

# SELECT LEGAL ISSUES IN TREATMENT COURT

National Drug Court Institute  
Hon. Gregory G. Pinski  
Judicial Consultant



**NDCI**  
NATIONAL DRUG  
COURT INSTITUTE



# DISCLOSURE

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Points of views or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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# LEARNING OBJECTIVES

## After this presentation, you will know:

- Fourth Amendment search and seizure issues
- Fifth Amendment due process issues
- First Amendment and participant restrictions
- First Amendment and Alcoholics Anonymous®
- Medication assisted treatment laws
- Use of prescription medications
- Jail sanction and termination due process issues
- Illegality of preventive detention



# CONSTITUTIONALITY

## FOURTH AMENDMENT ~ SEARCHES

The Fourth Amendment guarantees freedom from unreasonable searches and seizures.

Probationers have greatly diminished expectations of privacy and warrantless searches are permitted.

Mandatory search waivers are constitutional and totally suspicionless searches are permitted.



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# FOURTH AMENDMENT

- The constitutionality of a waiver executed by offenders on bond or other non-convicted status is in doubt.
- Drug testing is allowed:
 

“Presumably for this very reason, the vast majority of drug treatment programs, including the one [the defendant] participates in as a condition of her probation, require abstinence from alcohol (Am. U. Sch. Pub. Affairs, 1997 Drug Court Survey Report: Executive Summary, p. 49). Based on the relationship between alcohol and drug use, we conclude that substance abuse is reasonably related to the underlying crime and that alcohol use may lead to future criminality where the defendant has a history of substance abuse and is convicted of a drug-related offense.” *People v. Beal*, 70 Cal. Rptr. 80 (Cal. Ct. App. 1997).

# CONSTITUTIONALITY

## *WHAT IS DUE PROCESS?*

**Before depriving  
a citizen of life,  
liberty, or  
property, the  
government must  
follow fair  
procedures.**



# CONSTITUTIONALITY

## DUE PROCESS ~ TERMINATION

**A hearing is required  
before terminating a  
participant from  
treatment court.**



# CONSTITUTIONALITY

## DUE PROCESS ~ REQUIREMENTS

### What fair procedures are required?

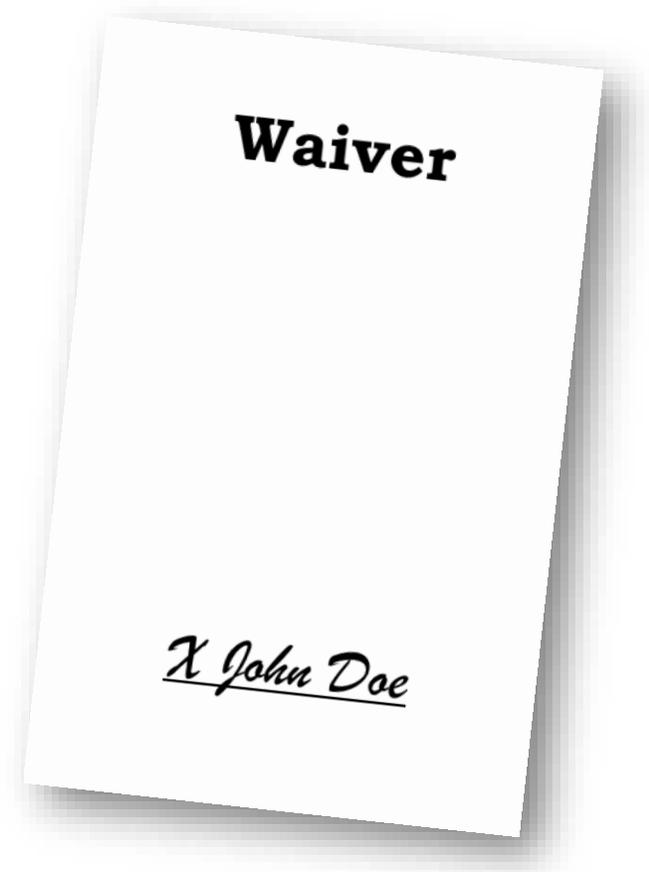
- Probable cause determination
- Written notice
- Right to appear
- Cross-examine and call witnesses
- Burden of proof
- Independent magistrate
- Reasons for decision
- Right to counsel (state-by-state determination)



# CONSTITUTIONALITY

## DUE PROCESS ~ WAIVER

**A treatment court cannot require participants to waive a termination hearing as a condition of participation.**



# CONSTITUTIONALITY

## DUE PROCESS ~ JUDICIAL IMPARTIALITY

**Can a treatment court judge preside over a participant's termination hearing and probation revocation hearing?**

**Oklahoma Supreme Court:** Requiring the district court to act as treatment court team member, evaluator, monitor, and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a treatment court participant's program.

**Minnesota Court of Appeals:** If probation is revoked based on treatment court termination, the defendant is entitled to a judge other than the treatment court judge to preside over the probation revocation proceedings.

**CONSULT STATE ETHICS OPINIONS!**

# CONSTITUTIONALITY

## DUE PROCESS ~ JUDICIAL IMPARTIALITY

### Recommendations

Ask a participant whether he or she wants the treatment court judge to recuse from the termination hearing

Provide an opportunity to consult with counsel

Notify the participant of their rights at the hearing





# CONSTITUTIONALITY

## DUE PROCESS ~ JAIL SANCTION

**YES!**

**If a treatment court participant denies misconduct, is a hearing required before a jail sanction is imposed?**



# CONSTITUTIONALITY

## DUE PROCESS ~ JAIL SANCTIONS

**Besides violating a participant's constitutional rights, YOU can be sanctioned too!**

**A Mississippi judge was removed from office for:**

- Jailing a participant for 24 days for unspecified violations
- Keeping participants in treatment court indefinitely, some for over four years
- Refusing to conduct jail sanction hearings

**“We agree that Judge Thompson’s lack of understanding and appreciation for basic legal principles ... of due process safeguards cannot be overlooked.”**

**– Mississippi Supreme Court**

# CONSTITUTIONALITY

## DUE PROCESS ~ PREVENTIVE DETENTION

**It is lawful to place a participant with a substance use disorder in jail while you are waiting for a placement bed to become available?**

**NO!**

# CONSTITUTIONALITY

## DUE PROCESS ~ PREVENTIVE DETENTION

**“But, if I release her, she will OD...”**



**NO!**

Preventive detention is **UNCONSTITUTIONAL!**

Treatment courts **CANNOT** jail participants because they need inpatient treatment and a bed is not available without basic due process protections.

# CONSTITUTIONALITY

## DUE PROCESS ~ PREVENTIVE DETENTION

### Why Is Preventive Detention Wrong?

- The Sixth Amendment guarantees the right to a speedy and public trial and arrested persons cannot be detained for extended period without a trial.
- The Eighth Amendment allows for reasonable bail and prohibits cruel and unusual punishment.
- Jail is not treatment.
- There is no evidence that preventive detention reduces crime, treats substance use disorders or instills fear.

# CONSTITUTIONALITY

## DUE PROCESS ~ PREVENTIVE DETENTION

### **Unlawful Preventive Detention Exposes Treatment Courts to CLASS ACTION LAWSUITS**

Recently, the Seventh Circuit Court of Appeals made this observation about a treatment court in Indiana:

“Unfortunately, the drug treatment court in Clark County was not one of the success stories. Under the stewardship of Judge Jerome Jacobi, the court ran roughshod over the rights of participants who frequently languished in jail for weeks and even months without justification. The jail stays imposed as sanctions for noncompliance [and awaiting placement in treatment facilities] were arbitrary and issued without due process.”



# CONSTITUTIONALITY

## DUE PROCESS ~ PREVENTIVE DETENTION

### Recommendations

- Hold a hearing with testimony by a treatment provider concerning the participant's substance use or mental health needs.
- Document the efforts taken to secure a treatment bed placement.
- Make a probable cause determination.
- Set bail.
- Exhaust other less restrictive alternatives (e.g. house arrest, halfway house, GPS monitoring, etc.)
- Rely on other non-compliance issues to justify the sanction (e.g. missing appointments, curfew, etc.)



# CONSTITUTIONALITY

## DUE PROCESS ~ PREVENTIVE DETENTION

### Recommendations

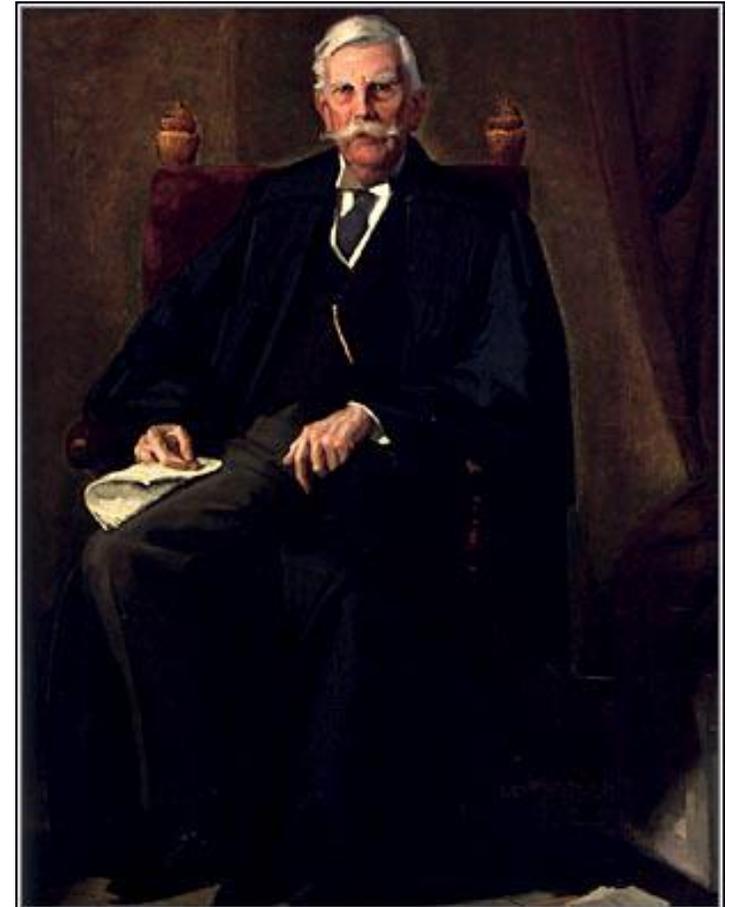
- Rely on treatment provider recommendations for alternatives.
- Allow consultation with an attorney.
- Set review dates, as well as an automatic release condition when a treatment bed is available.
- Explore a civil commitment proceeding.

# CONSTITUTIONALITY

## A FINAL THOUGHT ON DUE PROCESS

**W**hatever disagreement there may be as to the scope of due process, there is no doubt that it embraces the fundamental concepts of fairness and opportunity to be heard.

--- Justice Oliver Wendell Holmes,  
*Frank v. Mangum*, 237 U.S. 309 (1915)





# CONSTITUTIONALITY

## MEDICATION ASSISTED TREATMENT GRANT REQUIREMENTS

Beginning in 2015, treatment courts receiving federal funding must attest in writing that they will not deny an otherwise eligible participant's use of MAT and they will not require discontinuance of medications as a condition of graduation.



# CONSTITUTIONALITY

## MEDICATION ASSISTED TREATMENT NADCP POSITION



**Best Practice Standard I(E)**: “...numerous controlled studies have reported significantly better outcomes when addicted offenders received medically assisted treatments including opioid antagonist medications such as naltrexone, opioid agonist medications such as methadone, and partial agonist medications such as buprenorphine.”

**Board Position Statement**: Treatment court professionals must:

- Learn about MAT
- Consult with experts on MAT options
- Eliminate blanket prohibitions of MAT
- MAT decisions are based on medical evidence
- Impose consequences for abuse or unlawful use of MAT medications

# CONSTITUTIONALITY

## MEDICATION ASSISTED TREATMENT VALID PROHIBITIONS

### When can a treatment court prohibit MAT and retain federal funding?

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



# CONSTITUTIONALITY

## MEDICATION ASSISTED TREATMENT LEGAL CHALLENGES

### MAT prohibitions are invalid under:

Americans with Disabilities Act (ADA)

Rehabilitation Act of 1973

Fourteenth Amendment due process guarantees

Eighth Amendment cruel and unusual punishment

# CONSTITUTIONALITY

## RECOMMENDATIONS ON PRESCRIPTION MEDICATIONS

### Participant Use of Prescriptions:

- Use a prescription notification form
- Use releases to obtain records
- Refer participants to providers with MOUs with the treatment court
- Control and monitor use



# CONSTITUTIONALITY

## FIRST AMENDMENT – ALCOHOLICS ANONYMOUS

Treatment courts can *refer* participants to deity-based programs such as Alcoholics Anonymous<sup>®</sup>, but courts cannot *require* participation in such programs without violating the First Amendment.

**WARNING**

# CONSTITUTIONALITY

## FIRST AMENDMENT – ALCOHOLICS ANONYMOUS

### **Why does *requiring* attendance at deity-based programs violate the First Amendment?**

The First Amendment Establishment Clause prohibits the government from establishing or requiring religious practices.

Deity-based programs like Alcoholics Anonymous<sup>®</sup> require:

- Confess to God “the nature of our wrongs” (Step 5)
- Appeal to God to “remove our shortcomings” (Step 7)
- By “prayer and meditation” make “contact” with God to achieve the “knowledge of the will” (Step 11)

# CONSTITUTIONALITY

## FIRST AMENDMENT – ALCOHOLICS ANONYMOUS

### IT DOESN'T MATTER:

- Treatment court is voluntary
- AA doesn't require belief in God, just a higher power
- It's just a reference to God
- Treatment providers require AA, not the treatment court

***Courts have uniformly held that requiring attendance at AA/NA violates the First Amendment***

# CONSTITUTIONALITY

## FIRST AMENDMENT – ALCOHOLICS ANONYMOUS

### Recommendations:

- Courts have held that if a secular alternative is available, there is no First Amendment violation by referring to AA/NA.
- Secular alternatives include, among others, LifeRing Secular Recovery<sup>®</sup>, Rational Recovery<sup>®</sup>, Smart Recovery<sup>®</sup>



# **CONSTITUTIONALITY**

## **FIRST AMENDMENT – AREA RESTRICTIONS**

**Despite the absence of an express guarantee, state and federal courts have recognized the right to travel as a fundamental right entitled to constitutional protection.**

**Although requirements vary by state, courts can impose reasonable place and area restrictions if the restriction is:**

- Related to offender or the underlying offense**
- Narrowly drawn**
- Related to rehabilitation needs of the offender**



# CONSTITUTIONALITY

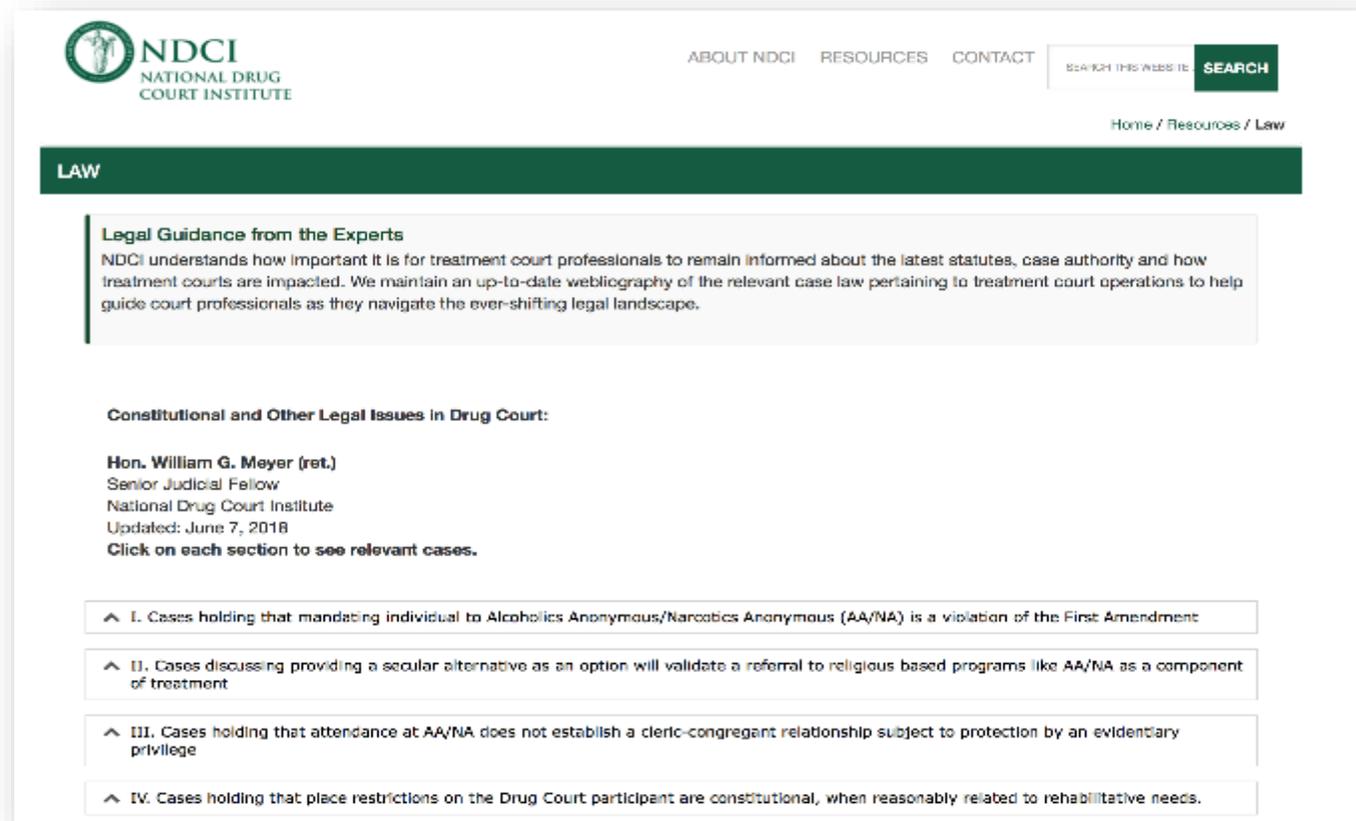
## FIRST AMENDMENT – ASSOCIATION RESTRICTIONS

**The First Amendment encompasses the right of association.**

**Courts can impose restrictions on associating with other felons, drug users, etc.**

**Restrictions interfering with the fundamental constitutional right of marriage require heightened consideration.**

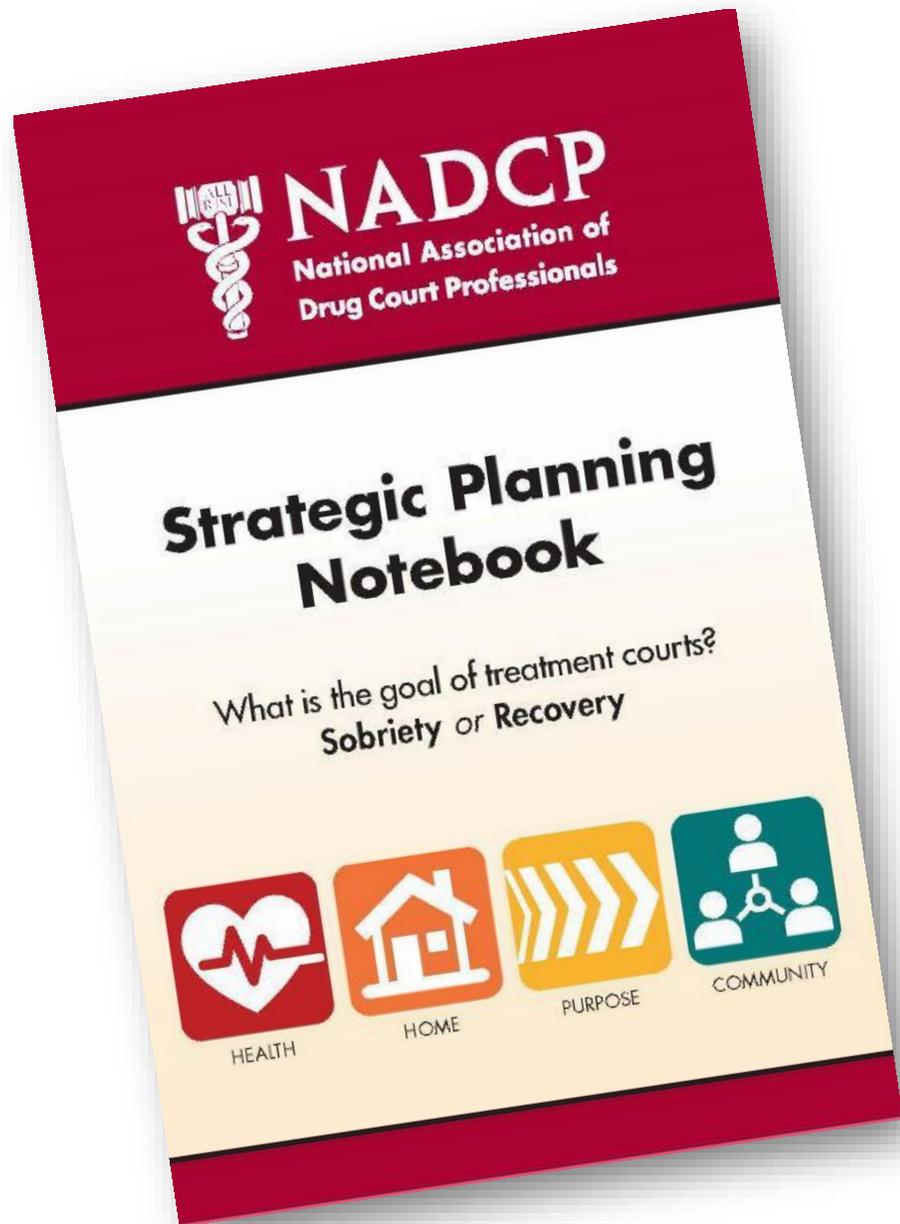
# CONSTITUTIONALITY RESOURCES FOR TREATMENT COURTS



The screenshot shows the National Drug Court Institute (NDCI) website. The header includes the NDCI logo and name, navigation links for 'ABOUT NDCI', 'RESOURCES', and 'CONTACT', and a search bar with the text 'SEARCH THIS WEBSITE' and a 'SEARCH' button. Below the header is a breadcrumb trail: 'Home / Resources / Law'. A dark green bar with the word 'LAW' in white is positioned below the breadcrumb. The main content area features a section titled 'Legal Guidance from the Experts' with a paragraph explaining NDCI's commitment to providing up-to-date legal resources. Below this is a section titled 'Constitutional and Other Legal Issues in Drug Court:' followed by the name and title of Hon. William G. Meyer (ret.), a Senior Judicial Fellow at NDCI, and the date the page was updated (June 7, 2018). A list of four categories of cases is provided, each with a small upward-pointing arrow icon:

- I. Cases holding that mandating individual to Alcoholics Anonymous/Narcotics Anonymous (AA/NA) is a violation of the First Amendment
- II. Cases discussing providing a secular alternative as an option will validate a referral to religious based programs like AA/NA as a component of treatment
- III. Cases holding that attendance at AA/NA does not establish a cleric-congregant relationship subject to protection by an evidentiary privilege
- IV. Cases holding that place restrictions on the Drug Court participant are constitutional, when reasonably related to rehabilitative needs.

<https://www.ndci.org/resources/law/>



# Strategic Planning Notebook

Connect how the topic relates to recovery

Write down these connections to recovery

Share ideas on how to incorporate the topic into your program

