

# Practicing Law in Treatment Courts-not so simple anymore

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# Recusal issues

The law is moving!

# The debate

- Drug Court Judge knows too much.
- Drug Court Judge knows what is important for sentencing.
- Referral Judge may reduce sentence creating “escape route” and undercut treatment court
- Referral Judge may not distinguish between persons referred.
- Traditional recusal issues
- Defense request for recusal.

# First cases favored recusal

## FIRST CASES FAVORED

- Alexander v. State, 48 P.3d 110, 115 (Okla. Crim. App. 2002)
- Edgar v. K.L., 93 F.3d 256, 259 (7th Cir. 1996) (extra judicial facts)

## TREND

- IN RE DISQUALIFICATION OF BLANCHARD, 2017 Ohio 5543 (Ohio Supreme Court 2017)
- State v. Horne, (Tenn. Court of Criminal Appeals 2017)
- State v. Barraza, P.3d (NM Court of Appeals 2017)
- State v. Watson, No. M2015-00108-CCA-R3-CD., (Tenn: Court of Criminal Appeals 2016)
- State v. McGill, No. M2015-01929-CCA-R3-CD. (Tenn: Court of Criminal Appeals 7/18/2016)
- Plus many more.....

# The basic rules remain the same

- Judges know how to recuse when they have a personal interest or “feeling”.
- If the defendant requests another Judge, get them one. No big deal.

Due Process, equal protection,  
constitutional issues.

So many issues!

BASIC Con. Law stuff

# First Amendment:

- **Religion**

*Ex: **NO** mandatory AA/NA without alternatives being offered as well.*

- This is settled law.
- It does not matter that this is a voluntary program
- This is settled law. Adapt.
- Civil liability may attach for intentional violation. (Sacramento CA, again 8/13)



# So, what to do?

- The law says you cannot force them if they object. You must provide an alternative as well. There are plenty.
- Change your order! *“You must attend AA, NA or other community based self help program, as approved by your probation officer. “*
- *REALITY*: this is very few people and they get over it quickly. Recognize the law, make the new order, enforce the order.
- *COVER YOUR RECORD.*

# Another First Amendment issue:

- **Area and place restrictions:**

*Ex: Do not enter any establishment where ....*

- Valid if narrowly drawn and related to rehabilitation needs of the offender.
- Must have allowances for compelling needs of probationer such as child visitation.
- Should be reasonable in size and duration.

# First Amendment

- **Freedom of association**

*Ex: Do not associate with any person on probation or parole, or any person who uses drugs, except in the context of treatment*

- Valid if narrowly drawn and related to rehabilitation needs of the offender.

# Fourth Amendment

“You are subject to a search of your person, place of residence, vehicle, or any item under your dominion and control any time, day or night, with or without probable cause, or your then and there presence, by any peace or probation officer.”

“You are subject to testing for the presence of banned items and controlled substances for the duration of your participation in the program.”

Get a waiver of electronics and password disclosures.

# Search depends on model

- Post conviction: 4<sup>th</sup> Amendment waivers are valid under Federal law-reduced expectation of privacy Sampson (2006).
- Pre conviction and non-conviction cases, must be individualized findings to apply search on a case by case basis (also true on some local state cases post conviction)
- **Make it a program rule.**

# Electronic devices: sample

You provide specific consent within the meaning of P.C. §1546 to any law enforcement agency seeking information provided by the California Electronic Communication Protection Act. This includes consent to seize and examine call logs, texts and voicemail messages, photographs and emails, contained on any device or cloud or internet connected storage owned, operated, or controlled by you, including but not limited to cell phones, computers, computer hard drives, laptops, gaming consoles, mobile devices, tablets, storage media devices, thumb drives, Micro SD cards, external hard drives, or any other electronic storage devices, by whatever law enforcement agency is seeking the information. You shall also disclose any and all passwords, passcodes, password patterns, fingerprints, or other information required to gain access into any of the aforementioned devices.

# Other bans:

- Alcohol- OK: People v. Beal (CA 1997)
- Articulate why “medical” or recreational marijuana cannot be used on record, and place as a term of probation. (interferes with cognition) (Interferes with motivation)(Except: Arizona )
- Recommendation: authorize FDA approved MAT only.
- Articulate why folks cannot consume any item “not for human consumption”, poppy seeds, or other items that will mess up drug testing.

# Due Process Concerns

- Juveniles have the same rights as adults regarding due process, except for jury.

Program violation: probation-full panoply of rights apply. (PC, counsel, notice, appear, cross exam and witnesses, magistrate, findings)



Changes are coming based on your model!

# Watch out! As the target population changes, so may the rules!!

- Is a sanction a potential loss of a *recognized liberty or property right?*
- Does it invoke the same level of due process as a VOP?
- Certainly if you are a post adjudication probation model. Probably if you are not. Best practice: do it. Adds about 45 seconds to the colloquy.

*What process is due* when defendants potentially suffer a loss to a recognized liberty or property right?

***Q: What is happening?***

- Sanction in program?
- Termination from program?
  
- Different rules may apply depending on the model!
  - DEJ
  - POST CONVICTION

# Due Process

- Procedural protections are due under the 5<sup>th</sup> and 14<sup>th</sup> Amendments when the defendant will potentially suffer a loss to a recognized liberty or property right.
- If due process applies, the question remains what process is due.

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

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

**THIS IS ALSO AN ETHICS ISSUE!**

# The question is: what process is due?

## Termination vs. Sanctions

- Neal v. State, 2016 Ark. 287 (Ark. Sup. Ct. 6/30/16) (Citing *Laplaca* and *Staley, infra*, Ark. Sup. Ct. holds: “[T]he right to minimum due process before a defendant can be expelled from a drug-court program is so fundamental that it cannot be waived by the defendant in advance of the allegations prompting the removal from the program.”)

- **Gross v. State of Maine, Superior Court case # CR-11-4805**  
**(2/26/13)**(drug court procedures relating to **termination** violative of due process and, therefore, unconstitutional. Drug Court participant entitled to: notice of the termination allegations and the evidence against him, right to call and x-examine witnesses, a hearing at which he is present, a neutral magistrate, written factual findings and the right to counsel. Here, the drug court team discussed the termination decision during the termination hearing, without defendant's presence or that of his counsel. That procedure coupled by the fact the Superior Court felt that the drug court judge should have recused, resulted in a finding of constitutional infirmity. Moreover, the appellate court ruled the defendant did not, arguably could not prospectively waive his rights, citing LaPlaca and Staley.

# SANCTIONS ?

- **Brookman v. State, Md: Court of Special Appeals**  
**2017** (Sanctions imposed reversed and remanded for a hearing. Defendants wanted to contest sanctions imposed without a hearing for low creatinine results and failure to appear for a drug test. Court held it was a due process violation to not accord an adversarial hearing, including the right to counsel, the ability to call witnesses and a continuance, if necessary for preparation.)

# Due Process concerns

- Termination is LIKE a VOP hearing in most cases
- Watch your record! Incentives and Sanctions should be noted. Contract analysis does not settle the issue
- States are divided on hearings for non-probation programs. Best practice: follow the VOP procedure.
- Clear majority now moving toward due process.
- *PROSPECTIVE WAIVERS OF RIGHTS IN THIS AREA ARE INVALID!*



# Question:

- Is a sanction a potential loss of a recognized liberty or property right?
- Does it invoke the same level of due process as a VOP?
- Certainly if you are a post adjudication probation model. Probably if you are not. Best practice: do it. Adds about 45 seconds to the colloquy.
- Get the notice of violation on your report forms! Provide due process!

# He waived his rights! NOPE!

- Hendrick v. Knoebel, (SD Indiana 5/10/2017) (“Though we need not rule on Defendants' argument concerning the waiver provision in the DTC Agreement, we note our serious doubts as to its enforceability under Indiana contract law, given the conspicuous lack of parity between the parties, the absence of specificity in the provision's language, the fact that it purports to absolve the DTC's employees of liability for intentionally tortious conduct, and the fact that the DTC Program is an entity of the local government performing a public service. See generally *LaFrenz v. Lake Cty. Fair Bd.*, 360 N.E.2d 605, 608 (Ind. Ct. App. 1977). Moreover, because the provision implicates federal common law by purporting to waive federal statutory and constitutional rights, the likelihood of its enforceability is increasingly remote. Federal courts are rightly skeptical, albeit not uniformly dismissive, of claims that a plaintiff has waived his constitutional rights or has released a defendant from liability for violating them. We "indulge every reasonable presumption against waiver of fundamental constitutional rights," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Bayo v. Napolitano*, 593 F.3d 495, 503 (7th Cir. 2010), and we acquiesce in a waiver only if it has been "knowing, intelligent, and voluntary." *Schiro v. Landrigan*, 550 U.S. 465, 484 (2007). The lack of specific language in the agreement before us, in conjunction with its prospectivity, not only falls short of eliciting "an intentional relinquishment or abandonment of a known right or privilege," *Patterson v. Illinois*, 487 U.S. 285, 292-93 (1988), but also encourages DTC staffers to violate the DTC participants' constitutional rights, knowing they are acting with impunity. Enforcing such an agreement is inconsistent with the public interest given its potential for abuse and cancellation of the participants' primary means of vindication.”)

# Ouch

Mississippi Commission on Judicial Performance v Thompson 169 So.3d 857  
(5/2015)

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

# Consider this

- Is really about the factual basis or about the factors in mitigation and sanctions?
- What would you prefer if it was you in the client's shoes? Full due process?

# Remember your record!

- You need to document not just the sanctions but the good reviews and incentives in some manner for potential review.
- If someone questions what happened in a couple of years, how will they know *why* you did, what you did?

# Equal Protection issues:

- Poverty-you cannot deny access to indigents. Admission based on ability to pay is a denial of equal protection.
- Discretionary admission criteria must not violate due process (suspect class, semi-suspect class)
- Monitor disparate impacts in admission and program.
- DA may be gatekeeper for admission, and unless constitutional violation, no right to hearing to challenge rejection. *This area is changing rapidly.*

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

Updated every 6 months

# Best Practice:

- Keep your lawyers involved
- This is how we protect the program, protect the clients, and protect the Constitution.
- It turns out that lawyers also improve outcomes!!!



# Prosecutors

- Attend staffing? Cost savings up 171%
- Attend Court? Recidivism drops 35%

***If your prosecutor is interested in public safety, they should show up***

# Defense Counsel

- Defense attends staffing: Cost savings up 93%
- Defense attorney attends court: Recidivism down 35%

***Defense counsel: necessary***

# Other due process stuff:

- A drug test is a search.
- Some drug tests do not meet Daubert/Kelly/ Frye standards.
- Be sure that the testing meets legal standards for admission in a court of law.
- No information should go to a Judge without notice to counsel. THAT creates the legal nightmare.
  - What if it must be challenged?
  - What if it is not competent evidence?
- Then you buy trouble! Attorneys are there to prevent trouble and facilitate the needs of the treatment team! They protect due process.
- Again, this is a court, not just a program.

# Other stuff

- Open Courtroom? Absolutely (Noelle Bush) (rule of minimization)
- Closed staffing? Yes. (State v. Sykes, 182 Wn2d 168)

# Recent serious trouble spots

- Blanket prohibitions or policies regarding MAT.
  - Pay attention to ADA, RA, 1983 Civil rights claims, 8<sup>th</sup> A issues.
  - Criminal violations for practicing medicine w/o license.
- Lack of due process on hearings for violations and revocations.
- 1983 Civil Rights claims on 1<sup>st</sup> Amendment issues, et alia.  
(Constitutional rights claims) Mandatory damages, no immunity.
- WAIVERS OF RIGHTS as condition of admission.

# 42 USC 1983

## Civil rights proceedings.

- Quasi-immunity for 1983 action extinguished if violates an established constitutional right
- Notice is assumed that requiring AA is a violation of the First Amendment
- Drug court case manager not immune (*Hanas v. Inner City Christian Outreach, Inc.*  
542 F.Supp.2d 683, 701 (E.D. Mich. 2008))

# He waived his rights! NOPE!

- Hendrick v. Knoebel, (SD Indiana 5/10/2017) (“Though we need not rule on Defendants' argument concerning the waiver provision in the DTC Agreement, we note our serious doubts as to its enforceability under Indiana contract law, given the conspicuous lack of parity between the parties, the absence of specificity in the provision's language, the fact that it purports to absolve the DTC's employees of liability for intentionally tortious conduct, and the fact that the DTC Program is an entity of the local government performing a public service. See generally LaFrenz v. Lake Cty. Fair Bd., 360 N.E.2d 605, 608 (Ind. Ct. App. 1977). Moreover, because the provision implicates federal common law by purporting to waive federal statutory and constitutional rights, the likelihood of its enforceability is increasingly remote. Federal courts are rightly skeptical, albeit not uniformly dismissive, of claims that a plaintiff has waived his constitutional rights or has released a defendant from liability for violating them. We "indulge every reasonable presumption against waiver of fundamental constitutional rights," Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Bayo v. Napolitano, 593 F.3d 495, 503 (7th Cir. 2010), and we acquiesce in a waiver only if it has been "knowing, intelligent, and voluntary." Schriro v. Landrigan, 550 U.S. 465, 484 (2007). The lack of specific language in the agreement before us, in conjunction with its prospectivity, not only falls short of eliciting "an intentional relinquishment or abandonment of a known right or privilege," Patterson v. Illinois, 487 U.S. 285, 292-93 (1988), but also encourages DTC staffers to violate the DTC participants' constitutional rights, knowing they are acting with impunity. Enforcing such an agreement is inconsistent with the public interest given its potential for abuse and cancellation of the participants' primary means of vindication.”

Hoffman v Knoebel

US District Court Southern District Indiana

No.4:14-cv-00012-SEB-TAB July 27, 2017

- **It is undisputed that Plaintiffs suffered deprivations of their constitutional due process rights.**
- Judge Jacobi testified that participants never received written warning of the allegations against them before sanctions of jail time were imposed at the status hearings.
- Judge Jacobi never gave a DTC participant an advisement of rights or a re-advisement of rights when any DTC participant was given a sanction. >>>It was not practice to advise a DTC participant of their right to have counsel. >>>no legal counsel was ever appointed prior to a petition to terminate being filed. ...could not recall a time where the judge or anyone else in the courtroom asked a participant if they wanted legal assistance.
- (case decided on other issues, including immunity)



# Equal protection

- Poverty-you cannot deny access to indigents. Admission based on ability to pay is a denial of equal protection.
- Discretionary admission criteria must not violate due process (suspect class, semi-suspect class)
- DA may be gatekeeper for admission, and unless constitutional violation, no right to hearing to challenge rejection.
- Watch your data! Your court should match your jail pop. There is a profound inequity in treatment courts around historically disadvantaged populations. Gender, ethnicity, race, etc.

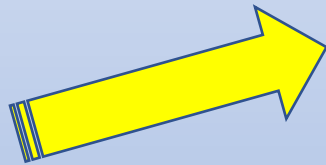
# Protective or Prophylactic Incarceration

- What law or legal theory allows this?
- What about the 8<sup>th</sup> Amendment?
- Violations of probation: watch your record and the length of the hold.
- Pursue civil proceedings if necessary.
- IF you do this, make it rare and LAY A GOOD RECORD with testimony regarding the issues, the efforts to address the issues in alternative less restrictive manners, and testimony from a health or treatment professional regarding severity of the threat. Set frequent reviews, and look to reduce harm or release if stable.

Medically Assisted treatment

# MAT: Legal issues abound!

**My  
advice!**



Always start from here:

1. **Are you a medical doctor?**
2. Do you have a license to practice medicine?
3. Do you specialize in addiction medicine?

# Thank you New England !

- Case law on MAT that demands appropriate treatment comes from you!
- SMITH- Ban in jail violates ADA
- PESCE—MAT in custody

# Be careful

- Beisel v. Espinosa, Florida, 2017, United States District Court Tampa Division, case No.8:17-cv-51-T-33TBM, pro per misfires, but has instructive language. **[Adult Drug Court allows MAT but local FDC does not-equal protection and discrimination]**
- ADA, Rehabilitation Act of 1973, and some of 42 USC Section 1983 applies to FTC. Some tort claims may also lie.
- Monitor the Legal Action Center, NY NY for updates

## Can we mandate cessation as a condition of Drug Court graduation?

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

## The Bottom Line

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



# Challenging Blanket MAT prohibitions:

- The Americans with Disabilities Act (ADA)
  - Prohibits discrimination by state and local governments
- Rehabilitation Act of 1973 (RA)
  - Prohibits discrimination by federally operated or assisted programs.
  - See: *Discovery House, Inc. v. Consol. City of Indianapolis*, 319 F.3d 277, 279 (7<sup>th</sup> Circuit, 2003) (“the ADA and The RA...fun along the same path, and can be treated in the same way”).
- Due Process protections of the 14<sup>th</sup> Amendment
  - 1983 Civil Rights violations....
- 8<sup>th</sup> Amendment-cruel and unusual punishment.

# “This drug court isn’t a program under the ADA and RA”

## Wrong.

- Pennsylvania Dep’t of Corrections v. Yesky 524 U.S. 206, 210 (1999) (ADA applies to correctional programs)
- People v. Brathwaite, 11 Misc. 3d 918, 816 N.Y.S. 2<sup>nd</sup> 331 (Crim. Ct., Kings County 2006) (Brooklyn’s alternative sentencing program falls under Title II’s definition of “state service or program.” )
- Evans v. State, 667 S.E. 2d 183, 186 (Ga. App. 2008) (A drug court is a “public entity” under the ADA).

# But they aren't disabled simply because they need MAT!

**WRONG!** Addiction is a disability.

MX Group, Inc. v. City of Covington, 293 F.3d 326, 336 (6<sup>th</sup> Circuit 2002)

*It is well established that drug addiction constitutes and “impairment” under the ADA and that drug addiction necessarily substantially limits major life activities of “employability, **parenting**, and functioning in everyday life”. (emphasis added)*

US v. City of Baltimore, 845 F. Supp. 2<sup>nd</sup> 640 (D. Maryland 2012) Residents of substance abuse facility were individuals with a disability.

# Eligible Participants disqualified due to blanket MAT policy but would be otherwise qualified?

- Thompson v. Davis, 295 F.3d 890, 896 (9<sup>th</sup> Circuit, 2002) Incarcerated individuals who were illegally denied parole because of their disability (drug addiction) sufficiently alleged that there were otherwise qualified for parole.

# MAT users are not a significant risk to health or safety

- New Directions Treatment Services v. City of Reading, 490 F.3d 293, 305 (3<sup>rd</sup> Cir. 2007) (NIMBY case) General statements about heroin users does not establish substantial risk to community. Must establish nature, severity and duration of risk, based on current medical knowledge and best evidence.
- Start, Inc. v Baltimore County, Md. Et alia, 295 F. Supp.2d 569, 577-78 (D.Md. 2003) Risks of diversion and concerns can be mitigated by protocols and administration.
- There are several cases in this area.

# Blanket Denial of MAT access is discrimination because of a disability.

- Disparate treatment
  - Thompson v. Davis, 295 F.3d 890 (9<sup>th</sup> Circuit 2002) denial of parole because of addiction is subject to disparate treatment analysis of ADA.
- Reasonable Accommodation
  - ADA requires reasonable accommodation to avoid discrimination.
- Disparate Impact
  - Title II ADA prohibits eligibility requirements that screen out or tend to screen out individuals with a disability, unless the criteria are essential to the provision of services.

## Watson v. Kentucky, E.D Kentucky, 7/7/15 (F. Supp.2d)

- Watson requires the state court take her off the conditional release terms or remove the “blanket prohibition on her taking suboxone, methadone or any other drugs that she needs to treat her addiction. The state attorney clarified that there was not a Blanket prohibition on MAT, but agreed that “it’s generally the Court’s practice to allow MAT if the doctor will show medical need.”
- Relief denied. Her challenge on federal grounds was denied stating the claim could be handled on the state level.

# Summary:

- Drug Court blanket prohibitions of MAT offend the ADA and RA.
  - Drug Court is a program covered by the statutes
  - Drug Court eligible persons have a disability. (DUI Court too)
  - Drug Court eligible persons do not as a class, constitute a substantial risk
  - Blanket denial of MAT is discrimination because of a disability.



# Due Process and Blanket prohibitions of MAT

*Constitutional due process requires reasonableness or a rational basis for conditions of treatment and supervision of persons on probation or in drug court.*

- Probation terms and conditions should be reasonably related to the crime and the rehabilitative needs of the individual and protection of the community People v. Beaty, 181 Cal.App.4th 644, 105 Cal.Rptr.3d 76 (2010)
- Judge must impose individualized conditions to meet community and individual needs. Commonwealth v. Wilson, 11 A.3d 519 (Pa. Super. 2010).

# Blanket denial of MAT is a due process violation-what about objections?

- All Judges should:
  - Consider relevant information before making a factual decision.
  - Hear arguments from all sides of the controversy and receive evidence from scientific experts, if the subject matter is beyond that of lay person knowledge.

There is a **federal presumption** tied to funding.

- The matter is settled (Presumption) in most instances if: (1) the physician has legal authority to write the prescription, (2) the medication is indicated to treat the patient's illness, (3) the prescription was not obtained fraudulently, and (4) the patient agrees to take the medication as prescribed. If prescribed: Presumption in favor of MAT **Burden of proof is on the objector to show it is inappropriate by preponderance.**

# No federal funding:

- (1) the physician has legal authority to write the prescription, (2) the medication is indicated to treat the patient's illness, (3) the prescription was not obtained fraudulently, and (4) the patient agrees to take the medication as prescribed.
- But the burden is different. The moving party makes a prima facie case, then opposition may introduce evidence of prior abuse of MAT, or MAT deception in treatment.

# GENERAL RULE:

- blanket prohibitions of MAT are a due process violation because they are not rationally (scientifically based).
- They are not reasonable because they are not consistent with individualized sentencing and treatment
- They do not give parties a fair opportunity to present their case, since one alternative is foreclosed.

# 8<sup>th</sup> Amendment-cruel and unusual punishment-growing area

- Correctional officials and health care providers may not act with deliberate indifference to an inmate's **serious medical needs**. Estelle v. Gamble, 429 U.S. 97, 104 (1976); .
- **Deliberate indifference** has both an objective and a subjective element: the inmate must have an objectively serious medical condition, and the defendant must be subjectively aware of and consciously disregard the inmate's medical need. Farmer v. Brennan, 511 U.S. 825, 837 (1994)

# What is a serious medical need?

- Withdrawal symptoms can qualify as a serious medical need. See, e.g., Boren v. Northwestern
- Regional Jail Authority, No. 5:13cv013, 2013 WL 5429421, at \*9 (W.D. Va. Sept. 30, 2013) (alcohol withdrawal states serious medical need); Mayo v.
- County of Albany, 357 F. App'x 339, 341-42 (2d Cir. 2009) (heroin and alcohol withdrawal); Sylvester v. City of Newark, 120 F. App'x 419, 423 (3d Cir.2005) (acute drug withdrawal); Foelker v.
- Outagamie County, 394 F.3d 510, 513 (7th Cir.
- 2005) (methadone withdrawal).

# What is deliberate indifference?

- The failure to provide methadone to an inmate exhibiting symptoms of withdrawal may constitute deliberate indifference to a serious medical need by intentionally ignoring the effects of withdrawal. Foelker v. Outagamie Cnty., 394 F.3d 510, 513 (7th Cir.2005);
- Alvarado v. Westchester County, 22 F. Supp. 3d 208 (SD New York 2014)
- Messina v. Mazzeo, 854 F. Supp. 116, 140 (E.D.N.Y. 1994) (pretrial detainee, whose participation in methadone program was interrupted by arrest, stated deliberate indifference claim against prison doctor who refused to continue methadone treatment).
- See also Mellender v. Dane County, \_\_\_ F. Supp. \_\_\_ (W. D. Wisc. 2006); Norris v. Frame, 585 F.2d 1183, 1188 (3d Cir. 1978)

# Can the Court compel the use of MAT?

- **Question one: are you a physician who is an expert in MAT?**
- That should answer your question.
- The answer is NO.
- Sell v United States 539 U.S. 166 (2003)
  - There are some recent changes for psychotropic meds, but not these.



# What if the prosecution or a party objects?

- Set a hearing, follow guidelines supra.

## Net Message:

- Beware of blanket MAT issues:
- Make a record of denials, or policies
- **Be aware that your “beliefs” are not medicine.**
- Failure to recruit/obtain accessible MAT may be a growing area of liability.

Best practices  
adult best practices standards.

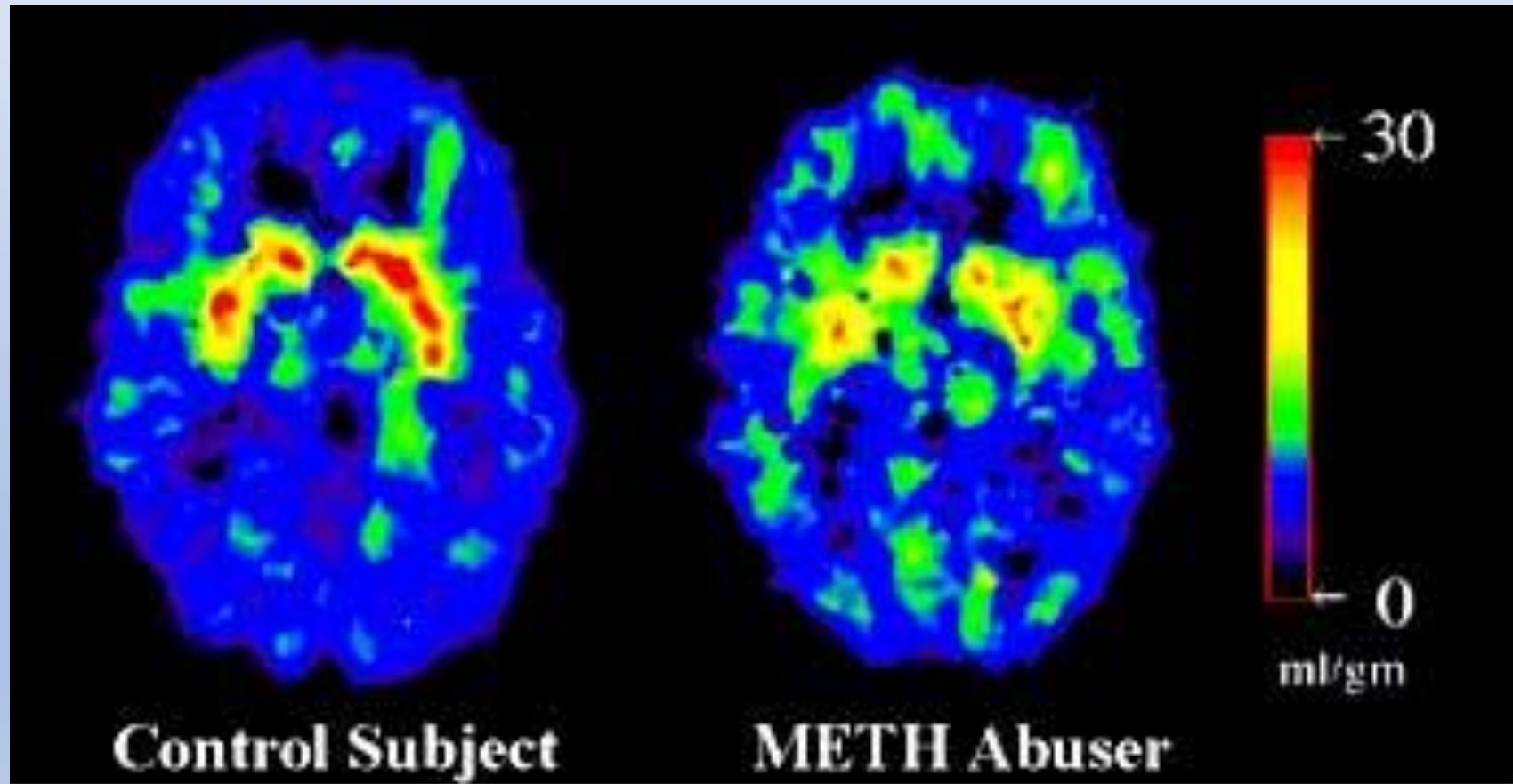
# Best Practices

- Ensure that DA and Defense Counsel attend staffings and review hearings
- Judges/Prosecutors: avoid public activities (non-judicial) with participants, except for cameo appearance
- Respect ethical obligations of defense counsel
- Stay in your lane, and follow the law.

# Best Practices

- Ensure that DA and Defense Counsel attend staffings and review hearings
- Advocate change in Canons and rules of professional responsibility.
- Judges: avoid public activities (non-judicial) with participants, except for cameo appearance
- Respect ethical obligations of defense counsel
- Mind the law and the boundaries!

- Understanding addiction and the psychopharmacology of drugs. Addiction is truly a disease of the brain. It is treatable.



Courts that use jail greater than 6 days have **worse** (higher) recidivism

Percent decrease in recidivism between courts that use differing amounts of jail sanction time



# Attorney roles:

1. Protect the Constitution

2. Maximize outcomes

- Facilitate the treatment team and the plan when it meets #1 and #2
- Only counsel can find the legal way to get treatment and probation's goals implemented.