. Nicki M. BOLAND. No. 2007-JP-00661-SCT. Feb. 28, 2008.

[Ethics – statements of judge at drug court conference constitute violation of canons 1,2(A),3(C)(1)]

Judicial disciplinary proceedings were initiated against Justice Court judge. The Commission on Judicial Performance recommended the judge be publicly reprimanded and assessed the costs of the proceedings.

Holdings: The Supreme Court, Easley, J., held that:

(1) comments made by judge during national drug court seminar break-out session did not constitute regarding a matter of legitimate public concern, and thus were not protected by the First Amendment;

(2) judge's conduct of making statement that was derogatory in nature to African-Americans in her community violated provision of state constitution and provisions of code of judicial conduct (Canons 1, 2A, and 3©(1); and

(3) public reprimand and the assessment of costs in the amount of $4,108.42 was appropriate sanction for judge.

Comments made by Justice Court judge at national drug court seminar break-out session, that members of board of supervisors in county in which she served were ignorant, that some of the Justice Court judges were on the same level as those who appeared before her in court, that fellow seminar participant should "get the hell out" of the room, and that African-Americans in her community could "go to hell," did not involve a matter of legitimate public concern, and thus were not protected by the First Amendment in judicial disciplinary proceeding; judge and other participants attended the seminar to gain certification to operate a drug court in county in which judge served, and seminar was not a forum for judge's expression of personal opinions. U.S.C.A. Const.Amend. 1.

Conduct of Justice Court judge, which consisted of having an outburst during national drug court seminar break-out session and making statement that was derogatory in nature to African-Americans in her community, violated provision of state constitution that prohibited judges from engaging in willful misconduct in office or engaging in conduct that was prejudicial to the administration of justice which brought the judicial office into disrepute.

Justice Court's judge conduct of making a derogatory statement concerning African-American members of her community during national drug court seminar break-out session violated provisions of code of judicial conduct requiring judge to uphold the integrity and independence of the judiciary, to avoid impropriety and the appearance of impropriety, and to diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration. Code of Jud. Conduct, Canons 1, 2(A), 3(C)(1).

Public reprimand and the assessment of costs in the amount of $4,108.42 was appropriate sanction for Justice Court judge who made derogatory statement concerning African-American members of her community during national drug court seminar break-out session; judge's action involved Mississippi team seminar members and national drug court representatives, all of the witnesses who attended the seminar and testified before the Commission on Judicial Performance stated that they were shocked, appalled, and embarrassed by judge's statement, and judge's conduct and behavior were contrary to the dignity of the judiciary**.**

La In Re Spears 2007 964 So. 2d 293, 2007-0499 (La8/31/07)

[Attorney Conduct]

Held: Disbarment of attorney was warranted, in attorney disciplinary proceeding, where attorney was involved in a scheme with probation officer for over one year in which participants in the Drug court probation program were offered a release from their probation obligations in exchange for cash, and attorney was convicted of computer fraud and conspiracy to commit computer fraud due to her actions with probation officers. 18 U.S.C.A. §§ 371, 1030(a)(4).

The Office of Disciplinary Counsel (ODC) filed charges against attorney involved in a scheme with probation officer for over one year in which participants in the Drug court probation program were offered a release from their probation obligations in exchange for cash, and attorney was convicted of computer fraud and conspiracy to commit computer fraud due to her actions with probation officers.

Respondent's actions constituted computer fraud because she affected the Orleans Parish Criminal District Court Docket Master Computer, where all entries involving a defendant's case are maintained. She also implicated respondent in the scheme, which had been ongoing for nearly a year. With Ms. Kirkland's cooperation, agents subsequently taped three of her telephone calls with respondent.
Following respondent's guilty plea to the conspiracy and computer fraud charges, she was sentenced on La.,2007.

Massachusetts CJE Opinion No. 2007-9.

Accepting Reimbursement of "Travel Expenses for Drug court Training Program. September 12, 2007. Code of Judicial Conduct permits judge to receive reimbursment of expenses for travel to mandatory training program required by federal grant that supports drug court operation where judge resides.

N.Y. Joint Opinion 06-154 and 06-167: January 25, 2007. Advisory Committee on Judicial Ethics. New York State Unified Court System. Advisory Committee on Judicial Ethics. New York State Unified Court System.

Judges should not participate in regularly-scheduled meetings with the representatives of a government agency which represents the interests of children and families, where the meetings involve discussion of substantive and procedural legal issues and do not include other agencies and parties representing other interests which are present in Family Court matters ["a pivotal issue in all such matters is whether a judge's participation would cast doubt on the judge's impartiality…" and not considering other perspective.]

Supreme Court of New Mexico. Inquiry Concerning a Judge, No.2004-011, In the Matter of Honorable William A. McBEE, District Judge, Fifth Judicial District, New Mexico. No. 29,265. May 16, 2006.

Judge's referral of defendant, charged with trafficking cocaine and distribution of methamphetamine, to Family Drug court when judge was personal friend of defendant's boyfriend, and continued involvement in the matter after it was assigned to another judge found to violate Code of Judicial Conduct.

N.Y. Opinion 05-155: January 26, 2006.

A fulltime judge may serve in an uncompensated advisory position as regional coordinator of the National Association of Drug court Professionals

In re Johnson. 903 So.2d 408, 2004-2973 (La. 6/3/05).

Juvenile court judge's failure to conduct hearings, as requested by other judge, who was appointed Supernumerary Judge pro tempore of Juvenile Court by the Supreme Court, after she was informed by appointed judge that the juvenile DRUG COURT treatment center was closing, constituted a violation of the Code of Judicial Conduct, as well as the Louisiana Constitution.

N.Y Opinion 05-32: April 21, 2005. Advisory Committee on Judicial Ethics. New York State Unified Court System.

(1) A part-time judge who practices law, and is presiding in a drug treatment court must disclose, on the record, the prior legal representation of a person who appears before the judge as a participant in the drug court and may proceed, provided that the judge has taken into consideration all relevant circumstances that might bear on whether the judge's impartiality might reasonably be questioned; (2) a part-time judge who practices law and is representing a client in Family Court may preside in a drug

treatment court where the participant is the pregnant girlfriend of the adversary party in the Family Court proceeding, provided that the judge believes he/she can be fair and impartial.

N.Y. Opinion 04-100: October 28, 2004. Advisory Committee on Judicial Ethics. New York State Unified Court System.

A judge of the drug court may not preside over a defendant's participation in the drug treatment court program where the judge's son represented defendant in the underlying criminal case, even if the son's involvement ended at the plea and sentencing stage.

Court on the Judiciary of Oklahoma, Appellate Division. STATE of Oklahoma, ex rel. W.A. Drew EDMONDSON, Appellee, v. Jerry L. COLCLAZIER, District Judge, Seminole County, Appellant. No. CJAD-01-2. June 14, 2002.

Trial court's finding that judge committed "oppression in office" was not against the clear weight of the evidence nor contrary to law or established principles of equity. Complaints included judge's termination of defendant, who had pled guilty to possessing marijuana with intent to distribute and who had no prior felony convictions, from drug court and sentencing him to life in prison on basis of ex parte communications and inadmissible polygraph results.

2002 OK JUD ETH 2. Oklahoma Judicial Ethics Advisory Panel. Judicial Ethics Opinion No. 2002-2. Jan. 25, 2002.

Judicial Ethics Advisory Panel holds that judge with **drug court** responsibilities can participant as an applicant for grant funding.

Supreme Court of Louisiana. In re Judge Pamela Taylor JOHNSON. No. 00-O-0392. June 30, 2000. Rehearing Denied Aug. 31, 2000

In judicial disciplinary proceeding, Supreme Court held: (1) judge's listing of certain persons as stake holders on federal grant application, without first obtaining their permission, did not rise to level of ethical misconduct, so as to warrant official judicial discipline; and (2) judge's authorization of court employees to attend educational seminars, which were not specifically related to their job functions, did not rise to a level of misconduct warranting official judicial discipline. Recommendation of public censure rejected.

EXPUNGEMENT

***Doe v. US*, No. 14-MC-1412 (EDNY May 21, 2015) [Opinion of Judge John Gleason]:**

Jane Doe filed an application on October 30, 2014, asking me to expunge her thirteen-year old fraud conviction because of the undue hardship it has created for her in getting — and especially keeping — jobs. Doe gets hired to fill home health aide and similar positions only to be fired when her employers learn through subsequent background checks about her conviction. Since the conviction was for health care fraud, it's hard to blame those employers for using the conviction as a proxy for Doe's unsuitability.

However, even if one believes, as I do, that employers are generally entitled to know about the past convictions of job applicants, and that their decisions based on those convictions are entitled to deference, there will nevertheless be cases in which all reasonable employers would conclude that the conviction is no longer a meaningful consideration in determining suitability for employment if only they had the time and the resources to conduct a thorough investigation of the applicant or employee.

I have conducted such an investigation, and this is one of those cases. In addition to presiding over the trial in Doe's case and her subsequent sentencing, I have reviewed every page of the extensive file that was created during her five years under probation supervision. I conclude that the public's interest in Doe being an employed, contributing member of society so far outweighs its interest in her conviction being a matter of public record that the motion is granted and her conviction is expunged....

Doe is one of 65 million Americans who have a criminal record and suffer the adverse consequences that result from such a record. Her case highlights the need to take a fresh look at policies that shut people out from the social, economic, and educational opportunities they desperately need in order to reenter society successfully.

The seemingly automatic refusals by judges to expunge convictions when the inability to find employment is the "only" ground for the application have undervalued the critical role employment plays in re-entry. They are also increasingly out of step with public opinion. The so-called "ban the box" practice, in which job applications no longer ask the applicant whether he or she has been convicted of a

crime, is becoming more prevalent. There is an increasing awareness that continuing to marginalize people like Doe does much more harm than good to our communities.

Accordingly, Doe's application for an order expunging her conviction is granted. It is hereby ordered that the government's arrest and conviction records, and any other documents relating to this case, be placed in a separate storage facility, and that any electronic copies of these records or documents and references to them be deleted from the government's databases, electronic filing systems, and public record. Doe's real name is to be removed from any official index or public record. It is further ordered that the records are not to be opened other than in the course of a bona fide criminal investigation by law enforcement authorities and only when necessary for such an investigation. The government and any of its agents may not use these records for any other purpose, nor may their contents be disseminated to anyone, public or private, for any other purpose.

Finally with respect to the relief granted here, I welcome the input of the parties. My intention is clear: no inquiry of the federal or state government by a prospective employer should result in the disclosure of Doe's conviction. Effectuating that intent without unduly burdening those governments or impairing their legitimate law enforcement interests is not so clear, at least not to me. Thus I welcome any proposed modifications to the relief set forth above, and of course any such proposals by the government would not be regarded as a waiver of its opposition to my decision to expunge the conviction.

State of Hawaii, Respondent/Plaintiff-Appellee, vs. Lisa Ann Pall, Petitioner/Defendant-Appellant. 129 Haw.363; 300 P.3d 1022. May 21, 2013 Decided and Filed

Held that, for the purposes of expungement of a drug conviction under Hawaii Statutes (Section 706-622.5(4) Supp. 2004, the requirement that a defendant sentenced to probation complied with other terms and conditions was satisfied if the defendant had completed his or her probationary term and had been discharged from probation. In this case, defendant had been discharged from probation, therefore relieved of any further obligations to the court and eligible for expugement of her drug conviction despite prior criminal convictions.

JOHN (2012-11) DOE, Petitioner-Appellant, v. STATE OF IDAHO, Respondent. STATE OF IDAHO, Plaintiff-Respondent, v. JOHN (2012-11) DOE, Defendant-Appellant. Docket No. 38672, Docket No. 38784, 2012 Opinion No. 52. COURT OF APPEALS OF IDAHO. 290 P.3d 1277; 2012 Ida. App. October 4, 2012, Filed.

Order denying motion to seal criminal case file, vacated and case remanded. District court had discretion to order the sealing of defendant's criminal record under Idaho Ct. Admin. R. 32, based on defendant's assertion that he suffered adverse employment consequences as a result of his criminal conviction, because the court had discretion to consider many types of economic or financial loss that may be reasonably asserted as a claimed justification for sealing court records, including financial harm asserted by those convicted of crimes.

Court of Appeals of Kentucky. COMMONWEALTH of Kentucky, Appellant v. Tammy SHARP, Appellee. No. 2005-CA-000810-MR. Nov. 16, 2007.

[Expungement statutes limit relief to certain violations, misdemeanor, and felony drug possession convictions. Life changes following drug court participation are laudable but don't rise to "extraordinary circumstances" permitting expungement for other offenses.]

Appeal from Jefferson Circuit Court:

The Commonwealth has appealed from the December 19, 2006, order of the Jefferson Circuit Court denying its motion to reconsider the March 18, 2005, and April 26, 2005, orders setting aside and vacating Tammy Sharp's ("Sharp") 1999 conviction for manufacturing methamphetamine, trafficking in methamphetamine, trafficking in marijuana over eight ounces, and illegal use or possession of drug paraphernalia.

On April 5, 1999, Sharp entered a negotiated guilty plea to all counts charged against her. On May 18, 1999, Sharp was sentenced to twelve years' imprisonment, probated for a period of five years. Following completion of her probation, in February 2005, Sharp filed a motion pursuant to KRS 218A.275, 431.076, and 431.078, to set aside and void her conviction and to expunge her criminal record. As reasons therefore, Sharp stated she had successfully completed the Drug court Program, had

not been charged with any additional criminal offenses, had remarried, had enrolled in community college, and was serving her community by working with several charitable organizations. The Commonwealth filed a response in opposition. On March 18, 2005, the circuit court entered an order setting aside and voiding Sharp's convictions pursuant to KRS 218A.275 but denied her motion to expunge her criminal record. The Commonwealth timely filed a motion to reconsider on March 23, 2005.

Although neither party challenged the trial court's refusal to expunge Sharp's criminal record, we believe it important to note the ruling was correct as the plain language of the expungement statutes limits such relief to certain violation, misdemeanor, and felony drug possession convictions. KRS 431.076, 431.078.

The sole question presented in this appeal is whether a criminal defendant's reform is sufficient to void a prior conviction under the "extraordinary circumstances" exception of CR 60.02. Although we believe it is not, we need not reach that question as the trial court improperly invoked CR 60.02 as a matter of law. It is axiomatic that a party must affirmatively request relief under CR 60 .02 and must affirmatively demonstrate entitlement to the extraordinary relief requested. *See McQueen v. Commonwealth,* 948 S.W.2d 415 (Ky.1997), *Gross v. Commonwealth,* 648 S.W.2d 853 (Ky.1983). No motion for such relief was presented to the trial court. There was no mention of CR 60.02 until after the Commonwealth notified the circuit court of the erroneous reasoning contained in its March 18, 2005, order. The trial court then, *sua sponte,* invoked CR 60.02.

Even were we not compelled to reverse the decision based upon the trial court's erroneous *sua sponte* invocation of CR 60.02, we are convinced reversal would still be necessary as Sharp's claims of reform simply do not rise to the level of "extraordinary circumstances" as required by the rule. While her alleged reformation is certainly laudable, it is not extraordinary, but merely expected in a society of law-abiding citizens. If mere reform were sufficient to overturn an otherwise valid judgment, no criminal conviction could ever truly be considered final. Relief under CR 60.02 requires substantially more than turning one's life around. Arguments such as those presented by Sharp are "more properly addressed in a plea to the executive for clemency under Section 77 of our Constitution." *McQueen, supra,* 948 S.W.2d at 418.

Court of Appeals of Minnesota. STATE of Minnesota, City Of Maple Grove, Appellant, v. David Gary Horner, Robin Cheryl Horner, Respondents. Nos. CX-00-592, C1-00-593. Oct. 10, 2000.

Affirmed trial court's order of expungement of all records relating to charges of felony possession and sale
of a controlled substance. Defendants, having satisfied requirements of drug court diversion program, moved to expunge all records relating to their charges. The District Court, Hennepin County, Kevin S. Burke, J., overruled city's objection and granted defendants' motion. City appealed. The Court of Appeals held that: (1) expungement petitions were not governed by statute providing for actual return of criminal identification data on arrested person's demand, and (2) defendants met statutory requirement that all pending actions or proceedings were resolved in favor of their favor.

Christopher L. Tusio, Petition, v. State of Delaware, Respondent. No. 96X-08-017. Superior Court of Delaware. Submitted January 9, `91997. Decided March 20, 1997.

Petitioner, who successfully completed drug court diversion program**,** with his drug charges nolle prossed by the State**,** argued that he was entitled to have his criminal record expunged as well. The Court denied his petition but agreed to review the Petitioner's application for expungement in six months, along with his efforts at continued sobriety.

FAMILY DRUG COURTS

1. Definition of "reasonable efforts" and "changed circumstances"

D.S., Petitioner, V. The Superior Court Of San Bernardino County, Respondent; San Bernardino County Children And Family Services, Real Party In Interest. No. E059136. Court Of Appeals Of California, Fourth District, Division Two. Filed September 24, 2013.

Definition of "reasonable efforts": Mother claimed improperly denied reunification services in 2006 leading to termination of parental rights despite completing drug court program in 2012, followed by

relapse… Appellate court found she had not made "reasonable efforts" to justify reunification services.

The appellate court pointed out that the mother took *no* steps to address her problems after the 2006 termination of parental rights until the subject child was removed in 2009. It also noted that despite her completion of one six-month program and a substantial period of sobriety, she relapsed into drug use and wound up in a homeless camp spending whatever cash she and the father had on drugs—the same situation from which her older child had been removed. (*R.T., supra,* 202 Cal.App.4th at p. 915.) Viewing this history in its totality, the court found that reasonable efforts to treat her substance abuse issues had *not* been made and that services were properly denied under section 361.5, subdivisions (b)(10) and (11).*R.T.* is highly instructive here.

Had Mother been able to maintain her sobriety after her completion of the "drug court" program, even suffering occasional brief relapses that did not endanger her children, we might find that she had made reasonable efforts. It is well known that the path to sobriety is a long one and immediate success cannot always be guaranteed, and an isolated incident representing a temporary lapse in judgment might be forgiven. (See *In re N.M.* (2003) 108 Cal.App.4th 845, 856; generally *Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1456-1457, 1464.)[5] But here, Mother succumbed to "stress" and returned to the use of methamphetamine and marijuana as soon as the threat of jail was removed. She continued to use drugs during her pregnancy with D.S., thus evidencing a callous disregard for the safety and health of her unborn child. She made no apparent efforts to seek assistance in combating her substance abuse issues after she was discharged from drug court. In our view, although a parent's obligation to make "reasonable efforts" may not be subject to a "bright-line" success or failure evaluation, the efforts must at least be ongoing so long as the problems have not been resolved. That is, the parent must demonstrate a continuing commitment and a willingness to try and overcome initial failures.

Efforts that are reasonable at one point, when substantial success has been achieved, do not continue to be "reasonable" when the parent gives up all his or her gains and makes no attempt to arrest the backsliding.

Court of Appeal, Fifth District, California. In re T.S. et al., Persons Coming Under the Juvenile Court Law. TUOLUMNE COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. THOMAS S. et al., Defendants and Appellants. Nos. F040145, F040148. (Super. Ct. Nos. JV4837 & JV4838). Nov. 7, 2002.

Court denies parents' appeal of trial court's termination of parental rights despite showing "great efforts toward sobriety and reunification in the previous six months" but concluding that "because an entire year has been lost to continued drug use" and "even with all the effort put forth by the parents. . . it is found not to be in the best interests of [the children] to return to the care of their parents.". . Once reunification services have been terminated, the Legislature has identified adoption as the preferred course of action in order to allow stability and permanence to children trapped in the dependency system. . ."

Court of Appeal, Fourth District, Division 1, California. In re COLLEEN M. et al., Persons Coming Under the Juvenile Court Law. SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. LISA M., Defendant and Appellant. No. D040641. (Super.Ct.No. J510547F/G). March 25, 2003.

Mother's completion of dependency Drug Curt and 396 days of sobriety not sufficient to warrant "changed circumstances re termination proceedings.

2. Authority of court to prohibit use of alcohol in a civil proceeding

In re Ross Children. Nos. CA98-12-253, CA98-12-255. Court of Appeals of Ohio, Twelfth District, Butler County. Aug. 30, 1999.

The trial court erred when it ordered in a family **drug court** civil proceeding that an adult may not possess or use alcohol.

IMMIGRATION ISSUES

Supreme Court, Kings County, New York. The PEOPLE of the State of New York v. Gersain MUNIZ, Defendant. Aug. 11, 2010.

Background: Defendant charged with controlled substance possession and driving while intoxicated moved for entry into judicial diversion program for

drug treatment without a guilty plea on grounds of immigration consequences that could result.

Holding: Motion denied. Immigration consequences that would result from defendant's guilty plea did not justify his entry into program without requiring guilty plea.

Motion denied.

In the present case, although he has been residing in the United States for over twelve years and has two children who are citizens of the United States, the defendant remains undocumented. This status alone makes him subject to deportation pursuant to 8 USC § 1227(a)(1). Indeed, allowing him to participate in diversion for treatment without a plea would have no effect on his status and he would remain, throughout the pendency of this case and beyond, undocumented and subject to removal. While deportation would not be a consequence of his plea, as an undocumented immigrant, a plea to CPCS 5 § would render him inadmissible or unable to obtain lawful status in the United States pursuant to 8 USC § 1182(a)(2)(A)(i)(II), even if that plea were later vacated and the charges dismissed. Nevertheless, given that he has resided in the United States for over twelve years and has yet to obtain lawful status, his claim that his future inability to do so would be a "severe collateral consequence" of his plea is unpersuasive.

Unlike lawful permanent residents, even if undocumented immigrants successfully complete the drug treatment court program, their undocumented status continues. Thus, applying the statutory exception to this defendant and permitting him to participate in diversion for treatment without a plea, would not protect him from removal nor ensure he would be granted legal status.

Supreme Court of the United States. PADILLA *v.* KENTUCKY. CERTIORARI TO THE SUPREME COURT OF KENTUCKY. No. 08–651. Argued October 13, 2009—Decided March 31, 2010.

[Effective Counsel Requires Advice As To Whether Plea Carries Risk Of Deportation]

Petitioner Padilla, a lawful permanent resident of the United States for over 40 years, faces deportation after pleading guilty to drug distribution charges in Kentucky. In postconviction proceedings, he claims that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived in this country so long. He alleges that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla postconviction relief on the ground that the Sixth Amendment's effective assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction.

Held: Because counsel must inform a client whether his plea carries a risk of deportation, Padilla has sufficiently alleged that his counsel was constitutionally deficient.

IMMUNITY/LIABILITY OF DRUG COURT OFFICIALS

ANITA STOUDYMIRE, Petitioner, v. N.Y.S. DIVISION OF HUMAN RIGHTS et al., Respondents. 949 N.Y.S.2d 611, 2012 NY Slip Op 22210. 2012-0256. Supreme Court, Cayuga County. July 25, 2012.

[Immunity Of Judge From Claim Of Unlawful Discrimination For Terminating A Treatment Provider From Drug court Program]

Dismisses complaint taking issue with Judge McKeon's official letter as Presiding Judge of the Auburn Drug and Alcohol Court and the Cayuga County Felony Drug court dated October 19, 2010, sent to petitioner notifying her that such courts will no longer utilize Recovery Counseling, an alcohol and drug treatment business owned by petitioner. McKeon's letter referenced events at petitioner's residence without specific details as the basis for the decision. Additionally, McKeon notified petitioner that such court participants were being required to leave Recovery Counseling and transfer their treatment to another provider. Significantly, McKeon noted that the "integrity and viability of these courts cannot be compromised [and that] these recent events [at petitioner's residence] have done just that."

Court found that it was undisputed that the "recent events" were in reference to the arrest of petitioner's live-in boyfriend for drug possession and sale and the publicity it received. According to McKeon's answer but absent from the petition, the police also executed a search warrant at petitioner's home that resulted in

the recovery of drug paraphernalia and a large amount of cash.

Petitioner asserted that McKeon's actions were not taken in his judicial capacity, which would avoid application of judicial immunity.

Court found that McKeon, as the presiding judge of the treatment courts, had the authority to establish a procedure "necessary to carry into effect the powers and jurisdiction" of the treatment court (Judiciary Law § 2-b [3]), and to preserve his court's dignity and integrity. Contrary to petitioner's assertions, McKeon's letter to petitioner was an exercise of his judicial functions as the presiding judge of the treatment courts and judicial immunity attaches to the acts at issue. Therefore, the SDHR 923*923 properly concluded that it lacked jurisdiction and the determination to dismiss the complaint was not arbitrary, capricious nor affected by an error of law.

"The State's absolute immunity has been regarded as akin to subject matter jurisdiction (*see* *Lublin v State of New York,* 135 Misc 2d 419, 420-421 [Ct Cl 1987], *affd* 135 AD2d 1155 [1st Dept 1987], *lv denied* 71 NY2d 802 [1988]). Judicial immunity is an absolute defense to liability for harm resulting from official judicial acts, regardless of the bad faith of the judge or lack of any reasonable basis for the action, except when the acts are unconstitutional, unlawful, made in the absence of jurisdiction, or made outside the scope of authority of the office (28 NY Jur 2d, Courts and Judges § 330). Judicial immunity is designed to ensure judges' absolute independence in the exercise of their judicial functions, free of the fear of intimidation and harassment from vexatious lawsuits (*see* *Mosher-Simons v County of Allegany,* 99 NY2d 214 [2002]). The immunity exists regardless of how erroneous the decision and regardless of the judge's tainted motives, provided the act is constitutional, not unlawful, and is performed within the general scope of authority of judicial functions (Kreindler, Rodriguez, Beekman & Cook, New York Law of Torts § 17:49 [15 West's NY Prac Series]). Judicial immunity is imperative to the nature of the judicial function that judges be free to make decisions without fear of retribution through accusations of malicious wrongdoing (*Mosher-Simons,* 99 NY2d at 219).

ADAM FRANCE, Plaintiff, v. CHRISTINE BRAUN, et al., Defendants. Civil Action No. 2:10-286-DCR. United States District Court, E.D. Kentucky, Northern Division. January 10, 2012. (42.U.S.C.Section 1983 action)

[Allegations of sexual harassment by program personnel: Immunity For Those Acting In Official Capacity Only]

Plaintiff Adam France alleges that he was sexually harassed by Defendant Christine Braun when he was participating in the Kentucky Drug court program under her supervision. According to France, Braun made numerous sexually suggestive remarks to him prior to his graduation from Drug court in April 2010. France further asserts that after he had been conditionally discharged from the Drug court program, Braun kissed him and touched him sexually.

Held: Claim against state officials of the Kentucky Administrative Office of the Courts in their official capacity for failure to train and supervise drug court barred under 11th amendment barring suites against the state and its departments. Suit against Braun, employee, in her individual capacity not dismissed (action went beyond official capacity).

DENNIS MALIPURATHU, Plaintiff, v. RAYMOND JONES et al., Defendants. No. CIV-11-646-W. United States District Court, W.D. Oklahoma. September 4, 2012.

(Relief sought under 42.U.S.C. Section 1983, as were many similar drug court cases since 2011):

Malipurathu named multiple defendants and sought relief for alleged constitutional and statutory deprivations as well as for violations of the Americans with Disabilities Act of 1990 arising out of Malipurathu's unsuccessful participation in, and his termination from Washita/Custer County Drug court and his complaints about the conditions at the substance abuse treatment centers to which he was admitted during his participation in the Drug court program.

All complaints against drug court officials dismissed on grounds of immunity.

United States District Court, E.D. Virginia, Alexandria Division. William G. THORNE, Plaintiff, v. Kelly HALE et al., Defendants. No. 1:08cv601 (JCC). Oct. 29, 2009. Immunity/liability of drug court officials.

[Administrator of the Rappahannock Regional drug court, is protected by derivative absolute judicial immunity to which the Supreme Court of Virginia is entitled because she was acting "in obedience to a judicial order or under the court's direction" which provides oversight for the Rappahannock Drug court.]

Motion for Summary Judgment by defendants (drug court program and program officials) to dismiss plaintiff's complaints filed pro se alleging violation of his First, Fourth, Fifth, Sixth, Eighth, Thirteenth, and Fourteenth Amendment rights; also alleged violations of the Americans with Disabilities Act ("ADA"), the Civil Rights Act of 1964, and the Civil Rights Act of 1871, 42 U.S.C. § 1983 and certain Virginia statutes and provisions of the Virginia Administrative Code related to the provision of mental health services. In recompense, Thorne asked: (1) for $60,000,000 in damages; (2) that the Court declare his state court plea agreement null and void; and (3) that the Court order the Civil Rights Division of the Department of Justice to launch an investigation into the Rappahannock Regional Jail doing business as the Rappahannock Regional drug court.

While Thorne was in the Drug Treatment Court Program, he received treatment and support from the RACSB. The RACSB has never required Plaintiff to attend the AA or NA meetings and never imposed any sanctions against Thorne because it does not have any authority to do so.

Summary judgment is appropriate only if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists.

Held: Dismissed action against Rappahannock Community Service Board since not considered '"persons" amenable to suit under the statute and the RACSB itself has never required Thorne to attend the AA or NA meetings and has no authority to sanction Thorne for his non-compliance with the recommended programs.

Also found Defendant Hale, the Administrator of the Rappahannock Regional DRUG COURT, is protected by derivative absolute judicial immunity to which the Supreme Court of Virginia is entitled because she was acting "in obedience to a judicial order or under the court's direction" which provides oversight for the Rappahannock Drug court.

United States District Court, E.D. Virginia, Alexandria Division. William G. THORNE, Plaintiff, v. Kelly HALE et al., Defendants. No. 1:08cv601 (JCC). March 26, 2009. William G. Thorne, Fredericksburg, VA, pro se.

[Issues: Immunity of drug court officials in 1983 action;

AA/NA –immunity/liability of drug court officials for requiring AA/NA participations

Due Process challenge to evidence/testimony admitted through team staffing should be made against the state and not one of the drug court team members.

This decision presents a fairly extensive analysis of the official and personal liability of various state and local officials and agencies the appellant claims have deprived him of his first, fourth, fifth, sixth, eighth and eleventh, and fourteenth amendment constitutional rights; and their liability for alleged violations of the American with Disabilities Act and the Civil Rights Act of 1964 for his alleged denial of due process as a result of his drug court termination based on the drug court team's decision without the right for him to confront witnesses; and his failure to receive credit in his ultimate sentence for time served while serving jail sanctions; and also seeks injunctive relief, including the voiding of his conviction and an order for the U.S. Department of Justice to investigate the drug court program.

The Court held that (1) all of the officials sued had immunity from being sued except for the drug court program managers who operated the treatment program and had discretion regarding the establishment and enforcement of the requirements appellant challenges (e.g., mandatory AA/NA attendance) who had limited personal immunity; (2) challenges to drug court team decisions and court orders should be made at the time they were made, and not through a petition for injunctive relief to subsequently set them aside; and (3) the drug court was a specialized dockets within the normal structure of the state court system which is an arm of the state government and is therefore immune from suit under the 11th Amendment and Will. See 491 U.S. at 70].

This matter presents three motions to dismiss a civil rights lawsuit filed against a number of individuals

and entities involved in administering a "drug court" program in the Rappahannock area. The motions were filed by: Defendant Karl Hade, the Executive Secretary of the Supreme Court of Virginia ("Hade"); Defendant Judith Alston, a former Virginia Department of Corrections employee ("Alston"); Defendants Kelly Hale ("Hale") and Sharon Killian ("Killian"), both of whom allegedly served as managers or directors of the drug court; the Rappahannock Area Community Services Board (the "RACSB"), the Rappahannock Regional Jail (the "Regional Jail"), and the Rappahannock Regional Jail doing business as the Rappahannock Regional Drug court (collectively, the "Defendants"). Also before the Court is a motion by Hade and Alston to strike certain supplemental evidentiary filings.

I. Background

Pro se plaintiff William G. Thorne ("Thorne") brought this suit against several individuals and entities that took part in treating him for his drug and alcohol addictions through Virginia's drug court program. His experience with the drug court stems from a state criminal proceeding for the possession of a controlled substance. Thorne filed his original complaint (the "Complaint") in June 2008. At oral argument on the motions to dismiss filed by Defendants, the Court granted Thorne leave to amend the Complaint. He did so on October 22, 2008. . . .

In March 2006, Thorne entered into a plea agreement on a possession of a controlled substance charge. As part of the plea deal, he agreed to undergo treatment for drug and alcohol addiction. Pursuant to his plea, the Virginia court in which he pled guilty placed Thorne under the supervision of the Regional Jail/Drug court, which required him to participate in the Alcoholics Anonymous ("AA") and Narcotics Anonymous ("NA") addiction treatment programs. Had Thorne successfully completed the Regional Jail/Drug court program, the state would have dropped the charge against him. The RACSB served as the substance abuse and mental health treatment provider for the Regional Jail/Drug court.

Thorne complains that the practices of the AA and NA programs contravened his religious beliefs. He claims that the AA and NA programs are state-sponsored religions that violate the Free Exercise clause of the First Amendment. Among numerous other allegations, Thorne appears to have been offended by the public recitation of the Lord's Prayer at AA meetings. Other allegations include being subjected to "mind control" and being "forced to pray to pagan gods with individuals of dissimilar and contradictory beliefs."

Thorne, who was involved in a religious liberties lawsuit against AA in 1998, now claims that he would never have entered into a plea agreement if he had known that it would entail mandatory AA or NA participation. He also claims that Defendants refused to allow him to participate in other drug treatment programs more amenable to his religious beliefs.

Asserting that the responsibility for informing him about the practices of the Regional Jail/Drug court prior to his plea lay with the Virginia court and the Commonwealth's Attorney rather than with his counsel, Thorne states that he never waived his constitutional rights as part his plea. He claims that he was unlawfully incarcerated for various periods of time as "sanctions" for his failures to participate in the Regional Jail/Drug court program and that, because these "sanctions" were not deducted from his prison term, they improperly extended Thorne's "actual and potential incarceration." Thorne asserts that he was denied the right to counsel during hearings held to determine whether to levy "sanctions" against him. He also claims that several defendants presented evidence against him in a way that prevented him from defending himself.

Thorne believes that these and other practices related to the Regional Jail/Drug court treatment program violated his First, Fourth, Fifth, Sixth, Eighth, Thirteenth, and Fourteenth Amendment rights. He also alleges violations of the Americans with Disabilities Act, the Civil Rights Act of 1964, and the Civil Rights Act of 1871, 42 U.S.C. § 1983 (through which, the Court will presume, he brings his constitutional claims).

Finally, Thorne argues that Defendants violated Virginia statutory law and various sections of the Virginia Administrative Code related to the provision of mental health services. In recompense, Thorne asks: (1) for $60,000,000 in damages; (2) that the Court declare his state court plea agreement null and void; and (3) that the Court order the Civil Rights Division of the Department of Justice to launch an investigation into the Regional Jail/Drug court.

Holding:

(a) ADA claims barred by statute of limitations as well as failure to state a cause of action.

(b) Claims for Equitable and Injunctive Relief are denied because (1) none of the requested remedies are available through this court action. [. First, this Court cannot order the Department of Justice to investigate the Regional Jail/Drug court, or, for that matter, to take any action whatsoever in the context of this case. The Department of Justice, a division of the executive branch of the federal government, is not a party to this suit. …Under the same rationale, it is clear that the Court would have no basis to vacate Thorne's plea agreement and declare it unconstitutional and null and void. Setting aside the host of comity, federalism, and jurisdictional concerns that would preclude a Court declaration that Thorne's plea, or the conviction that followed, is "null and void," the Court cannot grant Thorne's request because he does not allege that any of the named Defendants caused the constitutional violation….

(c) Section 1983 Claims against entities are dismissed because only allegation of deprivation of a right under the Constitution or federal law must be caused by a "person" acting "under color of state law." States, and state government entities that are considered arms of the state under the Eleventh Amendment, are not "persons" under § 1983.

1. Regional Jail/Drug court

Thorne's Amended Complaint replaces references to the "Rappahannock Regional Drug court", apparently because Thorne intended to sue the Regional Jail for its role in hosting or otherwise facilitating the drug court rather than the drug court entity itself Had Thorne brought § 1983 claims against the Drug court, they also would have been subject to dismissal. In Virginia, Drug Treatment Courts are specialized dockets within the normal structure of the state court system. ..The state court system is an arm of the state government and is thus immune from suit under the 11th Amendment and Will. See 491 U.S. at 70.

The Regional Jail, is not a "person" who can be sued under § 1983. See Preval v. Reno, 203 F.3d 821 (4th Cir.2000)

2. State officials (Hade and Alston) cannot be sued under Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989), where the Supreme Court held that the "person[s]" who can be sued for damages under § 1983 do not include states and state officials acting in their official capacity.

3. Section 1983 Claims-Defendants Hade and Alston-Personal Capacity

Although § 1983 claims for damages cannot lie against state officers in their official capacities under Will, the Supreme Court, in Hafer v. Melo, 502 U.S. 21, 27 (1991), made it clear that state officials could be sued for damages in their personal capacities for actions they took as state officials. Defendants Hade and Alston claim that, to the extent that Thorne sued them in their personal capacities, he has failed to state cognizable claims under §1983.

(3)(a). Defendant Hade (Supreme Court Ex Secretary)

The Court agrees that Thorne has failed to state a claim against Hade through § 1983. …It is clear from the context of these allegations that none applies to Hade in his personal capacity. Hade was not individually involved in forcing Thorne into any particular drug treatment program. He did not affirmatively require the use of AA or NA in the local drug treatment program at issue. Letting the case to proceed against Hade based on these allegations would allow vague drafting, whether done intentionally or not, to subject Hade to the burdens of further litigation in a suit in which he has no legitimate place. The Court will not sanction such a result. It will dismiss Hade from this lawsuit.

(3)(b). Defendant Alston (probation officer)

…Thorne claims that, during the "sanctions" hearings that followed his failure to adhere to the drug court's rules, the allegations against him, the testimony of witnesses, and the presentation of evidence violated his Sixth Amendment rights. Testimony, he

asserts, was "made in secrete [sic] between the Drug court and RACSB administrators, |Defendants Kelly Hale, Judith Alston and Sharon Gillian Œ," the RACSB, the Commonwealth's Attorney, and the state court judge, "to include whispered testimony to the presiding Judge at the bench, so as to exclude Plaintiff ... from all measures of defense and redress commensurate with Due and Compulsory Process of Law." Id.

It is axiomatic that the judge, not any of the witnesses, regulates the manner in which evidence is presented in court. If the Commonwealth's Attorney solicited and used "secret" evidence, or if the judge in question accepted and relied upon such evidence, then any remedy would lie against the state, not the witness who provided so-called "secret testimony." Likewise, if Thorne was not allowed to defend himself in court, the blame does not lie with Alston as a witness. It is apparent from the face of the Amended Complaint that Thorne has failed to state a Sixth Amendment claim against Alston in her personal capacity. [Additionally, witness immunity shields Alston from suit based on her actions as a witness against Thorne. See Burke v. Miller, 580 F.2d 108, 109 (4th Cir.1978).]

While she may have been responsible for monitoring his compliance with its requirements, there is no indication that Alston had any authority to alter the program that Thorne agreed to complete as part of his plea deal. The Court will dismiss Alston from this case.

(3)(c) Section 1983 Claims-Defendants Hale and Killian (drug court managers)

Defendants Hale and Killian assert that qualified immunity blocks Thorne's § 1983 claims against them. Government officials sued under § 1983 may be entitled to qualified immunity, which protects them from civil suits when their performance of discretionary functions "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

…At this preliminary stage of the proceedings, the Court will not dismiss the claims against either Hale or Killian, both of whom are alleged to be "directors" of the drug court program for the RACSB. The Amended Complaint states that both Hale and Killian were to some extent responsible for implementing the treatment regimen to which Thorne was subjected, which included mandatory participation in AA/NA.

While the precise allegations against them are not stated with the precision that might be required of a complaint drafted by counsel, either Hale or Killian may have violated Thorne's rights by forcing him into a constitutionally-impermissible treatment scheme. The Court acknowledges that the allegations in the Amended Complaint are broadly phrased, inaccurately worded, and sometimes contradictory. But the gist of Thorne's allegations is that the policies put into action by the Drug court and the RACSB-which were purportedly overseen by Hale and Killian at the time in question-resulted in religious discrimination. Given Thorne's status as a pro se litigant and the preliminary nature of the motion to dismiss, the Court finds that Thorne has adequately alleged constitutional violations by Hale and Killian.

In a recent Michigan case with closely analogous facts, the district court found that the case manager at a drug court that utilized a religious drug treatment program did not have qualified immunity from First Amendment claims. The court reasoned that the individual had a First Amendment right to be free from the state's coercion of him into a religious treatment program that conflicted with his own beliefs. Moreover, the court found that the right was clearly established at the time of the violation. Hanas v. Inner City Christian Outreach, Inc., 542 F.Supp.2d 683, 701 (E.D.Mich.2008) (citing Inouye v. Kemna for the proposition that the Free Exercise right to be free from similar religious coercion was established as early as 2001). The district court denied qualified immunity to the Drug court case manager serving Mr. Hanas, and held that the treatment group and the pastor running it

were acting under color of state law, which made them potentially liable under § 1983.

United States District Court, E.D. Michigan, Southern Division. Joseph Raymond HANAS, Plaintiff, v. INNER CITY CHRISTIAN OUTREACH CENTER, INC., et al., Defendants. Civil Action No. 06-CV-10290-DT. Feb. 20, 2007.

[Motion to Compel Disclosure of Identify of Drug court Participants Cannot be Denied on Basis of Confidentiality if information is relevant.]

Plaintiff filed civil rights action alleging defendant tried to indoctrinate him into Pentecostal faith and prevent him from practicing his religion while being treated at defendant's center. In the course of litigation, he filed a Motion to Compel requesting identity of persons enrolled at treatment center while he was there. Defendant objected claiming information was confidential.

Held: Defendant seeks to withhold this information because of its confidential nature. Although this is understandable, privacy or the need for confidentiality is not a recognized basis for withholding discovery.). The district court also denied qualified immunity to the Drug court case manager serving Mr. Hanas, and held that the treatment group and the pastor running it were acting under color of state law, which made them potentially liable under § 1983.

JUDICIAL SYSTEM AND OTHER PROGRAM RESOURCES REQUIRED FOR DRUG COURT PROGRAMS

Supreme Court of Florida. In re CERTIFICATION OF NEED FOR ADDITIONAL JUDGES. No. SC02-2568. Feb. 5, 2003.

Supreme Court's annual, constitutionally mandated, review of need for increasing or decreasing number of state judges resulting in finding that case weights for delinquency and drug court cases, as recommended by the Delphi Policy Committee, do not reflect sufficient judicial time to adequately address these labor-intensive, complex proceedings. Steering Committee on Families and Children in the Courts and the Task Force on Treatment-Based Drug courts requested to reexamine these Delphi weights, conduct a thorough analysis of the workload associated with these types of cases and advise us as to their viability, and make recommendations as to any necessary adjustments to the Delphi weights.

Supreme Court of Florida. In re Certification of Need for Additional Judges No. SC01-2703. Jan. 3, 2002.

Maintains 38-minute case weight for drug cases but directs Drug court Steering Committee and Court Statistics and Workload Committee to conduct further study and provide advice regarding the impact of drug courts on weights for drug cases.

Supreme Judicial Court of Massachusetts, Suffolk. COMMONWEALTH v. George ANASTOS (and companion cases). Argued Feb. 3, 2003. Decided March 18, 2003.

Commissioner of Probation appealed from a judgment by the District Court Department, Suffolk County, finding the commissioner in contempt for failure to comply with court orders relating to the allocation of resources for drug testing. The issue became moot before the appeal was heard because adequate drug testing supplies became available.[But, while] the issues [were unlikely to arise again in substantially the same form] "...we trust that the commissioner, under the supervision of the CJAM, will devise a means of providing the type, frequency, and duration of drug testing necessary to support the mission of the drug court program.

JURISDICTIONAL ISSUES

Court of Appeals of Maryland. Robert Calvin BROWN, III v. STATE of Maryland. No. 118, Sept. Term, 2008. May 18, 2009.

Defendant challenged (1) jurisdiction of Baltimore City Adult Felony Drug Treatment Court because it was not a court created pursuant to the Maryland Constitution.

Holding: As the Baltimore City Adult Felony Drug Treatment Court was a division of the Circuit Court for Baltimore City, it had fundamental jurisdiction to try persons charged with felonious violations of the Maryland Controlled Dangerous Substances Act; if the procedures established by the Felony Drug Treatment Court erroneously violated the rights of a defendant, there were well-developed mechanisms for correcting any violations.

Defendant also claimed jail sentence of 35 days following termination from the drug court constituted double jeopardy in violation of his fifth amendment constitutional rights because he had already served a jail sanction for the conduct while still a drug court participant.

Holding: Defendant failed to preserve on appeal his double jeopardy argument, where he failed to raise the issue in the circuit court at the alleged inception of the second prosecution.

Supreme Court of Wyoming. Alan BLANTON, Appellant (Defendant), v. The STATE of Wyoming, Appellee (Plaintiff). No. S-07-0090. March 11, 2008.

[Authority to transfer jurisdiction of District Court case to circuit court to participate in drug court; authority of "drug court judge"]

[also discussion of history and role of state's drug courts]

State filed petition to revoke probation of defendant who pleaded guilty to felony property destruction. Petition was transferred from the District Court (general jurisdiction court) to the Circuit Court (limited jurisdiction court) for resolution in the Drug court, where defendant was placed on probation a second time, with the additional requirement that he complete a drug court treatment program. When defendant failed to complete the program, Denise Nau, Circuit Court Judge, revoked probation. Defendant appealed.
Held: District Court could not transfer initial petition to revoke probation to Circuit Court for resolution in Drug court.

District courts are Wyoming's state courts of general jurisdiction. When a case is assigned by the district court to the circuit court, the case remains pending in the district court, and the circuit court judge acts as a substitute district court judge, exercising the jurisdiction and authority of the district court.

Supreme Court of Florida. Sammy Lee LAWSON, Petitioner, v. STATE of Florida, Respondent. No. SC06-2423. Oct. 25, 2007.

[Trial court's retention of jurisdiction over drug court participant preadjudication is indefinite and extends beyond period of program participation.]

[Termination: nature of hearing required]

Trial Court did not abuse its discretion in revoking defendant's probation of defendant discharged from treatment program for nonattendance in treatment and sentencing him to five years in prison even though sentencing court failed to specify the number of chances defendant would have to complete the program or the time period for program completion. . . .
This Court has often stated that the grant of probation "rests within the broad discretion of the trial judge and is a matter of grace rather than right." . . . Just as there is broad discretionary power to grant the privilege of probation, the trial court has equally broad discretion to revoke it.

United States District Court, E.D. New York. UNITED STATES of America, v. Robert Scott BRENNAN, Defendant. No. 96-CR-793(JBW). Jan. 2, 2007.

[Sentencing: deferral of federal court to state drug court (Post-Booker)]

Background: Based on defendant's arrest and prosecution by the state on drug possession charges and violations of federal supervised release, government sought a revocation of defendant's term of federal supervised release and the imposition of a new term of federal imprisonment.

Held: Defendant's state drug possession charges would be allowed to go forward in the state rather than in federal system, and charges for violations of federal supervised release would be suspended.

Given the difference between the federal and the New York State systems with regard to the assistance available to some offenders with substance abuse problems, the fact that the defendant had completed a detoxification program and was willing to be monitored in a state drug treatment program, family considerations, and the likelihood of more effective treatment out of as compared to in prison, justice would be better served within the state system; thus, defendant's present state drug possession charges would be allowed to go forward in the state rather than in federal system, and charges for violations In the United States District Court for the Eastern District of New York a **drug court** equivalent to the system in the New York State courts has not been adopted, although this district's Probation Services provides excellent anti-**drug** programs. …The federal

probation system is under severe strain. Budgetary restrictions and the large number of cases handled have made it difficult even for our highly skilled Eastern District probationary staff to give full consideration to every case of a drug addicted defendant. In addition, as noted in Part II, A, *supra,* a mandatory term of imprisonment is sometimes required.

Since the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), made the federal sentencing guidelines largely advisory, the issue of whether it is appropriate for federal sentencing judges to consider the disparity between state and federal sentences becomes critical in some cases. It has been suggested that consideration during sentencing of "the disparity between state and federal sentences ... [would] help alleviate both the disparity [between state and federal sentences] and the concern that the federal courts are overwhelmed with matters that can and should be tried in the states." Demaso at 2128.

Federal courts are recognizing post- *Booker* that it may be appropriate to take state sentencing practices into account when sentencing federal defendants. *See, e.g., United States v. Wilkerson,* 411 F.3d 1 (1st Cir.2005) (remanding case for further sentencing proceedings based on indication that the district judge might have given a different sentence under an advisory guidelines regime, where district judge expressed concern about disparate state and federal sentences in similar cases but stated that the guidelines did not permit him to take that disparity into account.); *United States v. Clark,* 434 F.3d 684, 687-88 (4th Cir.2006) ("[T]he consideration of state sentencing practices [by federal sentencing judges] is not necessarily impermissible per se."); Michael J. Gilbert and Matthew J. Lang, *State Federal Disparities and Nonguidelines Sentencing*, New York Law Journal, January 9, 2007, at 4 (cases cited).
Given the difference between the Federal and the New York State systems with regard to the assistance available to some offenders with substance abuse problems, the fact that the defendant has completed a detoxification program and is willing to be monitored in a state drug treatment program, family considerations, and the likelihood of more effective treatment out of as compared to in prison, justice would be better served within the state system.

In an attempt to assist the defendant and his family, without endangering the public, the court should allow the defendant's present state drug possession charges to go forward in the state rather than the federal system.

County Court, Monroe County, New York. PEOPLE of the State of New York, Respondent, v. William MILLER, Defendant-Appellant. No. 05/0131. Aug. 9, 2006.

[Court deferring sentencing and referring participant to drug court retains jurisdiction to sentence if participant terminates drug court]

Defendant-appellant, William Miller, appealed from a judgment of Henrietta Town Court (Kopacki, J.), convicting him, upon his guilty plea, of two counts of petit larceny and sentencing him to two consecutive one-year terms in the Monroe County Jail. The sentence was imposed after defendant, whose case had been transferred to the Rochester Drug Treatment Court pursuant to CPL 170.15(4) upon his guilty plea, was terminated from that court, and the case was transferred back to the Henrietta Town Court for sentencing.

On appeal, defendant raises various points, all based upon his erroneous premise that he was originally sentenced by the Henrietta Town Court to probation. [His sentence was deferred pending participation in the drug court]

Contrary to defendant's position, on September 29, 2005, the Henrietta Town Court did not "revoke" defendant's probation or "re-sentence" defendant to a term of local jail time. To understand the error of defendant's position, one only need look at the record in this case.. The record of this case contains no copy of any conditions of probation. Rather, it is evident that what occurred in this case is that defendant, following two arrests for petit larceny that were addiction-driven, pleaded guilty to both charges and executed a Drug court contract under which he was given the opportunity and agreed, to have his case transferred to and participate in the Rochester Drug Treatment Court. Defendant consented to have his sentencing adjourned while he participated in that Court's drug treatment program.

JUVENILE DRUG COURTS

Florida Supreme Court. Judicial Ethics Advisory Committee. *Whether Judge May Allow Juveniles To Perform Community Service Hours By Participating In A Jogging Program With Him.*

Opinion Number 2010-37. November 18, 2010.

No. Such an action, even if well-intentioned, reasonably could place the judge in situations undermining the impartiality of the judge's judicial office.

Supreme Court of Nebraska. In re Interest of TYLER T., a child under 18 years of age. State of Nebraska, appellee, v. Tyler T., appellant. No. S-09-631, S-09-632, S-09-633. April 29, 2010.

[Fifth (and fourteenth) Amendments: Due Process Drug court Proceeding – Requirement of a Written Record for case decisions, including orders affecting probation]

After juvenile had been adjudicated delinquent in three prior cases and placed on probation, the State filed petitions to revoke probation in all three cases. The Madison County Court extended the probation for one year and added the condition that juvenile attend and successfully complete the DRUG TREATMENT COURT program. Juvenile appealed, contending that the county court, sitting as a juvenile problem-solving court, ordered his detention without legal authority and in violation of his due process rights.

Held: Appellate Court cannot undertake a meaningful appellate review of this claim because of the complete absence of a verbatim record of the hearing or the resulting order.

Reversed and remanded. [no adequate record for review]

Given the therapeutic component of problem-solving-court programs, we are not prepared to say that each and every action taken in such a proceeding must be a matter of record. But we have no difficulty in concluding that when a judge of a problem-solving court conducts a hearing and enters an order affecting the terms of the juvenile's probation, the proceeding must be on the record. We agree with other courts which have held that where a liberty interest is implicated in problem-solving-court proceedings, an individual's due process rights must be respected.

Court of Appeal, Sixth District, California. In re G. V., a Person Coming Under the Juvenile Court Law. The People, Plaintiff and Respondent, v. G. V., Defendant and Appellant. No. H034665. (Santa Clara County Super. Ct. No. JV33669). April 20, 2010.

[juvenile drug courts]

Graduation from JTC does not automatically terminate juvenile's obligation to pay restitution determined after contested hearing.

Juvenile, on probation for various offenses, admitted violating probation and, at disposition hearing, signed JTC "Disposition Agreement" agreeing to have his sentence in detention center stayed pending his successful completion of the juvenile drug treatment court. At time of JTC graduation, District Attorney states juvenile still owes restitution, determined after a contested hearing which juvenile alleges was dismissed with court disposition agreement.

The "Disposition Agreement" specifically stated that it applied to the disposition of the "petition No. J33669C" regarding "W & I 777" allegations only. Given the broad discretion of the juvenile court on matters of probation, on this record it cannot be said that the court abused its discretion by refusing to terminate the minor's probation on the other charge.

Court of Appeals of Washington, Division 1. STATE of Washington, Respondent, v. J.V., Appellant No. 56926-1-I. April 24, 2006.

Background: Minor was placed in juvenile treatment court after being charged with assault and taking a motor vehicle. He was later terminated from the program and the Superior Court, King County, Harry McCarthy, J., imposed a "manifest injustice disposition", sentencing minor to 3- to 40 weeks of treatment. Minor claimed excessive sentence denied him due process.

In juvenile proceedings, record supported the finding that minor's need for treatment for substance abuse was an aggravating factor supporting a manifest injustice disposition.

We hold that due process does not require a treatment court contract to provide explicit notice of the possibility of a manifest injustice disposition.

Once the court concludes that a disposition within the standard range would effectuate a manifest injustice, the determinate sentencing scheme of the JJA no longer applies, and the court is vested with broad discretion in determining the disposition.

District Court of Appeal of Florida, Second District. T.N., Petitioner, v. Gary PORTESY, Detention Superintendent, Hillsborough Regional Juvenile Detention Center, Respondent. No. 2D05-01 Oct. 7, 2005.

Trial court was not statutorily authorized to order detention of juvenile at drug treatment facility. Petition granted. Trial court was not authorized to order detention of juvenile at drug treatment facility, as sanction for juvenile's violation of agreement to participate in drug program in lieu of adjudication for drug charges, which resulted in finding of indirect contempt; such detention was not within specified possible statutory sanctions that a trial court may impose for indirect criminal contempt.

[As part of the agreement to participate in the juvenile drug court, T.N. was subject to mandated drug treatment and testing to ensure that he remained drug free. Additionally, the agreement specified that if T.N. failed to comply with the terms of the agreement, the trial court could find him in contempt and impose one or more of several enumerated sanctions. The list of possible sanctions included placement in a secure facility and placement in a residential treatment program.

"Although we do not find the trial court's finding that T.N. was in indirect criminal contempt of court to be error, we conclude that the sanction that the trial court imposed was in error. …The legislature has specified the possible sanctions that a trial court may impose for indirect criminal contempt. See § 985.216(2)-(3). Because the trial court's use of the ACTS Addiction Receiving Facility and the residential drug treatment program as sanctions for indirect criminal contempt are not contemplated within the statute, those sanctions were improperly imposed…. Accordingly, we quash that portion of the trial court's order that imposed these sanctions. On January 25, 2005, this court granted T.N.'s petition for writ of habeas corpus and ordered his immediate release.]

Court of Appeals of Arizona, Division 1, Department E. In re MIGUEL R. In re Jose J.Nos. 1CA-JV 02-0016, 1CA-JV 02-0072. Feb. 25, 2003.

Juveniles appealed from decisions of the Superior Court, Maricopa County, which required them to participate in the county Juvenile drug court program as a special term of standard probation.

Held that: (1) involuntary placement was reasonably related to purpose of probation, even though juveniles did not wish to participate; (2) issue of whether imposition of 365 days in the drug court was abuse of discretion was not ripe; (3) juveniles could be required to participate in the drug court; (4) involuntary placement did not violate due process rights; (5) requirement that juveniles participate in the drug court did not violate Fifth Amendment rights against self- incrimination; and (6) placement did not violate equal protection.

294 Ariz. Adv. Rep. 22. Court of Appeals of Arizona, Division 2, Department B. In re Fernando C. No. 2 CA-JV 98-0089. May 3, 1999. Review Denied Sept. 21, 1999.*

Juvenile was adjudicated delinquent and placed on drug court probation after he was found guilty of unlawful possession of marijuana. Following violation of probation, the Superior Court committed the juvenile to juvenile corrections facility, and the juvenile appealed, contending that the Drug Medicalization Prevention and Control Act did not apply to juveniles and he therefore could not be committed to a corrections facility. The Court of Appeals ruled that the Act did not apply to juveniles and he therefore could be committed to a corrections facility. Affirmed.

District Court of Appeal of Florida, Fourth District. STATE of Florida, Appellant, v. R.B., a child, Appellee. No. 96-3231. May 27, 1998.

[statute giving trial courts discretion to dismiss charges against substance abuse impaired offender who successfully completes court referred drug treatment program applied to juveniles.]

305 Ariz. Adv. Rep. 14. Court of Appeals of Arizona, Division 1, Department D. Katherine S., Petitioner, v. The Honorable John FOREMAN, Judge of the Superior Court of the State of Arizona, In and For the County of Maricopa, Respondent Judge, State of Arizona, Real Party in Interest. No. 1 CA-SA 98-0328. Sept. 30, 1999. Review Dismissed Oct. 5, 2000.

Held: Juvenile court lacked jurisdiction over sister of juvenile adjudicated delinquent and participating in a juvenile drug court program, despite its issuance of subpoena to sister's mother directing her to bring

sister to court, where sister had not committed any delinquent act and was not charged with aiding and abetting violation of any order directed to her brother, person who was properly before court. Relief granted; orders directing conduct of Katherine vacated.

District Court of Appeal of Florida, Second District. STATE of Florida, Appellant, v. R.D.H., a minor, Appellee. No. 2D99-1999. Oct. 25, 2000.

Even if trial court withholds adjudication of delinquency, the court is statutorily mandated to suspend the juvenile's driver's license.

In the Matter of H.M., DOB: 4/21/81, Minor Indian Child Under the Age of 18 Years. DW-JV-001-98 and DW-JV-004-98. Duckwater Juvenile Court. June 19, 1998. [Cite 1998 D. Supp. 0006,*1]

Court denied motion for reconsideration of its placement of juvenile in drug court program, holding that treatment court session concept for both the juvenile and tribal adult courts are not foreign to Western Shoshone and Northern Paiute Tribes, that they are a blending of traditional, treatment oriented, jurisprudence, that the juvenile has been making progress in the program**.**

PROGRAM MANAGEMENT/ ADMINISTRATIVE ISSUES [See Also Immunity And Liability]

BRANDY ROBERTS, formerly Ingram, Plaintiff, v. SOUTHWEST YOUTH AND FAMILY SERVICES, INC. and STANLEY EUGENE WILSON, JR., individually and in his official capacity, Defendants. Case No. CIV-13-307-M. United States District Court, W.D. Oklahoma. August 23, 2013.

Allegation of "Coerced, extorted and compelled sexual conduct) against dug court coordinator in Caddo County, Oklahoma dismissed based on finding organization for whom Drug court Coordinator was employed was entity that constituted a "governmental entity" and plaintiff therefore failed to meet statutory required notice requirements.

Terry Penola, Appellant, vs. The State of Nevada, Respondent. No. 59346. 2012 Nev. Unpub. March 7, 2012.

Reverses District Court failure to provide credit for time served. Although Drug court Handbook for Sixth Judicial District Court (Humboldt County) provides: "Drug court sanctions shall not be credit for time served on underlying sentence." No indication defendant agreed to these provisions and waived right to receive credit since no signed participation agreements available.

(one of numerous cases arising from defendant's failure to sign participant agreement acknowledging conditions relating to credit for incarceration time or other program conditions where trial record did not indicate participant had notice of conditions at issue).

ANITA STOUDYMIRE, Petitioner, v. N.Y.S. DIVISION OF HUMAN RIGHTS et al., Respondents. 949 N.Y.S.2d 611, 2012 NY Slip Op 22210. 2012-0256. Supreme Court, Cayuga County. July 25, 2012.

[Immunity Of Judge From Claim Of Unlawful Discrimination For Terminating A Treatment Provider From Drug court Program]

Dismisses complaint taking issue with Judge McKeon's official letter as Presiding Judge of the Auburn Drug and Alcohol Court and the Cayuga County Felony Drug court dated October 19, 2010, sent to petitioner notifying her that such courts will no longer utilize Recovery Counseling, an alcohol and drug treatment business owned by petitioner. McKeon's letter referenced events at petitioner's residence without specific details as the basis for the decision. Additionally, McKeon notified petitioner that such court participants were being required to leave Recovery Counseling and transfer their treatment to another provider. Significantly, McKeon noted that the "integrity and viability of these courts cannot be compromised [and that] these recent events [at petitioner's residence] have done just that."

Court found that it was undisputed that the "recent events" were in reference to the arrest of petitioner's live-in boyfriend for drug possession and sale and the publicity it received. According to McKeon's answer but absent from the petition, the police also executed a search warrant at petitioner's home that resulted in the recovery of drug paraphernalia and a large amount of cash.

Petitioner asserted that McKeon's actions were not taken in his judicial capacity, which would avoid application of judicial immunity.

Court found that McKeon, as the presiding judge of the treatment courts, had the authority to establish a procedure "necessary to carry into effect the powers and jurisdiction" of the treatment court (Judiciary Law § 2-b [3]), and to preserve his court's dignity and integrity. Contrary to petitioner's assertions, McKeon's letter to petitioner was an exercise of his judicial functions as the presiding judge of the treatment courts and judicial immunity attaches to the acts at issue. Therefore, the SDHR 923*923 properly concluded that it lacked jurisdiction and the determination to dismiss the complaint was not arbitrary, capricious nor affected by an error of law.

"The State's absolute immunity has been regarded as akin to subject matter jurisdiction (*see Lublin v State of New York*, 135 Misc 2d 419, 420-421 [Ct Cl 1987], *affd* 135 AD2d 1155 [1st Dept 1987], *lv denied* 71 NY2d 802 [1988]). Judicial immunity is an absolute defense to liability for harm resulting from official judicial acts, regardless of the bad faith of the judge or lack of any reasonable basis for the action, except when the acts are unconstitutional, unlawful, made in the absence of jurisdiction, or made outside the scope of authority of the office (28 NY Jur 2d, Courts and Judges § 330). Judicial immunity is designed to ensure judges' absolute independence in the exercise of their judicial functions, free of the fear of intimidation and harassment from vexatious lawsuits (*see Mosher-Simons v County of Allegany*, 99 NY2d 214 [2002]). The immunity exists regardless of how erroneous the decision and regardless of the judge's tainted motives, provided the act is constitutional, not unlawful, and is performed within the general scope of authority of judicial functions (Kreindler, Rodriguez, Beekman & Cook, New York Law of Torts § 17:49 [15 West's NY Prac Series]). Judicial immunity is imperative to the nature of the judicial function that judges be free to make decisions without fear of retribution through accusations of malicious wrongdoing (*Mosher-Simons*, 99 NY2d at 219).

ADAM FRANCE, Plaintiff, v. CHRISTINE BRAUN, et al., Defendants. Civil Action No. 2:10-286-DCR. United States District Court, E.D. Kentucky, Northern Division. January 10, 2012. (42.U.S.C.Section 1983 action)

[Allegations of sexual harassment by program personnel: Immunity For Those Acting In Official Capacity Only]

Plaintiff Adam France alleges that he was sexually harassed by Defendant Christine Braun when he was participating in the Kentucky Drug court program under her supervision. According to France, Braun made numerous sexually suggestive remarks to him prior to his graduation from Drug court in April 2010. France further asserts that after he had been conditionally discharged from the Drug court program, Braun kissed him and touched him sexually.

Held: CLAIMS AGAINST STATE OFFICIALS OF THE Kentucky administrative Office of the Courts in their official capacity for failure to train and supervise drug court barred under 11th amendment barring suites against the state and its departments. Suit against Braun, employee, in her individual capacity not dismissed (action went beyond official capacity).

00 Cal. Daily Op. Serv. 6683, 2000 Daily Journal D.A.R. 8815. Todd Russell STROUD, Petitioner, v. The Superior Court of Los Angeles County, Respondent; The People, Real Party in Interest. Tyrone Franklin Swain, Petitioner, v. The Superior Court of Los Angeles County, Respondent; The People, Real Party in Interest. No. S081186.Aug. 10, 2000.

Reverses Court of Appeal finding that: (1) the magistrate's prior but non-mandatory commitment to attend a Judicial Council drug court advisory committee meeting was not good cause justifying his absence from the courtroom for an entire day near the end of the multi-day preliminary hearing, and did not override the defendants' statutory right to a continuous preliminary hearing; reinstates complaints against defendants which were the subject of the preliminary hearing.

PUBLIC HOUSING

Supreme Court of the United States. Department of Housing and Urban Development v. Rucker et al. No. 00-1770. Argued February 19, 2002; Decided March 26, 2002.

Reversed decision of U.S. Court of Appeals affirming U.S. District Court's preliminary injunction prohibiting tenants' evictions based on drug use of

petitioners' children and grandchildren. Held: Section 1437d(1)(6)'s plain language unambiguously requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity…"

United States Court of Appeals, Ninth Circuit. Pearlie RUCKER; Herman Walker; Willie Lee; Barbara Hill, Plaintiffs-Appellees, v. Harold DAVIS; Oakland Housing Authority, Defendants, and United States Department of Housing and Urban Development, Defendant-Appellant. Pearlie Rucker; Herman Walker; Willie Lee; Barbara Hill, Plaintiffs-Appellees, v. Harold Davis; Oakland Housing Authority, Defendants Appellants, and United States Department of Housing and Urban Development, Defendant.Nos. 98-16322, 98 16542. Argued and Submitted March 12, 1999. Opinion filed Feb. 14, 2000. Rehearing En Banc Granted and Opinion Withdrawn Aug. 18, 2000. Argued and Submitted En Banc Sept. 19, 2000. Filed Jan. 24, 2001*
***U.S. Department of Housing and Urban Development v. Pearlie Rucker, et. al.* Nos. 00-1770 and 00-1781. March 26, 2002.**

[2000]: Circuit Court affirmed U.S. District Court's preliminary injunction prohibiting tenants' evictions. Held that: (1) Congress did not intend statute authorizing eviction of a public housing tenant for criminal drug activity by a member of the tenant's household or any guest or other person under the tenant's control to apply to the eviction of innocent tenants, and (2) statute does not authorize the eviction of a tenant if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest. [2002] The decision was overturned by the U.S. Supreme Court on the grounds that Congress did not intend to permit the eviction of innocent tenants and judicial discretion should be exercised in applying the provisions of the statute.

Appellate Court of Illinois, Third District. The Housing Authority of Joliet, Plaintiff-Appellant, v. Patricia KEYS, Defendant-Appellee. No. 3-00-0902. Dec. 14, 2001.

Public housing tenant, who was patient in hospital when her adult grandson and niece committed crime and who had no knowledge of its commission, exercised no control over her grandson and niece, and, as such, could not be evicted.

Commonwealth Court of Pennsylvania. Housing Authority of the City of Pittsburgh, Appellant, v. Marcella FIELDS. Argued Feb. 7, 2001. Decided March 28, 2001.

Evidence did not establish that tenant's son was "under the tenant's control" justifying eviction.

Commonwealth Court of Pennsylvania. Allegheny County Housing Authority, Appellant, v. Janice HIBBLER. Argued Nov. 1, 1999. Decided Jan. 13, 2000. Publication Ordered April 11, 2000.

Housing authority required to consider mitigating factors before deciding to evict tenant and her family for drug-related activity of tenant's minor son.

REQUIREMENTS FOR PARENTAL PARTICIPATION (In Juvenile Drug court Cases)

305 Ariz. Adv. Rep. 14. Court of Appeals of Arizona, Division 1, Department D. Katherine S., Petitioner, v. The Honorable John FOREMAN, Judge of the Superior Court of the State of Arizona, In and For the County of Maricopa, Respondent Judge, State of Arizona, Real Party in Interest. No. 1 CA-SA 98-0328. Sept. 30, 1999. Review Dismissed Oct. 5, 2000.

Held: Juvenile court lacked jurisdiction over sister of juvenile adjudicated delinquent and participating in a juvenile drug court program, despite its issuance of subpoena to sister's mother directing her to bring sister to court, where sister had not committed any delinquent act and was not charged with aiding and abetting violation of any order directed to her brother, person who was properly before court. Relief granted; orders directing conduct of Katherine vacated.

SENTENCING OF DRUG COURT PARTICIPANTS [See Also "Effect Of Drug court Participation On Sentencing"]

STATE OF NEW JERSEY, Plaintiff-Respondent, v. RICKY GREENE a/k/a RICHARD L. HOWARD, RICKY L. GREENE, RICHARD L.

GREENE and STEVEN HOWARD, Defendant-Appellant. No. A-2031-11T2. Superior Court of New Jersey, Appellate Division. Submitted January 30, 2013. Decided March 1, 2013.

One year and seven months after defendant was sentenced to special probation and drug court, he pled guilty to violating several of the conditions. The judge found no mitigating factors and the same three aggravating factors she found at the time of the initial sentencing. Again concluding that the aggravating factors substantially outweighed the nonexistent mitigating factors, the judge indicated that she wished she could be more lenient but advised defendant that she could be more punitive because defendant was subject to a ten-year term of imprisonment and a five-year-minimum term. The judge explained, "So, my leniency will come in the form of I'm going to give you what the State is recommending... seven years with a 42 month period of parole ineligibility." Court found that the judge's findings on and balancing of the aggravating and mitigating factors are supported by the record and the sentence "is neither shocking to the conscience nor an abuse of discretion…"

STATE of New Jersey, Plaintiff-Respondent, v. Darryl BISHOP, Defendant-Appellant. State of New Jersey, Plaintiff-Respondent, v. Wilberto Torres, Defendant-Appellant. 60 A.3d 806 (2013) 429 N.J. Super. 533. Nos. A-0048-11T4, A-1399-11T4.Superior Court of New Jersey, Appellate Division. Argued September 12, 2012. Decided February 27, 2013.

Upholds imposition of a lengthy sentence under provisions of "special probation" if defendant terminated from drug court; lengthy sentence is the leverage for "carrot and stick" approach.

Superior Court of New Jersey, Appellate Division. STATE of New Jersey, Plaintiff-Respondent, v. Richard DELCRISTO, Defendant-Appellant. Submitted Dec. 7, 2010. Decided Feb. 16, 2011.

On appeal from Superior Court of New Jersey, Law Division, Warren County, Indictment No. 07-12-502.

[State guidelines provide for enhanced sentence for defendants who fail drug court]

Defendant was sentenced to three years in prison after pleading guilty to a violation of probation following drug court termination. The State subsequently moved to correct an "illegal sentence." Because, pursuant to the "Brimage Guidelines" for sentencing upon drug court termination, a five year sentence was required, rather than the three years that would otherwise have been applicable. After granting that motion, the court resentenced defendant to five years in prison with an eighteen-month parole disqualifier. Defendant appealed that resentencing, arguing that the resentencing violated the Double Jeopardy clauses of the state and federal constitutions.

Held: appeal granted; case remanded and for the re-imposition of the three year sentence imposed.

[T]he touchstone of the double jeopardy analysis lies in the expectation of finality that a defendant vests in his sentence." . It is true that *N.J.S.A.* 2C:35-12 requires the imposition of a mandatory minimum term higher than the twenty-two month period imposed here. However, that same section also provides that a lesser minimum term can be imposed when "the defendant has pleaded guilty pursuant to a negotiated agreement." *N.J.S.A.* 2C:35-12. That is precisely the situation here. Thus, the sentence imposed is not illegal.

RONDELL WALKER, Appellant, v. STATE OF INDIANA, Appellee. No. 34A02-1101-CR-612. Court of Appeals of Indiana. March 13, 2012.

"…Walker argues that a maximum sentence is inappropriate because he suffers from drug addiction. Specifically, Walker argues that his substance abuse "should weigh heavily in his favor because all facts show a person who is addicted to life altering substances and who needs to be rehabilitated rather than harshly punished." But Walker has already been offered the most comprehensive form of rehabilitative intervention available to offenders with substance abuse problems in Indiana—the opportunity to participate in Drug court. As part of the Drug court program, Walker received substance abuse treatment, intensive judicial monitoring, and many other services. Walker was given the chance to avoid prison time while working to overcome his addiction, but he squandered that opportunity by breaking the Drug court rules. It may be true that Walker suffers from drug addiction and could benefit from further treatment, but the judicial system simply has nothing left to offer him short of incarceration. For all of these reasons, we cannot conclude that Walker's maximum, twenty-year executed sentence is inappropriate…"

JACOB J. CUMMINGS, Appellant-Defendant, v. STATE OF INDIANA, Appellee-Plaintiff. No. 34A04-1103-CR 103. Court of Appeals of Indiana. Filed August 31, 2011.

Affirms sentence. As the trial court noted at sentencing, Cummings has not suffered a relapse but has by choice knowingly and intentionally engaged in a pattern of unlawful behavior. …." Affirms sentence of three years of incarceration.

Court of Appeals of North Carolina. STATE of North Carolina v. Vanessa Mae FISHER. No. COA10-579. Feb. 15, 2011.

[upholds sentence imposed following drug court termination – no obligation to impose an alternative sentence]

Defendant appeals imposition of sentence by McDowell County District Court following drug court termination on the grounds that court abused its discretion by not imposing an alternate sentencing disposition as requested by her counsel.

Held: sentence affirmed. Defendant cites no authority to support her position that the trial court was required to impose an alternative disposition and cannot demonstrate that the trial court committed a manifest abuse of discretion by activating the sentences originally imposed

Court of Criminal Appeals of Tennessee, at Jackson. State of Tennessee v. Brent R. Steward. No. W2009-00980-CCA-R3-CD.

Defendant claimed due process rights violated because judge presiding over probation revocation hearing had previously served as member of drug court team and received ex parte information regarding the defendant's conduct at issue.

Held: Due process clause requires defendant's probation revocation to be adjudicated by a judge who has not previously reviewed the same or related subject matter as part of the drug court team. Reversed decision and remanded case for new hearing before a different judge.

Mary E. FORD, Appellant v. COMMONWEALTH of Kentucky, Appellee and William E. Flener, Appellant v. Commonwealth of Kentucky, Appellee. Nos. 2008-CA-001990-MR, 2009-CA-000889-MR, 2009-CA-000461 MR. April 30, 2010.

[credit for time served: abuse of discretion for court to not require complete record regarding time served] Having same judge preside over drug court and revocation hearing is not a denial of right to impartial hearing/due process]

Defendants appeal revocation of probation alleging (1) denial of due process because not provided an impartial hearing since the same judge presided over drug court and revocation hearing; an d (2) failure to properly credit time served.

[Agree to hear the appeal on this issue even though not clear issue preserved on the record because of the due process implications]

First: On probation termination: Standard of review is whether trial court abuse its discretion in revoking appellants' probation and diversion.

Held: having the same judge preside over the drug court and the revocation hearing does not necessarily violate the requirement for an unbiased judge; no evidence in the record to suggest personal bias or prejudice , etc. Probation is a privilege rather than a right. Both drug court programs and revocation hearings are subject to different due process requirements than the prosecution of cases. Trial practice in prosecutorial cases has allowed judges to preside over the same case upon remand and in successive trials involving the same defendant.

Therefore, can find no error in the judge here presiding over both the drug court and the revocation proceedings, and hence, the court did not abuse its discretion.

Second on credit for time served: -found Court abused its discretion by relying on incomplete record.

The court based its order on an admittedly incomplete record of the case and the Office of Probation and Parole's assurance that Ford had received appropriate jail time credit. If confusion existed as to the amount of jail time credit, a hearing should have been held. Accordingly, we determine that it was an abuse of discretion for the trial judge to fail to adequately explore the Ford's correct amount of jail time credit in the instant case.

Held: vacated court's order denying appellant's motion to reconsider its previous order regarding custody credit, and remanded to the Muhlenberg Circuit

Patin Earl HARRIS, Appellant-Defendant, v. STATE of Indiana, Appellee-Plaintiff. No. 53A04-0912-CR-702. April 13, 2010.

[*adequacy of court record – prevented ruling on issue]*
[*sentencing*]

Defendant pled guilty to theft, a Class D felony, to being a habitual offender, and to burglary, a Class C felony and agreed to participate in the Monroe County Drug Treatment Court Program and, if he completed the drug treatment program, the charges pled to would be dismissed; if he failed to complete the program, sentencing would be left to the trial court.

Defendant was terminated from the drug treatment program in April of 2008 after numerous violations. The trial court accepted the plea agreement and, after citing Harris's criminal history, sentenced Harris to maximum terms of three years for theft, four and one half years for the habitual offender finding, and eight years for burglary, all to be served consecutively. Defendant appealed on grounds (1) that the fifteen and one half year sentence was inappropriate because he pled guilty and was starting to show progress in turning his life around at the time of sentencing.

Held; sentence appropriate; record is inadequate in terms of showing substantial progress by defendant in treatment; affirms trial court termination.

Court of Appeals of Arkansas. Bernard JONES, Appellant v. STATE of Arkansas, Appellee. No. CACR 09 1046. March 31, 2010.

[Termination provisions – judge can request defendant participate in prison treatment program]

Appellant, terminated from the Hempstead County Circuit Court Drug court and his probation revoked, was sentenced to a term of six years in prison with a special condition that he attend drug counseling as a condition of his incarceration. He appeals, alleging the sentence was illegal because the judge exceeded his authority in imposition special conditions for his incarcerations.

Held: condition is stated in the form of a recommendation and was in response to appellant's request for treatment.

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Rachel Louise LOVELESS, Defendant and Appellant. No. E045449. (Super.Ct.No. FMB008330). March 9, 2009.

[sentencing: court can take into account performance in drug court to impose longer sentence upon defendant who fails the program]

Defendant appeals from a three-year prison sentence imposed after she violated the terms of her Drug court probation and argues the trial court (1) violated her due process rights in 2006 by revoking her Proposition 36 probation; (2) violated her due process right to individualized sentencing by imposing the aggravated term based on a court policy; (3) erred by not considering factors in mitigation or aggravation as they existed at the time of the original grant of probation; and (4) abused its discretion in imposing the upper term.

Held:

> 1. Defendant's Proposition 36 Probation was Properly Revoked Where Defendant's Persistent Failure to Enroll and Participate In Drug Treatment Constituted a Refusal of Treatment.
>
> 2. Defendant's Failure to Object that Her Sentence Was Not Individualized Was Forfeited and Lacks Merit-
> A trial court has broad discretion when it comes to sentencing. Defendant's claim of error is that the court followed a local policy of imposing the upper term upon revocation of DRUG COURT probation. If the upper term had been imposed in conformity with a local policy, it was defendant's duty to object.
>
> The trial court did not state it was imposing the upper term pursuant to any local court policy, although the prosecutor argued that the upper term could be imposed based on both the local policy and defendant's unsatisfactory performance on probation. Instead, the court selected the upper term because of defendant's performance on

probation and the fact she forged her community service hours. These are fact-based, individualized reasons for imposing the upper term. Thus, even if defendant had objected to the imposition of an aggravated sentence pursuant to a local court policy, we would find there was no error because the record does not support such an assertion.

3. Defendant's Claim that Her Sentence was Based on Improper Aggravating Factors Was Forfeited by Failing to Object.

To the extent defendant is urging us to reverse the sentence because the number of mitigating factors is numerically greater than the number of aggravating factors, her argument must fail. The selection of the base term is not a simple matter of adding the number of factors; it is the qualitative weight that the sentencing court accords to the factors which governs whether the upper or lower term is justified. (*People v. Wright* (1982) 30 Cal.3d 705, 719.)

Court of Criminal Appeals of Tennessee, at Jackson. STATE of Tennessee v. Justin VAULX. No. W2008-00772-CCA-R3-CD. Assigned on Briefs Jan. 6, 2009. May 13, 2009.

Direct Appeal from the Circuit Court for Madison County challenging the defendant's removal from community corrections and drug court participation and order for him to serve his sentence in confinement, based on positive test results from analysis of his drug patch which he claims was unreliable and noted further that he had never failed a urinalysis test during his entire time in drug court.

Holding: Affirms sentence; No abuse of discretion by the trial court. Like probation, the trial court may revoke a community corrections sentence upon finding by a preponderance of the evidence that the defendant has violated the conditions of the sentence. The court specifically found the defendant's testimony not to be credible in light of the prior violations of his sentence for using cocaine and marijuana. The court noted: "I've sent him to drug treatment twice. I put him in drug court and each and every time, [the defendant] has continued to use illegal drugs, specifically cocaine and marijuana."

Court of Appeals of Virginia. Judson Jeffrey HARRIS v. COMMONWEALTH of Virginia. Record No. 0208-08-2. May 12, 2009.

Appellant claims that termination from drug court, which is a liberty interest, requires the same procedural protections as a person facing revocation of probation, including notice, the opportunity to challenge the case against him, and the opportunity to be heard and that his termination violated his the Due Process clause of the Fourteenth Amendment. Appellant also claimed that the reasons for his termination related to comments he made on a MySpace page which were protected under the First Amendment and that he could not be terminated d from the program or incarcerated for these comments.

Holding: Claims of Due process violations barred because not raised at time of termination and request to reverse termination never made. [See Also *Harris v. Commonwealth,* Record No. 2927-07-2 (Va.Ct.App. Mar. 10, 2008 above where appellant alleged that his termination from drug court violated his due process rights and had made this argument to the trial court during his motion for bond and during his sentencing hearing. However, he never sought reversal of his termination from the drug court program because of an alleged violation of his due process rights. This Court held that Rule 5A:18 barred our consideration of the issue because the specific objection he made on appeal was not timely made in the trial court.

Here, appellant argued during his sentencing hearing that he should not be sent to jail because to do so violated his due process rights. In support of this argument, appellant asserted that he was entitled to due process prior to his termination from the drug court program. However, appellant did not ask the circuit court to reverse his termination on this ground. Therefore, due process argument was not presented to the circuit court and now barred by Rule 5A:18.

Appellant also contends that the circuit court erred in refusing to consider evidence of the reasons he was terminated from the drug court program. The record clearly shows that Harris never offered, nor did he seek to offer, any evidence of the reasons he was terminated from the drug court program. While Harris advised the court that people were present to address the issue, he never sought to call any witnesses or to present any evidence. Therefore, cannot be determined that circuit court erred in

refusing evidence when no evidence was offered nor was any refused.

Appellant also claims circuit court erred in not considering alternatives to incarceration. Here, the terms of the plea agreement accepted by the circuit court explicitly stated that if appellant failed to successfully complete the drug court program, he would be returned to the circuit court for determination of his guilt and imposition of a sentence.

The circuit court accepted the order terminating appellant's participation in the drug court program, found appellant guilty, and imposed the sentence appellant accepted in the plea agreement. Thus, the circuit court cannot be deemed to have erred in not considering alternatives to incarceration.

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Joseph LOYA, Defendant and Appellant. No. E044823. (Super. Ct. No. FMB008660). May 7, 2009.

[upholds midterm sentence]

Defendant contends that the trial court abused its discretion by sentencing him to the midterm rather than the low term because the mitigating factors, "clearly, substantially and [u]ndisputedly outweighed the non-existent aggravating factors."

Holding: Sentence affirmed: A trial court has wide discretion in sentencing matters and may balance aggravating and mitigating factors against each other by qualitative as well as quantitative measures. Absent a clear showing that a sentencing decision is arbitrary or irrational, it will be upheld.

Supreme Court, Appellate Division, Fourth Department, New York. The PEOPLE of the State of New York, Respondent, v. Jason ANDREWS, Defendant-Appellant. May 1, 2009.

Defendant contends that the court lacked authority to sentence him because the Participation Agreement had expired on October 30, 2006, four months before his termination from the Drug court program and over six months before sentencing.

Held: Defendant's agreement "to participate [in the **Drug court** program] for a period of time not to exceed thirty-six months" did not impose a time limitation upon the deferral of sentencing or otherwise deprive the court of authority to sentence defendant pursuant to the terms of the plea agreement.

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Jeramie Paul MILLER, Defendant and Appellant. No. E045450. (Super.Ct.No. FMB005683). March 24, 2009.

[Sentencing: upholds maximum sentence for offense]

Defendant sought modification of his three-year prison sentence for felony drug possession imposed following termination from drug court program and represented in "Drug court Application and Agreement" which he signed as the maximum punishment he could receive. At termination hearing, counsel argued for a 16-month sentence, citing various mitigating factors that outweighed aggravating factors. After counsel finished, but before pronouncing sentence, the court commented as follows: "Mr. Miller was told, as is everyone that comes in here, that once you come into drug court you're going to be sentenced to the aggravated term in the event that you fail out of drug court, because you'll have ample opportunity to use the tools and the benefits of the program. If you decide not to do that, then you'll be sentenced to the aggravated term or you do not get drug court." Counsel made no further objection.

Defendant claims he received no such warning.

Holding: Assuming defendant is correct that the court did not in fact warn him that he would receive the upper term if he did not complete drug court, and so identified a factor that did not apply to defendant's particular case, he would still have had to object to preserve a claim of error on this basis. However, defendant was not prejudiced by counsel's omission since there was other evidence from which the court could reasonably have concluded that the aggravating factors in his record outweighed the two in mitigation.

United States Court of Appeals, Ninth Circuit. UNITED STATES of America, Plaintiff-Appellee, v. Nicolas FRANCO-FLORES, aka Nico, Defendant-Appellant. No. 08-10101. Argued and Submitted Feb. 11, 2009. Filed March 9, 2009.

[suspended sentence while defendant participates in drug court is considered a "criminal justice sentence" under 4A1.1(d) of the federal sentencing guidelines for purposes of score calculations.]

Background: Defendant was convicted in the United States District Court for the District of Nevada of being an illegal alien in possession of a firearm and distribution of a controlled substance, and was sentenced to 120 months' imprisonment, and he appealed, claiming the calculation of his sentence improperly factored in points based on his prior unsuccessful termination from a state drug court program in Reno, Nevada.

Holding: The Court of Appeals, D.W. Nelson, Senior Circuit Judge, held that Nevada state-law offense for which sentence was deferred constituted a criminal justice sentence.

Under U.S. Sentencing Guidelines section 4A1.1(d), two additional criminal history points must be added "if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." A "'criminal justice sentence' means a sentence countable under § 4A1.2 ... having a custodial or supervisory component, although active supervision is not required for this item to apply." There is no dispute that Franco-Flores committed the federal offenses while subject to an outstanding drug court arrest warrant for failing to comply with drug court requirements. The only real dispute is whether his deferred sentence on the original state court drug charge, to which he pleaded guilty, contained a "custodial or supervisory component" such that the state court disposition constituted a "criminal justice sentence" under section 4A1.1(d).

Franco-Flores argues that no supervisory conditions were imposed with respect to his drug treatment and therefore he was not under a criminal justice sentence at the time of the instant offense. The record suggests otherwise. Franco-Flores's state sentence was deferred with conditions. Although he was not monitored by a probation officer, he was monitored by the drug court, and he was required to make court appearances and attend his drug treatment program there. Indeed, if there were any doubts as to the existence of conditions at the time of his federal arrest, there was an outstanding bench warrant issued by the State of Nevada for failing to appear before the drug court.

We make explicit: …a suspended sentence with a supervisory or custodial component can constitute a "criminal justice sentence" under section 4A1.1(d).

Court of Appeals of Virginia, Richmond. Judson Jeffrey HARRIS v. COMMONWEALTH of Virginia. Record No. 2927-07-2. March 10, 2009.

Appellant was convicted of possession of heroin after he failed to meet the conditions of drug court participation that deferred the trial court's finding of guilt. On appeal, appellant contends the trial court erred (1) in failing to reverse his termination from the Rappahannock Area Regional Drug Treatment Court (drug court) because the termination violated his due process rights under the Fourteenth Amendment; (2) in refusing to consider evidence of the reasons for his termination from drug court; and (3) in refusing to consider alternatives to incarceration.

Held: Appellant's claim of denial of due process was barred because raised for the first time on appeal. Appellant's claim that the trial court erred in refusing to consider evidence of the reasons for his termination from drug court and in refusing to consider alternatives to incarceration were rejected because (1) challenge to reasons for his termination should have been raised with the drug court; and (2) pursuant to his plea agreement, if appellant failed to successfully complete the drug court program, he would be found guilty and sentenced.

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Mark Aaron VOGT, Defendant and Appellant. No. E043581. (Super.Ct.No. FMB7824). Sept. 16, 2008.

Defendant and appellant appeals after his probation was revoked and he was sentenced to the upper term of four years eight months in state prison, contending that the trial court improperly denied him a probation violation hearing in violation of his due process rights, and that the imposition of the upper term violated his right to a jury trial under *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856; 166 L.Ed.2d 856] (*Cunningham*).

Holding:

1. *Defendant Waived His Right to a Probation Revocation Hearing.* The facts and circumstances constitute sufficient evidence that defendant voluntarily and

intelligently waived his right to a probation revocation hearing. Defendant opted to participate in the drug court treatment program in lieu of custody, so the trial court placed him on probation in order to allow him to participate. Defendant initialed and signed the form entitled "Drug court Application and Agreement" (the Agreement).

2. *The Trial Court Properly Imposed the Upper Term.* The defendant explicitly agreed that if he failed the drug court treatment program, he would be terminated from the Program and sentenced "in the range indicated in the Plea Bargain Agreement." The plea agreement expressly stated the sentencing range as two, three, or four years for transportation of a controlled substance, and the court sentenced him to the upper term of four years accordingly.

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Kari Lynn SUKANE, Defendant and Appellant. Nos. E042078, E042952. (Super.Ct.Nos. FMB6438, FMB6551). July 29, 2008.

[Affirms sentence imposed without probation violation hearing since Defendant waived right to hearing in Drug court Agreement she executed.]

Defendant was placed on probation in two separate cases and ordered to complete the Drug court Treatment Program, in lieu of going to prison. After numerous program violations, the trial court sentenced her at the same time on both cases. The court imposed the upper term in each case, for a total term of seven years in state prison. The two cases have been consolidated on appeal, and defendant now argues: 1) she was deprived of her right to a formal probation violation hearing, 2) the court abused its discretion when it imposed the upper term because it failed to consider or weigh her mitigating circumstances, and 3) the imposition of the upper term violated her right to a jury trial under *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*).

Held: (1) Defendant Waived Her Right to a Probation Revocation Hearing Twice when she executed agreement to participate in the Drug court Treatment Program; (2) The Trial Court Properly Imposed the Upper Term in Sentence even though mitigating factors not considered since it is not reasonably probable that a more favorable sentence would have been imposed in the absence of error.

Supreme Court of Kentucky. COMMONWEALTH of Kentucky, Appellant v.Amanda R. GADDIE, Appellee. No. 2006-SC-000575-DG. Nov. 21, 2007.

[Trial court could not increase sentence that was entered as a condition for defendant to enter drug court]

Appeal from Hardin County Circuit Court.

Gaddie entered a guilty plea in the district court to the charges of prescription drugs not in original container and possession of marijuana, for which she received a term of imprisonment of 180 days in jail, probated for two years. One of the conditions of her probation was submission to drug screens to ensure that she did not use illicit drugs. Two months after she entered her guilty plea, she had a positive drug screen for marijuana. Based on the positive drug screen, the Commonwealth moved the district court to revoke Gaddie's probation. In lieu of revocation, Gaddie agreed to an increase in her term of imprisonment from 180 days in jail to twelve months in jail, probated for two years on condition of successful completion of drug court. The district court issued an amended judgment reflecting the agreement. After serving six months in the county detention center, Gaddie filed a petition for writ of habeas corpus under Kentucky Revised Statutes (KRS) 419.020 in the circuit court. The circuit court concluded that being allowed to participate in the drug court program was an extraordinary circumstance justifying relief under CR 60.02(f), especially when Gaddie requested and agreed to the relief. And the circuit court reasoned that although constitutional rights were at issue, such rights could be waived, as Gaddie had done when she agreed to an amendment of the original judgment to provide for a longer jail term if she did not complete the drug court program.

Held:

(1) trial court lacked jurisdiction to increase original sentence for drug offenses more than ten days after entry of judgment, and
(2) defendant's participation in drug court as condition of probation was not reason of extraordinary nature for amending original

judgment to increase sentence for defendant to enter the drug court even though defendant requested referral to drug court and agreed to increased sentence.

Supreme Court of Idaho, Boise, September 2007 Term. STATE of Idaho, Plaintiff-Respondent, v. Paul Lawrence ROGERS, Defendant-Appellant. No. 33935. Oct. 22, 2007.

[Drug court judge can also serve as sentencing judge]
[Drug court termination hearing requires same due process protections as parole or probation revocation hearing.]
[Drug court participation is a liberty interest under the 5th and 14th amendment.]

[also extensive discussion of Idaho drug court history and provisions; recognizes drug courts are different in each locale and no uniform process throughout the state]

Defendant plead guilty in return for admission into a diversionary drug court program, was terminated from the drug court program and convicted in the District Court, Fourth Judicial District, Ada County, of possession of a controlled substance. Defendant appealed, alleging that he was terminated from the drug court program without due process of law in violation of the Fourteenth Amendment.

Held: As a matter of first impression, drug court termination proceedings where defendant has pled guilty required the same restricted due process protections provided to parolees and probationers. Defendant who plead guilty in return for admission into a diversionary drug court program had a protected liberty interest in remaining in the program, entitling him to the restricted due process protections provided to parolees and probationers. U.S.C.A. Const.Amend. 14. Because Rogers was required to plead guilty in order to enter ACDCP he had a liberty interest in remaining in that diversionary program.

Parolees and probationers have a liberty interest under the Fifth and Fourteenth Amendments and cannot be terminated from parole or probation without due process of law. U.S.C.A. Const.Amends. 5, 14. Due process required for termination of drug court participation is to be flexible, does not need to be equated to a separate criminal prosecution and may be informal, on the condition that the safeguards are provided. U.S.C.A. Const.Amend. 14.

Drug court judge may preside over drug court termination proceedings and may consider evidence which might not necessarily be admissible in a criminal trial, if such evidence is disclosed prior to the hearing, is reliable and would assist the court in making its determination.

Drug court judge presiding in drug court termination proceedings may serve as the sentencing judge, since information from the termination proceedings would be admissible in a sentencing hearing.

Superior Court of New Jersey, Appellate Division. STATE of New Jersey, Plaintiff-Appellant, v. Dale A. SCOTT, Jr., Defendant-Respondent. Argued March 14, 2007. Decided: Sept. 5, 2007.

[Authority for judges to resentence terminated defendant to drug court – if state consents to drug court sentence initially, state cannot subsequently object at hearing on defendant's violation of drug court terms]

Defendant, Dale A. Scott, Jr., entered a negotiated plea of guilty to multiple charges, i.e., three counts of third degree burglary, five counts of third degree theft, three counts of third degree forgery; three counts of third degree uttering a forged instrument; and one count of fourth degree theft. In exchange, the State agreed to recommend concurrent terms aggregating a ten-year period with a three-year parole disqualifier, or successful completion of "Drug court." Judge Edward M. Coleman imposed a five-year probationary term in "Drug court." Four months later, defendant pled guilty to a violation of probation for failing to comply with the terms of the "Drug court" program. Over the State's objection, a different judge re-sentenced defendant to continue in "Drug court." The State appeals from that sentence. We affirm.

Both parties rely on the holding in *State v. Matthews,* 378 *N.J.Super.* 396 (App.Div.), *certif. denied,* 185 *N.J.* 596 (2005), which was decided after the trial court sentenced defendant for the first time, but before the trial court re-sentenced defendant. During the original sentencing in *Matthews,* the prosecutor objected to the defendant being sentenced to probation and placed into "Drug court." *Id.* at 398. The trial court, in its belief that it was bound by *N.J.S.A.* 2C:35-14c, then proceeded to sentence the defendant to a custodial term, finding that the prosecutor's objection to "Drug court" was not a

"patent abuse of prosecutorial discretion," pursuant to *N.J.S.A.* 2C:35-14c.

On appeal, we affirmed the sentence, holding that:

[W]hen the express conditions enumerated in *N.J.S.A.* 2C:35-14-the specific statute-are extant, admission into special probation, i.e., a Drug court program, is governed by *N.J.S.A.* 2C:35-14. It is only when a defendant is not precluded from a Drug court program by the restrictions in *N.J.S.A.* 2C:35-14a and b, and the prosecutor does not have the right to object under the patent and gross abuse of discretion standard under subsection c, that admission into a drug treatment program under *N.J.S.A.* 2C:45-1b(3) may be appropriate.

Because the defendant was convicted of offenses which were similar to *N.J.S.A.* 2C:35-5, we found that the prosecutor had the right pursuant to *N.J.S.A.* 2C:35-14c to object to the defendant's request to be placed into "Drug court." *Matthews, supra,* 378 *N.J.Super.* at 404. We also concluded that the prosecutor's objection to defendant's requested sentence of probation and "Drug court" was not "a patent and gross abuse of discretion," and therefore upheld the trial judge's sentence. *Ibid.* We conclude that the reasoning in *Matthews* is persuasive and well-reasoned. We will continue to follow *Matthews* unless and until the Supreme Court decides differently.

However, *Matthews* presents a different procedural history than this case. Here, the prosecutor consented to "Drug court" at the original hearing, but objected after a Violation of Probation (VOP) finding. The State argues that because a VOP sentence should be based on the original crime, the State is allowed, "to raise objections that could have been raised at the original sentencing." We are not persuaded.

The State argues that *State v. Ikerd,* 369 *N.J.Super.* 610 (App.Div.2004) stands for the proposition that because a VOP sentence should be based on the original crime, the State is therefore able to object upon re-sentencing. However, no such proposition is found in *Ikerd.* The State consented to a "Drug court" sentence. It did not qualify this consent or reserve the right to object upon a re-sentencing. We conclude that in these particular circumstances the State has the right to be heard at a re-sentencing hearing, but it cannot exercise the veto power that *N.J.S.A.* 2C:35-14c permits at the original sentencing.

County Court, Monroe County, New York. PEOPLE of the State of New York, Respondent, v. William MILLER, Defendant-Appellant. No. 05/0131. Aug. 9, 2006.

[Court deferring sentencing and referring participant to drug court retains jurisdiction to sentence if participant terminates drug court]

Defendant-appellant, William Miller, appealed from a judgment of Henrietta Town Court (Kopacki, J.), convicting him, upon his guilty plea, of two counts of petit larceny and sentencing him to two consecutive one-year terms in the Monroe County Jail. The sentence was imposed after defendant, whose case had been transferred to the Rochester Drug Treatment Court pursuant to CPL 170.15(4) upon his guilty plea, was terminated from that court, and the case was transferred back to the Henrietta Town Court for sentencing,

On appeal, defendant raises various points, all based upon his erroneous premise that he was originally sentenced by the Henrietta Town Court to probation. [His sentence was deferred pending participation in the drug court]

Contrary to defendant's position, on September 29, 2005, the Henrietta Town Court did not "revoke" defendant's probation or "re-sentence" defendant to a term of local jail time. To understand the error of defendant's position, one only need look at the record in this case.. The record of this case contains no copy of any conditions of probation. Rather, it is evident that what occurred in this case is that defendant, following two arrests for petit larceny that were addiction-driven, pleaded guilty to both charges and executed a Drug court contract under which he was given the opportunity and agreed, to have his case transferred to and participate in the Rochester Drug Treatment Court. Defendant consented to have his sentencing adjourned while he participated in that Court's Drug Treatment program.

Court of Appeals of Iowa. STATE of Iowa, Plaintiff-Appellee, v. John Ira BELLVILLE, Defendant-Appellant. No. 04-1634. Aug. 31, 2005.

Although Court finds that appellant did not knowingly waive his right to appeal when entering the drug court, based on the colloquy between the appellant and the court, upholds District Court's

imposition of consecutive prison terms totaling 52 years pursuant to drug court plea agreement after appellant is terminated from drug court, finding no abuse of discretion.

Court of Appeals of Iowa. STATE of Iowa, Appellee, v. Toby Lynn MERRITT, Appellant. No. 04-1664. June 15, 2005.

Court found that it appeared the sentencing court imposed its sentence due solely to the indication at the time the defendant entered his plea and was referred to drug court of what sentence would be imposed if he proved unsuccessful in the drug court program. It did not appear to consider either additional factors or alternative sentencing options.

District court's failure to exercise discretion in imposing sentence was, in fact, an abuse of its discretion. Moreover, its failure to state reasons for the particular sentence imposed was error.
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Court of Appeal, First District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Woodrow Paul CHANEY, Defendant and Appellant. No. A104021. (Solano County Case Number FCR 184072). June 17, 2004.

[failure in drug court and subsequent treatment programs while under probation supervision could be considered aggravating factor for purposes of subsequent sentencing]

United States District Court, D. Maine. UNITED STATES of America v. Trevis CALDWELL, Defendant Nos. CRIM.02-41-P-H-01, CRIM.02-65-P-H.Dec. 10, 2002.

Permits consolidation of cases for sentencing purposes since they were already consolidated when referred from different counties to the drug court docket.

Dispute arose as to how defendant's criminal history category should be determined for purposes of sentencing under Sentencing Guidelines. The District Court, Hornby, Chief Judge, held that three state court criminal convictions were functionally consolidated into one, when defendant was sentenced to probation by DRUG COURT, contingent upon successful completion of rehabilitation program. (Maine's Adult Drug Treatment Court in Cumberland County assembled the criminal charges pending against this defendant in three different counties and proceeded to impose two alternative dispositions for the resulting group: essentially concurrent probation on all charges if he was successful in the Adult Drug Treatment Court program; consecutive prison terms on all charges if he was unsuccessful. Although the Adult Drug Treatment Court entered no formal consolidation order, action considered "functionally consolidated" purposes of guideline calculations. Several of the stated objectives of the drug court considered to be are consistent with functional consolidation: to "coordinate case processing and monitoring of participants in ADTC who have multiple contacts with the legal system".

Court of Appeal, First District, Division 4, California. The PEOPLE, Plaintiff and Respondent, v. Brett Lamar RASH, Defendant and Appellant. No. A096895. (Sonoma County Super. Ct. No. 30953). Oct. 30, 2002.

[No valid plea agreement precluding imposition of a prison sentence existed for Defendant who entered no contest plea to charges of possessing CDS and driving motor vehicle while license suspended (which prosecutor explicitly stated was not a negotiated plea conditioned on drug treatment), and was subsequently rejected for treatment despite judge's indication of his inclination that defendant participate in treatment**]**

Court of Appeals of Iowa. State of Iowa, Appellee, v. Kristen Wen PAUL, Appellant. No. 99-1592. April 11, 2001. Appeal from the Iowa District Court for Decatur County.

Upholds Defendant's waiver of right to appeal as condition of plea agreement to enter drug court.

[Defendant subsequently terminated from drug court and sentenced to term of imprisonment "not to exceed sixty-four years".]

Court of Appeals of Georgia. GARDNER v. The STATE (Two Cases). Nos. A03A0508, A03A0557. Jan. 29, 2003.

Violation of Drug court Program Requirements constituted violation of "general condition of probation" rather than "special condition" under Georgia Statute thereby authorizing revocation of no more than two years of probation.

The People of The State of New York, Respondent, v. Kevin C. Brothers, Appellant. Supreme Court, Appellate Division, Third Department, New York. Jan. 6, 2000.

Defendant was convicted in the County Court, Rensselaer County, McGrath, J., upon his plea of guilty to criminal possession of a controlled substance in the fifth degree and, following his discharge from a drug program, was sentenced to an indeterminate term of two and one-third to seven years in prison. Defendant appealed. The Supreme Court, Appellate Division, held that evidence supported conclusion that defendant willfully violated an agreement requiring him to complete a drug program, such that he was subject to a term of incarceration.

STATE STATUTORY INTERPRETATION

1. ARIZONA: PROPOSITION 200

Court of Appeals of Arizona, Division 1, Department B. STATE of Arizona, Appellant, v. Dean Thomas Tousignant, Appellee. No. 1 CA-CR 01-0418. April 9, 2002.

Under Drug Medicalization Prevention and Control Act (Proposition 200), Defendant who violates probation cannot reject further probation but must be continued on probation with appropriate additional conditions imposed.

294 Ariz. Adv. Rep. 22. Court of Appeals of Arizona, Division 2, Department B. In re Fernando C. No. 2 CA-JV 98-0089. May 3, 1999. Review Denied Sept. 21, 1999.*

Juvenile was adjudicated delinquent and placed on **drug court** probation after he was found guilty of unlawful possession of marijuana. Following violation of probation, the Superior Court committed the juvenile to juvenile corrections facility, and the juvenile appealed, contending that the Drug Medicalization Prevention and Control Act did not apply to juveniles and he therefore could not be committed to a corrections facility. The Court of Appeals ruled that the Act did not apply to juveniles and he therefore could be committed to a corrections facility. Affirmed.

David Peter Calik, Petitioner v. Superior Court of the Statue of Arizona In and For the County of Yuma and the Hon. Kirby Kongable, Judge thereof, Respondents and State of Arizona, Respondent and Real Party in Interest, No. 1 CA-SA, 97-0273. Court of Appeals of Arizona. Division 1, Department A. October 23, 1997. 254 Ariz. Adv. Rep. 22.

(Case subject to further appellate review)

Defendant pled guilty to possession of methamphetamine in the Superior Court of Yuma County and was sentenced to probation with the condition of incarceration in the county jail. Defendant challenged the sentence on the grounds that Proposition 200 required the suspension of a sentence of incarceration and imposition of probation for persons who committed nonviolent first time drug offenses. The Court held that, based on a review of the statutory language which was conclusive, the provisions of Proposition 200, did not preclude trial courts from imposing incarceration in jail as a condition of probation for such offenders.

2. ARKANSAS: DRUG COURT ACT (Ark.Code Ann. § 16-08-303(c)(1) (Repl.2006).

Supreme Court of Arkansas. Jeremy Michael RICHIE, Appellant, v. STATE of Arkansas, Appellee. No. CR 08-793. Dec. 3, 2009.

[Statutory construction- Arkansas Drug court Statute]

Arkansas Drug court Statute does not authorize court to impose incarceration or conditions of incarceration; once defendant is sentenced, authority to determine conditions of incarceration passes to Department of Corrections.
"Sanctions permitted under the drug treatment Act included court costs, treatment costs, drug testing costs, a program user fee, and necessary supervision fees.. No provision in the drug court Act itself mentions incarceration."

Appellant was originally sentenced t five years' probation, with requirement that he complete the Faulkner County Drug court Substance Abuse Program. His probation was subsequently revoked for failure to adhere to the rules of the Drug court and sentenced to a period of twelve months' confinement in the Regional Punishment Facility and an additional five years' probation. Again, a "special condition" of Richie's probation was that he participate in the Drug court Substance Abuse Program. Subsequently the state again filed a motion for revocation and, the

circuit court revoked his probation and sentenced him to ten years on each count, to run concurrently, in the Arkansas Department of Correction and also directed him to complete the Therapeutic Community Program while in prison.

Richie argues that the circuit court did not have the authority to order him to undergo drug rehabilitation and treatment as part of his sentence…The State argues that the circuit court had wide latitude regarding sentencing under the Arkansas Drug court Act. The Drug court Act provisions, however, do not authorize a court to attach conditions to sentences of incarceration.

In the original language of that Act, the "Drug court program" was defined as "a highly structured judicial intervention process for substance abuse treatment of eligible offenders which requires successful completion of the Drug court program treatment *in lieu of incarceration*." Ark.Code Ann. § 16-98-302(1) (Repl.2006).The statute further provided that Drug court programs "may require a separate judicial processing system differing in practice and design from the traditional adversarial criminal prosecution and trial systems." Ark.Code Ann. § 16-08-303(c)(1) (Repl.2006). Sanctions permitted under the Drug Court Act included court costs, treatment costs, drug testing costs, a program user fee, and necessary supervision fees. No provision in the Drug Court Act itself mentions incarceration…The Act, as amended in 2007, now provides that one of the goals of the program is to use a "non-adversarial approach in which prosecution and defense promote public safety while protecting the right of the accused to due process."

However, that there is no statutory provision authorizing a circuit court to impose a condition of incarceration on a defendant, even one who may have gone through the Drug court program…once the circuit court enters a judgment and commitment order, jurisdiction is transferred to the Department of Correction-the Executive Branch-and it is for that branch to determine any conditions of incarceration, such as whether the defendant will undergo drug treatment. To this extent, the sentence was illegal, and we remand to the circuit court with directions to strike the unlawful conditions and for the entry of a new judgment and commitment order consistent with this opinion.

Supreme Court of Arkansas. Tracy Ann CROSS, Appellant, v. STATE of Arkansas, Appellee. No. CR 09-494. Dec. 3, 2009.

[State statutory interpretation: Arkansas Drug court Act (re sentencing authority]

Appellant Tracy Ann Cross appeals from an order of the Lawrence County Circuit Court revoking her probation and sentencing her to ten years' imprisonment for various drug-related offenses. She asserts that the circuit judge imposed an illegal sentence on her because, although her probation had been extended, it was not extended pursuant to an evidentiary hearing find her in violation of probation conditions, as required by law. Court rejects argument by state that Arkansas Drug court Act provides special sentencing authority to judges.

Sentencing is entirely a matter of statute in Arkansas, and a circuit judge may only impose a sentence authorized by statute.. A review of the Drug court Act reveals no provision granting Drug court judges special sentencing authority separate and apart from section 5-4-303(d). We hold, accordingly, that the Drug court program under the Drug Court Act is subject to the sentencing provisions of the Arkansas Criminal Code.

Reversed and dismissed.

3. CALIFORNIA: PROPOSITION 36

Court of Appeal, Third District, California. The PEOPLE, Plaintiff and Respondent, v. James Clyde BROCK, Defendant and Appellant.No. C061986. (Super.Ct.No. 08NCR06468).May 18, 2010.

Defendant James Clyde Brock appeals the sentence imposed following his plea of guilty to possession of methamphetamine, contending that trial court imposed an unauthorized sentence when it ordered him to take part in a drug court and to serve 180 days in jail, rather than sentencing him to Proposition 36 probation. Under the statutes, "any person convicted of a nonviolent drug possession offense shall receive probation." (§ 1210.1, subd. (a).) unless…found by the court, by clear and convincing evidence, to be unamenable to any and all forms of available drug treatment… Proposition 36 overrides a sentencing court's traditional discretion.

Thus, as relevant here, if the trial court had made a finding by clear and convincing evidence that defendant was not amenable to any form of drug treatment, he was not entitled to Proposition 36 probation. Absent such a finding, defendant was entitled to Proposition 36 treatment. Here, the trial court did not make an explicit finding that defendant was unamenable to drug treatment. Nor can we find such a finding to have been implicitly made, based on the trial court's decision to reinstate defendant on probation "subject to serving local time and participating in a[ ] [court] drug treatment program.

Court of Appeal, First District, Division 3, California. The PEOPLE, Plaintiff and Respondent, v. Ronny Boyce FOREMAN, Defendant and Appellant. No. A105691. Jan. 31, 2005.

[Forging or uttering a prescription to obtain drugs was not a nonviolent offense within the meaning of the statutes codifying Proposition 36 mandating drug treatment and probation for nonviolent drug offenders]

Court of Appeal, Third District, California. The PEOPLE, Plaintiff and Respondent, v. Reginald Antwan DAVIS, Defendant and Appellant. No. C040635. Jan. 7, 2003. As Modified Jan. 22, 2003. As Modified Feb. 4, 2003.

Reverses trial court's lifting of stay of defendant's two year prison sentence after Defendant was terminated from drug court in 2002 for drug offense to which he pled guilty in 1999 on grounds that, under Proposition 36, the lifting of the stay could only be imposed on finding that defendant was a danger to others.

Court of Appeal, First District, Division 1, California. The PEOPLE, Plaintiff and Respondent, v. Rito Henry RAMIREZ, Defendant and Appellant. No. A096389. (San Mateo County Super Ct. No. 49360). May 30, 2002.

Reverses judgment of trial court which denied appellant's request for sentencing under Proposition 36 on the grounds it considered appellant a poor "candidate for drug treatment."

Court of Appeal, Third District, California. The PEOPLE, Plaintiff and Respondent, v. Tanja Marie Grigalba, Defendant and Appellant. No. C039009. (Super.Ct.No. 01F3674). May 29, 2002.

"Sale or transportation of methamphetamine" is nonviolent drug possession offense within the meaning of Proposition 36. Reverses Order of probation and remands case to trial court for resentencing in accordance with the provisions of Proposition 36.

Court of Appeal, Fifth District, California. The PEOPLE, Plaintiff and Respondent, v. Robert Alan Gunning, Defendant and Appellant. No. F038785. (Super.Ct.No. BF095086). May 17, 2002.
Court of Appeal, Third District, California. The PEOPLE, Plaintiff and Respondent, v. Austin Schomberg, Defendant and Appellant. No. C039210. (Super. Ct. No. CR 01-2538). May 14, 2002.

Vacates sentence and orders appellant to be resentenced under provisions of Proposition 36. Appellant entered a plea agreement May 29, 2001 providing a sentence of 16 months of incarceration, and the case was scheduled for sentencing June 28, 2001 but was continued to July 5, 2001 at which time the defendant claimed that, notwithstanding his plea agreement, the provisions of Proposition 36 should be applied. The court permitted the defendant to withdraw his plea and imposed the 16 month sentence on August 7, 2001.

4. FLORIDA: PROPOSED BALLOT AMENDMENT

Supreme Court of Florida. ADVISORY OPINION TO THE ATTORNEY GENERAL re RIGHT TO TREATMENT AND REHABILITATION for Non-Violent Drug Offenses. No. SC01-1950. May 16, 2002.

Approval of proposed amendment to Florida Constitution proposed by Florida Campaign for New Drug Policies based on inquiry that proposed amendment does not engage in "logrolling" and does not cause "multiple precipitous and cataclysmic changes in state government" and ballot title and summary fairly apprize voters of amendment's purpose.

5. GEORGIA: DEFINITION OF "GENERAL" AND "SPECIFIC" CONDITIONS OF PROBATION (OCGA: SECTIONS 42-8-34).

Court of Appeals of Georgia. GARDNER v. The STATE (Two Cases). Nos. A03A0508, A03A0557.

Jan. 29, 2003.

Violation of Drug court Program Requirements constituted violation of "general condition of probation" rather than "special condition" under Georgia Statute thereby authorizing revocation of no more than two years of probation.

6. NEW MEXICO: NMSA 1978, §§ 30-31- 28, 31-12-8: CONDITIONAL DISCHARGE

Court of Appeals of New Mexico. STATE of New Mexico, Plaintiff-Appellee, v. Jeffrey FAIRBANKS, Defendant-Appellant. No. 22,996. Oct. 8, 2003.

Background: Defendant received a conditional discharge from the Bernalillo County District court which dismissed charges after he successfully completed a drug court program but ordered him to pay a $ 75 crime lab fee. Defendant maintained payment of lab fee was not required without a conviction.

Held:

(1) imposition of $75 crime lab fee against defendant was unauthorized without a conviction, and
(2) defendant did not unambiguously agree to pay fee under terms of plea agreement.

Reversed and remanded.

Imposition of $75 crime lab fee against defendant was unauthorized without a conviction; portion of crime lab fee statute unequivocally required defendant to be "convicted" of crime before lab fee could be imposed, once defendant successfully completed probation/drug court and charges were dismissed under conditional discharge, conviction whether by verdict or plea, no longer existed, and thus, dismissal under conditional discharge statute was not a "conviction" as contemplated by crime lab fee statute. NMSA 1978, §§ 30-31- 28, 31-12-8. Conditional Discharge is not a conviction, even though there is a guilty plea, the successful completion of probation under the terms of a conditional discharge results in the eradication of the guilty plea or verdict and there is no conviction.

TERMINATION FROM DRUG COURT: [Including Nature of Hearing/Requirements]

1. Adequacy of Record of Proceeding:

SHANDALEIGHA M. THARP, Appellant-Defendant, v. STATE OF INDIANA, Appellee-Plaintiff. No. 48A05-1105-CR-292. Court of Appeals of Indiana. January 11, 2012.

[Termination: lack of notice of intent to terminate or termination hearing considered harmless error]

While appellant was clearly entitled to notice of the violation and an evidentiary hearing, Tharp makes no argument that reversing and remanding for such a hearing would be beneficial to her in any way, other than to delay her sentencing …. Court finds that denial of Tharp's right to an evidentiary hearing and the other elements of due process did not affect the trial court's determination that she violated the terms of the Drug court program when she abandoned it, that her participation in the program should be terminated, and that she should be sentenced.

Supreme Court, Appellate Division, Third Department, New York. The PEOPLE of the State of New York, Respondent, v. Tammy L. CAMPBELL, Appellant. Dec. 23, 2010.

[standard of proof – preponderance of the evidence]

Defendant appealed her termination from the Warren County Court Drug court, which revoked her probation, terminating her from the drug court, and imposed a sentence of imprisonment, and defendant appealed.

Held: probation violations [and therefore termination from the drug court] were established by a preponderance of the evidence.

Supreme Court of Virginia. Judson Jeffrey HARRIS v. COMMONWEALTH of Virginia. Record No. 091177. Feb. 25, 2010. Va.,2010. 279 Va. 541, 689 S.E.2d 713.

[termination]- requires hearing regarding termination from drug court in addition to hearing on termination from probation]

[adequacy of record – must show reasons for termination from drug court as well as probation revocation]

[court required to consider reasons defendant had been terminated from drug court, not simply to hold a

probation revocation hearing- recognizing liberty interest]

Following defendant's plea of guilty to possession of heroin, and his subsequent termination from DRUG COURT treatment program, commonwealth moved to impose terms of plea agreement. The Circuit Court, City of Fredericksburg, sentenced defendant to incarceration, pursuant to plea agreement, and defendant appealed claiming trial court required to consider the reasons for his termination and to conduct a hearing in which he had right to participate before imposing plea agreement terms.

Held: Defendant, whose successful completion of DRUG COURT treatment program was a condition for dismissal of drug possession charges against him, had a liberty interest in continued participation in the program, and thus, after defendant had been terminated from program and commonwealth moved for execution of sentence pursuant to plea agreement, trial court was required to consider the reasons that defendant had been terminated from the program, before imposing plea agreement terms and sentencing defendant to incarceration.

Reversed and remanded.

2. Hearing Requirements

MICHAEL TORNAVACCA, APPELLANT, v. STATE OF ARKANSAS, APPELLEE. 2012 Ark. 224. No. CR 11-702. Supreme Court of Arkansas. Opinion Delivered May 24, 2012. No. CR 11-702. Supreme Court of Arkansas. Opinion Delivered May 24, 2012.

Appellant requested a second chance to remain in the program, and then the following exchange occurred:

THE COURT: I'm not giving you another choice. There were statements made at the hospital that are a matter of the hospital records that when you get out you would do it again. When you abuse the medication you were given and were given permission from this Court to take, and then use them in excess.

APPELLANT: It was not an intentional use to get high. It was in confusion.

THE COURT: Well, it wasn't going to get high. It was going to cause death.

APPELLANT: It almost did.

THE COURT: This is the reason you're getting thirty years in the Arkansas Department of Correction. That's what you pled to. That's what you're going to get. That's the order of the Court. You have got strike two and three based upon your action in taking that medication.

"…Phyllis Lemons, the public defender who initially represented appellant on the charges, testified that she was not aware that appellant had been given any documentation advising him about what his rights were in drug court. She assumed that drug-court personnel would pass along that information. Lemons stated that the circuit judge gives participants the opportunity to present evidence to refute allegations of misconduct. She said, however, that she did not believe that a hearing was necessary in most instances "because some strikes are so obvious that there is no defense to them."

Because the circuit court's findings that appellant committed his second and third strikes are not clearly erroneous, we conclude that the circuit court did not clearly err in finding that appellant failed to demonstrate a reasonable probability that the outcome would have been different had his counsel raised a due-process objection. In the absence of prejudice, we affirm the circuit court's decision that appellant did not receive ineffective assistance of counsel.

Supreme Court of New Hampshire. The STATE of New Hampshire v. Ryan LaPLACA. No. 2010–042. Argued: March 10, 2011. Opinion Issued: June 28, 2011.

State filed motion to impose suspended sentence, asserting that defendant had violated conditions of sentence after he was terminated from drug court sentencing program after defendant had been terminated from treatment. The Superior Court, Grafton County, denied defendant's motion for hearing and granted state's motion. Defendant appealed.

Held: As a matter of first impression trial court's enforcement of provision in drug court sentencing program agreement stating that defendant waived his right to any and all hearings violated defendant's state constitutional right to procedural due process.

Supreme Court, Appellate Term, New York, 9th and 10th Judicial Districts. The PEOPLE of the State of New York, Respondent, v. James POMPI, Appellant. No. 2009–2197WCR. May 20, 2011.

Defendant appeals termination from drug court sentence to two consecutive years of incarceration alleging (1) inadequate assistance of counsel and s convictions Appeal from judgments of the City Court of New Rochelle, Westchester County (Preston S. Scher, J.), rendered September 30, 2009. The judgments convicted defendant, upon his pleas of guilty, of two charges of criminal possession of a controlled substance in the seventh degree and sentenced him to two consecutive one-year terms of imprisonment.

Held: By pleading guilty, defendant forfeited his claim that he was denied the effective assistance of counsel to the extent that it does not directly involve the plea bargaining process.

Defendant's contention that he was denied due process because the City Court failed to hold a hearing on whether he had violated the terms of his drug treatment court contract is unpreserved for appellate review, as defendant neither requested a hearing nor moved to withdraw his pleas on this ground.

Defendant's contentions that the City Court improperly imposed enhanced sentences and that the sentences were harsh and excessive are academic because defendant has served his sentences and has been released from custody.

Accordingly, the judgments of conviction are affirmed.

Court of Appeals of Kentucky. Troy BONN, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2009–CA–002304–MR. May 6, 2011. Appeal from Graves Circuit Court, Action No. 09–CR–00013.

[no right to continuance to obtain expert witness for termination hearing- drug court a privilege, not a right]

Defendant's request for continuance to obtain expert witness to testify regarding his positive drug test denied and defendant's probation revoked and sentenced to ten years, probated for five.

Held: Sentence affirmed. probation is a privilege, not a right. Action on a continuance request is at the court's discretion.

Court of Appeals of Kansas. STATE of Kansas, Appellee, v. Joshua FLANIGAN, Appellant. Nos. 103,332, 103,333. April 22, 2011.

Appeal from Geary District Court.

[dismissed defendant's claim that violation of drug court rules result in lack of appropriate services]

Defendant appeals termination from drug court program, alleging the district court abused its discretion in revoking his probation claiming the drug court team's recommendation for revocation was retaliatory and based on his angry outburst when confronted with the choice to attend inpatient drug treatment or face probation revocation. Further, he argues that his probation condition violations were outweighed by mitigating factors, such as his need for anger management counseling and the failure of the drug court to provide him with all of the tools that he needed to succeed.

Held: Probation is an act of grace by the sentencing judge and, unless required by law, is granted as a privilege and not as a matter of right. Once a probation violation has been established, the decision to revoke probation is within the sound discretion of the district court.

Supreme Court of Nebraska. STATE of Nebraska, appellee, v. Samantha A. SHAMBLEY, appellant. No. S–10–556. 281 Neb. 317, 795 N.W.2d 884. April 8, 2011.

Defendant pled guilty to possession of a controlled substance, and the District Court, in lieu of sentencing at that time, transferred the case to the drug court program. Subsequently, defendant was discharged from the drug court
program, and the District Court, Madison County, Robert B. Ensz, J., sentenced defendant to 90 days' incarceration with credit for 9 days served while awaiting sentence, and defendant appealed.

Held: The Supreme Court, McCormack, J., as matters of apparent first impression, held that: (1) drug court program participants are entitled to the same due process protections as persons facing termination of parole or probation; (2) defendant was deprived of her right to procedural due process when she was

denied her right to cross-examination in drug court termination proceeding;(3) in drug court termination proceedings, the State bears the burden of proving, by a preponderance of the evidence, the alleged grounds for termination;(4) State failed to sustain its burden of proving, by preponderance of evidence, the alleged grounds for termination of defendant's participation in drug court program; and (5) defendant did not waive her due process right to have the State prove by a preponderance of the evidence the alleged drug court contract violations for which her participation in drug court program was to be terminated.

Vacated in part, and in part reversed and remanded with directions.

Court of Criminal Appeals of Tennessee, at Knoxville. STATE of Tennessee v. Daniel GONZALEZ, Jr. No. E2009-01863-CCA-R3-CD. Assigned on Briefs Aug. 24, 2010. Jan. 12, 2011.

Defendant appealed termination from the Davidson County Drug court by the Circuit Court for Blount County on the grounds that he failed to complete the drug court program and that he threatened to commit suicide and hurt staff members. The Defendant stipulated to the admissibility of a letter from the drug court dismissing him from the program that stated that the Defendant "violated the conditions of the drug court program by showing negative and aggressive behavior and threatening to hurt himself and others on several occasions. The letter also stated that the Defendant was considered "treatment resistant."On cross-examination, the community service officer who filed the termination request indicated that he had not interviewed the Defendant and that he did not know the extent of the Defendant's drug addiction or psychological problems and had not personally witness any of the Defendant's behavioral problems in the drug court program. Other testimony indicated that defendant's medication for Parkinson's disease had been changed when he entered the drug court in order to obtain less expensive medications which he stated caused him to hallucinate and hear voices and cause severe depression.

The trial court found that the Defendant committed a material violation of the terms of his community corrections sentences by failing to complete the drug court program, needed mental health treatment and threatened to hurt himself or others in the program. The trial court revoked the Defendant's community corrections sentences, ordered him to serve the remainder of his sentences in confinement, and requested that he be placed in the Department of Correction's Special Needs Unit to receive medical treatment.

Held: A trial court may revoke a suspended sentence upon its finding by a preponderance of the evidence that a violation of the conditions of release has occurred. …The evidence was undisputed that the Defendant was dismissed from the drug court program because of his behavior. Completion of the program was a requirement of his community corrections sentences. As a result, the trial court did not abuse its discretion by revoking the Defendant's community corrections sentences.

Supreme Court, Appellate Division, Third Department, New York. The PEOPLE of the State of New York, Respondent, v. Alexander L. STOKES, Appellant. July 1, 2010.

Defendant allegedly violated the terms of the drug court participation agreement on multiple occasions. Rather than undergo a hearing to determine if he had violated the terms of the agreement, he admitted to the violations in exchange for a prison sentence of three years and postrelease supervision of two years. The Albany County Court imposed that sentence, and defendant then appealed.

Sentence affirmed: Defendant's argument that he was deprived of a hearing to determine whether he violated the participation agreement is not properly before the court since he failed to request a hearing… but elected to forgo it and admit to the violations in exchange for a prison sentence below the potential maximum.

STATE of North Carolina v. Brent William JACOBY. No. COA09-751. Jan. 19, 2010.
[termination from drug court]

Held: [Buncombe County] Trial court did not abuse its discretion by revoking a defendant's probation and Drug court participation after he missed a probation meeting and two drug screenings. The defendant contended that he simply forgot the meeting, and did the drug screening later than planned, but on the same day. He missed the second drug screening because he was in jail. Although the defendant claimed that he was prevented from making the second drug screening, he offered no evidence as to why he was in custody.

"Probation is an act of grace by the State to one convicted of a crime."

"All that is required in revoking a suspended sentence is evidence which reasonably satisfies the judge in the use of his sound discretion that a condition of probation has been willfully violated."

"The breach of any single valid condition upon which the sentence was suspended will support an order activating the sentence."

Court of Appeals of Indiana. Amanda May DULWORTH, Appellant-Defendant, v. STATE of Indiana, Appellee-Plaintiff. No. 48A05-0905-CR-267. Sept. 24, 2009. Transfer Denied Nov. 12, 2009.

[termination standard of review: "Regarding abuse of discretion;: so long as the proper procedures have been followed in conducting a probation revocation hearing, the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence.."

[effect of plea agreement on sentencing: "…The Agreement that Dulworth entered into with the State was tantamount to a plea agreement. And plea agreements "are in the nature of contracts entered into between the defendant and the [S]tate."

Appellant-defendant Amanda May Dulworth appeals the trial court's decision to order her to serve a previously stayed eighteen-month sentence in the DOC after she failed to complete a Drug court program because she was eligible to complete her sentence in a work release center. Dulworth also maintains that her rights under the Equal Protection provision of the Fourteenth Amendment to the United States Constitution were violated because there is a work release center in Madison County for men but no such facility exists for women. Concluding that Dulworth was properly sentenced, we affirm the judgment of the trial court.

At a hearing that commenced on March 24, 2009, the trial court stated that it was bound by the Agreement to impose the eighteen-month executed sentence.

Regarding abuse of discretion; so long as the proper procedures have been followed in conducting a probation revocation hearing, the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence.

As noted above, although Dulworth was originally placed on probation following the suspension of the eighteen-month sentence, she subsequently committed forgery and admitted the probation violation. The State and Dulworth then agreed that she could-in lieu of serving an executed sentence-enroll in, and successfully complete, a program through the Madison County Drug court Program. The Agreement made it clear that if Dulworth failed to complete the program, was removed, or voluntarily withdrew from the Drug court program, she would be taken into custody and remanded to the original trial court…

When Dulworth withdrew from the Drug court after submitting five "dirty screens" and missing several treatment meetings, she immediately sought a sentence modification but the trial court declined to consider any lesser sanction than the eighteen-month executed sentence that had been agreed upon.

The Agreement that Dulworth entered into with the State was tantamount to a plea agreement. And plea agreements "are in the nature of contracts entered into between the defendant and the [S]tate." As a result, the trial court did not abuse its discretion when it ordered Dulworth to serve the previously stayed eighteen-month sentence in the DOC.

Regarding her claim of denial of. Equal Protection because no female work release center in Madison County: Claim is moot because court bound by the terms of the agreement.

Court of Appeals of Arkansas. Anthony COLLINS, Appellant v. STATE of Arkansas, Appellee. No. CACR 08-1513. June 17, 2009.

[termination – standards for review; appellant's contention he violated Drug court because of problems with homelessness and lack of transportation insufficient to counter record of failures to comply with program requirements]

Anthony Collins appeals from the judgment and commitment order entered by the Jefferson County Circuit Court revoking his drug-court probation in three separate cases. On appeal, Collins contends that there was insufficient evidence supporting the trial court's finding that he inexcusably violated the terms

and conditions of his probation. He also contends that the sentence imposed by the trial court was illegal.

Affirmed.

On April 18, 2007, a judgment and commitment order was filed, sentencing Collins to a total of forty-eight months' drug- court probation. He was also ordered to pay a fine, court costs, restitution, and fees, and participate in drug treatment, perform community service, and tour the Arkansas Department of Correction.

On April 25, 2007, the State filed a petition to revoke his drug-court probation, alleging that Collins failed to attend drug testing on April 20, appear for drug-testing review on April 25, report for group counseling and classes, participate in the drug program, complete his community-service hours, tour the Arkansas Department of Correction, and make payments toward his financial obligations. Collins testified at the hearing, as did his wife, indicating he had turned his life around and wanted another chance to participate in the drug court. The trial court revoked Collins's probation and sentenced him to a total of fifteen years' imprisonment. Collins has timely appealed from this order, arguing there was insufficient evidence to support the trial court's finding that he inexcusably violated the terms and conditions of his drug-court probation.

In order to revoke probation, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation. There was overwhelming evidence presented at the hearing that Collins committed many violations of his probation which Collins does not dispute but, rather, contends were the result of his homelessness and lack of transportation.

For his second point, Collins argues that the trial court imposed an illegal sentence, because it reflected that Collins pled guilty to four more class-C-felony counts than he agreed to in the Report of Plea Negotiations, also filed April 18, 2007. Due to this discrepancy, Collins argues that the sentence imposed was illegal and should be reversed and remanded.

We cannot reach Collins's argument because he failed to file a timely notice of appeal.

City Court, City of Jamestown. PEOPLE of the State of New York, v. Christopher J. KIMMEL, Defendant. June 16, 2009.

[termination: termination from treatment program did not require a hearing even though it could result in sentencing where defendant did not dispute failure to participate in treatment]

Defendant who absconded from a mental health treatment court moved for an evidentiary hearing before being terminated from that court and returned to trial court for sentencing.

Held: The City Court held that the defendant did not have a due process right to an evidentiary hearing at which he would attempt to show that his absence from mental health treatment program may have been caused by factors beyond his control.

Due process does not require a full blown hearing each time a defendant is discharged from a residential treatment program and returned to trial court for sentencing, a defendant is entitled to a hearing…When the reason for a treatment team's recommendation of the defendant's termination from a residential treatment program and return to trial court for sentencing is not a re-arrest or discharge from treatment based on allegations of fact which are contested, due process does not necessarily require a hearing…

Defendant did not have a due process right to an evidentiary hearing at which he would attempt to show that his absence from mental health treatment program may have been caused by factors beyond his control, upon his termination from treatment court and return to trial court for sentencing, where defendant did not dispute that he failed to appear in treatment court and failed to participate in treatment.

Court of Appeals of Virginia, Virginia. Judson Jeffrey HARRIS v. COMMONWEALTH of Virginia. Record No. 0208-08-2. May 12, 2009.

Appellant claims that termination from drug court, which is a liberty interest, requires the same procedural protections as a person facing revocation of probation, including notice, the opportunity to challenge the case against him, and the opportunity to be heard and that his termination violated his the Due Process clause of the Fourteenth Amendment. Appellant also claimed that the reasons for his termination related to comments he made on a MySpace page which was protected under the First Amendment and that he could not be terminated d

from the program or incarcerated for these comments.

Holding: Claims of Due process violations barred because not raised at time of termination and request to reverse termination never made. [See Also *Harris v. Commonwealth,* Record No. 2927-07-2 (Va.Ct.App. Mar. 10, 2008 above where appellant alleged that his termination from drug court violated his due process rights and had made this argument to the trial court during his motion for bond and during his sentencing hearing. However, he never sought reversal of his termination from the drug court program because of an alleged violation of his due process rights. This Court held that Rule 5A:18 barred our consideration of the issue because the specific objection he made on appeal was not timely made in the trial court.

Here, appellant argued during his sentencing hearing that he should not be sent to jail because to do so violated his due process rights. In support of this argument, appellant asserted that he was entitled to due process prior to his termination from the drug court program. However, appellant did not ask the circuit court to reverse his termination on this ground. Therefore, due process argument was not presented to the circuit court and now barred by Rule 5A:18.

Appellant also contends that the circuit court erred in refusing to consider evidence of the reasons he was terminated from the drug court program. The record clearly shows that Harris never offered, nor did he seek to offer, any evidence of the reasons he was terminated from the drug court program. While Harris advised the court that people were present to address the issue, he never sought to call any witnesses or to present any evidence. Therefore, cannot be determined that circuit court erred in refusing evidence when no evidence was offered nor was any refused.

Appellant also claims circuit court erred in not considering alternatives to incarceration. Here, the terms of the plea agreement accepted by the circuit court explicitly stated that if appellant failed to successfully complete the drug court program, he would be returned to the circuit court for determination of his guilt and imposition of a sentence. The circuit court accepted the order terminating appellant's participation in the drug court program, found appellant guilty, and imposed the sentence appellant accepted in the plea agreement. Thus, the circuit court cannot be deemed to have erred in not considering alternatives to incarceration.

Court of Appeals of Washington, Division 1. STATE of Washington, Respondent, v Lorenzo BELL, Appellant. No. 59784-1-I. April 27, 2009.

Defendant was terminated from the King County drug court program because he falsified his sober support group verification slip and lied to the court about it, in violation of drug court policies. Bell contends that his termination violated due process because there was no evidence that he violated the drug court policies and procedures. He also appeals his conviction for delivery of an uncontrolled substance in lieu of a controlled substance, arguing that the stipulated evidence was insufficient to support the conviction. Because the court clearly stated the reasons for the termination based on the evidence and the drug court policies set forth in the drug court handbook which he had received, the record demonstrates that Bell received due process. And because the State submitted police reports establishing the essential elements of the crime charged, pursuant to the provisions of the drug court program, sufficient evidence supports the conviction. Drug court participants are entitled to the same minimal due process rights as persons facing alleged probation, parole, SSOSA, or conditions of sentence violations.. A decision to terminate participation in drug diversion court requires an exercise of discretion similar to that involved in a decision to revoke a suspended or deferred sentence. Bell's termination from drug court having been reviewed for an abuse of discretion, his conviction was affirmed.

Court of Appeals of Kansas. STATE of Kansas, Appellee, v. Merinda Ann OAKS, Appellant. No. 99,744. Nov. 7, 2008. Review Denied Jan. 27, 2009.

Defendant appealed the district court's decision revoking her probation and ordering her to serve her underlying sentence, claiming the court abused its discretion. The defendant was given multiple opportunities to avoid incarceration -- once through diversion and twice through probation…The district court found the defendant had failed to take advantage of these opportunities and ordered her to serve her prison sentence. We conclude the district court did not abuse its discretion.

Court of Appeals of Washington, Division 1. STATE of Washington, Respondent, v. Michael

CRIST, Appellant. Nos. 59288-2-I, 59289-1-I. May 4, 2009.

Appellant appeals the trial court's order that terminated his participation in drug court for non-compliance contending the termination was not supported by sufficient evidence because the "Drug court Policy and Procedures Manual," to which the trial court referred in finding grounds for his termination, was not included in the trial records.

Holding: (1) Regardless of the absence of the manual, however, the record shows that Crist did not comply with the requirements he agreed to when his case was diverted to drug court. His non-compliance with the agreements provided the court with sufficient grounds for his termination. (2) Probation termination and drug court program termination require a showing of noncompliance by a preponderance of the evidence. *State v. Varnell*, 137 Wn.App. 925, 929, 155 P.3d 971 (2007) and drug court participants are entitled to the same minimal due process rights. Revocation of a suspended or deferred sentence rests within the discretion of the court.

Tennessee v. Stewart, Ct. of Crim. Appeals at Nashville. 2008 Tenn. Crim. App. October 6, 2008.

[Court ordered new termination hearing upon finding judge delegated decision making authority to team].

"…In Tennessee, the "neutral and detached hearing body" is statutorily prescribed to be the trial judge. The statute does not give the trial judge the authority to consult outside entities or persons in making its determination or to delegate the decision-making authority to another entity or person, other than another trial judge. Based upon the statute, we hold that the trial judge violated the defendant's due process protections in allowing the drug court team to deliberate and make a recommendation to the court about the disposition of a matter that was statutorily vested in the trial judge's authority. Further, the record in this case reflects that the trial judge not only received the recommendation from the drug court team, it delegated the decision-making authority to the team.In this regard, it is telling that the trial judge instructed the drug court team at the hearing, "I have no thoughts or opinions on what you should do, should you decide that [the defendant] should come back with no sanctions whatsoever, or if he should be revoked and dismissed from the program or anything between, I do not care what your opinion is. I trust your judgment." Thereafter, the judge's order stated that he "affirms the recommendation of the team." Neither the transcript of the hearing nor the order reflect that the trial judge engaged in its own deliberation of the proper disposition of the case. The procedure followed in this case was outside the statutory procedure and authority of
the judge and deprived the defendant of due process. We hold that the defendant is entitled to a new hearing…"

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Mark Aaron VOGT, Defendant and Appellant. No. E043581. (Super.Ct.No. FMB7824). Sept. 16, 2008.

Defendant and appellant appeals after his probation was revoked and he was sentenced to the upper term of four years eight months in state prison, contending that the trial court improperly denied him a probation violation hearing in violation of his due process rights, and that the imposition of the upper term violated his right to a jury trial under *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856; 166 L.Ed.2d 856] (*Cunningham*).

Holding:

1. Defendant Waived His Right to a Probation Revocation Hearing. The facts and circumstances constitute sufficient evidence that defendant voluntarily and intelligently waived his right to a probation revocation hearing. Defendant opted to participate in the drug court treatment program in lieu of custody, so the trial court placed him on probation in order to allow him to participate. Defendant initialed and signed the form entitled "Drug Court Application and Agreement" (the Agreement).

2.The Trial Court Properly Imposed the Upper Term. The defendant explicitly agreed that if he failed the drug court treatment program, he would be terminated from the Program and sentenced "in the range indicated in the Plea Bargain Agreement." The plea agreement expressly stated the sentencing range as two, three, or four years for transportation of a controlled substance, and the court sentenced him to the upper term of four years accordingly.

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Kari Lynn SUKANE, Defendant and Appellant. Nos. E042078, E042952. (Super.Ct.Nos. FMB6438, FMB6551). July 29, 2008.

[Affirms sentence imposed without probation violation hearing since Defendant waived right to hearing in Drug court Agreement she executed.]

Defendant was placed on probation in two separate cases and ordered to complete the Drug court Treatment Program, in lieu of going to prison. After numerous program violations, the trial court sentenced her at the same time on both cases. The court imposed the upper term in each case, for a total term of seven years in state prison. The two cases have been consolidated on appeal, and defendant now argues: 1) she was deprived of her right to a formal probation violation hearing, 2) the court abused its discretion when it imposed the upper term because it failed to consider or weigh her mitigating circumstances, and 3) the imposition of the upper term violated her right to a jury trial under *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*).

Held: (1). Defendant Waived Her Right to a Probation Revocation Hearing Twice when she executed agreement to participate in the Drug court Treatment Program; (2) The Trial Court Properly Imposed the Upper Term in Sentence even though mitigating factors not considered since it is not reasonably probable that a more favorable sentence would have been imposed in the absence of error.

Court of Appeals of Washington, Division 1. STATE of Washington, Respondent, v. Eddie James FRANCIS, Appellant. Nos. 59771-0-I, 59772-8-I, 59773-6-I. July 21, 2008.

Francis appeals his conviction in the King County Drug court for three drug offenses, arguing that the introduction of hearsay evidence at his drug court termination hearing violated his right to due process. He also requests dismissal or remand for entry of findings of fact and conclusions of law on charges for which he was convicted. Because Francis did not object to the introduction of hearsay evidence at the termination hearing and has not demonstrated prejudice from the post-appeal entry of findings of fact and conclusions of law, conviction is affirmed.

Termination: Standard of Review: When the State seeks to terminate an individual's participation in drug court, the State must prove noncompliance with the drug court diversion agreement by a preponderance of the evidence.[FN1] Due to the similarity between the court's function in a drug court termination proceeding and those involving alleged probation, parole, SSOSA, or conditions of sentence violations, Washington courts have held that drug court participants are entitled to the same minimal due process rights. Revocation of a suspended or deferred sentence rests within the discretion of the court A decision to terminate participation in a drug diversion court requires a similar exercise of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds.

Hearsay Evidence: At a termination hearing the minimal due process rights an offender possesses include the right to confront adverse witnesses, unless good cause exists not to allow the confrontation. A court may nevertheless consider alternatives to live testimony in these settings, including affidavits and other documentary evidence that would otherwise be considered hearsay. However, hearsay evidence should be considered only if there is good cause to forgo live testimony. Good cause is defined in terms of "difficulty and expense of procuring witnesses in combination with 'demonstrably reliable' or 'clearly reliable' evidence."

A defendant's failure to object to hearsay evidence and his own use of it during argument constitute a waiver of any right of confrontation and cross-examination.

Court of Appeals of Kentucky. John J. RIGGS, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2007-CA-000406-MR. April 18, 2008.

[Termination- Notice of Intent to Terminate Not required]
[no constitutional right to probation]

Appeal from Greenup Circuit Court, Action No. 04-CR-00143 & 05-CR-00133

Appellant claimed due process rights violated because he didn't receive adequate notice of intent to terminate him from drug court and that court abused discretion in terminating him from drug court

program and rejecting request to remain in the drug court after admitting to violations including failed drug screening tests, consorting with felons, leaving his restricted area without permission, and failing to appear for drug court. At the end of the hearing, Riggs requested another opportunity to comply with drug court. He did not deny that he had violated the terms of his probation. Following the hearing, the circuit court revoked Riggs's probation as stated in the January 25, 2007 order.

"At the revocation hearing, Riggs appeared with his attorney, and he cross-examined the Commonwealth's witness. …he never claimed not receiving notice of the revocation proceeding and never claimed that he was not aware of the allegations underlying that action.

There is no constitutional right to probation. *Land v. Commonwealth,* 986 S.W.2d 440, 442 (Ky.1999). Riggs does not dispute he violated the terms of his probation as testified to by the drug court coordinator. Given the facts of this matter, we find no error and affirm.

Court of Appeals of Indiana. Tammy CHILDERS, Appellant-Respondent, v. STATE of Indiana, Appellee Petitioner. No. 18A02-0711-CR-940. April 4, 2008.

Appellant claims trial court's termination of her participation in drug court and sentence to term of five years inappropriate because not provided with full set of drug court program rules when agreeing to enter drug court program. Held: issue moot since termination based on her commission of a new offense. Which was explicit condition of her agreement.

Court of Appeals of Washington, Division 2. STATE of Washington, Respondent, v. Patrick Boyd DRUM a/k/a Tim Jones, Appellant. In re Personal Restraint Petition of Patrick Boyd Drum a/k/a Tim Jones, Petitioner. Nos. 35947-2-II, 34377-1-II. March 25, 2008.

[also addresses claim judge was biased because member of drug court "team"]

Defendant charged with residential burglary entered into a drug court contract, under which he agreed to undergo drug treatment. After seeking release from the contract, defendant was convicted in the Jefferson Superior Court, of residential burglary, and he appealed on various grounds.

Held:

(1) defendant waived his right to raise any evidentiary issues by entering into drug court contract, and
(2) drug court contract was not equivalent to a guilty plea, and thus contract was not required to meet same due process standards as guilty pleas
(3) Judge was not biased because a member of the drug court "team" since no showing of actual or potential bias
(4) Defense counsel's advice to enter into drug court contract did not reflect ineffective counsel since reasonable strategy to further defendant's own goals; defendant's stipulation to guilt by entering into drug court contract was not ineffective counsel since court made independent finding of guilt.

Court of Appeals of Kentucky. Jeffrey M. STEWART, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2007-CA-000252-MR. Feb. 15, 2008.

[Due process requirements for termination—no requirement for counsel; drug court not a court; it is a treatment program; drug court judge not impartial and can sentence]

Appeal from Muhlenberg Circuit Court.

In April 2006, appellant was ordered "...released immediately from incarceration" and placed on shock probation for a period of five years" upon several conditions, including that Stewart have no further violations of the law, and that he enter and complete the Muhlenberg County Drug court program. Seven months later, in November 2006, the Court ordered that Stewart be terminated from the drug court program since he violated its terms. A probation revocation hearing was scheduled and appellant was incarcerated pending further orders of the court.

At the hearing, the court revoked Stewart's probation and reinstated his sentence. He appealed on various grounds, including (1) denial of right to counsel at termination hearing; and (2) impartiality of judge who also served as drug court judge.

Held:

(1) No denial of right to counsel since drug court "is not a 'court' in the jurisprudence sense; it is a drug treatment program administered by the court system." Further, one's termination from a drug court treatment program is not "subject to due process protections any more than his participation in a private drug treatment program would have been[.]"

(2) No reasonable basis exists for questioning the judge's impartiality simply because he presided over both Stewart's drug court proceedings and his probation revocation proceedings. As the United States Supreme Court has explained, "[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant."

Supreme Court of Florida. Sammy Lee LAWSON, Petitioner, v. STATE of Florida, Respondent. No. SC06-2423. Oct. 25, 2007.

[Termination: nature of hearing required]

Trial Court did not abuse its discretion in revoking defendant's probation of defendant discharged from treatment program for nonattendance in treatment and sentencing him to five years in prison even though sentencing court failed to specify the number of chances defendant would have to complete the program or the time period for program completion. . . .

This Court has often stated that the grant of probation "rests within the broad discretion of the trial judge and is a matter of grace rather than right." …Just as there is broad discretionary power to grant the privilege of probation, the trial court has equally broad discretion to revoke it.

[Trial court's retention of jurisdiction over drug court participant preadjudication is indefinite and extends beyond period of program participation.]

District Court of Appeal of Florida, Fourth District. Daniel BATISTA, Appellant, v. STATE of Florida, Appellee. No. 4D05-4315. March 21, 2007.

[state not required to prove reasons for terminating pretrial drug court participant in evidentiary hearing]

[offer of pretrial intervention program solely within discretion of the state]

Defendant filed motion for an evidentiary hearing following state's unilateral termination of his pre-trial intervention (PTI) program. The Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Edward Garrison, J., denied motion. Defendant appealed.

Held: state was not required to prove, in an evidentiary hearing, that its reasons for unilaterally electing to terminate PTI were valid.

Affirmed; conflict certified.
The issue on appeal is whether the trial court erred in denying a motion for an evidentiary hearing following the state's unilateral termination of Batista's pre-trial intervention (PTI). We affirm.

After Batista was charged, he entered into a deferred prosecution agreement placing him in a PTI program. The terms of the agreement allowed the state attorney, during the period of deferred prosecution, to revoke or modify the conditions of Batista's deferred prosecution by:

> (1) Changing the period of deferred prosecution.
>
> (2) Prosecuting him for this offense if he violated any of these conditions.
>
> (3) Voiding this agreement should it be determined that he had a prior record of adult criminal felony convictions.

The agreement required Batista to submit to random drug testing, maintain his employment, pay his supervision costs, refrain from possessing or carrying weapons, and avoiding drugs and ingesting intoxicants in excess. If Batista complied with all conditions, no criminal prosecution would be instituted for the charged offense. Upon signing the agreement, Batista admitted guilt.

The state's motivation for revoking Batista's participation in the PTI program is not disclosed in the record.

Batista sought a "full" evidentiary hearing to require the state to prove that he had "willfully and materially" violated PTI. Batista claimed a right to such a hearing based on principles of due process, the

applicable Florida Statute providing for PTI, and principles of contract law.
Denial of a hearing on a matter concerning termination of pre-trial intervention is not a dispositive order and, thus, not appealable under Florida Rule of Appellate Procedure.

The Florida Supreme Court has recognized that a decision regarding admission to a PTI program is at the sole discretion of the state, is a prosecutorial function, and is non-reviewable.

Appellate Court of Illinois, Fourth District. The PEOPLE of the State of Illinois, Plaintiff-Appellee, v. Charles J. ANDERSON, Defendant-Appellant. No. 4-06-0021. Jan. 9, 2007.

Appellant, whose period of participation in the Macon County Circuit Court's two year drug treatment program would have terminated on May 17, 2004 if he had been successful, claimed the trial court had no authority in December 2005 to revoke his participation in the program and sentence him to prison. The drug court agreement provided that:

> 1. "I agree to participate in the [Drug court [program for a period of up to 24 months, during which time the charges pending against me in this cause will be held in abeyance pending successful completion of the program."
>
> 2. "I understand that upon successful completion of the [d]rug [c]ourt [p]rogram that this case will be dismissed, and I will not be prosecuted for the offenses alleged herein."

Held: Defendant had been dismissed from the drug court in January 2003 based on commission of new offense. The trial court's authority to sentence the defendant was not limited by the pre-adjudicatory period required for drug court participation.

2006 Ga. App. LEXIS 1564,*;283 Ga. App. 213; 641 S.E.2d 189;2007 Fulton County D. Rep. 40 WILKINSON v. THE STATE. A06A2411. COURT OF APPEALS OF GEORGIA 283 Ga. App. 213; 641 S.E.2d 189; 2006 Ga. App. LEXIS 1564; 2007 Fulton County D. Rep. 40 December 20, 2006, Decided.

After pleading guilty to a charge of possessing cocaine, Crystal Wilkinson entered into a "drug court contract" that required her to participate in a drug court program in lieu of serving a sentence. The State petitioned to terminate the contract, alleging that Wilkinson violated its terms by possessing marijuana. Following a hearing, the trial court terminated the contract and sentenced Wilkinson to five years. Wilkinson appeals, challenging the sufficiency of the evidence.

Issue: State's burden of proof in establishing that a drug court contract should be terminated.

…We find it analogous to revocation of probation or of first offender status. Given that marijuana was found in what appeared to be Wilkinson's lingerie drawer, the preponderance of evidence supported the trial court's conclusion that she had constructive possession of it. No

Slip Copy, 2007 WL 4118388 (Table) (N.Y.Sup.App.Term), 2007 N.Y. Slip Op. 52199(U).

Unreported Disposition

Supreme Court, Appellate Term, New York, 9th and 10th Judicial Districts. The PEOPLE of the State of New York, Respondent, v. Joseph SHARPE, Appellant. No. 2006-1284WCR.

[Termination by Caseworker constitutes termination from program]

[Finding of a "willing and voluntary plea"]

[Sufficiency of the drug court contract in alerting participant to consequences of termination from treatment program]

Defendant entered into a Drug Treatment program after having pleaded guilty to two charges of criminal possession of a controlled substance in the seventh degree with the understanding that if he completed the one-year program successfully, this would satisfy his sentences, whereas if he did not, he would receive consecutive one-year jail terms. Defendant was "kicked out" of the drug treatment program for "arguing with the caseworker". Upon appeal, defendant contends that defendant's unintentional, forced termination from the Drug court Treatment program (1) did not sufficiently establish that he failed the program; (2) that a "Drug court Contract"

signed by defendant and the attorneys fails to show the consequences of being thrown out of the program at the whim of a caseworker and allows it to be "concluded" that defendant unsuccessfully completed the program; and (3) defendant's mental health was never examined more fully to determine if his pleas were knowingly, voluntarily and intelligently entered.

Held: Upon the present record, the court below should not be deemed to have erred in failing to order mental health examinations of defendant in the absence of any requests therefore.

Supreme Court of Idaho, Boise, September 2007 Term. STATE of Idaho, Plaintiff-Respondent, v. Paul Lawrence ROGERS, Defendant-Appellant. No. 33935. Oct. 22, 2007.

[Drug court termination hearing requires same due process protections as parole or probation revocation hearing.]

[Drug court judge can also serve as sentencing judge]

[Drug court participation a liberty interest under the 5th and 14th Amendment]

[also extensive discussion of Idaho drug court history and provisions; recognizes drug courts are different in each locale and no uniform process throughout the state]

Defendant plead guilty in return for admission into a diversionary drug court program, was terminated from the drug court program and convicted in the District Court, Fourth Judicial District, Ada County, of possession of a controlled substance. Defendant appealed, alleging that he was terminated from the drug court program without due process of law in violation of the Fourteenth Amendment.

Held: As a matter of first impression, drug court termination proceedings where defendant has pled guilty required the same restricted due process protections provided to parolees and probationers. Defendant who plead guilty in return for admission into a diversionary drug court program had a protected liberty interest in remaining in the program, entitling him to the restricted due process protections provided to parolees and probationers. U.S.C.A. Const.Amend. 14. Because Rogers was required to plead guilty in order to enter ACDCP he had a liberty interest in remaining in that diversionary program.

Parolees and probationers have a liberty interest under the Fifth and Fourteenth Amendments and cannot be terminated from parole or probation without due process of law. U.S.C.A. Const.Amends. 5, 14. Due process required for termination of drug court participation is to be flexible, does not need to be equated to a separate criminal prosecution and may be informal, on the condition that the safeguards are provided. U.S.C.A. Const.Amend. 14.

Drug court judge may preside over drug court termination proceedings and may consider evidence which might not necessarily be admissible in a criminal trial, if such evidence is disclosed prior to the hearing, is reliable and would assist the court in making its determination.

Drug court judge presiding in drug court termination proceedings may serve as the sentencing judge, since information from the termination proceedings would be admissible in a sentencing hearing.

Court of Appeals of Idaho. STATE of Idaho, Plaintiff-Respondent, v. Paul Lawrence ROGERS, Defendant-Appellant. No. 31264. Aug. 22, 2006.

> Defendant was convicted in the District Court, Fourth Judicial District, Ada County, of possession of a controlled substance after he was terminated from the county drug court program. Defendant appealed claiming denial of due process by not receiving notice of the grounds for his termination and an opportunity to present witnesses at an evidentiary hearing.
>
> Held:
> (1) as a matter of first impression, contract law, not constitutional due process law, would govern rights of drug court participants upon termination from a drug court program, and
> (2) defendant breached terms and conditions of drug court agreement, such that termination from drug court program was proper.

[As a preliminary matter, a short discussion of Idaho's drug court program is warranted. …

A review of the purposes and policies underlying the Ada County Drug court program confirms that contract law rather than due process law is applicable

in cases such as this. Drug courts in Idaho "closely supervise, monitor, test and treat substance abusers" and are based on partnerships among the courts, law enforcement, corrections and social welfare agencies. I.C. § 19-5602(2).

A contract law analysis in the context of a participant's termination from drug court adequately addresses the due process concerns raised by the dissent.

Dissent: based on a finding that appellant had a protected liberty interest in remaining enrolled in drug court, and he was deprived of that liberty without due process when he was terminated without adequate notice of the evidence against him or an evidentiary hearing at which he could confront his accuser(s).

Court of Appeals of Minnesota. STATE of Minnesota, Respondent, v. Mercedes Delrocio ORTIZ, Appellant. No. A05-962. May 9, 2006.

Appellant challenged her probation revocation, arguing that the district court failed to make proper findings under State v. Austin, 295 N.W.2d 246, 250 (Minn.1980), as required by State v. Modtland, 695 N.W.2d 602, 605 (Minn.2005), and that there is not clear and convincing evidence to support the probation revocation. Because we conclude that the district court's findings are adequate under Austin and Modtland and there is clear and convincing evidence to support the probation revocation, we affirm…

[Appellant pleaded guilty to first-degree controlled-substance crime and fourth-degree driving while impaired...After accepting appellant's guilty pleas, the district court imposed an 86-month sentence but stayed execution with the conditions that appellant would serve one year in the workhouse and be on probation for three years. The district court also recited the conditions of appellant's probation on the record, including that she (1) obey all the rules established by the drug court case manager and the court; (2) not be charged with any misdemeanors, gross misdemeanors, or felonies; (3) not use, possess, receive, or transport any firearms; (4) not use unauthorized prescription or illegal drugs; (5) keep probation informed of her residence and work and not change those without the knowledge or consent of the court; (6) successfully complete any treatment recommended, including aftercare; (7) serve 365 days in the workhouse; (8) pay $25 to the defendant's training and employment fund during probation; (9) be employed or otherwise engaged in productive activities and fulfill any child-support obligations; and (10) complete urinary analysis, for which $250 would be credited against the fine for each clean UA.

At termination hearing, appellant claims the district court's findings were inadequate because the district court failed to find that appellant's probation violations were intentional or inexcusable and the district court's analysis on the third Austin factor was cursory. Court concludes that the district court's findings on the Austin factors were adequate…and finds that the record also contains a sentencing worksheet signed by appellant that lists the terms and conditions of her stayed felony sentence. The fourth condition required appellant to "keep the drug court Case Manager and Court informed at all times of your place of residence and employment, and make no change in these without the knowledge and consent of the Court." Appellant's signature appears at the bottom of this worksheet. While appellant's probation officer testified at the probation-revocation hearing that she was unaware of whether a Spanish interpreter translated the sentencing worksheet to appellant because she was not present at the time, the district court noted that appellant knew what was required of her because of the district court's oral recitation of the probation conditions that were translated to appellant at the sentencing stage of the hearing and appellant's oral acknowledgement of her understanding on the record.

Court of Appeal, First District, Division 5, California. The PEOPLE, Plaintiff and Respondent, v. Bobbie HIBSHMAN, Defendant and Appellant. No. A109779. (Del Norte County Super. Ct. No. CRF0110056). March 2, 2006.

Upholds termination of appellant's probation and drug court program after trial court found she was actively involved in the sale of fraudulent documents to be submitted to drug court by a preponderance of the evidence.. The facts supporting revocation of probation must be proven by a preponderance of the evidence. (People v. Rodriguez (1990) 51 Cal.3d 437, 439.) Revocation of probation rests entirely in the sound discretion of the trial court. (Smith, at p. 626.) While this discretion is broad, the court may not act arbitrarily or capriciously and its determination must be based on the facts before it. The evidence presented at the revocation hearing was sufficient to support the trial court's finding.

Court of Appeals of Kentucky. Amiee J. BARRICKMAN, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2004-CA-000890-MR. Jan. 13, 2006.

Rejects appellant's contention that she was denied due process when she was terminated from pretrial diversion drug court without being represented by counsel and subsequently sentenced to five years imprisonment; termination from drug court is not a "critical stage of the proceeding"; termination from drug court not subject to due process protections any more than termination from a private drug treatment program.

"…Although Barrickman argues that the issue presented here is one of first impression, this is not the case. In Dunson v. Commonwealth, 57 S.W.3d 847 (Ky.App.2001), the appellant argued that "since he was not represented by counsel at the DRUG COURT termination hearing, he was denied representation at a critical stage of the proceedings," and therefore his due process rights were violated. Id. at 849-50. This court, however, rejected this contention, concluding that the appellant's "attempt to elevate the drug treatment program to a critical stage of the revocation proceedings must fail." As we explained: "While this particular drug treatment program is known as the 'Fayette County DRUG COURT,' and while it is operated through this state's Court of Justice, the 'DRUG COURT' is not a 'court' in the jurisprudence sense; it is a drug treatment program administered by the court system. Accordingly, [the appellant's] termination from this particular drug treatment program was not subject to due process protections any more than his participation in a private drug treatment program would have been, or his participation in any other rehabilitation program such as anger management counseling or a job training program."

Court of Appeals of North Carolina. STATE of North Carolina v. Kimberly Dale AVERY. No. COA05-232. Sept. 6, 2005.

Upholds trial court's termination of appellant from drug court based on finding of willful violation of program conditions. "…The judge's finding of a willful violation, if supported by competent evidence, will not be disturbed on appeal absent a showing of manifest abuse of discretion. State v. Guffey, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960).

…To revoke probation "[a]ll that is required ... is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." State v. Hewett, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967). The defendant has the burden of showing excuse or lack of willfulness and if the defendant fails to carry this burden, evidence of failure to comply is sufficient to support a finding that the violation was willful or without lawful excuse. State v. Crouch, 74 N.C.App. 565, 567, 328 S.E.2d 833, 835 (1985). A defendant's evidence which contradicts or disputes the prosecution's evidence merely creates credibility issues for the trial judge to resolve. State v. Darrow, 83 N.C.App. 647, 649, 351 S.E.2d 138, 140 (1986). The trial judge, as the fact finder, is not required to accept the defendant's testimony or evidence as true. State v. Young, 21 N.C.App. 316, 321, 204 S.E.2d 185, 188 (1974).

City Court, City of Rochester, New York. In the Matter of Monroe County Office of Probation's ex parte request for Order of Unsatisfactory Termination of Probation of probationer Tanya Akman. Aug. 18, 2005.

Probationers, including drug court probationers, were entitled to notice and hearing before their probations could be terminated as unsatisfactorily served, even though terminations were based on convictions for subsequent crimes, which was clear termination ground.

Court of Appeals of Kentucky.Jerel Patrick HARPRING, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2004-CA-000898-MR. Aug. 12, 2005.

Appellant's probation was terminated for (1) failure to report his arrest to his probation officer; and (2) his termination from the drug court. Appellant contended (1) that the drug court judge should have recused herself from presiding over probation revocation hearing; and that (2) the court erred by relying on "unverified assertions" to remove Harpring from DRUG COURT and "privileged communications" to revoke his probation.

"…It is well settled "that probation is a privilege rather than a right. One may retain his status as a probationer only as long as the trial court is satisfied

he has not violated the terms or conditions of the probation." This Court has held that "[i]t is not necessary that the Commonwealth obtain a conviction in order to accomplish revocation of probation"; therefore, "[o]ur review is limited to a determination of whether, after a hearing, the trial court abused its discretion in revoking the appellant's [probation]."

"….We do not believe the fact that the same judge presided over Harpring's trial proceedings, DRUG COURT sessions, and probation revocation hearing necessarily violates the requirement for an unbiased judge, nor do we believe Harpring was denied due process. There is no evidence in the record to suggest that the judge harbored any personal bias or prejudice against Harpring, had personal knowledge of disputed evidentiary facts outside the record, or expressed any opinions showing pre-judgment of Harpring's case. In fact, there is nothing that draws the judge's impartiality into question.

…Harpring's second argument is that the court erred by removing him from the DRUG COURT program and then by relying on that removal as a basis to revoke his probation. Specifically, Harpring claims "[i]t is clear from reading the transcripts of the DRUG COURT Proceedings and the probation revocation hearing that the trial court was strongly influenced in its decisions to terminate [him] from DRUG COURT and, then, to revoke his probation by the allegation that [he] said he was a drug dealer." Again, we disagree.

While DRUG COURT is a program operated through Kentucky's Court of Justice, it "is not a 'court' in the jurisprudence sense." Rather, "it is a drug treatment program administered by the court system." Accordingly, a participant's termination from the DRUG COURT program is "not subject to due process protections any more than his participation in a private drug treatment program would have been, or his participation in any other rehabilitation program such as anger management counseling or a job training program."

Appellate Court of Illinois, Fourth District. The PEOPLE of the State of Illinois, Plaintiff-Appellee, v. Charles J. ANDERSON, Defendant-Appellant. No. 4-04-0175. July 19, 2005.

Defendant was entitled to hearing before his summary dismissal from drug-court program. Drug-court program was form of conditional liberty, and program required defendant to comply with certain conditions or face loss of privilege…

A. Due Process

[1] The purpose of the DRUG COURT Act is to provide the trial courts with an alternative to a criminal disposition or sentence by, under certain conditions, permitting a defendant to participate in a program addressing a defendant's admitted drug use or drug addiction with the hope of reducing the number of incidents of drug-related crimes in the State of Illinois. . …. Neither the DRUG COURT Act nor the Sixth Judicial Circuit's policies and guidelines specify the procedures to be taken upon an alleged violation of the program. However, the language in section 35 of the DRUG COURT Act indicates the trial court should consider evidence, presumably presented at a hearing, of the defendant's conduct that could result in a dismissal from the program…

"Our analysis begins with a comparison between the purposes of the drug-court program and those of probation, supervision, and parole. The main distinction between defendant's drug-court program and the imposition of supervision, probation, or parole is the timing of the programs' implementation in relation to the criminal disposition. Unlike the drug-court program at issue here, supervision, probation, and parole are imposed after a finding of guilt. However, we find the distinction is of no consequence and is not outweighed by the similarities…."Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." Morrissey, 408 U.S. at 480, 92 S.Ct. at 2600, 33 L.Ed.2d at 494 … Applying the Supreme Court's analyses to the DRUG COURT Act, we find both the interests of a defendant and the State are better protected only if the minimum requirements of due process are met, in the form of a hearing, prior to the revocation of or dismissal from participation in the drug-court program. . …. Even though defendant did not have the right to participate in the drug-court program, as it was a matter of legislative and judicial grace, due process should circumscribe summary dismissal from that program."

(N.Y.A.D. 3 Dept.), 2005 N.Y. Slip Op. 03081 Supreme Court, Appellate Division, Third Department, New York. The PEOPLE of the State of New York, Respondent, v. Gary M. JUCKETT, Appellant.

April 21, 2005.

[Defendant's termination from drug court based on admissions in drug treatment court program could be relied upon to terminate him from program; no confidentiality provided to participant's statements (no indication of whether statements were made in court hearing or at treatment session]

Court of Appeals of Kentucky. David SMALLWOOD, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2004-CA-000431-MR. April 1, 2005.

In probation revocation hearing, Defendant entitled to prior written notice of claimed violations.

In Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the United States Supreme Court addressed due process requirements for parole revocation hearings. The court listed six due process requirements, including "written notice of the claimed violations ..." Morrissey, 408 U.S. at 489, 92 S.Ct. at 2604, 33 L.Ed.2d at 499. The Kentucky Supreme Court later applied these standards to probation revocation hearings in Murphy v. Commonwealth, 551 S.W.2d 838, 840-841 (Ky.1977). The written notice requirement is codified in KRS 533.050(2) which states that: The court may not revoke or modify the conditions of a sentence of probation or conditional discharge except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification. (Emphasis added).

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Becky Sue SMITH, Defendant and Appellant. No. E036366. (Super.Ct.No.FWV028953). Feb. 28, 2005.

Defendant appealed revocation of probation and enforcement of her previously suspended 3-year sentence following termination from the Drug court claiming she lacked notice of drug court program requirements that she attend Matrix program.

Court found that the reporter's transcript of the DRUG COURT hearing illustrated that defendant did not have actual notice that her probation was conditional upon attending the Matrix program….Defendant was never ordered to attend Matrix, was not told where Matrix is, and was not even told what Matrix is. In fact the term "Matrix" is not mentioned anywhere in the reporter's transcript for January 23, 2004. While defendant was given an opportunity to ask questions Matrix was not freely discussed in open court. It was not defendant's responsibility to initiate an open discussion of the terms of her probation. That responsibility falls on the judge since it is the judge who knows what the terms of probation are and it is the judge who is responsible for enforcing those terms. The record does not reflect that defendant agreed, explicitly or implicitly, to attend Matrix.

During the revocation hearing the judge took judicial notice of the minute order from the hearing on January 23, 2004 stating that defendant was released from custody to begin the Matrix program…. The order further sets out a payment schedule whereby defendant could pay for the $2000 Matrix program with $15 … We cannot confer actual notice upon a defendant where the only evidence of notice is contained in a minute order of a hearing and an examination of the reporter's transcript of that hearing evidences that there was no actual notice… The defendant had no knowledge of the term of her probation. The difference between the clerk's transcript and the reporter's transcript goes to the very existence of the condition on defendant's probation and does not merely clear up an ambiguity. Since the reporter's transcript of the January 23 hearing does not contain any evidence that defendant had actual notice that she was required to attend Matrix as a term of her probation, her failure to attend Matrix is not a valid ground for finding that she failed drug court.

Court of Appeal, Fourth District, Division 2, California. The PEOPLE, Plaintiff and Respondent, v. Becky Sue SMITH, Defendant and Appellant. No. E036366. (Super.Ct.No.FWV028953). Feb. 28, 2005.

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Since the reporter's transcript of the January 23 hearing does not contain any evidence that defendant had actual notice that she was required to attend Matrix as a term of her probation, her failure to attend Matrix is not a valid ground for finding that she failed DRUG COURT.

The second ground that the trial court relied on when it determined that defendant failed drug court was that defendant failed to appear in DRUG COURT, as ordered, on January 30, 2004. While defendant does not contend she lacked notice of this term of her probation, out of an abundance of caution, we are inclined to evaluate whether or not defendant had sufficient notice. The evidence clearly establishes that defendant was aware she was required to comply with DRUG COURT instructions, including appearing in court when so ordered.

Defendant had sufficient notice that, as a term of her probation, she was required to attend DRUG COURT …." Unlike a lack of notice of her requirement to attend Matrix, defendant cannot claim that she had no notice of the requirement that she attend DRUG COURT. Defendant knew that if she failed DRUG COURT her probation would be revoked. Nonetheless, defendant failed to appear in DRUG COURT, as ordered, on January 30; her probation was then validly revoked by the trial court for failing DRUG COURT. Pursuant to defendant's plea agreement, the trial court sentenced defendant to the three-year prison sentence provided therein. We affirm.

Supreme Court, Kings County, New York. PEOPLE of the State of New York v. Pierre JOSEPH, Defendant.
Sept. 22, 2004.

[Defendant who has entered into a treatment program pursuant to a plea agreement and is subsequently discharged by the treatment provider, is entitled to a hearing regarding the basis of the discharge, in which there is a preponderance of trustworthy, reliable and accurate evidence for the court to determine the basis for the discharge, before the jail alternative can be imposed – relies on/discusses preponderance of the evidence standard established in Torres v. Berbary, 340 F. 3d. 63 (2003)]

Court of Appeals of Washington, Division 2. STATE of Washington, Respondent, v. Catherine Christine CASSILL-SKILTON, Appellant. Nos. 29710-8-II, 29714-1-II. July 20, 2004.

[Termination of defendant's diversion to DRUG COURT violated defendant's right to due process, where termination was entered without notice to defendant of alleged violation of diversion agreement, defendant was not given opportunity for hearing, and there was no indication of what evidence was relied upon in finding that agreement was violated]

Supreme Judicial Court of Maine. STATE of Maine, v. James JAKUBOWSKI. Docket No. OXF-02-478. Argued: Feb. 13, 2003. Decided: April 24, 2003.

[termination from drug court considered revocation of post-conviction bail and therefore not appealable]

James Jakubowski appealed from orders of the District Court (Rumford) and the Superior Court (Oxford County) terminating his participation in the Adult Drug Treatment Court program (drug court). Drug court is not a separate court, but a program within the Superior and District Courts in which heightened judicial attention is given to defendants

with substance abuse problems. See 4 M.R.S.A. § 421(1) (Supp.2002). Appeal dismissed..

Jakubowski pled nolo contendere in December 2000 to sexual abuse of a minor (Class C), 17-A M.R.S.A. § 254 (Supp.2002), and guilty to five Class D crimes. The Superior Court (Franklin County, Marden, J.) sentenced him to four years incarceration, all but one year suspended, and four years probation. He was apparently released in 2001 after completing the unsuspended portion of the sentence. In December 2001, he was arrested for OUI, 29-A M.R.S.A. § 2411 (1996 & Supp.2002), and operating without a license, id. § 1251. In January 2002, he was arrested again for OUI and violating a condition of release, 15 M.R.S.A. § 1092 (2003). The State brought two complaints in the District Court (Farmington), the first containing the two January charges and the second containing the two December charges. The first complaint, but not the second one, was transferred to Superior Court on Jakubowski's demand for a jury trial. The State also filed a motion in Superior Court (Franklin County) to revoke Jakubowski's probation. In March, the Superior Court ordered Jakubowski referred to drug court for screening. In April, all three cases were transferred to the District Court (Rumford), at Jakubowski's request, so that he could participate in drug court.

The court held a hearing in April to admit Jakubowski to drug court. He entered into a plea agreement under which the State dismissed the operating without a license charge, and he admitted the probation violation and pled guilty to violating a condition of release and the two OUIs. Sentencing was stayed, with the sentence to depend on Jakubowski's participation in drug court. If he successfully completed drug court, he would receive a partial probation revocation of ninety days and seven days on each of the three new crimes, to be served concurrently, with credit for his time served since January, which meant no additional jail time; his probation would continue but with credit for the time spent in drug court. If he failed to successfully complete drug court, he would receive a full revocation of his probation, i.e., three years imprisonment, and 120 days on the new crimes, to be served concurrently to each other but consecutive to the revocation. Either way he would receive a $600 fine and an eighteen-month license suspension on each OUI. Jakubowski, the State, and the court all signed an "Entry/Bail Contract and Order Admitting Defendant into the Adult Drug Treatment Court" that set drug court-related bail conditions, and Jakubowski was admitted into drug court and released on bail.

Thereafter, Jakubowski was arrested following an incident in which he consumed a large amount of alcohol and his girlfriend was allegedly raped at knifepoint by his drinking companion. He was not charged with any new offenses. The court held a hearing concluding on July 9, which it termed a "sanction/termination hearing," meaning that the question before it was whether to terminate Jakubowski's participation in drug court or to sanction him with jail time but allow him to remain in drug court. The court made no factual findings about whether Jakubowski had violated the entry/bail conditions. Jakubowski did not dispute that he had violated the conditions by drinking and being in the company of someone who was drinking. The court considered the seriousness of the violation and exercised its discretion to rule that Jakubowski was terminated from drug court. The court did not expressly state that it was revoking Jakubowski's bail. The court immediately proceeded to sentencing and, although stating that it had the latitude to choose a lesser sentence, decided to impose the sentences set forth in the plea agreement for failure to successfully complete drug court. Jakubowski filed appealed referencing all three docket numbers

Held: although he filed an appeal of all three docket entries, he protested only the decision to terminate him from drug court. He did not seek review of the revocation of his probation or of his three new criminal convictions. Because Jakubowski pled guilty and never moved to withdraw his pleas, he could not have appealed from the three new convictions. See State v. Huntley, 676 A.2d 501, 503 (Me.1996).

Title 15 M.R.S.A. § 1105 (2003) authorizes the court to impose participation in drug court as a condition of post- conviction bail. On violation of such a condition the court may, inter alia, revoke bail pursuant to 15 M.R.S.A. § 1099. The standard of proof for finding a violation of post-conviction bail is a preponderance of the evidence, id. § 1099(2), and the decision whether a particular violation justifies revocation is within the discretion of the court. Although the court did not explicitly state it was revoking Jakubowski's bail when it terminated him from drug court, it partially based the termination on the fact that he had admittedly violated the post-conviction bail conditions set forth in the Entry/Bail Contract, as well as on its discretionary determination that the violation was sufficiently serious to warrant

termination. As in any other case where the court revokes the post- conviction bail of a defendant who has not been sentenced, the revocation was separate from the subsequent imposition of sentence and entry of judgment. Thus, the order terminating Jakubowski's participation in drug court is appropriately viewed as a revocation of his post-conviction bail.

A revocation of post-conviction bail is not reviewable by the Law Court, either immediately or in an appeal from a subsequent final judgment. Instead, if after revocation a defendant is in custody because the court orders him held without bail, he can appeal the revocation to a single justice of the Supreme Judicial Court pursuant to 15 M.R.S.A. § 1099-A. Jakubowski cannot take advantage of this appeal provision because he was not in custody as a result of the bail revocation--or, if he was, it was only for a matter of minutes, until the imposition of sentence and the revocation of probation. For the same reason, even if the statute were not so limited, any appeal from his bail revocation would be moot. Jakubowski's appeal must therefore be dismissed.

Supreme Court of Iowa. STATE of Iowa, Appellee, v. James Craig THOMAS, Appellant. No. 01-1463. April 2, 2003.

Defendant was convicted in the District Court, Pottawattamie County, of two counts of delivery of methamphetamine, and his sentence was held "in abeyance" while he was transferred to treatment facility under supervision of drug court. Defendant later absconded from the Drug court and was sentenced by the court without allocution by counsel. Defendant appealed, claiming his plea was not voluntary and intelligent.. The Court of Appeals affirmed defendant's conviction, but vacated his sentence, and remanded for resentencing. Defendant appealed. The Supreme Court held that defendant's guilty plea was knowingly and voluntarily entered but that Defendant was entitled to allocution by counsel at sentencing hearing.

City Court, City of Rochester, New York. The PEOPLE of the State of New York, Plaintiff, v. Donny WOODS, Defendant. Aug. 20, 2002.

[(1) termination of defendant from drug court, entered pursuant to plea agreement, was proper when Court conducted a review of the records to determine basis for the treatment provider's termination, defendant indicated his understanding of the drug court requirements in open court, and defendant had review of his case (and his noncompliance) each time he appeared in court; (2) defendant has no due process right to have a new provider assigned.]

Court of Appeals of Washington, Division 1. STATE of Washington, Respondent, v. Donald SHIMER, Appellant. No. 49518-6-I. Aug. 5, 2002.

[trial court's conviction of defendant following termination from drug court based on "stipulated facts trial" was based on insufficient evidence presented at the stipulated facts trial]

Supreme Court of Alabama. Ex parte Robert James KNOX. Re Robert Jame Knox, v. State. No.1981772. April 6, 2001. Petition for Writ of Certiorari to the Court of Criminal Appeals, (Tuscaloosa Circuit Court, CC-97-1468; Court of Criminal Appeals, CR-98-0162). On Application for Rehearing.

Granted application for rehearing; withdrew opinion previous released; and quashed writ of certiorari; permitted trial judge to revoke sentence deferment entailed by defendant's drug court status upon a finding the defendant did not belong in drug court.

Court of Appeals of Arkansas, Division II. Jacob SISK, Appellant, v. STATE of Arkansas, Appellee. No. CA CR 02-649. March 19, 2003.

Probation Officer's showing of Defendant's failure to comply with drug court conditions was sufficient evidence to support revocation. Trial court's findings on appeal not reversed unless they are clearly against the preponderance of the evidence. Petty v. State, 31 Ark.App. 119, 788 S.W.2d 744 (1990). State need only prove one violation of the probation conditions for the trial court to revoke probation. Ross v. State, 22 Ark.App. 232, 738 S.W.2d 112 (1987).

Court of Appeals of Iowa. State of Iowa, Appellee, v. Kristen Wen PAUL, Appellant. No. 99-1592. April 11, 2001. Appeal from the Iowa District Court for Decatur County.

Upholds Defendant's waiver of right to appeal as condition of plea agreement to enter drug court. [Defendant subsequently terminated from drug court and sentenced to term of imprisonment "not to exceed sixty-four years".]

Court of Appeals of Washington, Division 3, Panel

Four. STATE of Washington, Respondent, v. Kenneth Michael STRATTON, Appellant. Nos. 20514-2-III, 20515-1-III. Nov. 5, 2002.

Upholds termination from drug court based on testimony defendant smelled of alcohol consumption in violation of drug court program conditions.

Court on the Judiciary of Oklahoma, Appellate Division. STATE of Oklahoma, ex rel. W.A. Drew EDMONDSON, Appellee, v. Jerry L. COLCLAZIER, District Judge, Seminole County, Appellant. No. CJAD-01-2. June 14, 2002.

Trial court's finding that judge committed "oppression in office" was not against the clear weight of the evidence nor contrary to law or established principles of equity. Complaints included judge's termination of defendant, who had pled guilty to possessing marijuana with intent to distribute and who had no prior felony convictions, from drug court and sentencing him to life in prison on basis of ex parte communications and inadmissible polygraph results.

Court of Criminal Appeals of Oklahoma. L.B. ALEXANDER, Appellant, v. STATE of Oklahoma, Appellee. No. F-2000-472. May 30, 2002.

Denies defendant's appeal of termination from drug court as (1) abuse of discretion by not recognizing the "relapses and restarts that commonly occur with drug addicts"; and denial of fair and impartial trial because judge "removed himself as an adjudicatory body when he became a participant in drug court "team", particularly since defendant did not request recusal.

United States Court of Appeals, Tenth Circuit. Gregory Allen CARPENTER, Petitioner-Appellant, v. James L. SAFFLE, Director of the Department of Corrections, Respondent-Appellee. No. 00-6459. May 2, 2001.

Denies appellant's appeal to overturn conviction for drug possession based on plea agreement conditioned on drug court program entry for which Defendant was actually not eligible because of criminal history but did not disclose prior history. Appellant sought appeal of District Court's denial of habeas corpus petition challenging conviction on charges of drug possession based on plea agreement entered pursuant to the Oklahoma Drug court Act wherein he agreed that the charges against him would be dropped if he successfully completed drug court program but would be sentenced to term of 25 years if he failed the program. Defendant was terminated from the program, sentenced, and subsequently appealed on grounds of having two prior felony convictions and therefore not being eligible for the drug court program. Appeal denied.

Supreme Court of Delaware. Sean HAINES, Defendant Below, Appellant, v. STATE of Delaware, Plaintiff Below, Appellee. No. 219, 2000. Submitted Oct. 11, 2000. Decided Nov. 13, 2000.

Dismisses (primarily because alleged errors were not previously raised) Defendant's appeal of conviction pursuant to drug court plea agreement on grounds that he (1) should not have had to participate in the Drug court status conferences because he was not initially convicted of drug crimes nor was he subsequently charged with drug crimes; (2) was denied due process because he was not given fair notice of the alleged probation violation and the VOP hearing terminating him from the drug court; and (3) that the revocation of probation improperly was based upon hearsay evidence.

Steven Lee Hagar, Petitioner v. State of Oklahoma, Respondent. No. C-98-1165. Court of Criminal Appeals of Oklahoma. Sept. 27, 1999.

Court required to state on the record the reasons for participants termination from drug court program.

State of Tennessee, v. Arcenta Van Harrison No. M199901184CCAR3CD. Court of Criminal Appeals of Tennessee, at Nashville. April 7, 2000.

Following appellant's plea of guilty to three counts of theft of property over $ 500 and two counts of theft of property over $ 1,000, trial court sentenced appellant to concurrent terms of four years for the theft over $ 500 and eight years for the theft over $ 1,000 and ordered appellant serve his sentence on community corrections which included participation in the Drug court Program. A warrant was subsequently issued alleging the appellant violated the terms of his community corrections by failing to report to his case officer and to "attend Drug court status check". After an evidentiary hearing, the trial court revoked community corrections and re-sentenced the appellant to an effective term of nine years incarceration. On appeal, the appellant contended, among other claims, that the trial court erred in revoking his community corrections.

The appellate court found that…at the beginning of the revocation hearing, the appellant conceded that he had violated the terms of his probation. A trial court has the authority to revoke a defendant's community corrections sentence when he violates the conditions of that sentence.
See Tenn.Code Ann. S 40-36-106(e)(4). Thus, the record fully supports the trial court's determination that the appellant violated the terms of his sentence, and the trial court did not abuse its discretion in revoking the appellant's community corrections sentence.

State of Washington v. Deborah Valentine, Appellant. No. 45142-1-I. Court of Appeals of Washington, Division 1. May 15, 2000*

Appellant's termination from drug court program on allegations of noncompliance without opportunity to respond to allegations reversed and remanded for new termination hearing.

3. Right of Participant to Withdraw

STATE OF NEW JERSEY, Plaintiff-Respondent, v. WILLIAM JACKSON, Defendant-Appellant. No. A-5072-09T2. Superior Court of New Jersey, Appellate Division. Submitted October 16, 2012. Decided January 10, 2013.

Plea Of Guilty With Entry To Drug court Could Not Be Withdrawn When Defendant Denied Admission To Drug court: Defendant's plea agreement included application to drug court and, if denied, stipulated sentence; defendant was denied drug court admission and sentenced consistent with the agreement.
Upholds plea agreement providing for defendant to apply to drug court even though prosecutor subsequently determined defendant ineligible. Trial court record does not address situation.

STATE OF NEW JERSEY, Plaintiff-Respondent, v. DWAYNE C. McMILLAN a/k/a DWAYNE McMILLEN and DWAYNE McMILLIAN, Defendant-Appellant.No. A-2170-10T4. Superior Court of New Jersey, Appellate Division. Submitted February 7, 2012.Decided February 28, 2012.

Dismisses defendant's claim plea agreement providing that he could apply to drug court was illusory since prosecutor know he wouldn't be eligible.

"We ordinarily will not consider arguments raised for the first time on appeal, and there is good reason to follow that rule here. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Holding out the illusory offer of a Drug court application to a defendant known to be per se ineligible, in order to induce a guilty plea, would be fundamentally unfair. But, there is an insufficient factual record concerning defendant's appellate argument on that issue, because he did not raise the claim in the trial court. We can only speculate as to why the prosecutor's office agreed to allow defendant to apply to Drug court and then apparently rejected him as "per se ineligible." Perhaps his complete criminal and juvenile records were not available at the time of the plea negotiations. The record does not reflect that defendant appealed his rejection from Drug court, which would have created a record as well…"

Walker v. Lamberti 29 So.3d 1172 Fla.App. 4 Dist.,2010. District Court of Appeal of Florida, Fourth District. John WALKER, Petitioner, v. Al LAMBERTI, as Sheriff of Broward County, Florida, and the State of Florida, Respondents. No. 4D10-400. March 8, 2010.

[drug court participation conditions - imposition of sanctions]

[termination from drug court – right of defendant to from pretrial program]

[Defendant who voluntarily agreed to participate in Drug court cannot subsequently opt out to avoid jail sanction]

Defendant who was charged with possession of cocaine entered into a deferred prosecution agreement (DPA) and entered the Drug court felony pretrial intervention (PTI) program. After defendant failed a drug test, the Seventeenth Judicial Circuit Court, Broward County placed defendant in a jail-based drug treatment program. Defendant filed petition for writ of habeas corpus.
Held: Defendant who agreed to participate in Drug court felony pretrial intervention (PTI) program after being charged with possession of cocaine could not subsequently opt out of program so as to avoid placement in jail-based drug treatment program after failing a drug test, even though entry into program was voluntary; continued participation after entry was not voluntary, defendant agreed to be subject to the terms and conditions of program for between 12

and 18 months or until terminated by the court, and deferred prosecution agreement (DPA) signed by defendant placed him on notice that he could be subjected to sanctions such as pretrial detention in a jail-based drug treatment program…

Court of Appeals of Washington, Division 2. STATE of Washington, Respondent, v.Evan Ray TYRRELL, Appellant. No. 34081-0-II. Feb. 7, 2007.

[Withdrawal from drug court requires court order, not simply non-appearance of participant]

Defendant entered the Jefferson County, Washington Drug court. Contract permitted him to withdraw within the first two weeks (October 21 and 28, 2004) and to then be prosecuted under the pending charge as if the contract had never been entered into. Defendant attended two sessions the first week and did not report to any other sessions. A bench warrant was issued for his arrest. Tyrrell was not heard from again until his arrest on the warrant in early July 2005 and subsequently charged with bail jumping and subsequently tried for the bail jumping charge and the underlying possession charge. Although jury found him not guilty of bail jumping, trial court terminated him from the drug court.

Held: Defendant did not properly withdraw from Drug court continuing to attend.

District Court of Appeal of Florida, Fourth District. Brooke Nicole MULLIN, Petitioner, v. Ken JENNE, as Sheriff of Broward County, Florida, Michael J. Satz, as State Attorney, James V. Crosby, as Secretary of Florida Department of Corrections, Respondents. No. 4D04-2315. Jan. 12, 2005.

[defendant cannot be compelled to remain in a drug court program if entry to the program is voluntary; incarceration as a sanction in such a program can be imposed only on participants who voluntarily remain in the program**]**

TERMINATION OF PARENTAL RIGHTS/FINDING OF NEGLECT

Court of Appeals of Ohio, Sixth District, Lucas County. In the matter of: JASMINE H. and Ja'Shawn H. No. L-05-1255. Decided May 5, 2006. Asad S. Farah, for appellant. Bruce D. McLaughlin, for appellee.

Appellant appealed the decision of the Lucas County Court of Common Pleas, Juvenile Division, which terminated her parental rights to Jasmine H. and Ja'Shawn H. and awarded permanent custody to the Lucas County Children Services agency ("LCCS")…Although appellant participated successfully in the drug court program, her relapses into drug use, her admitted illegal drug use which spanned over a decade and the testimony of her family and the caseworker established that she was unable to put any parenting skills or principles into practice due to her continual relapses…

Court of Appeal, Fifth District, California. BOBBIE R., Petitioner, v. The SUPERIOR COURT of Tuolumne County, Respondent, Tuolumne County Department of Social Services, Real Party in Interest. No. F049667. (Super.Ct.No. JV5927). April 4, 2006.

Court denies petitioner request for extraordinary writ to vacate the orders of the juvenile court terminating reunification services and setting a Welfare and Institutions Code section 366.26 hearing as to his son B. Court finds that, despite petitioner ‘s continued relapses while in drug court program, he was provided with reasonable services and that substantial evidence supported the juvenile court's finding that there was not a substantial probability that the child would be returned to petitioner's custody within another six months.

Supreme Court, Appellate Division, Third Department, New York. In the Matter of AMBER DD. and Another, Alleged to be Neglected Children. Tompkins County Department of Social Services, Respondent; Brenda DD., Appellant. Feb. 23, 2006.

Mother's participation in DRUG COURT program based on her desire to avoid prison could not be considered "voluntary" so as to bring her within statutory exception [e.g., proof that a parent repeatedly abuses drugs or alcohol constitutes prima facie evidence of neglect, except "when such person is voluntarily and regularly participating in a recognized rehabilitative program".] and finding of neglect premised on her repeated abuse of drugs and alcohol is upheld.

Court of Civil Appeals of Alabama. V.O. v. STATE DEPARTMENT OF HUMAN RESOURCES.
2020541. Oct. 17, 2003.

[Upholds trial court's termination of parental rights of mother who violated drug court program policies although demonstrated progress in program; Dissent finds that the evidence clearly and convincingly supports the trial court's ultimate conclusion that the mother's current inability to care for her children is unlikely to change in the foreseeable future. The mother was admittedly resistant to early efforts at reunification by DHR. However, since her conviction and her participation in DRUG COURT, the mother has made significant progress toward overcoming her addiction. She had, until she was incarcerated for her unauthorized use of NyQuil, maintained visits with her children. Indeed, the court report in the record indicated that the mother enjoyed the visits and that, for the most part, the mother's behavior at visitations was appropriate. The mother also made sure that she was employed]

Tuscaloosa County Department of Human Resources No. 2000032. April 20, 2001.

County department of human resources petitioned to terminate parental rights of mother and father. The Juvenile Court, Tuscaloosa County terminated their rights and father appealed. The Court of Civil Appeals, held that evidence was sufficient to support termination of father's parental rights. Evidence was sufficient to support termination of father's parental rights, despite evidence that father loved child and the county department of human resources did not involve father in its rehabilitation and reunification efforts; father had visited with child three times since child was taken into department custody, father was in jail at time of proceeding for harassment and domestic violence involving the mother of his oldest child, a violation of his sentence under the drug court program, and father admitted that he had been involved in selling drugs in the past.

Missouri Court of Appeals, Southern District, Division Two. In the Interest of J.L.F., A Minor, The Greene County Juvenile Office, Petitioner-Respondent, v. R.L.F., Respondent Appellant. No. 24927. Jan. 15, 2003. Motion for Rehearing and Transfer Denied Feb. 6, 2003.

Improvement in mother's conduct as a result in participation in drug court not sufficient to justify denial of petition to terminate parental rights on grounds of neglect and abuse.

Court of Appeal, Fourth District, Division 1, California. In re ERIC B. et al., Persons Coming Under the Juvenile Court Law. SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. GWENDOLYN B., Defendant and Appellant. No. D040087. (Super.Ct.No. J504826C/D). Nov. 13, 2002.

Affirms trial court's denial of mother's petition for reunification despite "enthusiastic" participation in drug court program and her remaining drug free for 140 days.

Court of Appeal, Fifth District, California. In re T.S. et al., Persons Coming Under the Juvenile Court Law. TUOLUMNE COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. THOMAS S. et al., Defendants and Appellants. Nos. F040145, F040148. (Super. Ct. Nos. JV4837 & JV4838). Nov. 7, 2002.

Court denies parents' appeal of trial court's termination of parental rights despite showing "great efforts toward sobriety and reunification in the previous six months" but concluding that "because an entire year has been lost to continued drug use" and "even with all the effort put forth by the parents. . . it is found not to be in the best interests of [the children] to return to the care of their parents.". . Once reunification services have been terminated, the Legislature has identified adoption as the preferred course of action in order to allow stability and permanence to children trapped in the dependency system. . . "

Court of Appeal, Fourth District, Division 1, California. In re COLLEEN M. et al., Persons Coming Under the Juvenile Court Law. SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. LISA M., Defendant and Appellant. No. D040641. (Super.Ct.No. J510547F/G). March 25, 2003.

Mother's completion of dependency Drug Curt and 396 days of sobriety not sufficient to warrant "changed circumstances re termination proceedings.

Court of Appeal, Fourth District, Division 1,

California. In re MARCO A., a Person Coming Under the Juvenile Court Law. SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. SAMANTHA A., Defendant and Appellant. No. D039308. (Super.Ct.No. J510855D). June 19, 2002.

Mother's showing of changed circumstances, including graduation from a drug court, not sufficient to demonstrate best interest of child to be returned to her custody.

Court of Appeal, Fourth District, Division 1, California. In re DOMINIC H., a Person Coming Under the Juvenile Court Law. San Diego County Health and Human Services Agency, Plaintiff and Respondent, v. Jenna C., Defendant and Appellant. No. D039222. (Super.Ct.No. J512678D). --April 10, 2002. APPEAL from a judgment of the Superior Court of San Diego County, Susan D.

Court order terminating parental rights of appellant, who was drug court participant and in compliance with **drug court** conditions, was not an abuse of discretion in determining minor's best interests.

00 Cal. Daily Op. Serv. 6821, 2000 Daily Journal D.A.R. 9023. Court of Appeal, Fourth District, Division 3, California. In re BRIAN M., a Person Coming Under the Juvenile Court Law. Orange County Social Services Agency, Plaintiff and Respondent, v. Renee R., Defendant and Appellant. No. G026653. Aug. 14, 2000.

The Superior Court of Orange County granted petition of child protection agency for child's adjudication as dependent and entered order denying mother reunification services. Mother appealed. The Court of Appeal affirmed trial court's determination and held that mother's violation of court order requiring her to enter drug rehabilitation/drug court as condition of probation vested juvenile court with discretion to deny her reunification services.

Superior Court of Connecticut. In re JAALI A. aka Jaali A.-H. July 10, 2000.*

Despite mother's recent participation in adult **drug court** and period of sobriety, mother's history of drug use, lack of prior contract with child and extent of time child already spent in foster care justifies finding of her failure to rehabilitate and granting of termination petition.

TRANSFERS OF CASES WITHIN COURT

Missouri Court of Appeals, Southern District, Division Two. STATE of Missouri ex rel., Tisha Joy MOORE, Relator, v. Honorable Stephen R. SHARP, Respondent. No. 26089. Dec. 13, 2004.

[trial court lacked authority to assign wife's petition for dissolution of marriage to drug court commissioner for consolidation purposes because commissioner's authority limited cases referred for drug court disposition though parties had agreed to such referral; when court of general jurisdiction establishes and uses a **DRUG COURT**, it is exercising a special statutory power; in doing so, it is confined strictly to the authority given by the statute.]

State of Louisiana v. Charles Riley No. 98-KA-830. Court of Appeal of Louisiana, Fifth Circuit. March 10, 1999. Rehearing Denied April 5, 1999.

Affirmed District court rule permitting transfer of prosecution for possession of cocaine from division to which the case had been randomly assigned to division created specially for narcotics cases did not violate due process, since assignment and transfer procedure was not subject to control or manipulation by either the District Attorney or any judge; to be transferred, the case had to meet specific requirements, and, once those requirements were met, the case was automatically transferred.

TRANSFERS OF CASES TO OTHER JURISDICTIONS

Court of Criminal Appeals of Oklahoma. Reggie Neal LOONEY, Appellant, v. STATE of Oklahoma, Appellee. No. RE-2002-242. June 24, 2002.

Defendant pleaded guilty in the District Court, Garvin County, to possession of a controlled substance. Sentence was delayed pending completion of drug court program in McClain County (which handles cases referred from Garvin County)… Defendant was terminated from the program and sentenced. Defendant appealed on various grounds. The Court of Criminal Appeals held that: (1) state should file request for termination from the drug court in the original case filed in Garvin County from which the drug court assignment originated; and (2) the original court proceeding in Garvin County is the

controlling case for purposes of the administration of a defendant's drug court program.

TREATMENT-RELATED ISSUES

Supreme Court, Kings County, New York. The PEOPLE of the State of New York, Plaintiff, v. Vincent CEFARELLO, Defendant. No. 330–2010. June 28, 2011.

[selection of treatment modality – residential vs. outpatient**]**

Defendant was referred to the Brooklyn Treatment Court. The prosecutor consented to his diversion into treatment only if he participated in the Drug Treatment Alternative–to–Prison (DTAP) program, which was developed by the Kings County District Attorney and requires that all participants must initially be placed in long-term residential treatment facilities. The defendant declined the DTAP offer and requested the Court allow him to attend an outpatient treatment program through Judicial Diversion.

Issue: How should a judge determine the appropriate modality of treatment where the clinical recommendation, the People's policy, and criminal justice considerations may call for different outcomes?

Held: …, The Court finds that the defendant's …inability to maintain abstinence after participation in an outpatient program, all suggest the need for the structured and restrictive level of care provided by a residential treatment program. Here, where the defendant has not voluntarily enrolled in treatment despite the negative consequences resulting from his drug use, the Court believes community safety precludes allowing the least restrictive level of care.

Court of Appeals of Kansas. STATE of Kansas, Appellee, v. Joshua FLANIGAN, Appellant. Nos. 103,332, 103,333. April 22, 2011. Appeal from Geary District Court.

[dismissed defendant's claim that violation of drug court rules result in lack of appropriate services]

Defendant appeals termination from drug court program, alleging the district court abused its discretion in revoking his probation claiming the drug court team's recommendation for revocation was retaliatory and based on his angry outburst when confronted with the choice to attend inpatient drug treatment or face probation revocation. Further, he argues that his probation condition violations were outweighed by mitigating factors, such as his need for anger management counseling and the failure of the drug court to provide him with all of the tools that he needed to succeed.

Held: Probation is an act of grace by the sentencing judge and, unless required by law, is granted as a privilege and not as a matter of right. Once a probation violation has been established, the decision to revoke probation is within the sound discretion of the district court.

Supreme Court, Kings County, New York. PEOPLE of the State of New York v. Pierre JOSEPH, Defendant. Sept. 22, 2004.

[Defendant who has entered into a treatment program pursuant to a plea agreement and is subsequently discharged by the treatment provider, is entitled to a hearing regarding the basis of the discharge, in which there is a preponderance of trustworthy, reliable and accurate evidence for the court to determine the basis for the discharge, before the jail alternative can be imposed – relies on/discusses preponderance of the evidence standard established in Torres v. Berbary, 340 F. 3d. 63 (2003)]

City Court, City of Rochester, New York. The PEOPLE of the State of New York, Plaintiff, v. Donny WOODS, Defendant. Aug. 20, 2002.

(1) termination of defendant from drug court, entered pursuant to plea agreement, was proper when Court conducted a review of the records to determine basis for the treatment provider's termination, defendant indicated his understanding of the drug court requirements in open court, and defendant had review of his case (and his noncompliance) each time he appeared in court; (2) defendant has no due process right to have a new provider assigned.]

VETERANS TREATMENT COURT PROGRAMS

Elmore Cook, Jr., Plaintiff, v. James Butler, Defendant. United States District Court for the Northern District of Alabama, Southern Division. Decided and Filed March 16, 2015.

Plaintiff's claim of being denied entry into the veterans court program due to racial discrimination dismissed without prejudice because plaintiff failed to provide any facts to substantiate his claim. The court also noted "[t]he plaintiff must at least allege that he has a statutory right to participate in Veterans Court or that he was not approved for the program for some statutorily impermissible reason."

(Unpublished) The People, Plaintiff and Respondent, v. Shean Wardell Collins, Defendant and Appellant. Court of Appeal of California, Second Appellate District, Division Two. Filed February 25, 2015.
Defendant claimed the trial court abused its discretion "by denying him probation pursuant to Penal Code section 1170.9." "..Reviewing a trial court's determination whether to grant or deny probation, it is not the appellate court's function to substitute its judgment for that of the trial court or to reweigh the pertinent factors. Its function is to determine whether the trial court's order is arbitrary or capricious or exceeds the bounds of reason. (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.) Under the circumstances presented here, the trial court's order was not arbitrary, capricious, or unreasonable." The court also held that "there was no abuse of discretion in the trial court's determination that defendant's circumstances were not so "unusual" as to overcome the statutory limitation on probation."

(Unpublished) The People, Plaintiff and Respondent, v. Tyler Torres, Defendant and Appellant. Court of Appeal of California, Fourth Appellate District, Division One. Filed March 3, 2015.
Dismisses appellant's claim that the trial court abused its discretion under PC 1170.9 by denying him probation, finding that "[o]n the record before us, we are satisfied that the trial court appropriately exercised its discretion. It properly considered the relevant materials before it (including Torres's sentencing brief, Michel's evaluation of Torres, and the probation report), heard testimony from various individuals, and considered argument from counsel. Despite Torres's assertion to the contrary, the court seriously considered Torres's allegation of qualification to probation and the Veterans Court. "'…it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.'" (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.) We cannot conclude the court's denial of probation was "'arbitrary or capricious'" or that it exceeded "'the bounds of reason.'" (*Ibid*.)."

(Unpublished) The People of the State of Illinois, Plaintiff-Appellee, v. Foster Johnson, Defendant-Appellant. Appellate Court of Illinois, First District, Fifth Division. Decided June 27, 2014.
Upholds trial court sentence which did not involve veterans treatment court participation, finding no abuse of discretion. " … [a]lthough the trial court did not specifically state that it had considered this option, the trial court specifically noted that it had considered the evidence in mitigation. Moreover, the trial court was not required to "detail precisely" its findings and reasoning supporting its sentencing disposition; we presume that the trial court considered all the mitigating information before it, and defendant has not demonstrated otherwise. *Powell*, 2013 IL App (1st) 111654.The court also found "… that defendant was never eligible for the veterans program because the State never consented to it, and there was therefore no discretion for the trial court to exercise in determining whether to approve of defendant's participation in the program."

(Unpublished) Elton James Peterson, Appellant v. The State of Texas, Appellee. **Court of Appeals of Texas, Fifth District, Dallas**. **Filed October 24, 2013.**
Dismisses defendant's claim that comments by the judge during sentencing reflected bias which "precluded any consideration of a sentence other than a term of years." Held: "…..from our review of the record none of the complained-of

comments rise to the level of fundamental error obviating the need to object in the trial court. *See Jasper*, 61 S.W.3d at 421; *cf. McIntosh v. State*, 855 S.W.2d 753, 760 (Tex. App.--Dallas 1993, pet. ref'd) ([HN5] "Fundamental error must be so egregious and create such harm that the defendant has not had a fair and impartial trial.")."

(Unpublished) The People, Plaintiff and Respondent, v. Robert Gonzales Roman, Defendant and Appellant. Court of Appeal of California, Fifth Appellate District. Filed October 29, 2013.

Defendant claimed trial court abused its discretion under PC 1170.9 in denying him probation, because it "relied only on the assessment from probation." The appellate court found no error, citing the conclusion of the probation officer who noted defendant neither claimed to have endured an event that caused PTSD, nor did he identify any job or position he may have held during his military service that would explain PTSD. It also found there was no evidence of substance abuse arising from defendant's service in the military, agreeing with the probation report that noted defendant's substance abuse issues arose well before his military service as evidenced by his personal and criminal histories. The court disagreed with defendant's assertion that the trial court relied only on the probation officer's report."… It is clear from the record that the court considered the probation report, defense counsel's argument, and the statements proffered by defendant's mother. No error occurred."

The People of the State of Illinois, Plaintiff-Appellee, v. Rodney McKinney, Defendant-Appellant, First District, Third Division. Decided August 8, 2012.

Reversed trial court's denial of Defendant's motion to withdraw his guilty plea which he entered while under the mistaken belief that he was not eligible for veterans court upon a finding that Defendant was not ineligible for veterans court based on his ineligibility for probation because the Veterans Court Act does not require that a person be eligible for probation to be eligible for one of its programs and his participation in such a program is not precluded by the Code. The lower court's denial of the defendant's motion to withdraw his guilty plea was reversed and the case was remanded for further proceedings.

The People, Plaintiff and Respondent, v. Elijah Leigh Ferguson, Defendant and Appellant. Court of Appeal of California, Fourth Appellate District, Division Three. Filed April 28, 2011.

Defendant claimed trial court abused its discretion under PC 1170.9 for not deeming him eligible for probation and therefore making him ineligible for veterans court (he was currently serving in the Marines at the time of the incident). The trial court's decision was upheld, on the grounds that the trial court's declining to utilize section 1170.9's alternative sentencing scheme was not an abuse of discretion. The trial court's finding that the appellant was statutorily ineligible for probation under section 12022.53, subdivision (g), was only one of three reasons the court gave for denying probation. [HN18] A single valid reason suffices to justify a sentencing choice." The court also found that the trial court concluded appellant had not established he committed the offenses as a result of combat-service-related PTSD.

VIOLENT OFFENDER - DEFINITION

[Ten year old dismissed manslaughter indictment did not disqualify defendant from drug court for nonviolent offenders]

Supreme Court of Arizona, En Banc. STATE of Arizona, Appellee, v. Melissa Jean GOMEZ, Appellant. No. CR-05-0062-PR. Feb. 8, 2006.

Defendant was convicted in the Superior Court, Maricopa County of possession of methamphetamine and possession of marijuana. Defendant appealed her sentences claiming entry to Proposition 200 drug court program should not have been denied based on 10 year old dismissed manslaughter indictment.

Held: 10-year-old dismissed manslaughter indictment did not disqualify defendant from mandatory sentence of probation and drug treatment…. [A] dismissed indictment, like a reversed conviction, does not disqualify a defendant from mandatory probation. Our interpretation of the statute makes it unnecessary to reach the constitutional issue decided by the court of appeals, which held that A.R.S. § 13-901.01(B) violates due process and the rule of …insofar as the statute disqualifies an otherwise eligible defendant from mandatory probation based on the mere existence of a prior indictment.

United States District Court, District of Columbia. William F. MILLER, Plaintiff, v. UNITED STATES, et al., Defendants. Civil Action No. 96-0220 (PLF). May 16, 1997.

[Definition of "crime of violence": felon in possession of firearm not a crime of violence for purpose of drug diversion eligibility]

Prisoner brought § 1983 action, alleging that Federal Bureau of Prisons violated his constitutional and statutory rights by its restrictive interpretation of statute permitting sentence reduction for nonviolent offenders who successfully complete substance abuse treatment program. The District Court, Paul L. Friedman, J., held that: (1) crime of being felon in possession of firearm was not "crime of violence," for purposes of this statute, and (2) prisoner was entitled to be considered for sentence reduction.