

PROCEDURAL DUE PROCESS, DRUG COURTS, AND  
LOSS OF LIBERTY SANCTIONS

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ABSTRACT

*The exponential growth of problem-solving courts across the United States in the past several decades represents a paradigm shift in the American criminal justice system. These specialized courts depart from the traditional adversarial model commonly found in the judicial system towards a collaborative model of justice that endeavors to treat and rehabilitate offenders with underlying conditions as an alternative to incarceration. Drug treatment courts focus on providing drug addiction treatment services to offenders suffering from severe use disorders. As a condition of participating in drug court, offenders agree to be bound by a system of sanctions imposed by the court in response to certain proscribed behaviors.*

*One concern with the quotidian operations of drug treatment courts is whether, and to what degree, procedural due process applies in situations where a participant receives a sanction amounting to a loss of liberty, either a short-term jail stay or an order to attend a residential treatment facility for a designated period of time. Despite their thirty-year existence, these issues remain unresolved. This Article highlights the current state of the law regarding procedural due process and liberty sanctions in drug treatment courts and then offers qualitative empirical data regarding how these knotty issues play out in action in the context of one adult drug treatment court located in a Western state. Ultimately, I assert that based upon the very special context in which these problem-solving courts operate, judicial precedent requires only minimal due process protections prior to the imposition of loss of liberty sanctions, and such protections can be satisfied by having drug court clients sign a knowing waiver of these rights prior to the imposition of such sanctions – a practice not presently done in large measure in drug treatment courts nationwide.*

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### I. INTRODUCTION

On a wintry, chilly day in late November of 2018, I find myself sitting in the jury box in courtroom 505, which is located on the fifth floor of the Western County Courthouse in what appears from the parking lot to be an otherwise conventional-looking office building in a metropolitan city in Western State.<sup>1</sup> I am here because for the past seven months I have been observing the judicial proceedings for the Western County Drug Court, a specialized problem-solving court that provides intensive probation supervision as well as treatment services for individuals involved in the criminal justice system who possess severe use disorders. It is approximately 4:00 p.m. – regular docket has just ended and most of the drug court participants have already shuffled out of the courtroom. Remaining in the courtroom with me are the judge, two probation officers, two public defenders, the district attorney, the court administrator, and two judicial assistants. It is at the end of docket, the time when newly-accepted drug court participants are sentenced to the Western County Drug Court for a term of “eighteen months or for however long it takes to complete the program.”<sup>2</sup>

The judge calls the underlying criminal cases of Mr. Jones and Mr. Childress. The law enforcement officer assigned to the Western County Drug Court briskly exits through a side-door of the courtroom. Moments later he returns, escorting two males who appear to be in their late-twenties and dressed in beige jail scrubs and shackled at the wrists by handcuffs. The two defendants assume a position at the dark wooden podium, approximately twenty feet from the judge’s bench. After explaining to the defendants how the court functions and making sure that both have read and understood what was contained in the “Western County Drug Court Client Contract and Agreement,” the following colloquy between the judge and the two defendants occurs:

Judge: I also want to talk to you about something that’s really important. It’s your due process rights, okay? Do you know what due process means, Mr. Jones?

Mr. Jones: Not really.

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<sup>1</sup> As is required of researchers engaging in empirical studies, the identity of the actual courthouse and city is protected so as to ensure confidentiality and anonymity. Consequently, I have changed the name of the actual court to the pseudonym “Western County Drug Court,” and additionally used the pseudonym “Western State” to refer to the state in which this research was conducted.

<sup>2</sup> Transcript of Western County Drug Court Proceedings (dated December 27, 2018).

Judge: How about you, Mr. Childress? Do you know what due process means?

Mr. Childress: I'm gonna say no.

Judge: So it's in the United States Constitution, okay? There are certain things that cannot be taken away from you without due process of law. And I want to talk to you about it because it's really important in a program like this because it's different, okay? So like everyday you come in there's not gonna be an attorney standing next to you. You're gonna just speak to me directly. You understand that? [*Both defendants indicate "yes"*].

It also means that if you make mistakes in this program and I feel that I need to sanction you, okay, and sanction is some sort of punishment because I'm trying to affect your behavior, then it's not like there's an attorney there that's gonna say, "Hey, should I do this or should I not do this?" So that's important because this program is just gonna be you and me talking, okay? And probation is gonna tell me things . . . and [for example] if you missed four UAs . . . there needs to be a consequence for that, okay? But, Mr. Childress if you're saying no, in fact I went to a different place and I have receipts for four UAs, you need to say something. Do you understand that?

Mr. Childress: Yes, sir.

Judge: What I'm trying to say is that you shouldn't get a sanction or punishment for something that you did not do. You understand that? Because I'm gonna talk to you about what I'm gonna sanction you or punish you for, okay? You will know that. That's kind of . . . the due process part. I'm gonna tell you what you missed. And then you're gonna say either you didn't miss it and you have proof, or you did miss it.

If you come up and say, "Judge I did everything." And we're like, "Well no, you didn't do everything. I'm just gonna put you in jail," well then that's when you need to

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speaking up, okay? Now, if you speak up that's okay but make sure that you understand there's consequences for you not being honest with the court. You understand? [*Both defendants indicate "yes"*]. So if you want me to retest a UA, we will do that. But if it comes back positive, then that's called dishonesty. And then that means you're gonna get a harsher sanction. Do you understand that? [*Again, both defendants indicate "yes"*].<sup>3</sup>

As is customary, after the judge makes this presentation to the defendants and instructs them about the parameters of the Western County Drug Court, he asks defendants immediately prior to imposing sentence whether they have any questions. Invariably, defendants respond with a curt "no." Following the imposition of sentence, the judge officially welcomes Mr. Jones and Mr. Childress to the Western County Drug Court and offers them both words of sincere encouragement moving forward. The other members of the drug court team then introduce themselves to both Mr. Jones and Mr. Childress, also with their own heartfelt words of encouragement. The two defendants are then led back to the courthouse jail by the attending law enforcement officer. Both men will be released from jail early the next morning to formally start their drug court sentences by meeting with their assigned drug court probation officers for the very first time.

This scene is a microcosm of a much larger revolution that has occurred in the criminal justice system over the past three decades through the advent of problem-solving courts and, in particular, adult drug treatment courts.<sup>4</sup> Described as a "national movement,"<sup>5</sup> drug courts have become "a central part of the criminal justice system."<sup>6</sup> Because these courts are largely focused on the intensive drug treatment of offenders with the goal of a life of sobriety and prosocial behavior, they represent a move away from the purely retributive philosophy of the American criminal justice system occurring during the 1960s to the late 1990s,<sup>7</sup> and towards

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<sup>3</sup> Transcript of the Western County Drug Court Proceedings (dated November 29, 2018).

<sup>4</sup> JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* 39 (2001) ("The rapid expansion of the drug court model has led participants and observers alike to label the phenomenon a 'movement,' even a 'revolution' in criminal justice.") (citation omitted).

<sup>5</sup> Scott J. Sanford & Bruce A. Arrigo, *Lifting the Cover on Drug Courts: Evaluation Findings and Policy Concerns*, 49 *INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY* 239, 240 (2005).

<sup>6</sup> REBECCA TIGER, *JUDGING ADDICTS: DRUG COURTS AND COERCION IN THE JUSTICE SYSTEM* 1 (2013).

<sup>7</sup> See, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 8-9 (2001). See also Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, 3 *PUNISHMENT & SOCIETY* 9, 10-11 (2001) (recounting the historical policy developments in the criminal justice system from the 1960s to the 1990s which led to a more punitive state); Katherine Beckett & Megan Ming Francis, *The Origins of Mass Incarceration: The Racial Politics of Crime and Punishment in the Post-*

a more rehabilitative-minded penal system.<sup>8</sup> The first adult drug treatment court started in Dade County, Florida in 1989.<sup>9</sup> Today there are over 3,000 drug treatment courts operating across the United States, which include adult drug courts, juvenile drug courts, family dependency courts, and veterans courts.<sup>10</sup> But as one consequence of drug treatment courts existing within the larger, traditional criminal justice system, the distinction between treatment and punishment has become blurred and complicated.<sup>11</sup>

There is a strong correlation between the criminal justice-involved population and substance abuse and drug dependency.<sup>12</sup> Studies suggest that upwards of 70% to 80% of individuals involved in the criminal justice system have a substance use disorder.<sup>13</sup> The drug court model emerged partly in response to the failure to adequately address substance abuse issues by either correctional facilities or the courts through the traditional criminal justice process.<sup>14</sup> In fact, the criminal justice system is currently the largest referral source for public drug treatment in the United States.<sup>15</sup> In an effort to rehabilitate some percentage of offenders who possess severe drug dependencies, drug treatment courts offer criminal justice-involved individuals intensive, court-monitored treatment as “an alternative to the normal adjudication process.”<sup>16</sup>

The American criminal justice system traditionally operates in accordance with two primary dynamics, namely: i) an adversarial model of justice that pits prosecution against defense in a robust exchange of facts and procedure to unearth

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*Civil Rights Era*, 16 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 433, 436-38 (describing the rise of the retributive turn in the American criminal justice system through a racial politics perspective).

<sup>8</sup> Angela J. Thielo, et al., *Prisons or Problem-Solving: Does the Public Support Specialty Courts?*, 14 VICTIMS & OFFENDERS 267, 267 (2019) (noting that drug treatment courts are “marked by the traditional rehabilitative ideal”).

<sup>9</sup> Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MARYLAND LAW REVIEW 82, 84 (2006).

<sup>10</sup> Angela J. Thielo, et al., *Prisons or Problem-Solving: Does the Public Support Specialty Courts?*, 14 VICTIMS & OFFENDERS 267, 269 (2019).

<sup>11</sup> MIRIAM BOERI, HURT: CHRONICLES OF THE DRUG WAR GENERATION 162 (2018). *See also* State v. Brookman, 190 A.3d 282, 284 (Ct. App. Md. 2018) (“Drug court programs are conceived of as collaborative rather than adversarial. However, the coercive powers of the court under the criminal law are used as an important instrument to achieve the program’s goals.”).

<sup>12</sup> Elaine Wolf & Corey Colyer, *Everyday Hassles: Barriers to Recovery in Drug Court*, 31 JOURNAL OF DRUG ISSUES 233, 234 (2001).

<sup>13</sup> Sarah Messer, Ryan Patten & Kimberlee Candela, *Drug Courts and the Facilitation of Turning Points: An Expansion of Life Course Theory*, 43 CONTEMPORARY DRUG PROBLEMS 6, 7 (2016).

<sup>14</sup> Andrew J. Myer & Maria M. Buchholz, *Examining the Impact of a Gender-Specific Drug Court on Recidivism*, 41 JOURNAL OF CRIME AND JUSTICE 206, 206 (2018).

<sup>15</sup> Liam Martin, *Reentry Within the Carceral: Foucault, Race and Prisoner Reentry*, 21 CRITICAL CRIMINOLOGY 493, 498 (2013).

<sup>16</sup> JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 39 (2000).

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guilt or establish innocence;<sup>17</sup> and ii) a contest overseen by a neutral and detached judicial arbiter.<sup>18</sup> Drug courts, however, have been described as a “paradigm shift”<sup>19</sup> from this traditional criminal court model. Indeed, drug courts differ from the traditional criminal court model in several significant ways. Characteristics of most every drug court include: i) intensive case management and supervision by an entire drug court collaborative “team” (comprised generally of a judge, court administrator, district attorney, public defender, probation officers, members of law enforcement, and treatment providers); ii) a non-adversarial relationship between the prosecution and defense; iii) an active, ongoing relationship between each drug court participant and the presiding judge; iv) long-term treatment for substance use disorders; and v) a system of graduated sanctions and rewards to incentivize compliant behavior. It has been articulated that “rather than punishing a specific criminal act that has happened in the past, a traditional role for courts, drug courts are focused on curing a specific condition, that of addiction, and affecting future action.”<sup>20</sup>

Drug treatment courts embrace a disease model of addiction for the treatment of individuals presenting with severe use disorders, albeit under the coercive umbrella of the criminal justice system.<sup>21</sup> In order to modify participants’ addictive behaviors and to instill accountability for their actions, graduated incentives and sanctions are handed out swiftly,<sup>22</sup> usually not longer than the one or two-week period between in-court review hearings. The drug court team effectuates behavior change throughout the program by doling out incentives and sanctions to participants through all phases of the program. The furnishing of incentives or rewards “are tools used by the team in a graduated process to provide motivation for the participant to attempt new behaviors.”<sup>23</sup>

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<sup>17</sup> See RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 13 (2008).

<sup>18</sup> Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MARYLAND LAW REVIEW 82, 86 (2006).

<sup>19</sup> John R. Gallagher & Anne Nordberg, *Comparing and Contrasting White and African American Participants’ Lived Experiences in Drug Court*, JOURNAL OF ETHNICITY IN CRIMINAL JUSTICE 100, 114 (2016).

<sup>20</sup> Rebecca Tiger, *Drug Courts and the Logic of Coerced Treatment*, 26 SOCIOLOGICAL FORUM 169, 174 (2011).

<sup>21</sup> Peggy F. Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GEORGIA LAW REVIEW 717, 726 (2008) (“All team members work cooperatively with the drug treatment court participants to reduce their propensity to commit further crimes by treating their addictive disease.”) (citation omitted); REBECCA TIGER, *JUDGING ADDICTS: DRUG COURTS AND COERCION IN THE JUSTICE SYSTEM* 5 (2013) (“Drug courts are predicated on the notion that every aspect of a person’s life is affected by their addiction, and thus broad swaths of their lives need to be addressed by the court to intervene in this addiction.”).

<sup>22</sup> REBECCA TIGER, *JUDGING ADDICTS: DRUG COURTS AND COERCION IN THE JUSTICE SYSTEM* 89 (2013).

<sup>23</sup> WESTERN COUNTY DRUG COURT CLIENT HANDBOOK 13 (copy on file with author).

The incentives offered by the Western County Drug Court include the following: i) verbal praise (by the drug court judge or other members of the drug court team); ii) the awarding of a group leader position with a treatment provider; iii) decreased supervision; iv) the ability to leave the bi-weekly drug court sessions early (*i.e.*, if a participant is on the “100% Board,” meaning that he or she complied with all programmatic requirements over the past two weeks, including clean urinalysis tests); v) token gift cards to grocery and retail stores, coffee shops, or restaurants; vi) paid urinalysis tests and bus passes; vii) reduced curfew restrictions; and viii) a monthly raffle gift card (usually for \$25).<sup>24</sup>

In turn, sanctions “are the responses used by the team to address non-compliance and promote accountability.”<sup>25</sup> The sanctions imposed by the Western County Drug Court team include the following: i) verbal reprimand by the judge during court proceedings; ii) increased supervision by the probation officers; iii) increased home visits (conducted by the probation officers); iv) curfews imposed to restrict movement and mandatory call-ins; v) electronic home monitoring; vi) “useful public service” hours (*i.e.*, performing community service tasks such as working in a soup kitchen); vi) increased drug and alcohol monitoring; vii) reduced financial assistance (*i.e.*, a reduction in paid drug screens and bus passes); ix) incarceration (usually for a period of two or three days); x) thirty day “performance contracts” (*i.e.*, contractual terms negotiated by the participant and the drug court team which the participant must comply with or else be expelled from the program and resentenced on the underlying crimes); xi) “court time” (*i.e.*, where a participant is required to sit through non-drug court proceedings at a different date and time); xii) increased drug treatment or ordered residential treatment; and xiii) having the in-court review meeting scheduled for the very end of the docket so as to have the participant sit through the entire day’s proceedings.<sup>26</sup> In the courtroom sentencing to the Western County Drug Court, the judge describes the incentives as “praise for the good things that you do”<sup>27</sup> and sanctions as “things that we impose on you when you do not comply with the program”<sup>28</sup> requirements. Behavior change through the drug court program occurs through the use of these various incentives and sanctions, together with making certain the participants are receiving the proper treatment modalities for their addictions.

The determination of what sanction (or incentive) a participant will receive is decided on the day of drug court during morning “staffing” meetings among drug

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<sup>24</sup> WESTERN COUNTY DRUG COURT CLIENT HANDBOOK 13 (copy on file with author).

<sup>25</sup> WESTERN COUNTY DRUG COURT CLIENT HANDBOOK 13 (copy on file with author).

<sup>26</sup> WESTERN COUNTY DRUG COURT CLIENT HANDBOOK 13 (copy on file with author).

<sup>27</sup> Transcript of Western State Drug Court Proceedings (dated June 28, 2018).

<sup>28</sup> Transcript of Western State Drug Court Proceedings (dated June 28, 2018).

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court team members, decisions made only a few hours before the participants are required to appear before the judge and discuss their progress in the program. These decisions are not wholly arbitrary; the drug court team is guided by a graduated sanctions table. Short-term jail sanctions, usually lasting from one to four days, are the most severe sanction available in a drug court team's toolkit. The drug court itself is dramaturgical by nature,<sup>29</sup> an orchestrated theater where outcomes and discourses are staged and rehearsed in advance by the drug court team for the intended benefit of the in-court audience comprising not only the individual participant to which they are specifically directed, but also to the entire community of participants of the drug treatment court program. The therapeutic side of drug treatment courts in modifying addictive behaviors by swiftly imposing sanctions can often collide with the broader legal protections to which individuals in the criminal justice system are otherwise entitled, such as procedural due process.

The untangling of this intersection between therapeutic modalities and legal rights remains unresolved and is still in its infancy. The overriding question, though seemingly straightforward, is nonetheless elusive given the special structuring of these problem-solving courts: to what extent are drug court participants entitled to procedural due process when sanctions are imposed that constitute the loss of a liberty right such as incarceration and orders to attend in-patient residential treatment? To be clear, drug court actors and proponents do not view judicial orders to attend in-patient residential treatment as a sanction, but rather as a form of therapy. Nonetheless, I assert that from the vantage point of the participants' lived experiences, residential orders to in-patient treatment facilities do deprive participants of liberty rights – though they are not incarcerated in a penal institution, participants are judicially ordered to leave behind family, children, jobs, and connections to the community as they move to residential treatment facilities for periods that can last anywhere from three weeks to two years.

The legal and empirical issues raised by this Article are part of my larger ethnographic study of the Western County Drug Court. For the past three years I have been observing drug court team staffing sessions and in-court review proceedings together with conducting interviews with members of the Western County Drug Court team. The purpose of this Article is twofold – to discuss the current uncertainty in the law regarding due process and drug court sanctions that result in a loss of liberty for participants, and to offer empirical findings and observations from the study to help inform and add context to these important issues as they occur in the field.

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<sup>29</sup> See JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 61 (2001) (characterizing the operation of drug courts as “therapeutic theater”).



The Article proceeds as follows. Part II provides the reader with a brief background on the development and rise of drug treatment courts in the United States. Part III discusses the general legal requirements of procedural due process in the context of drug treatment courts and provides an overview of the major cases impinging on these constitutional rights as they pertain to drug court revocation proceedings and incarceration sanctions. Part IV bridges the gap between legal requirements and law in action, offering empirical insights from my ethnographic study of the Western County Drug Court. Part V offers a conclusion and a potential solution to these larger issues.

## II. BACKGROUND ON DRUG TREATMENT COURTS

As has been well-documented by criminal justice scholars, the American criminal justice system turned to a more retributive stance following the tumultuous political events of the 1960s and the advent of neoliberalism in the late 1970s and early 1980s.<sup>30</sup> According to Loïc Wacquant, this “law and order” revolution forsook the notion of a rehabilitative ideal for the American criminal justice system; it was replaced by an expanded carceral state characterized by mass incarceration and a “new penology”<sup>31</sup> whose goal was “no longer to prevent crime or to treat individual offenders with a view toward their reintegration into society after they have served their sentence,”<sup>32</sup> but rather was geared towards isolating groups perceived as dangerous by monitoring behaviors and managing criminal risks.<sup>33</sup> This era of retributive philosophy in the American criminal justice system has been characterized generally by mass incarceration, lengthier prison sentences, increased punitive sanctions such as “three-strikes” policies and truth-in-sentencing laws, and a limiting of judicial discretion during the sentencing process.<sup>34</sup> All of these dynamics occurred in conjunction with the well-known War on Drugs.<sup>35</sup> Indeed, the incarceration rate in the United States expanded six-fold from the 1970s to the 2000s, resulting in the United States having the highest incarceration rate of any developed nation in the world.<sup>36</sup>

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<sup>30</sup> Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DAEDALUS 74, 74 (2010).

<sup>31</sup> The term “new penology” was first coined by Malcolm M. Feeley and Jonathan Simon to describe the shift in penal ideology that occurred during the 1970s and 1980s. See Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY 449 (1992). According to Feeley and Simon, the criminal justice system moved from one concerned with assigning responsibility for offender conduct and providing treatment to one geared towards identifying, classifying, and managing dangerous populations. *Id.* at 452.

<sup>32</sup> LOÏC WACQUANT, PRISONS OF POVERTY 68 (2009).

<sup>33</sup> LOÏC WACQUANT, PRISONS OF POVERTY 67-68 (2009).

<sup>34</sup> BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 52-63 (2006).

<sup>35</sup> Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STANFORD LAW & POLICY REVIEW 420-22 (2009).

<sup>36</sup> Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOCIETY REVIEW 695, 699 (2010).

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The development of drug treatment courts occurred at a significant moment in the history of the American criminal justice system, a time when commentators, scholars, legal actors, and politicians recognized that the War on Drugs and the associated punitive turn failed to adequately address drug usage by swaths of criminal offenders and drug-related crime across the country.<sup>37</sup> The judge who coordinated and directed the development of the first drug treatment court in Miami, Florida explained the reason for the court's creation in the following way: “[p]utting more and more offenders on probation just perpetuates the problem. The same people are picked up again and again until they end up in the state penitentiary and take up space that should be used for violent offenders. The [d]rug [c]ourt tackles the problem head-on.”<sup>38</sup> By focusing on providing drug treatment services to criminal offenders with severe drug dependencies rather than bluntly sentencing them to a term of incarceration, it is fair to contend that the rise of drug courts nationwide represents a return towards a more rehabilitative model for dealing with individuals ensnared by the criminal justice system and away from the retributive model of the latter portion of the twentieth century.<sup>39</sup>

Most adult drug courts operate in accordance with one of the following approaches: a deferred prosecution program or a post-adjudication program.<sup>40</sup> In a deferred prosecution program, offenders who satisfy certain eligibility criteria are referred to the drug court program prior to pleading to a criminal charge.<sup>41</sup> If he or she successfully completes the drug court program, generally speaking no criminal charges are formally entered. That said, however, if the offender is removed from the drug court program (either voluntarily or involuntarily) prior to successful completion, criminal prosecution for the underlying offense will be renewed. Alternatively, in a post-adjudication drug court model, which now comprises the majority of drug treatment courts in the United States,<sup>42</sup> offenders must first plead

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<sup>37</sup> Peggy F. Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME LAW REVIEW 439, 448-49 (1999).

<sup>38</sup> Peggy F. Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME LAW REVIEW 455 (1999) (citation omitted).

<sup>39</sup> Scott J. Sanford & Bruce A. Arrigo, *Lifting the Cover on Drug Courts: Evaluation Findings and Policy Concerns*, 49 INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 239, 253-54 (2005) (arguing that “the drug court model stands in contrast to predominant ‘get tough’ philosophies within the criminal justice system that favor punitive sentences rather than rehabilitation”).

<sup>40</sup> Peggy F. Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-solving Court*, 42 GEORGIA LAW REVIEW 717, 746 (2008).

<sup>41</sup> Paul Gavin & Anna Kawalek, *Viewing the Dublin Drug Treatment Court through the Lens of Therapeutic Jurisprudence*, 11 INTERNATIONAL JOURNAL FOR COURT ADMINISTRATION 1, 5 (2020).

<sup>42</sup> Steven Belenko, *The Role of Drug Courts in Promoting Desistance and Recovery: A Merging of Therapy and Accountability*, 27 ADDICTION RECOVERY & THEORY 3, 10 (2019). See also Sarah Kirschenhieter, *Note, Zealous and Effective Advocacy: An Assessment of the Constitutional Right to Counsel Within a Drug Court*

guilty to the criminal charges as a condition precedent to any drug court referral, but their sentences are suspended while they participate in the drug court program.<sup>43</sup> Successful completion of the program ordinarily results in a waived sentence – participating in drug court thus becomes the criminal sentence. Again, however, unsuccessful completion of the drug court program will likely result in the offender being returned to the original criminal division for sentencing occasioned by the guilty plea.<sup>44</sup>

While the granular, everyday operations of each particular drug court is left to the province of local state and county actors, most adult drug courts are institutionalized and structured in accordance with one of the most fundamental documents in the history of these problem-solving courts: *Defining Drug Courts: The Key Components*, published in 1997 by the United States Department of Justice, Office of Justice Programs, in collaboration with the National Association of Drug Court Professionals.<sup>45</sup> This publication sets forth in prescriptive terms ten separate “Key Components” that should undergird the operation of any drug court in the United States.<sup>46</sup> These ten Key Components can be briefly summarized as follows: 1) the integration of alcohol and drug treatment into the processing of criminal cases; 2) the use of a non-adversarial approach between prosecution and defense counsel; 3) the early identification of suitable participants and the prompt placement into drug court; 4) the providing of a continuum of services by the drug court to its participants, which can address a range of social services, including mental illness, homelessness, unemployment, familial troubles, and sexually-transmitted diseases; 5) frequent and random drug testing to monitor substance use; 6) the development of a coordinated strategy to respond to participants’ compliance with the drug court program (which generally calls for the establishment of graduated sanctions and rewards to mark behavior, progress and setbacks); 7) the creation of an ongoing judicial interaction between the drug court judge and each participant through regularly scheduled court appearances; 8) the internal monitoring of drug court programs to measure effectiveness; 9) the continuing interdisciplinary education of the drug court team members; and 10) the establishment of partnerships among the drug court and various public and community-based organizations, most commonly treatment providers and social

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*Proceeding*, 2017 *Cardozo Law Review* 68, 77 (2017) (noting that the post-adjudication model “is one of the most widely used models in the United States”).

<sup>43</sup> Paul Gavin & Anna Kawalek, *Viewing the Dublin Drug Treatment Court through the Lens of Therapeutic Jurisprudence*, 11 *INTERNATIONAL JOURNAL FOR COURT ADMINISTRATION* 1, 5 (2020).

<sup>44</sup> Paul Gavin & Anna Kawalek, *Viewing the Dublin Drug Treatment Court through the Lens of Therapeutic Jurisprudence*, 11 *INTERNATIONAL JOURNAL FOR COURT ADMINISTRATION* 1, 5 (2020).

<sup>45</sup> U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997).

<sup>46</sup> U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997).

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service agencies. Importantly, Key Component number two contemplates the protection of participants' due process rights despite the non-adversarial relationship between prosecution and defense counsel.

Most every drug court purposefully functions as a collaborative team, generally comprised of a judge, district attorney, public defender, court administrative staff (e.g., a drug court coordinator), law enforcement, probation officers, and treatment providers. An adverse approach among team members is intentionally dispensed with in favor of a concentrated focus on treating the offender's underlying substance abuse issues and correcting deviant behaviors.<sup>47</sup> As one commentator has noted, drug treatment courts seek "to reshape the offender's behavior from addiction and irresponsibility to non-use and accountability. Offenders are required to take charge of their lives by confronting addiction."<sup>48</sup> Although the results remain mixed regarding the overall effectiveness of drug treatment courts, a survey of the evaluative studies suggests lower rates of recidivism for drug court participants and drug court graduates as against comparison groups.<sup>49</sup>

The decision to participate in drug court must be made voluntarily, intelligently, and knowingly on an informed basis in order to satisfy the legal standards of competency.<sup>50</sup> An individual defendant who chooses to participate in drug court always retains the right to leave the program and re-enter the traditional criminal justice processing system.<sup>51</sup> While a participant's decision to enter drug treatment court is indeed voluntary from a legal standpoint, this decision has been characterized and criticized as a form of coercive treatment,<sup>52</sup> principally because the decision to enter a drug treatment court usually results in the offender being released from incarceration and returned to the community to begin treatment.<sup>53</sup> Precisely because treatment for a severe drug dependency takes a long time,<sup>54</sup> and

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<sup>47</sup> Peggy F. Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-first Century: The Evolution of the Revolution in Problem-solving Courts*, 42 *GEORGIA LAW REVIEW* 717, 788 (2008).

<sup>48</sup> William D. McColl, *Baltimore City's Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 *MARYLAND LAW REVIEW* 467, 490 (1996).

<sup>49</sup> See, e.g., Lisa M. Shannon, et al., *Examining the Impact of Prior Criminal Justice History on 2-year Recidivism Rates: A Comparison of Drug Court Participants and Program Referrals*, 62 *INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY* 291, 305 (2018) (finding that drug court graduates were less likely to be rearrested in a two-year follow-up window as compared to drug court dropouts or non-participants).

<sup>50</sup> Peggy F. Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-first Century: The Evolution of the Revolution in Problem-solving Court*, 42 *GEORGIA LAW REVIEW* 717, 749 (2008).

<sup>51</sup> Peggy F. Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-first Century: The Evolution of the Revolution in Problem-solving Court*, 42 *GEORGIA LAW REVIEW* 717, 750 (2008).

<sup>52</sup> REBECCA TIGER, *JUDGING ADDICTS: DRUG COURTS AND COERCION IN THE JUSTICE SYSTEM* 139 (2013).

<sup>53</sup> Peggy F. Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-first Century: The Evolution of the Revolution in Problem-solving Court*, 42 *GEORGIA LAW REVIEW* 717, 750 (2008).

<sup>54</sup> Steven Belenko, *The Role of Drug Courts in Promoting Desistance and Recovery: A Merging of Therapy and Accountability*, 27 *ADDICTION RECOVERY & THEORY* 3, 12 (2019).

relapse is both expected and frequent, a typical sentence to drug treatment court is usually for at least one year, and oftentimes longer.<sup>55</sup>

Drug treatment courts are intensive supervision programs (“ISP”) that rely upon multiple and frequent points of contact between the participant and the drug court team. ISPs are also characterized by “a rigorous structuring of daily activities”<sup>56</sup> for parolees or probationers, consciously done to fill their lives “with a network of rules . . . about appointments, work, treatment participation”<sup>57</sup> and drug testing. As a form of an ISP, a drug court is premised upon the close surveillance<sup>58</sup> of the drug court participant and this is accomplished by a reduced caseload for the drug treatment court probation officers and a general cap on the number of participants sentenced to a particular drug court program. Drug court participants are required to meet with their probation officers at least once a week, attend several sessions of individualized treatment programs and counseling services multiple times a week (which could be either out-patient or in-patient residential living), appear in court before the judge on either a weekly or biweekly basis for the court to check-in and assess compliance with programmatic requirements, and submit to randomized urinalysis tests several times a week.<sup>59</sup> A participant’s progression through the drug court sentence is managed by the entire drug court team through a series of personalized, graduated incentives and sanctions geared towards fostering accountability and recovery.<sup>60</sup> By balancing the granting of incentives along with imposing graduated sanctions upon drug court participants throughout their tenure in the program, drug courts are an institutional blending of rehabilitation and punishment at the same time.<sup>61</sup> Observers have described this process as a “carrot and stick approach”<sup>62</sup> to motivate participants to change deviant behaviors and lead productive lives in the community. In the end, “[t]he conventional wisdom is that drug courts are successful in reducing drug addiction and drug-related criminal recidivism while being less expensive alternatives to traditional case processing.”<sup>63</sup>

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<sup>55</sup> Steven Belenko, *The Role of Drug Courts in Promoting Desistance and Recovery: A Merging of Therapy and Accountability*, 27 ADDICTION RECOVERY & THEORY 3, 9 (2019).

<sup>56</sup> See JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990 241 (1993).

<sup>57</sup> See JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990 241 (1993).

<sup>58</sup> Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUSTICE 99, 117 (1996) (noting that ISPs are based on a close surveillance of the offender).

<sup>59</sup> Peggy F. Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-first Century: The Evolution of the Revolution in Problem-solving Court*, 42 GEORGIA LAW REVIEW 717, 752-62 (2008).

<sup>60</sup> REBECCA TIGER, JUDGING ADDICTS: DRUG COURTS AND COERCION IN THE JUSTICE SYSTEM 88-114 (2013).

<sup>61</sup> Steven Belenko, *The Role of Drug Courts in Promoting Desistance and Recovery: A Merging of Therapy and Accountability*, 27 ADDICTION RECOVERY & THEORY 3, 10 (2019).

<sup>62</sup> GREG BERMAN & JOHN FEINBLATT, GOOD COURT: THE CASE FOR PROBLEM-SOLVING JUSTICE 9 (2005).

<sup>63</sup> Kathleen M. Contrino, et al., *Factors of Success: Drug Court Graduate Exit Interviews*, 41 AMERICAN JOURNAL OF CRIMINAL JUSTICE 136, 138 (2016).

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Despite the apparent success of drug courts to lower recidivism rates and rehabilitate offenders from both drug addiction and criminal behavior,<sup>64</sup> there have been criticisms lodged against the operation of drug courts from a due process perspective.<sup>65</sup> Some commentators question whether the collaborative, non-adversarial approach in drug treatment courts can adequately protect participants' due process rights, most prominently with respect to the requirement of many drug courts that offenders plead guilty to an offense as a condition precedent to being sentenced to drug court.<sup>66</sup> Others assert that the non-adversarial posture between prosecution and defense in the collaborative drug court model offends the Sixth Amendment constitutional right of counsel during all stages of a drug court proceeding.<sup>67</sup> Relatedly, another critique questions the impact drug courts have upon the role of defense counsel, who by virtue of being a member of the drug court collaborative team often may be deprived of, or disincentivized to, zealously defend his or her client's due process rights in contravention of ethical guidelines, particularly with respect to the incurrence of graduated sanctions.<sup>68</sup> Still others have

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<sup>64</sup> See, e.g., Denise C. Gottfredson, Stacy S. Najaka & Brook Kearley, *Effectiveness of Drug Treatment Courts: Evidence from a Randomized Trial*, 2 CRIMINOLOGY & PUBLIC POLICY 171, 187-88 (2003); Cassia Spohn, et al., *Drug Courts and Recidivism: The Results of an Evaluation Using Two Comparison Groups and Multiple Indicators of Recidivism*, 31 JOURNAL OF DRUG ISSUES 149, 171 (2001) (finding that drug court participants were significantly less likely than traditionally adjudicated offenders to be re-arrested during a follow-up period); Deborah Koetzle Shaffer et al., *Drug Abusing Women in the Community: The Impact of Drug Court Involvement on Recidivism*, 39 JOURNAL OF DRUG ISSUES 803, 815 (2009) (finding that offenders on normal probation are eight times more likely to recidivate when compared to drug court participants); Ojmarh Mitchell, et al., *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-traditional Drug Courts*, 40 JOURNAL OF CRIMINAL JUSTICE 60, 69 (2012) (finding that adult drug courts reduce recidivism as compared to other programs with an effect size of 50% versus 37%); Paul Dynia & Hung-En Sung, *The Safety and Effectiveness of Diverting Felony Drug Offenders to Residential Treatment as Measured by Recidivism*, 11 CRIMINAL JUSTICE POLICY REVIEW 299, 310 (2000) (finding that offenders ordered to undergo drug treatment services have lower recidivism rates than non-programmatic participants). *But see* Elizabeth P. Deschenes, Susan Turner & Peter W. Greenwood, *Drug Court or Probation?: An Experimental Evaluation of Maricopa County's Drug Court*, 18 JUSTICE SYSTEM JOURNAL 55, 71 (1995) (finding no significant differences in rearrest rates between those on standard probation and those participating in drug court); Robert Granfield, Cynthia Eby, and Thomas Brewster, *An Examination of the Denver Drug Court: The Impact of a Treatment-Oriented Drug-Offender System*, 20 LAW & POLICY 183, 195 (1998) (finding no significant difference between drug court participants and traditional offenders in terms of rearrests).

<sup>65</sup> See generally Trent Oram & Kara Glecker, *Comment, An Analysis of the Constitutional Issues Implicated in Drug Courts*, 42 IDAHO LAW REVIEW 471 (2006) (discussing several aspects of due process concerns regarding the operation of drug treatment courts, including: i) issues in accessing drug courts; ii) procedural due process protections for those involved in the program; iii) procedural due process protections upon termination from a drug treatment court program; and iv) the right to privacy among drug court participants).

<sup>66</sup> Eric L. Jensen, Nicholas L. Parsons & Clayton J. Mosher, *Adult Drug Treatment Courts: A Review*, 1/2 SOCIOLOGY COMPASS 552, 557 (2007).

<sup>67</sup> See, e.g., Sarah Kirschenheiter, *Note, Zealous and Effective Advocacy: An Assessment of the Constitutional Right to Counsel Within a Drug Court Proceeding*, 2017 CARDOZO LAW REVIEW 68, 89 (2017) ("The right to counsel and effective assistance of counsel are based on adversarial proceedings, which is problematic when attempting to apply to the non-adversarial drug court model.").

<sup>68</sup> Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 JOURNAL OF LAW & POLICY 57, 64 (2009). See also Eric Lane, *Due*

questioned whether a participant in a problem-solving court can receive the due process protection of a neutral and detached magistrate when judges in problem-solving courts are specifically expected to shed their roles as neutral arbiters and instead become interactively and intimately involved with the lives of participants as they progress or flounder in the program.<sup>69</sup> Further objections have been raised around the potential “net widening” effect of drug treatment courts, whereby offenders are sentenced to drug court who would otherwise be diverted out of the criminal justice system entirely.<sup>70</sup> Finally, others raise alarm over the fact that a drug court sentence may in fact be more punitive than any traditional sentence the offender may have received because drug court programs are not only intrusive and intensive<sup>71</sup> (including the possibility of multiple jail sanctions), but generally last anywhere from one to two years’ in duration.

Addressing all the potential due process issues surrounding the operation of drug treatment courts is beyond the scope of this Article. Instead, the following sections will be tailored to a rather specific set of questions surrounding due process and the operation of problem-solving courts which to date have received little, if any, attention in the scholarly literature or in the available caselaw, namely, whether participants in drug treatment courts are entitled to procedural due process when

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*Process and Problem-Solving Courts*, 30 FORDHAM URBAN LAW JOURNAL 955, 960-61 (2003) (questioning the role of defense counsel to provide effective assistance of counsel in problem-solving courts due to the collaborative nature of their structure); Mangesh Duggal, *Long May You Run: Drug Courts in the Twenty-First Century*, 21 BERKELEY JOURNAL OF CRIMINAL LAW 126, 146 (2016) (“Another due process concern is that [drug treatment courts] undermine the traditional role of defense attorneys”).

<sup>69</sup> Evan C. Tsai, *The Practitioner’s Guide to Due Process Issues in Veterans Treatment Courts*, 43 Mitchell Hamline Law Review 577, 612 (2017) (questioning how participants can be afforded the due process protections of a neutral and detached judge in the context of a veterans treatment court). See also Eric Lane, *Due Process and Problem-Solving Courts*, 30 FORDHAM URBAN LAW JOURNAL 955, 957 (2003) (addressing the question whether a problem-solving court judge “can judge in a manner consistent with the protection of a defendant’s due process rights, or whether there is something in this problem-solving rendering of a judge’s function that must undermine those protections”); *State v. Stewart*, 2010 WL 3293920, \*6 (Ct. Criminal App. Tenn. Aug. 18, 2010) (“Even laying aside the concern that forcing a drug court judge to adopt these opposing ‘mentor’ and ‘big-brother’ roles necessarily compromise his appearance of neutrality when reviewing the same conduct at a probation revocation, due process also guarantees that the arbiter of a defendant’s parole revocation will be ‘detached.’ A trial judge will necessarily find it difficult, if not impossible, to reach the constitutionally-required level of detachment when dealing with a course of conduct he has previously reviewed as a member of a drug court team.”).

<sup>70</sup> Anida L. Chiodo, *Sentencing Drug-Addicted Offenders and the Toronto Drug Court*, 45 CRIMINAL LAW QUARTERLY 53, 77 (2001); Mangesh Duggal, *Long May You Run: Drug Courts in the Twenty-First Century*, 21 BERKELEY JOURNAL OF CRIMINAL LAW 126, 154 (2016).

<sup>71</sup> Anida L. Chiodo, *Sentencing Drug-Addicted Offenders and the Toronto Drug Court*, 45 CRIMINAL LAW QUARTERLY 53, 83 (2001). See also Eric L. Jensen & Clayton Mosher, *Adult Drug Courts: Emergence, Growth, Outcome Evaluations, and the Need for a Continuum of Care*, 42 IDAHO LAW REVIEW 443, 467 (2006) (“Part of the problem here is that the consequence of failing in drug court may in fact be more severe than if the individual had been processed through regular criminal justice system channels. In some cases the length of time an individual spends in a drug court program may be longer than what they would be in a traditional court setting, potentially leading to significant disparities in the sentencing of similarly situated offenders.”).

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sanctions are imposed upon them that constitute a deprivation of liberty. These legal observations and resulting questions will be exemplified through ethnographic, *in situ* examples from my ongoing qualitative study of the Western County Drug Court.

### III. PROCEDURAL DUE PROCESS, DRUG TREATMENT COURTS, AND LIBERTY SANCTIONS

The Fourteenth Amendment to the United States Constitution, made applicable of course to the states, provides that any state deprivation of life, liberty, or property cannot be accomplished without providing an individual the due process of law.<sup>72</sup> Applying the due process requirement requires a court to engage in a two-pronged analysis. A court must first determine whether the asserted individual interest is encompassed within the Amendment's protection of life, liberty or property.<sup>73</sup> If protected interests are indeed implicated, the court must then decide what legal procedures constitute "due process of law."<sup>74</sup> While the United States Supreme Court has articulated that the "range of interests protected by procedural due process is not infinite"<sup>75</sup> it is unquestionable that the state "cannot hold and physically punish an individual except in accordance with due process of law."<sup>76</sup> As the United States Supreme Court articulated in *Zadvydas v. Davis*, "[f]reedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty"<sup>77</sup> that the Fourteenth Amendment protects.

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<sup>72</sup> The Fourteenth Amendment to the United States Constitution provides as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. 14, §1.

<sup>73</sup> *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

<sup>74</sup> *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

<sup>75</sup> *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (1972). In articulating the breadth of liberty interests protected by the Fourteenth Amendment, the United States Supreme Court stated as follows: "[w]hile this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>76</sup> *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

<sup>77</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).



Offenders in the criminal justice system do not forfeit the entirety of their due process protections as a consequence of having been convicted.<sup>78</sup> In the seminal case of *Morrissey v. Brewer*,<sup>79</sup> the United States Supreme Court held that notions of due process apply to parole revocation proceedings, most notably because the parolee will “suffer grievous loss”<sup>80</sup> by being condemned to return to prison as a result of violating the conditions of parole. On the nature of the liberty interest possessed by a parolee prior to revocation, which would consequently cause the due process clause to be implicated, the United States Supreme Court stated as follows:

The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked.<sup>81</sup>

Given this liberty interest in remaining outside the confines of prison walls, the Supreme Court then turned to what procedural requirements are due to a parolee prior to his or her revocation. While recognizing that the contemplated state process could be “informal”<sup>82</sup> and “flexible,”<sup>83</sup> the Court held that the state must provide for the following minimum requirements in order to adhere to procedural due process: i) sending written notice of the alleged parole violations to the parolee; ii) disclosing to the parolee the evidence against him or her; iii) affording the parolee an opportunity to be heard in person and to present evidence in his or her favor; iv) providing the parolee with an opportunity to confront and cross-examine adverse

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<sup>78</sup> *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

<sup>79</sup> *Morrissey v. Brewer*, 408 U.S. 471 (1972).

<sup>80</sup> *Morrissey v. Brewer*, 408 U.S. 480, 481 (1972).

<sup>81</sup> *Morrissey v. Brewer*, 408 U.S. 480, 482 (1972).

<sup>82</sup> *Morrissey v. Brewer*, 408 U.S. 480, 482 (1972).

<sup>83</sup> *Morrissey v. Brewer*, 408 U.S. 480, 489 (1972).

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witnesses; v) arranging for a “‘neutral and detached’ hearing body”;<sup>84</sup> and vi) preparing a written statement by the hearing body conveying “the evidence relied on and reasons for revoking parole.”<sup>85</sup> Less than a year after the *Morrissey* decision, the United States Supreme Court determined in *Gagnon v. Scarpelli* that probationers facing revocation proceedings are also entitled to the same procedural due process requirements extended to parolees.<sup>86</sup>

The majority of adult drug treatment courts operate according to a post-adjudication model, whereby offenders must first plead guilty to the alleged criminal charges as a condition precedent to being alternatively referred to and accepted by the drug court program.<sup>87</sup> While in the drug court program, a participant is not incarcerated, but rather living in the community with the ability to “do a wide range of things,”<sup>88</sup> albeit with the condition that he or she complies with the terms of the particular drug court program, which ordinarily consist of, among other things: i) undergoing random drug testing procedures; ii) attending appointments with probation officers; iii) appearing in court for in-person reviews with the drug court judge; and iv) attending substance use treatment as dictated by the drug court team. Failing to adhere to programmatic requirements oftentimes leads to a revocation from drug treatment court with the consequence of the participant’s case being transferred back to the original criminal division for sentencing.<sup>89</sup>

The potential for revocation from drug treatment court raises the question of whether problem-solving court participants are entitled to the same procedural due process protections prior to termination as are afforded to parolees and probationers. In this regard the Supreme Court of Nebraska held in *State v. Shambley* that drug court participants indeed have a “conditional liberty interest in continuing in the program similar to the conditional liberty interests of participants in pre-parole, early release programs; parolees; and probationers.”<sup>90</sup> Therefore, the *Shambley* court concluded that drug court termination proceedings should be conducted similarly to termination hearings for parolees and probationers, with

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<sup>84</sup> *Morrissey v. Brewer*, 408 U.S. 480, 489 (1972).

<sup>85</sup> *Morrissey v. Brewer*, 408 U.S. 480, 489 (1972).

<sup>86</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

<sup>87</sup> Paul Gavin & Anna Kawalek, *Viewing the Dublin Drug Treatment Court through the Lens of Therapeutic Jurisprudence*, 11 INTERNATIONAL JOURNAL FOR COURT ADMINISTRATION 1, 5 (2020). *See also* *State v. Shambley*, 795 N.W.2d 884, 888 (Neb. 2011) (“A drug court program participant pleads guilty and agrees to the terms and conditions of the program in exchange for the possibility of avoiding sentencing and, oftentimes, being allowed to withdraw the plea upon successful completion of the program.”).

<sup>88</sup> *Morrissey v. Brewer*, 408 U.S. 480, 482 (1972).

<sup>89</sup> *State v. Shambley*, 795 N.W.2d 884, 888 (Neb. 2011).

<sup>90</sup> *State v. Shambley*, 795 N.W.2d 884, 893 (Neb. 2011).

drug court participants receiving similar requirements of procedural due process.<sup>91</sup> Although this holding has not been uniformly adopted,<sup>92</sup> most state courts considering this issue have determined that participants in problem-solving courts are entitled to the same procedural due process protections as individuals facing termination from parole or probation.<sup>93</sup>

A more nuanced and undeveloped legal issue is whether, and to what degree, drug court participants are entitled to some procedural due process protections prior to receiving a sanction from the court as a consequence for noncompliant behavior, such as missing treatment appointments or failing a urinalysis exam. The *Key Components* sets forth the following graduated sanctions as a guide for drug treatment courts to utilize in their respective programs: i) warnings and admonishment from the judge in open court proceedings; ii) demotions to early phases of the drug court program; iii) increased frequency of drug testing and court appearances; iv) “confinement in the courtroom or jury box”;<sup>94</sup> v) increased monitoring by probation or increased treatment; vi) imposition of monetary fines; vii) orders to perform community service work (*e.g.*, working at a soup kitchen for a designated number of hours); viii) escalating period of jail stays; and ix) termination from the drug court program and referral back to the original division for criminal sentencing.<sup>95</sup>

The Western County Drug Court Client Handbook incorporates these sanction choices, and adds the following sanctions as other possibilities: i) curfews; ii) required call-ins to probation (*e.g.*, calling the probation officers each morning for

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<sup>91</sup> *State v. Shambley*, 795 N.W.2d 884, 895 (Neb. 2011).

<sup>92</sup> *See, e.g.*, *Dunson v. Commonwealth of Kentucky*, 57 S.W.3d 847, 849 (Ct. App. Ky. 2001) (holding that a participant is not entitled to due process prior to a termination from drug court because a specialized drug court is not a “court” in a jurisdictional sense, but rather nothing more than participating in “a private drug treatment program . . . anger management counseling or a job training program.”).

<sup>93</sup> *See, e.g.*, *Gaither v. State*, 296 So.3d 553, 556 (Fla. Ct. App. 2020) (adopting the holding of *State v. Shambley* and stating that “[t]he termination of the conditional liberty granted drug court participants inflicts a ‘grievous loss’ similar to the loss of parole or probation”); *Gosha v. State*, 931 N.E.2d 432, 434 (Ind. Ct. App. 2010) (holding that a drug court participant “has a protected liberty interest such that he must be accorded procedural due process before the court may terminate his participation in the Drug Court Program and reinstate his original sentence.”); *State v. Rogers*, 170 P.3d 881, 885-86 (Idaho 2007) (following *Morrissey* and *Gagnon* and concluding that a drug court participant was entitled to procedural due process prior to termination the diversionary drug treatment court); *State v. Varnell*, 155 P.3d 971, 974 (Ct. App. Wash. 2007) (holding same); *Tornavacca v. State*, 408 S.W.3d 727, 735-36 (Ark. 2012) (same); *People v. Scura*, 72 P.3d 431 (Co. Ct. App. 2003) (same). *See also* Andrew Fulkerson, *How Much Process is Due in Drug Court?*, 48 CRIMINAL LAW BULLETIN 655, 675 (2012) (“The greater weight of authority is that drug court defendants are entitled to the same procedural due process protections as other persons facing revocation of parole or probation.”).

<sup>94</sup> U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *DEFINING DRUG COURTS: THE KEY COMPONENTS* 24 (1997).

<sup>95</sup> U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *DEFINING DRUG COURTS: THE KEY COMPONENTS* 24-25 (1997).

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a “check in”); iii) “court time” (*e.g.*, requiring participants to attend and observe non-drug court proceedings on a different day); and iv) thirty-day “performance contracts” (*i.e.*, individuals are asked to come up with goals that they can accomplish over the next thirty-day period such as attending all probation appointments and taking all urine analysis tests – the failure to adhere to the contract may lead to drug court termination). As evidenced from the foregoing lists of possible sanctions, the only one that rises to the level of a protected liberty interest is involuntarily incarceration. However, it remains unclear whether, and to what extent, drug court participants are entitled to procedural due process protections with respect to the imposition of a jail sanction for programmatic violations.

To date, a very small handful of courts have addressed this issue, mainly indirectly in dicta, by suggesting that due process concerns are not implicated outside of the context of drug court termination proceedings. In *State v. Rogers*,<sup>96</sup> the Supreme Court of Idaho decided the primary issue before it, namely, whether drug court participants are entitled to procedural due process protections prior to termination. In concert with *Shambley* and relying upon the United States Supreme Court precedents of *Morrissey* and *Gagnon*, the Supreme Court of Idaho held that procedural due process is required before termination from drug treatment court. But at the end of its opinion, the *Rogers* court expressed the following in dicta regarding sanctions:

We understand that similar to the [Ada County Drug Court Program], many diversionary programs are informal in nature, and we do not want to unnecessarily impede the functioning of diversionary programs. The principles articulated in this opinion apply only when a participant in a diversionary program is facing termination from the program because that is when the participant faces a loss of liberty. Intermediate sanctions imposed in these programs do not implicate the same due process concerns, and continued use of informal hearings and sanctions need not meet the procedural requirements articulated here.<sup>97</sup>

In similar fashion, the Fifth District Court of Appeal of Florida also offered (albeit in a footnote) that drug court sanctions “short of termination”<sup>98</sup> may not require the same level of procedural due process as for termination proceedings, particularly

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<sup>96</sup> *State v. Rogers*, 170 P.3d 881 (Idaho 2007).

<sup>97</sup> *State v. Rogers*, 170 P.3d 881, 886 (Idaho 2007).

<sup>98</sup> *Gaither v. State*, 296 So.3d 553, 557 n.1 (Fla. Ct. App. 2020).

in the observation that “[d]ue process is a flexible concept, and lesser sanctions do not implicate the same due process concerns.”<sup>99</sup>

As of this writing, the closest decision addressing intermediate sanctions and due process concerns is *Brookman v. State of Maryland*.<sup>100</sup> In *Brookman*, Crystal Brookman was charged with multiple counts of identity theft and conspiracy to commit theft.<sup>101</sup> The criminal court imposed a suspended jail sentence and placed Brookman on supervised probation.<sup>102</sup> Following a violation of the conditions of her probation, the court sentenced Brookman to the Montgomery County Adult Drug Court.<sup>103</sup> During Brookman’s sojourn through the drug court, on at least two separate occasions she submitted urinalysis samples that resulted in a showing of low creatine levels.<sup>104</sup> At a hearing following the latest submission of a urine sample with a low level of creatine, the state requested that the court impose an immediate jail sanction for these programmatic violations; Brookman’s counsel requested a continuance of the hearing so as to seek the independent guidance of a chemist to see if the lab report was scientifically reliable.<sup>105</sup> Denying the request, the court imposed an immediate sanction of overnight incarceration.<sup>106</sup> Brookman then filed an application for leave to appeal, requesting the reviewing court to determine whether the drug court violated her due process rights by imposing sanctions without affording her an adversarial hearing.<sup>107</sup>

Determining that sanctions imposed by a drug treatment court constitute a final judgment and likening the status of a drug court participant to a probationer or parolee, the *Brookman* court concluded that the imposition of sanctions are immediately appealable (in part because the Montgomery County Drug Court client contract explicitly provided that participants “‘have the right to request and have a formal adversarial hearing before the imposition of a sanction of incarceration’”).<sup>108</sup> In this regard, the *Brookman* court stated the following:

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<sup>99</sup> Gaither v. State, 296 So.3d 553, 557 n.1 (Fla. Ct. App. 2020).

<sup>100</sup> *Brookman v. State*, 158 A.3d 1099 (Ct. Special App. Md. 2017), *aff’d*, *State v. Brookman*, 190 A.3d 282 (Ct. App. Md. 2017).

<sup>101</sup> *Brookman v. State*, 158 A.3d 1099, 1102 (Ct. Special App. Md. 2017).

<sup>102</sup> *Brookman v. State*, 158 A.3d 1099, 1102 (Ct. Special App. Md. 2017).

<sup>103</sup> *Brookman v. State*, 158 A.3d 1099, 1102 (Ct. Special App. Md. 2017).

<sup>104</sup> *Brookman v. State*, 158 A.3d 1099, 1102 (Ct. Special App. Md. 2017). In the context of drug treatment courts, a urinalysis result with a low creatine level may signify to the drug court team “an effort by the participant to overhydrate and dilute his or her urine (and thus defeat the test).” *Brookman v. State*, 158 A.3d 1099, 1102-03 n.1 (Ct. Special App. Md. 2017).

<sup>105</sup> *Brookman v. State*, 158 A.3d 1099, 1102-03 (Ct. Special App. Md. 2017).

<sup>106</sup> *Brookman v. State*, 158 A.3d 1099, 1103 (Ct. Special App. Md. 2017).

<sup>107</sup> *Brookman v. State*, 158 A.3d 1099, 1103 (Ct. Special App. Md. 2017).

<sup>108</sup> *Brookman v. State*, 158 A.3d 1099, 1109 (2017).

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[W]here participation in Drug Court is a term of a defendant's probation and there exists an independent possibility that sanctions that deprive the defendant of liberty or extend his or her participation in the program, the defendant stands in a position akin to someone who has (allegedly) violation probation.<sup>109</sup>

In so holding, the *Brookman* court recognized that, in actuality, a hearing had occurred on the day it imposed a jail sanction for the diluted urinalysis test. The court acknowledged that the defendant was present in the courtroom when the judge discussed the results of her urinalysis test and counsel was present on her behalf who argued for a continuance “to look into whether or not there could possibly be a margin of error or something else within Ms. Brookman that results in this” (*i.e.*, another physical justification for the occurrence of low creatine in her urine). Nonetheless, the court found that Brookman's due process rights were violated because the hearing was not truly adversarial in nature. To the contrary, as the court held, “Ms. Brookman sought an opportunity to dispute the results of her urine tests, and sought a continuance so that she could obtain an expert and analyze the results, and the court refused. The court took the State's allegations not only at face value, but as a *fait accompli*, and denied her any opportunity to review or challenge the results before imposing sanctions.”<sup>110</sup> Consequently, *Brookman* held that the drug treatment court violated her constitutional rights to procedural due process prior to the imposition of a carceral sanction.

A related concern to the issue of whether drug court sanctions do or do not rise to the level of due process protections is that a criminal defendant may waive constitutional protections of due process so long as it is done knowingly, intelligently, and voluntarily.<sup>111</sup> Some drug treatment court programs contain a provision in their respective drug court client contracts whereby participants expressly waive rights to a procedural hearing upon alleged programmatic violations and the consequent imposition of sanctions. These contracts are entered into by participants prior to sentencing to the drug court; any violations of the terms and conditions of the client contract may arise weeks, if not months or years, prior to any jail sanction. Consequently, it begs the question whether a drug court participant can waive procedural due process rights *ex ante* when he or she is initially sentenced to drug treatment court. This issue has been addressed by only a handful of courts to date.

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<sup>109</sup> *Brookman v. State*, 158 A.3d 1099, 1107 (2017).

<sup>110</sup> *Brookman v. State*, 158 A.3d 1099, 1111 (2017).

<sup>111</sup> *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995).

In *Staley v. State of Florida*, Bobby Staley was placed on probation for various drug offenses, but later violated the terms of his probation.<sup>112</sup> In exchange for a suspended sentence of two years' imprisonment, Staley agreed to be sentenced to a drug treatment court for two years. Upon entering the drug court program, Staley executed a drug court client contract that included a provision where he "agrees to waive his rights to an adversarial hearing or trial and will instead proceed directly to sentencing upon determination by the Drug Court Judge that [he] has failed to successfully complete the Drug Court Program."<sup>113</sup> Approximately a year later, Staley allegedly violated the terms and conditions of drug court by failing to submit a urinalysis sample as directed. Several days later, the court issued a notice to appear and related probable cause statement, but no affidavit of probation was ever filed.<sup>114</sup> On the very same day, a hearing was held which found that Staley had violated his probation; consequently, the court sentenced Staley to two years' imprisonment.<sup>115</sup> Perhaps inexplicably, the state did not present any proof of Staley's violation at the hearing.<sup>116</sup> According to the appellate court, "no evidence was admitted [and] no one testified about what condition of probation Staley had violated."<sup>117</sup> Despite these infirmities in the record, the state nevertheless argued that the probation revocation procedure satisfied due process concerns because Staley waived the right to any adversarial hearing in accordance with his signed drug court client contract.<sup>118</sup> The appellate court disagreed, holding in part that a drug court participant cannot knowingly and intelligently waive procedural due process rights in advance through a drug court contract "without knowing what those allegations [would be]."<sup>119</sup> More specifically, the court held as follows: "[a] probationer can certainly waive his rights to due process and to statutory procedures after they have been implicated. Thus, for instance, once an affidavit of violation has been filed the probationer may elect not to contest it. But we do not believe he can prospectively waive these rights."<sup>120</sup>

Similarly, the Supreme Court of New Hampshire in *State v. LaPlaca* held that a drug court participant could not lawfully waive his or her due process rights through a provision in the drug court client agreement to any hearing in advance of termination proceedings.<sup>121</sup> In this regard, the *LaPlaca* court articulated the following:

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<sup>112</sup> *Staley v. State*, 851 So.2d 805, 806 (Fla. Ct. App. 2003).

<sup>113</sup> *Staley v. State*, 851 So.2d 805, 806 (Fla. Ct. App. 2003).

<sup>114</sup> *Staley v. State*, 851 So.2d 805, 806 (Fla. Ct. App. 2003).

<sup>115</sup> *Staley v. State*, 851 So.2d 805, 806 (Fla. Ct. App. 2003).

<sup>116</sup> *Staley v. State*, 851 So.2d 805, 806 (Fla. Ct. App. 2003).

<sup>117</sup> *Staley v. State*, 851 So.2d 805, 806 (Fla. Ct. App. 2003).

<sup>118</sup> *Staley v. State*, 851 So.2d 805, 806 (Fla. Ct. App. 2003).

<sup>119</sup> *Staley v. State*, 851 So.2d 805, 807 (Fla. Ct. App. 2003).

<sup>120</sup> *Staley v. State*, 851 So.2d 805, 807 (Fla. Ct. App. 2003).

<sup>121</sup> *State v. LaPlaca*, 27 A.3d 719, 725 (N.H. 2011).

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It was impossible for the defendant to have full knowledge of the allegations against him when the facts giving rise to those allegations had yet to occur. The defendant's advance waiver of the right to any and all hearings was akin to pleading guilty to any future allegations brought against him because the effect of such a waiver eliminated the obligation of the State to prove the allegations against him, and deprived him of the opportunity to contest them. It would subvert the requirements of due process to uphold the defendant's prospective waiver of his right to a hearing.<sup>122</sup>

The *LaPlaca* court limited its decision regarding the constitutional concerns of advance waivers to the termination proceeding the defendant faced which resulted in the imposition of a suspended sentence of incarceration.<sup>123</sup> The court "left for another day" whether a prospective waiver would pass constitutional scrutiny "in the context of the imposition of lesser sanctions,"<sup>124</sup> meaning sanctions which result in the loss of conditional liberty but fall short of complete termination from the drug court program – in other words, short-term jail sanctions.

Despite the existence of drug treatment courts in the criminal justice system for over thirty-two years, important legal questions remain regarding the day-to-day operations of drug treatment courts and the imposition of graduated sanctions for violative behavior. These issues are salient as the number of drug treatment courts, and problem-solving courts more generally, exponentially expand across the country and more criminal offenders are being routed through these specialized tribunals. In particular, four questions remained unresolved, as follows:

1. Are drug court participants entitled to a truly adversarial hearing when a sanction of incarceration is imposed in the absence of a specific drug treatment court contractual provision explicitly entitling the defendant to such a hearing?
2. In light of the situational and flexible nature of procedural due process,<sup>125</sup> what protections are participants in drug treatment court

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<sup>122</sup> State v. LaPlaca, 27 A.3d 719, 725 (N.H. 2011).

<sup>123</sup> State v. LaPlaca, 27 A.3d 719, 726 (N.H. 2011).

<sup>124</sup> State v. LaPlaca, 27 A.3d 719, 726 (N.H. 2011).

<sup>125</sup> State v. LaPlaca, 27 A.3d 719, 726 (N.H. 2011) (noting that the "requirements of due process are flexible and call for such procedural protections as the particular situation demands") (citation omitted). *See also* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has



entitled to before being sent to jail as a short-term sanction for behavior that violates the terms and conditions of the drug court program?

3. Does a short-term jail stay even constitute the deprivation of a liberty interest as a matter of law? Under United States Supreme Court precedent it may not be considered a “grievous loss” (at least from the purely legal perspective and not from the subjective experiences of drug court participants)<sup>126</sup> On this front, the *Adult Drug Court Best Practices Standards* published by the National Association of Drug Court Professionals offers the following guidance: “[j]ail sanctions are imposed judiciously and sparingly. Unless a participant poses an immediate risk to public safety, jail sanctions are administered after less severe consequences have been ineffective at deterring infractions. Jail sanctions are definite in duration and typically last no more than three to five days.”<sup>127</sup> Given this supposedly limited application, are concerns about short-term jail stays much ado about nothing because of their intended infrequency?
4. Can hearings on short-term jail stays be waived in advance by participants through a drug court client contract? Do protections regarding advance waivers of short-term jail stays rise to the level of *ex ante* waivers of termination proceedings where the likely result is the imposition of the original sentence along with the likelihood of a longer-term sentence to prison?

In the following section, I offer some qualitative empirical findings on these still unaddressed legal issues in conjunction with my study of the Western County Drug Court.

#### IV. DUE PROCESS AND DRUG COURT SANCTIONS: ETHNOGRAPHIC INSIGHTS FROM THE WESTERN COUNTY DRUG COURT

Conducting an ethnographic study as a methodological design causes the researcher to immerse himself or herself among a certain group, community, culture, or institution as an active participant or a non-participant observer and

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been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.”).

<sup>126</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (stating that “[w]hether any procedural protections are due depends on the extent to which an individual will be ‘condemned to suffer grievous loss’”) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

<sup>127</sup> NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, *ADULT DRUG COURT BEST PRACTICES STANDARDS (VOLUME I)* 28 (2018).

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therein “carry out detailed observations, supplemented by field notes and interviews to obtain an insider’s view.”<sup>128</sup> I initially gained access to this research site by personally meeting with the drug court judge and drug court administrator, who both supported my research plan. The judge and the drug court administrator served as the prime gatekeepers for allowing me to conduct this research. In general, qualitative research such as ethnography “is a broad umbrella term for research methodologies that describe and explain persons’ experiences, behaviours, interactions and social contexts” without relying on quantitative or statistical models.<sup>129</sup> More particularly, qualitative research attempts to develop an understanding of the meanings and importance of certain experiences in individuals’ lives.<sup>130</sup> Qualitative research aims for depth and richness rather than breadth.<sup>131</sup> Accordingly, qualitative researchers seek to obtain in-depth and intimate information from a smaller group of people.<sup>132</sup> Because of this, qualitative research “makes no claim of the generalizability of findings to a specified larger population in a probabilistic sense.”<sup>133</sup> Nevertheless, qualitative research often results in thematic generalizability to a single human experience.<sup>134</sup> Qualitative research is concerned with “the applicability of [its] findings, based on how the nature and processes involved in experiences generalize.”<sup>135</sup> In contrast to the deductive nature of quantitative research, qualitative research is inductive, and is often described in the social science literature as “emergent.”<sup>136</sup> This inductive approach serves to protect the phenomenological integrity of the collected data.<sup>137</sup>

While a qualitative researcher of a single particular drug treatment court may not be able to generalize his or her findings to drug courts located in other districts

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<sup>128</sup> Subha Ramani & Karen Mann, *Introducing Medical Educators to Qualitative Study Design: Twelve Tips from Inception to Completion*, 38 *MEDICAL TEACHER* 456, 457 (2016).

<sup>129</sup> Ellie Fossey, Carol Harvey, Fiona McDermott & Larry Davidson, *Understanding and Evaluating Qualitative Research*, 36 *AUSTRALIAN & NEW ZEALAND JOURNAL OF PSYCHIATRY* 717, 717 (2002) (internal citations omitted).

<sup>130</sup> Ellie Fossey, Carol Harvey, Fiona McDermott & Larry Davidson, *Understanding and Evaluating Qualitative Research*, 36 *AUSTRALIAN & NEW ZEALAND JOURNAL OF PSYCHIATRY* 717, 730 (2002).

<sup>131</sup> Anne-Marie Ambert, Patricia A. Adler, Peter Adler & Daniel F. Detzner, *Understanding and Evaluating Qualitative Research*, 57 *JOURNAL OF MARRIAGE AND THE FAMILY* 879, 880 (1995).

<sup>132</sup> Anne-Marie Ambert, Patricia A. Adler, Peter Adler & Daniel F. Detzner, *Understanding and Evaluating Qualitative Research*, 57 *JOURNAL OF MARRIAGE AND THE FAMILY* 879, 879 (1995).

<sup>133</sup> Ellie Fossey, Carol Harvey, Fiona McDermott & Larry Davidson, *Understanding and Evaluating Qualitative Research*, 36 *AUSTRALIAN & NEW ZEALAND JOURNAL OF PSYCHIATRY* 717, 730 (2002).

<sup>134</sup> Kelly J. Asmussen & John W. Creswell, *Campus Response to a Student Gunman*, 66 *JOURNAL OF HIGHER EDUCATION* 575, 588 (No. 5 1995).

<sup>135</sup> Ellie Fossey, Carol Harvey, Fiona McDermott & Larry Davidson, *Understanding and Evaluating Qualitative Research*, 36 *AUSTRALIAN & NEW ZEALAND JOURNAL OF PSYCHIATRY* 717, 730 (2002).

<sup>136</sup> JOHN W. CRESWELL, *QUALITATIVE INQUIRY & RESEARCH DESIGN: CHOOSING AMONG FIVE APPROACHES* 47 (3d ed. 2013).

<sup>137</sup> Anne-Marie Ambert, Patricia A. Adler, Peter Adler & Daniel F. Detzner, *Understanding and Evaluating Qualitative Research*, 57 *JOURNAL OF MARRIAGE AND THE FAMILY* 879, 880 (1995).

in a probabilistic sense, because drug courts are all (or should be) organized according to the “10 Key Components” originating from the United States Department of Justice and the National Association of Drug Court Professionals, it is likely that the findings and observations contained in this research project can transcend thematically to other drug courts across the country.

The data contained in this Article stem primarily from: i) my in-court observations of drug court proceedings; ii) interviews with the public defenders and district attorneys assigned to the Western County Drug Court; and iii) reviewing the central documents governing the operations of the Western County Drug Court. In reporting these qualitative findings, anonymity and identity have been protected for all interviewees and participants in accordance with Institutional Review Board protocol. Consequently, pseudonyms for the participants have been used and generic job title identifiers employed for the legal actors.

#### A. THE STRUCTURE OF THE WESTERN COUNTY DRUG COURT

The Western County Drug Court has been in operation for over a decade. It operates on a probation-revocation model – that is, as a condition precedent to being sentenced to drug court, the individual has already been placed on regular probation for a felony violation and has failed to comply with the terms and conditions of regular probation. Consequently, in the traditional criminal court process, a probation revocation complaint gets filed and the general next step is to sentence that individual to either a term in community corrections (*i.e.*, a state-run, supervised half-way house) or to the department of corrections (*i.e.*, prison). But if the originating court believes that the person can benefit from drug treatment court, he or she can be referred by the originating court to the Western County Drug Court. According to the district attorney assigned to the Western County Drug Court, the program “does not want the casual user who is sometimes caught in a bad situation,” but rather a person who is “at a high risk to recidivate and has a high need in terms of their substance abuse.”<sup>138</sup> Individuals who have either a violent criminal background or a drug distribution felony on their records are generally denied entry into the Western County Drug Court for community safety reasons.<sup>139</sup>

The Western County Drug Court team is comprised of two public defenders, two rotating district attorneys, two probation officers, a member of law enforcement, three treatment providers, the judge, the drug court administrator, and the administrator of a sober living facility. Drug court occurs on a bi-weekly basis, with internal drug court “staffing” occurring in the judge’s chambers in the

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<sup>138</sup> Interview with the district attorney for the Western State Drug Court (dated October 30, 2018).

<sup>139</sup> WESTERN STATE DRUG COURT POLICIES AND PROCEDURE MANUAL 10 (on file with author).

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mornings from 9 a.m. to 11:30 a.m. and open court hearings occurring for three to four hours in the afternoon, starting at 1:30 p.m. There are two primary purposes for the morning staffing sessions. First, the drug court team deliberates on and evaluates prospective clients who have been referred to the drug court from their regular, traditional criminal court division for potential sentencing to the Western County Drug Court as an alternative to a sentence of community corrections or the department of corrections. Second, and most importantly, the drug court team discusses each current participant's progress in the program over the past two-week period. This discussion on participant developments, always spearheaded by the probation officers, leads to the collaborative team decision of whether a participant will receive a reward or a sanction for the past two weeks of behavior. During the two-week intervals between court review sessions, clients are at a minimum required to meet with their probation officer, attend multiple treatment sessions, and undergo several random urinalysis tests. Full compliance leads to a form of incentive whereas non-compliance can lead to a sanction, determined in part from a graduated table of sanctions in conjunction with the thoughts and input from the entire drug court team. Oftentimes a participant receives both an incentive and a sanction at the same court review session – for example, verbal praise from the judge for satisfying certain obligations (*e.g.*, making all probation appointments), but a sanction for failing to adhere to other conditions (*e.g.*, not showing up for treatment sessions).

At present, there are approximately forty-five individuals in the Western County Drug Court program – roughly 55% are male and 45% female, whose ages span from 20 to 65 years old. Because of the specific district in which the Western County Drug Court resides, the majority of drug court participants are either Caucasian or Latina/o. In addition to their past criminality, participants are often living in unstable housing or are homeless, often unemployed and without any financial resources, have little familial support, still often using drugs (commonly methamphetamines and cocaine), and often dealing with mental health issues or traumatic past experiences (*e.g.*, physical abuse). These social conditions oftentimes intersect along multiple fronts. The district attorney for the Western County Drug Court described participants in the following stark terms during our interview together:

These are people that are almost dying . . . or have had people die in their families and discover them dead and, all sorts of horrific things. People that are ruining their relationships with their mothers and fathers and children . . . [and] like being homeless. It's really sad and unfortunate [but] . . . that's the majority of our program. Like

this is high risk, high need, we are not going to succeed as much as we fail in this program.<sup>140</sup>

One of the public defenders for the Western County Drug Court echoed these sentiments when describing the drug court participants: “basically, they’re poor people who are usually uneducated who are struggling with something that’s so much bigger than them.”<sup>141</sup>

Newly admitted participants are officially sentenced to the Western County Drug Court at the end of the bi-weekly court docket (as demonstrated in part by the opening vignette). The official drug court sentence is for a term of “eighteen months or for however long it takes the defendant to complete” the program.<sup>142</sup> During the sentencing proceeding in open court, the drug court judge is careful to advise clients that the drug court program is a voluntary program that they can terminate by self-revoking at any time, and that they maintain their due process rights throughout the drug court sentence. While it is possible for a person to successfully graduate from the Western County Drug Court program in as few as fifteen months if they comply perfectly with all of the requirements from the very beginning, this is rare. Rather, as participants move through the drug court program, progress can be retarded by relapse (which is expected in the early stages) or by other forms of behavioral non-compliance. It is not uncommon, nor unexpected, for successful participants to remain in the program between two and three years.

The Western County Drug Court program is comprised of five distinct phases, lasting in during as follows: phase one – “orientation” (30 days minimum); phase two (60 days minimum); phase three (90 days minimum); phase four (90 days minimum); and phase five – “graduation and maintenance” (180 days minimum). Setbacks and “misses” are common and expected throughout all phases (perhaps less so in phases four and five), but participants must comply with any ordered treatment, meet with probation, and undergo drug testing throughout all phases. In the last two phases, however, restrictions such as the number of court appearances and the number of random drug screens may be eased if the drug court team determines that an individual is making significant positive progress in the program.

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<sup>140</sup> Interview with the district attorney for the Western County Drug Court (dated October 30, 2018).

<sup>141</sup> Interview with the public defender for the Western County Drug Court (dated August 17, 2020).

<sup>142</sup> Transcript of Western State Drug Court Proceedings (dated May 31, 2018).

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### B. DUE PROCESS AND DRUG COURT ENTRY

Between the informal staffing sessions with the drug court team, which usually end at roughly 11:30 a.m., and when in-court participant review sessions commence promptly at 1:00 p.m., the two public defenders assigned to the Western County Drug Court meet with the offenders who are set to be officially sentenced to the court that day. Most often, the prospective participants are in-custody, brought to the Western County Courthouse from either the Western County Jail or from other jails in nearby jurisdictions. During these meetings, the public defenders go over with the prospective participants the terms and conditions set forth in the Western County Drug Court Client Contract and Agreement (“Client Contract”), which runs seven pages long. In addition, prospective participants are also handed a copy of the Western County Drug Court Client Handbook (“Client Handbook”), a document that over the course of an additional thirteen pages sets forth and explains all of the expectations, practices, and operational procedures for the Western County Drug Court.

The first page of the Client Handbook makes it clear that the program is entirely voluntary, noting that the participant agrees “to all of the Western County Drug Court rules.”<sup>143</sup> Further, the Client Handbook tells each prospective participant that he or she “will be expected to do what the Judge tells you to do . . . .”<sup>144</sup> For each scheduled court appearance, the Client Handbook instructs each participant that the judge “will ask you to report on your progress including your sobriety, drug test results, attendance at counseling sessions, participation in treatment and any other matters concerning your progress.”<sup>145</sup> The Client Handbook then explains what will ordinarily happen during the in-court review sessions if the participant is either doing well or not doing-well, such as by relapsing, missing appointments with probation officers or therapists, or failing to avoid detrimental “people, places, and things.” While programmatic compliance results in intangible and material rewards and incentives, such as verbal praise from the judge or token gift cards to grocery stores and fast food restaurants, the Client Handbook states that when a participant is faltering in the program and meets with the judge:

The Judge will discuss this with you and determine whether any further action needs to be taken. If you have committed one or more of the program violations listed in your contract you will then be required to complete an approved sanction by the [drug court] Team. Some sanctions may include jail time, community service, writing

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<sup>143</sup> WESTERN COUNTY DRUG COURT CLIENT HANDBOOK 2 (copy on file with author).

<sup>144</sup> WESTERN COUNTY DRUG COURT CLIENT HANDBOOK 2 (copy on file with author).

<sup>145</sup> WESTERN COUNTY DRUG COURT CLIENT HANDBOOK 5 (copy on file with author).

essays, sitting through other court cases, or reading certain materials.<sup>146</sup>

While the Client Handbook unquestionably warns participants in advance that the decision to enter the Western County Drug Court is voluntary, and that sanctions will be imposed for programmatic violations, the Client Handbook is silent with respect to a participant's right to request notice and a hearing prior to the imposition of a sanction of incarceration. Moreover, the Client Contract provides a section regarding the participant's "rights and benefits." Among this list, three are significant for the due process concerns raised by this Article:

1. I may talk to an attorney at any time;
2. The Public Defender may be appointed to represent me and give me advice regarding [drug court] and the pending case prior to sentencing to probation and [drug court]; and
3. I understand that the [drug court] judge has the authority to impose a jail sanction for any violation of the terms and conditions of [drug court] or probation.<sup>147</sup>

In my interviews with the Western County Drug Court public defenders, I asked them about their interactions with prospective clients during the interim period between staffing and sentencing. As one described it to me, "[w]e're talking to them about drug court[,] we go over the contract with them, if they have any questions but also including, you know, really emphasizing that at any point if there's something they dispute, they can bring that up with the court and they can always talk to us."<sup>148</sup> Getting to know the drug court team members over the past three years, it bears noting that they are unquestionably committed to their professional roles in assisting participants to successfully navigate the drug court program. Moreover, I do not question the competency of the public defenders in the slightest. Nonetheless, I do question whether prospective drug court participants truly understand, appreciate, and embrace that they have a fundamental right to dispute something with the court if something occurs later on. I asked this question of one of the public defenders regarding the rights and benefits contained within the Client Contract itself. He responded as follows: "I think the client contract is too verbose. I think a lot of people kind of, you know, blank over as much as they can, which is why I read through the whole thing, but I mostly try to highlight the most important

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<sup>146</sup> WESTERN COUNTY DRUG COURT CLIENT HANDBOOK 6 (copy on file with author).

<sup>147</sup> WESTERN COUNTY DRUG COURT CLIENT CONTRACT 4 (copy on file with author).

<sup>148</sup> Transcript of interview with the public defender for the Western County Drug Court (dated July 13, 2020).

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parts of it. You know, that the biggest thing we want from you as a client is for you to just show up at first.”<sup>149</sup>

But this brief initial counseling session (which usually lasts thirty minutes for each new client) and what prospective participants likely take from it needs to be put in sociological perspective - the Western County Drug Court participants come from disadvantaged and marginalized backgrounds filled with poverty, low educational attainment, and instability.<sup>150</sup> As one of the public defenders remarked to me, “[t]he vast majority, probably like 98% qualify for a public defender, meaning they’re all socioeconomically poor.”<sup>151</sup> These individuals are additionally struggling with chronic and severe drug addiction. Added to these factors is the practical reality that most offenders are simply accepting drug court in order to get out of jail the next day and possibly avoid a future community corrections or department of corrections sentence imposed by judges in the other criminal division. On this note, the sheriff assigned to the Western County Drug Court put it this way to me: “I think the vast majority of people that we accept in our program want to be in our program to get released so they can get out and go get high.”<sup>152</sup> This possibly suggests why prospective participants’ eyes “blank over” when speaking with the public defender about the expectation of drug treatment court and the rights they may retain to contest a jail sanction if they deem it unwarranted. While participants do express bouts of agency during in-court review meetings with the judge and will verbally oppose the imposition of a jail sanction, the participants may nevertheless be completely lacking in the knowledge that they may possess the constitutional right to request a formal adversarial hearing to contest a jail sanction or immediately appeal such a decision.

The public defenders indicated to me during our interviews that once active in the program, participants will sometimes informally contact them with questions (most notably in connection with facing possible revocation from drug court). That said, in three years of observing drug court proceedings, I have *never* witnessed a

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<sup>149</sup> Transcript of interview with the public defender for the Western County Drug Court (dated July 13, 2020).

<sup>150</sup> This observation is reflective of the criminal justice population more generally. *See, e.g.*, Bruce Western & Becky Petit, *Incarceration and Social Inequality* 139 DAEDALUS 8, 8 (2010) (“America’s prisons and jails have produced a new social group, a group of social outcasts who are joined by the shared experience of incarceration, crime, poverty, racial minority, and low education.”) *See, e.g.*, Reuben Jonathan Miller, *Devolving the Carceral State: Race, Prisoner Reentry, and the Micro-Politics of Urban Poverty Management*, 16 PUNISHMENT & SOCIETY 305, 314 (2014) (noting that the overwhelming number of prisoners come from disadvantaged backgrounds); John M. Halushka, 67 SOCIAL PROBLEMS 233, 233 (2020) (noting that the population of prisoners returning home is “composed disproportionately of poor men of color with little schooling, who come from and return to some of America’s poorest and most racially segregated urban neighborhoods”).

<sup>151</sup> Transcript of interview with the public defender for the Western County Drug Court (dated July 13, 2020).

<sup>152</sup> Interview with sheriff for the Western County Drug Court (dated August 20, 2020).



drug court participant during in-court reviews with the judge turn to the public defenders to seek legal assistance, advice, or input. The explanation for this observation likely rests in the foundational structuring of drug treatment courts themselves. That is, participants are well-coached that the drug court members operate as a collaborative team for their collective benefit. This is no doubt true. But while the Client Contract advises that participants can speak to an attorney “at any time,”<sup>153</sup> one of the district attorneys made clear to me during our interview together that the public defenders assigned to the drug court team do not officially represent the participants while they are in the program itself.<sup>154</sup> The public defenders assigned to the Western County Drug Court team officially represent participants at two distinct points: at the initial sentencing to the Western County Drug Court and at revocation hearings should the client prove to be unsuccessful by the drug court team or decide to self-revoke from the program. Consequently, participants in the Western County Drug Court do not have official attorney representation at the moment jail sanctions are imposed from the bench.

During an interview with another public defender, she agreed with the notion that “at a certain point” a participant “really [has] the right to have a hearing”<sup>155</sup> to, for example, contest a “hot” urinalysis result. But while the participant’s right to request an adversarial hearing exists in spirit, it has never happened in practice during the course of my study. The same public defender, however, expressed his opinion that due process protections are nonetheless afforded to participants during the informal morning staffing sessions where he can advocate on the client’s behalf for a reduced sanction (*i.e.*, if jail is being contemplated by the full team) or sometimes request a more formal inquiry prior to any sanction imposed by the judge in open court, usually in the face of allegations by the urinalysis agency that a participant attempted to falsify a urine test through the use of non-human urine or through a device known as a “whizzinator.”<sup>156</sup> But even for this public defender, he subjectively views due process rights in the Western County Drug Court in situational terms, as evidenced by his other comments on this issue:

And the other part of it is that, we do advocate for there being due process in response to some of the sanctions. Um, the other side of it is that we make sure that they’re fully aware before they sign the drug court contract that there are certain sanctions that can be

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<sup>153</sup> Western County Drug Court Client Contract 4 (copy on file with author).

<sup>154</sup> Transcript of interview with the district attorney for the Western County Drug Court (dated October 10, 2018).

<sup>155</sup> Interview with the public defender for the Western County Drug Court (dated August 17, 2020).

<sup>156</sup> Interview with the public defender for the Western County Drug Court (dated August 17, 2020).

leveled against them up to basically a maximum of four days in jail.<sup>157</sup>

As demonstrated by this quote, this public defender believes that participants' procedural due process protections are in part occurring behind the scenes, removed from the proceedings in open court, and outside of the purview of the participants themselves. In my observations of these staffing sessions public defenders will sometimes advocate for less-punitive sanctions for the participants when incarceration is being contemplated, but the public defenders' arguments, while seriously considered by other team members, are not independent from the dynamic of the drug court team making a collective decision, leading one to question whether the public defender is suited to advocate against a client's proposed jail sanction, a client that he or she does not technically represent during the staffing sessions.<sup>158</sup> In addition, the comment also suggests the public defender's subjective belief that because participants are "fully aware before they sign the drug court contract" that incarceration sanctions may be imposed, this advance knowledge is a valid, implicit waiver of future adversarial hearings when the team decides to impose a short-term jail sanction.

More broadly, I asked a former district attorney for the Western County Drug Court whether the due process rights of defendants can be protected in the non-adversarial structure of a drug treatment court. After a slight pause, she responded as follows:

I think that that's a fair question in a vacuum, but here's the real context. Do you know where all these people would be if they weren't in drug court? Jail, community corrections, or prison. Those are the options, you know, so that's fine, but they could just go to [community corrections] or prison. I mean, which is a total waste of everybody's time and resources as people shouldn't be there. They should be in a program like this. Are there going to be proceedings that may make the most ardent of advocates a little uncomfortable? Sure. But it's a trade off and they're voluntarily in this program – they can go through the regular criminal jail, you know?<sup>159</sup>

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<sup>157</sup> Interview with the public defender for the Western County Drug Court (dated August 17, 2020).

<sup>158</sup> This problematic question has been raised by others. See, e.g., Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REVIEW OF LAW & SOCIAL CHANGE, 37, 57 (2000) ("That the defense attorney may have taken part in the court's design certainly does not relieve her [of the] responsibility to provide the individual client with effective assistance of counsel and zealous representation within that court.").

<sup>159</sup> Transcript of interview with the district attorney for the Western County Drug Court (dated November 30, 2018).

Several points can be gleaned from this statement. First, much like her public defender counterpart, this former district attorney also adopts the view that the voluntary nature of drug treatment courts should otherwise water down procedural due process protections for drug court participants. After all, it is indeed some practical trade off from the participants' perspective: if he or she does not agree with the possible imposition of short-term jail sanctions as a condition of drug treatment court, he or she can elect not to be sentenced to drug court. But this is a Hobson's choice at best – participants are savvy and know that the likely alternative to declining an opportunity at drug court is community corrections or the department of corrections. Having to make such a constrained choice should not, however, impliedly waive procedural due process protections, even if minimally guaranteed. Second, and relatedly, while the district attorney's interpretation of the matter is problematic from a legal vantage point, from a sociolegal standpoint he offers another point of consideration: that is, in the absence of a problem-solving drug treatment court, which is aimed at providing dire needed treatment services to those suffering with severe drug addictions, the alternative is more of the same – confinement in jail or prison which is a "total waste of everybody's time and resources" and serves to only compound our nation's current mass incarceration problem with its revolving door of justice whereby people with non-violent offenses who are plagued by addiction are returned to confinement without any resolution to what they need the most, namely, freedom from the traps of addiction and to lead a life of prosocial behavior and productivity.

The theme of the voluntariness of the Western County Drug Court as a substitute or outright replacement for formally adhering to procedural due process considerations was echoed by another district attorney for the program. When asked outright whether participants are afforded their due process rights, he responded in the following way:

Yeah, I think they are. I mean I think it's made very clear to them at the beginning that . . . the program is voluntary, that we've accepted you, but ultimately it's your . . . you [meaning the participant him/herself] make the yes or no decision . . . I think that's why you see [the judge] have some of them [referring to prospective participants in custody] come early and watch a session to see it and understand. But at the end of the day . . ., I mean everything is in front of them. There's no secrets. They know the schedules, they know the various sanctions if they mess up on what's coming. They

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have access to [the public defenders], so yeah, I think they are afforded due process. I've never had any concerns about it.<sup>160</sup>

Once again, the subjective understandings of the legal actors in the Western County Drug Court perceive that procedural due process is satisfied as a result of the voluntary nature of the program and through the fact that participants are notified well in advance that jail sanctions may be imposed at some point in the program. As a normative matter, whether the voluntary nature of drug treatment courts can stand in as a substitute for strict adherence to protections of procedural due process remains unresolved and uncertain. Because these problem-solving courts are so vastly different in structure and scope from our traditional adversarial model of criminal justice, it may be necessary for them to provide only minimum protections of due process in order to achieve broader individual and societal goals – the rehabilitation of the participant and a reduction in recidivism across communities.

#### C. DUE PROCESS AND *IN SITU* JAIL SANCTIONS

The messages conveyed by the judge to Mr. Jones and Mr. Childress in the opening vignette are routine when participants are sentenced to the Western County Drug Court. The judge stresses the voluntary nature of the program and informs participants that if they do not agree with a sanction, they have the ability to speak up. However, the sociolegal problem with this dynamic is that it places the onus and burden upon marginalized participants, rather than trained attorneys or professional advocates, to request a more formal hearing in the exercise of due process rights. The following excerpt between the judge and a newly-sentenced participant makes plain that the programmatic structure of the drug court places powerless participants in the role of exercising their own legal rights, many of which may not appreciate or even understand them:

Judge: I need *you* to understand that you're not signing all your rights away, do you understand that? I want to be real clear about this. If you're disputing something about what I'm about to impose a sanction on, then *you* need to let the court know that *you're* disputing that, okay? And if *you* want to have a hearing to determine if in fact that is true, you have a right to have that hearing. Do you understand that?

Participant: Okay.

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<sup>160</sup> Transcript of interview with the district attorney for the Western County Drug Court (dated July 28, 2020).

Judge: Like for instance, I can tell you honestly, we've had a lot of false positives, right? Um, and if I was going to sanction you for a positive and you said, "Hey Judge, I'd like to get that retested, that's fine, we can do that. Okay? But *you* have to let the court know if you're disputing something, do you understand that?"

Participant: I do.<sup>161</sup>

If the participant ever did raise an issue and request a formal hearing or a retest of a failed urinalysis test, I do not doubt that he or she would be provided one by the drug court. But it still leaves a sociolegal issue unaddressed – without attorney representation at the very moment when a sanction is being imposed, is the criminal justice system placing too much of a burden on marginalized and powerless participants to raise constitutional issues on their own accord? Do participants feel empowered enough to raise these issues with the judge?

These are not simply academic questions. As the judge notes above, there have been "a lot of false positives" regarding an initial urinalysis test. Although one of the public defenders noted to me that initial false positives are "very rare,"<sup>162</sup> he nevertheless conceded that the "there is flawed science" and false positives "even on confirmations."<sup>163</sup> He conceded that despite the best of intent among the drug court team, "at the end of the day, like people are gonna get tripped up by the science not being perfect around testing."<sup>164</sup> From the subjective perspective of this public defender, there exists a structural distinction between the due process rights to be accorded to participants during the revocation phase compared to those afforded to participants during the sanctions phase. For example, while he noted that at the revocation phase the drug court team would "afford somebody due process to the extent that they can get their own lab analyst,"<sup>165</sup> when "it's just at the sanctions phase though, I mean we're kind of stuck . . . basically by the practicalities of what we're trying to do,"<sup>166</sup> that is, imposing swift sanctions to modify problematic behavior to foster accountability and have participants internalize that their addictive behaviors have certain consequences. This latter point should not be taken lightly for the entire undergirding philosophy of drug treatment courts is to treat people with addiction and make people better. In the

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<sup>161</sup> Transcript of Western County Drug Court Proceedings (June 28, 2018) (emphases added).

<sup>162</sup> Interview with the public defender for the Western County Drug Court (dated August 17, 2020).

<sup>163</sup> Interview with the public defender for the Western County Drug Court (dated August 17, 2020).

<sup>164</sup> Interview with the public defender for the Western County Drug Court (dated August 17, 2020).

<sup>165</sup> Interview with the public defender for the Western County Drug Court (dated August 17, 2020).

<sup>166</sup> Interview with the public defender for the Western County Drug Court (dated August 17, 2020).

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words of this public defender, “[a]t the end of the day, all we’re trying to do is to help you recover from this addiction.”<sup>167</sup> Given this inherent tension between the therapeutic nature of drug treatment courts with its surrounding legal environment, it might be the case that during the sanctions phase participants are only afforded minimal due process protections.

In our conversation, I pressed one of the district attorneys assigned to the Western County Drug Court regarding her views on this inherent tension between therapy and legal formalities. She agreed with my observations that “there might be a slight watering down [of due process rights], but . . . I would say it’s almost a necessity to make the program work.”<sup>168</sup> But she counterbalances this dilemma upon two other practical realities of the drug court environment. First, she was comforted in her views by the notion that participants “have access” to the public defenders when desired.<sup>169</sup> Second, because of the therapeutic aspect of the drug treatment court, she is not going to “jump up and down on that first positive test” and advocate for a severe sanction such as jail.<sup>170</sup> In other words, her approach will be to advocate for a loss of liberty sanction only when participant behavior has repeatedly violated programmatic expectations and that participant is made aware in open court by the drug court team that future consistent behavior will likely result in such a sanction. This understanding does comport with my observations of in-court proceedings between participants and the judge – he will often suspend a few nights jail on the express condition that participants satisfy programmatic expectations over the course of the next two weeks, often by “showing up” to scheduled appointments with probation and treatment providers and taking the required drug screens.

To its credit, the Western County Drug Court does not sanction participants with jail in the early phases of the program based upon drug use alone. Indeed, relapse and use are expected. However, as the opening vignette of Mr. Jones and Mr. Childress demonstrates, the failure to be honest about use will and often can result in a short-term jail sanction. In this regard, the notion of honesty is fundamental to both the operation of drug treatment courts and the fundamental premise behind addiction treatment. In the therapeutic – legal hybridity of drug treatment courts, honesty serves dual purposes. From a therapeutic mindset, the disease of addiction in the words of one public defender:

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<sup>167</sup> Interview with the public defender for the Western County Drug Court (dated August 17, 2020).

<sup>168</sup> Interview with the district attorney for the Western County Drug Court (dated July 28, 2020).

<sup>169</sup> Interview with the district attorney for the Western County Drug Court (dated July 28, 2020).

<sup>170</sup> Interview with the district attorney for the Western County Drug Court (dated July 28, 2020).

creates a lack of honesty with yourself. That people are blinded to what is happening to them and what has happened to them because of this use, and they minimize it and they deny it in all sorts of different ways and . . . undergo all these mental gymnastics around their addiction so that they don't have to admit that they have a problem.<sup>171</sup>

One of the district attorneys assigned to the Western County Drug Court echoed these thoughts, responding in the following way when asked about the centrality of the honesty component in the drug court context: “Cause until you admit you’ve got a problem, or that . . . the substance issue is controlling your life and causing bad things to happen to you and everyone around you, you’re never gonna deal with it. And that’s . . . step one: “Okay, I’ve got a problem, and I wanna do something about it.”<sup>172</sup>

A participant being honest with the court and reporting use is tied to the therapeutic nature of treatment – honesty is one of the primary foundations for addiction recovery. But for the Western County Drug Court, however, reporting use in an honest manner also satisfies a social control function; the drug court team cannot monitor a participant all of the time. Rather, the drug court team is only getting “a limited snapshot of who they are, what their life is, what that week looked like, what that day looked like. So we can only gauge [use] based on that limited view, and so we need them to be telling us what’s going on.”<sup>173</sup> Consequently, self-reporting use to the drug court team heightens the intrusive surveillance that otherwise exists in the lives of the participants and enables the drug court team to respond with legal sanctions when reported.

Based upon my observations of in-court proceedings, the need to be honest and the possibility of false positives sometimes place participants in the untenable position of contesting a positive drug test and the subsequent invitation by the drug court judge for them to ask for a confirmation test. Despite protestations from the participant that he or she did not use, if a requested confirmation test comes back positive then the participant is sanctioned *more harshly* for dishonesty to the court than what the participant would have received originally if she or he had accepted the results of the initial drug screen. A public defender for the Western County Drug Court agreed with the assessment that this often results in a Hobson’s choice for participants, namely, accept the sanction for a failed drug screen or contest the results and request a confirmation but possibly suffer a harsher sanction (most

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<sup>171</sup> Interview with the public defender for the Western County Drug Court (dated August 17, 2020).

<sup>172</sup> Interview with the district attorney for the Western County Drug Court (dated July 28, 2020).

<sup>173</sup> Interview with the district attorney for the Western County Drug Court (dated July 28, 2020).

certainly jail) if the exercise of due process fails. The public defender recognized this constrained choice, commenting that “[m]ost of the time it’s not in their best interest to have a hearing on it, but we have talked to people about their right to have a hearing to contest [the results].”<sup>174</sup> Further, she noted to me her own subjective understanding of procedural due process in the daily operations of drug court – the fine distinction “between the way due process is interpreted is that they [the participants] have the option, not that they exercise that choice.”<sup>175</sup> Based upon this understanding, it would seem that simply having the option and ability to have a formal adversarial hearing is enough to satisfy concerns of procedural due process, not whether participants actually feel empowered to exercise the choice in their face-to-face interactions with the judge. I realize this dilemma is also obviously present when criminal defendants choose to defend themselves *pro se* in judicial proceedings. And while I too recognize that participation in drug court is indeed voluntary, individuals are also not making the conscious decision to advocate for themselves *pro se* when they accept drug treatment court as an alternative to a sentence to community corrections or the department of corrections – this dynamic is the default *modus operandi* for these problem-solving courts.

The difficult choice in contesting a positive drug test when a participant believes that he or she either has not used at all, or used that particular drug, is demonstrated by the following in-court exchange between the Western County Drug Court judge and Cindy, a thirty-something female who had been struggling to progress in the program for some time.<sup>176</sup> As follows, part of the judge’s concern is with Cindy’s honesty to the court surrounding her failure to disclose cocaine use in addition to methamphetamines:

- Judge: [S]o, what’s this about August 17th? That you used methamphetamines.
- Cindy: I don’t know. Just felt overwhelmed.
- Judge: But you were honest about it.
- Cindy: Yes.
- Judge: Anything else? [*the judge is giving Cindy an opportunity to admit the cocaine use – he is aware that this came back positive in her recent drug screen*]

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<sup>174</sup> Interview with the public defender for the Western County Drug Court (dated August 11, 2020).

<sup>175</sup> Interview with the public defender for the Western County Drug Court (dated August 11, 2020).

<sup>176</sup> Transcript of Western County Drug Court Proceedings (dated August 23, 2018).



- Cindy: Um, no.
- Judge: How about August 21st for cocaine?
- Cindy: Really?
- Judge: Yeah. So you know, meth is not cocaine. So...
- Cindy: Well, I used methamphetamines, that's it.
- Judge: Okay, do you want a retest on that? It's like this, it's either two nights jail now, or four nights if it comes back positive for cocaine. So what do you want to do? I mean, do you want a retest? You can do that.
- Cindy: No, I don't want a retest, but I mean, I thought I used meth, that's why I said I used meth, you know? I don't know how that could be a difference because I used meth.
- Judge: I'm asking you Cindy, then, do you want us to retest?
- Cindy: Well, I mean no because I don't want to do four days in jail, but I know that I used meth and not cocaine.<sup>177</sup>

The colloquy between the drug court judge and Cindy ensued for another minute or so with the two of them going back and forth about the positive test for cocaine.<sup>178</sup> Cindy recognized the judge's growing frustration about her possible dishonesty with the court because at one moment she exclaimed, "Okay then yes, I used cocaine."<sup>179</sup> To me it appeared that she simply wanted the interrogation to end. Seconds later, and once again proclaiming her non-use of cocaine, Cindy retracted the admission about using cocaine and accepted her better fate, namely, spending two nights in jail as a sanction rather than requesting a retest that may have only proven more punitive – spending four nights in jail. Other court observations demonstrate that participants sometimes "don't wanna risk" a retest because they "don't wanna get more time added" if the retest confirms a prior positive result and

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<sup>177</sup> Transcript of Drug Court Proceedings (dated August 23, 2018).

<sup>178</sup> Transcript of Drug Court Proceedings (dated August 23, 2018).

<sup>179</sup> Transcript of Drug Court Proceedings (dated August 23, 2018).

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the sanction for apparent dishonesty to the court becomes more punitive by way of a longer jail sanction.<sup>180</sup>

Whether Cindy was knowingly playing fast and loose with the court and trying to hide her use of cocaine, or whether she truly did not use cocaine and the initial drug test was indeed one of the perhaps rare false positives, I do not know. But such an uncertainty does not obviate a problematic, practical predicament faced by drug court participants on a bi-weekly basis, namely, whether to assert some semblance of due process and contest the impending imposition of jail sanctions, or simply concede to a potential loss of liberty sanction in order to avoid a more punitive result.

### D. DUE PROCESS CONCERNS AND ORDERS TO IN-PATIENT RESIDENTIAL TREATMENT

Most of the time drug court participants receive out-patient treatment services during their journeys through the Western County Drug Court. However, it often becomes necessary for therapeutic purposes to order that participants go to in-patient, residential treatment facilities when they are severely struggling with their addictions. The Western County Drug Court Client Handbook notifies participants that they may be referred to residential treatment by the drug court team. The residential facility stays can range from anywhere between three weeks and two years, depending upon the facility's program and the drug court team's assessment of the severity of a participant's addiction. Drug treatment courts nationally, and the Western County Drug Court team in particular, do not view judicial orders to attend residential treatment as a sanction at all, but rather as a therapeutic tool to aid in recovery.<sup>181</sup> Programmatically this may be true, but participants' often subjectively "view it as a sanction[ ] [b]ecause they're being removed from everything for 90 days."<sup>182</sup> When pressed a bit during our interview, one of the public defenders conceded that while an order to attend residential treatment is "not technically a sentence, . . . in practicality, it is."<sup>183</sup>

The perspective that an order to attend residential treatment is viewed as a form of punishment for the Western County Drug Court participants is not lost on the judge. He strategically uses the threat of imposing such an order as a corrective behavioral tool with participants during in-court proceedings. Jonah, a young twenty-something male who had recently started missing treatment sessions, failed

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<sup>180</sup> Transcript of Western County Drug Court Proceedings (dated December 27, 2018).

<sup>181</sup> Interview with the public defender for the Western County Drug Court (dated July 13, 2020).

<sup>182</sup> Interview with the public defender for the Western County Drug Court (dated July 13, 2020).

<sup>183</sup> Interview with the public defender for the Western County Drug Court (dated July 13, 2020).

to take some scheduled drug screens, and had a mix of both negative and positive drug screens over the course of the past two weeks after he had been compliant in the program for a long time, appeared before the judge for his bi-weekly review session one afternoon. Jonah explained his absences and failures as a combination of him not feeling well, him needing to visit a sick relative in the hospital, and the demands of his job working overnights at a warehouse. The judge's tone indicated that the excuses were unconvincing. Consequently, the following exchange then occurred:

Judge: I need you to focus on your sobriety. Do you understand that?

Jonah: I understand.

Judge: Okay, so here's the thing. If you can't do this in outpatient, we can talk about inpatient. Do you understand that?

Jonah: I understand.

Judge: There won't be no [warehouse job]. It will be you in a building dealing with these issues, okay?

Jonah: I understand.<sup>184</sup>

The judge ordered four hours of community service as a sanction based upon Jonah's programmatic violations, and Jonah straightened out his behavior during the following two weeks. Nevertheless, as the brief exchange above demonstrates, the drug court judge weaponizes a threat of a residential treatment order to instill complaint behavior; that is, it is oftentimes employed prospectively as a sanction in open court with participants despite the drug court team's subjective beliefs that residential treatment orders are not technically sanctions.

Another example of this occurred in open court between the judge and Thomas, a thirty-something participant who had "blown off the last two weeks"<sup>185</sup> by failing to make his treatment appointments and take his scheduled urinalysis tests. This failure to show compliance (and it was not Thomas's first demonstrable failure in doing so) caused the judge to order Thomas to attend residential treatment in terms that sounded threatening. At one point in the exchange, the judge got visibly frustrated with Thomas and stated:

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<sup>184</sup> Transcript of Western County Drug Court Proceedings (dated November 11, 2018).

<sup>185</sup> Transcript of Western County Drug Court Proceedings (dated May 17, 2018).

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I wanna be clear about this. I wanna be clear. I'm ordering [name of residential facility]. If you show up in two weeks from now and you haven't put the paperwork in to get into [the residential treatment facility] or you're not [in the facility], we're just gonna proceed with revocation. You understand that?<sup>186</sup>

In this exchange, Thomas was confronted with a constrained choice – either comply with the order to attend residential treatment or be faced with revocation from the drug court program and a consequent sentence likely to result in incarceration in the department of corrections.

In my observations of in-court proceedings of the Western County Drug Court, participants are often ordered to attend residential treatment programs of varying lengths. In some of these occasions, participants do express a willingness and desire to attend residential treatment because they have gotten to the point where they recognize that this is what is needed to help combat their current addiction. Other times, however, participants express their unhappiness or unwillingness to the judge regarding the prospect of being ordered to attend residential treatment.<sup>187</sup> It is not uncommon to watch participants become visibly upset and start to cry when told that such a change is being ordered. They sometimes exercise agency by requesting to not do a long-term program, but rather to do a short-time program at best.<sup>188</sup> More commonly, before being ordered to in-patient residential treatment, participants plead to the judge to demonstrate that they can turn things around in the next two weeks and prove themselves capable of complying with programmatic requirements before the court takes the drastic step of sending them to residential treatment.

To my knowledge, no court to date has addressed the issue of whether the imposition of an order to attend residential treatment in the context of a problem-solving court rises to the level of a loss of liberty sanction. The applicable question under *Morrissey* and *Gagnon* would be whether such a sanction is a form of government custody, detention, or physical restraint.<sup>189</sup> Because the drug court participant is not technically physically restrained in a residential treatment facility like incapacitation in jail – they do have some freedom of movement in the facility, if only minimal – it may be that a future court would consider an order of in-patient residential treatment to not rise to the level of a liberty sanction requiring even

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<sup>186</sup> Transcript of Western County Drug Court Proceedings (dated May 17, 2018).

<sup>187</sup> Transcript of Western County Drug Court Proceedings (dated November 29, 2018).

<sup>188</sup> Fieldnotes from Western County Drug Court Proceedings (dated November 29, 2018).

<sup>189</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

minimal due process protections under *Morrissey* and *Gagnon* and the drug court cases following their precedents.

Much like the situation discussed above where drug court participants are provided with a Hobson's choice to either exercise their due process rights in seeking a drug screen confirmation test or simply accepting a shorter jail sanction, participants faced with the judge informing them of the drug court team's decision to order residential inpatient treatment is also met with a problematic decision if the participant is steadfast in not wanting to leave family, friends, and a job to attend residential treatment. The participant unquestionably has a choice – he or she can refuse the order for in-patient residential treatment, but it comes as a severe cost – self-revoking from the drug court program and having the case sent back to the original criminal division for sentencing, likely resulting in a sentence to either community corrections or prison.<sup>190</sup>

#### V. CONCLUSION AND A POSSIBLE SOLUTION

Another scholar on drug treatment courts has observed that “[a] therapeutic sensibility can actually translate into very tough, harsh, intrusive forms of legal social control.”<sup>191</sup> This is no doubt the case, as demonstrated by my study of the Western County Drug Court. The question still lingers – if drug court participants are indeed entitled to due process protections in the face of loss of liberty sanctions, what type of procedure would that be given the special nature of these courts?

To satisfy broader constitutional concerns while still honoring how drug treatment courts must function by responding swiftly in imposing sanctions as part of the therapeutic aim of correcting addictive behaviors, the safest course is to adopt minimal procedural due process protections for drug court participants when faced with loss of liberty sanctions. In the first instance, blanket advance waivers of due process protections contained within drug court client contracts should be invalidated by the courts as constitutionally impermissible. That said, concerns over procedural due process protections can be efficiently complied with prior to the imposition of a short-term jail sanction by requiring the public defenders assigned to the drug court team to present two written forms for participants to execute during their consultation sessions prior to in-court proceedings. In order to make sure that the court is fully protecting participants' rights, drug treatment courts should present participants with a short and easy to understand “written notice of

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<sup>190</sup> Interview with the public defender for the Western County Drug Court (dated July 13, 2020).

<sup>191</sup> JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* 56 (2001).

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violation” form along with a written “advisal of admission to program violations and a waiver of rights regarding the imposition of a jail sanction.”<sup>192</sup>

The “written notice of violation” would briefly identify and list the alleged violations (including the dates and locations where applicable), together with the program policies and procedures that were violated. This form, completed by the participant’s probation officer, would be less than a full page and should be presented to the participant during the meeting with his or her public defender prior to court proceedings. The “written advisal of admission of program violations and a waiver of rights regarding the imposition of a jail sanction” should contain the identical information as the notice form, but also indicate the length of jail term to be imposed together with the following additional provisions to ensure that a participants does in fact knowingly and voluntarily waive his or her rights to a more formal hearing:

I, the undersigned Defendant, wish to admit to the violation(s) listed above and agree to imposition of the jail sanction. By entering this admission, I agree I am waiving the below rights as to the violation(s) listed above:

**Initials of Defendant**

\_\_\_ I have the right to a hearing before a judge regarding the alleged violation(s).

\_\_\_ I have the right to have counsel represent me. If I am indigent, I have the right to request appointment of the public defender to represent me at no cost to me.

\_\_\_ I have the right to disclosure to me of the evidence against me.

\_\_\_ At a hearing, the State must prove the alleged violation(s) by a preponderance of the evidence.

\_\_\_ At a hearing, I may testify, call witnesses, present evidence and confront and cross-examine adverse witnesses.

I acknowledge I have read and understand this admission and waiver. I hereby knowingly and voluntarily waive my rights as set forth above and agree to the imposition of the jail sanction. I acknowledge and agree that this admission and waiver is voluntary

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<sup>192</sup> The idea for these proposed forms originated in my participation in a legal panel on due process protections in drug treatment courts in Western State.

and not the result of undue influence, pressure or coercion. I further declare that at this time, I am not under the influence of any drugs, intoxicants, or medication that would interfere with my ability to understand this admission and waiver.

If the observations of a seasoned former public defender for the Western County Drug Court are indeed correct, the request for the procedural protections contained in the proposed “written advisal of admission of program violations and a waiver of rights regarding the imposition of a jail sanction” would be used by participants very infrequently.<sup>193</sup> Stated differently, in practice very few drug court participants will decide to assert their procedural due process rights. Drug court participants will most often choose not to challenge the impending jail sanction because in the understandings of this public defender, drug court participants are subjectively fully aware of what they committed to in accepting the drug court sentence and are therefore willing to accept a short-term jail sanction as part and parcel of their recovery process. But at least having these proposed forms utilized by drug treatment courts moving forward would certainly alleviate much of the current legal uncertainty around whether these specialized problem-solving courts are violating constitutional due process protections that should be afforded to their participants. Mandating the future use of these short, written forms should not impede the greater mission of drug treatment courts in changing the lives of their participants for the better.

Whether or not the imposition of an order to attend a residential in-patient facility constitutes a loss of liberty sanction remains to be decided by the courts in the future. However, based upon my empirical observations of the Western County Drug Court, these orders are perceived by both participants and legal actors as punitive sanctions irrespective of the larger drug court community’s standpoint that they are solely therapeutic in nature. The order to attend a residential treatment facility for a prolonged period of time, while it may not constitute a form of restraint akin to incarceration, may very well be a “grievous loss”<sup>194</sup> from the perspective of drug court participants. Adhering to the order requires them to leave behind their family, their children, their jobs, and their community connections. Given this, they too should be provided some form of process to contest this form of sanction beyond the constrained decision to self-revoke from drug treatment court only to find themselves in a much more stark reality.

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<sup>193</sup> Interview with public defender for the Western County Drug Court (dated February 2, 2021).

<sup>194</sup> *Morrissey v. Brewer*, 408 U.S. 480, 481 (1972).