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CARDOZO LAW REVIEW
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ZEALOUS AND EFFECTIVE ADVOCACY: AN
ASSESSMENT OF THE CONSTITUTIONAL RIGHT TO
COUNSEL WITHIN A DRUG COURT PROCEEDING

Sarah Kirschenheiter[†]

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[†] Associate Editor, *Cardozo Law Review* J.D. Candidate (May 2017), Benjamin N. Cardozo School of Law; B.A., University of Rochester, 2014. Many thanks to Professor Katharine Tinto for her expertise and critique throughout the note-writing process, and to my friends and family for their endless support.

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INTRODUCTION

On a particularly successful day at the Brooklyn Treatment Court, several rounds of applause congratulated multiple participants who “graduated” to different stages of the drug treatment program. The presiding judge interacted directly with the defendants, knew personal facts about them, and seemed to genuinely care about their responses to her inquiries.¹ This drug treatment court is one example of a problem-solving court, a judicial approach that attempts to allow judges and court staff to better respond to the needs of non-violent drug offenders by addressing the underlying issues that bring people into the court system in the first place.² This is achieved through innovative court models that provide treatment and intensive judicial monitoring in an attempt to respond to an offender’s problems including drug abuse, mental illness, and domestic violence.³

During the 1980s, there was an overload of drug-related cases reaching criminal court due to a national increase in arrests that

¹ I experienced this glimpse into a drug treatment court while conducting research for the Office of Policy and Planning, a division in charge of running New York State problem-solving courts.

² *Problem Solving Courts Overview*, N.Y. ST. UNIFIED CT. SYS., https://www.nycourts.gov/courts/problem_solving (last updated Feb. 16, 2017). Specifically, this Note will focus on Criminal Drug Courts for defendants facing a felony or misdemeanor charge where drug addiction is relevant to their crime. *Drug Treatment Courts*, N.Y. ST. UNIFIED CT. SYS., https://www.nycourts.gov/courts/problem_solving/drugcourts/overview.shtml (last updated Jan. 5, 2016). In New York State, there are two additional types of drug courts: Family Drug Treatment Courts and Juvenile Drug Treatment Courts, which respectively focus on neglect petitions and juvenile delinquency, each involving substance abuse as a component of the allegations. *Id.*

³ *Drug Treatment Courts*, *supra* note 2; *see also What Are Problem-Solving Courts?*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=qa&iid=664> (last visited Nov. 14, 2015).

coincided with the greater availability of cocaine.⁴ In response to this national increase in drug offender incarceration,⁵ the first drug court opened its doors in Miami-Dade County, Florida, in 1989.⁶ This pioneer court sought to effect lasting change on nonviolent drug offenders through a judicially supervised treatment program.⁷ Rather than continuing to put the same offenders on probation or in jail, this drug court sought to decrease recidivism by tackling the causes of the offenders' drug problems head-on.⁸ This was achieved by integrating alcohol and drug treatment services into the judicial arena in order to provide offenders with the rehabilitation necessary to end recidivism.⁹ In addition, drug courts effectively transform the traditional adversarial roles of the prosecutor and defense attorney into non-adversarial roles, with an emphasis on teamwork and deference to the judge.¹⁰ The drug court design incorporates a graduated system of rewards and sanctions based on how well the participants follow the rules of the court.¹¹ This innovative approach is designed to hold offenders accountable for their actions, while at the same time making them feel supported by the court staff who affords them the tools they need to successfully combat the drug abuse in their lives.¹² The potential sparked by the Miami-Dade County drug court model is evidenced by the vast nationwide expansion of drug courts since 1989.¹³ As of June 2015, there are 1,558 adult drug

⁴ John S. Goldkamp, *The Origin of the Treatment Drug Court in Miami*, in *THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INNOVATION* 19, 20 (W. Clinton Terry, III ed., 1999); see also *DRUG STRATEGIES, CUTTING CRIME: DRUG COURTS IN ACTION* 6 (1997) ("With the crack cocaine epidemic of the 1980s, the number of arrests for drug offenses rose from 647,411 in 1985 to more than 1 million in 1989.").

⁵ JUSTICE POLICY INST., *ADDICTED TO COURTS: HOW A GROWING DEPENDENCE ON DRUG COURTS IMPACTS PEOPLE AND COMMUNITIES* 4 (2011) [hereinafter *ADDICTED TO COURTS*] ("Drug courts were created at the height of this increase in drug incarceration to give states an option for working with people with drug addiction or who commit drug offenses.").

⁶ *History: Justice Professionals Pursue a Vision*, NAT'L ASS'N OF DRUG CT. PROFS., <http://www.nadcp.org/learn/what-are-drug-courts/drug-court-history> (last visited Sept. 12, 2015).

⁷ *Id.*; see also Goldkamp, *supra* note 4, at 24 ("[I]t is the courtroom-based team approach to treatment—and particularly the central, hands-on judicial role—that has distinguished Dade County's approach from other previous court initiatives aiming at the drug-related caseload.").

⁸ *DRUG STRATEGIES*, *supra* note 4, at 6.

⁹ *Id.* at 7.

¹⁰ See Goldkamp, *supra* note 4, at 25 ("The unusual role of the judge, however, is best understood in the context of the unorthodox, nonadversarial, and team-oriented roles played by the other criminal justice officials in the courtroom, roles designed to support the judge's role and to contribute to the treatment progress of the drug-involved felony defendants coming through the court. . . . Most noticeable are the transformed roles of the prosecutor and defender.").

¹¹ *ADDICTED TO COURTS*, *supra* note 5, at 3.

¹² JUDGE KAREN FREEMAN-WILSON & C. WEST HUDDLESTON, NAT'L DRUG COURT INST., *DWI/DRUG COURTS: DEFINING A NATIONAL STRATEGY* 5 (1999).

¹³ See, e.g., AMANDA B. CISSNER & MICHAEL REMPEL, *CTR. FOR COURT INNOVATION, THE STATE OF DRUG COURT RESEARCH: MOVING BEYOND 'DO THEY WORK?'* 1 (2005) ("[O]ver 1,300 drug courts in early 2005, less than 15 years after the Miami program enrolled its first defendant."); U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *DRUG COURTS* 1 (2017) ("There are more than 3,100 drug courts across the United States, half of which are adult

courts in the United States¹⁴ and all fifty states have at least one drug court.¹⁵

With the rapid and continuous expansion of drug courts in the United States, an in-depth analysis of the impact of these courts on the constitutional rights of participants¹⁶ is crucial.¹⁷ In particular, the Sixth Amendment right to counsel within a drug court proceeding is an area that lacks clear guidance as to what is constitutionally required. In a traditional criminal case, a defendant's right to counsel attaches once the adversarial proceeding against her has commenced.¹⁸ In contrast, the drug court proceeding is designed to be non-adversarial and there are several stages that are distinguishable from a traditional criminal court process.¹⁹ Consequently, exactly when the right to counsel attaches within a drug court proceeding is not easy to articulate nor clear from the caselaw. If counsel is not present or required at all stages of a drug court proceeding, the defendant's Sixth Amendment right to counsel may be violated.²⁰

Drug courts implicate two aspects of the right to counsel: when it applies and how it applies. This Note will propose that the right to counsel is constitutionally mandatory during all stages of a drug court proceeding, due to the potentially cumulative liberty interests at stake throughout each drug court participant's case. Considering the non-adversarial approach employed by drug courts, a defense attorney is left without a clear sense of her role in the proceeding, diminishing her ability to effectively advocate for the defendant. The effective assistance of counsel is equally as important as when the right to counsel applies. Therefore, the non-adversarial nature of a drug court proceeding must not completely erode a defense attorney's professional and ethical obligation to zealously and effectively advocate for the interests of her

treatment courts.”).

¹⁴ *Drug Courts*, NAT'L INST. OF JUST., <http://www.nij.gov/topics/courts/drug-courts/pages/welcome.aspx> (last modified Jan. 10, 2017).

¹⁵ *Find a Drug Court*, NAT'L DRUG CT. RESOURCE CTR., <http://ndrc.org/map> (last updated Dec. 31, 2015).

¹⁶ The term “participant,” used throughout this Note, refers to a defendant that is diverted from traditional criminal court into a drug treatment court.

¹⁷ See Trent Oram & Kara Gleckler, Comment, *An Analysis of the Constitutional Issues Implicated in Drug Courts*, 42 IDAHO L. REV. 471 (2006) (suggesting drug court improvement by better safeguarding the constitutional rights of drug court participants, particularly due process rights when entering and being terminated from drug courts, equal protection in accessing the courts, and privacy while participating).

¹⁸ *Brewer v. Williams*, 430 U.S. 387 (1977).

¹⁹ See RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE 3–5 (2009) (discussing sanctions); JUDGE KAREN FREEMAN-WILSON ET AL., NAT'L DRUG COURT INST., ETHICAL CONSIDERATIONS FOR JUDGES AND ATTORNEYS IN DRUG COURT 1–3 (2001) [hereinafter ETHICAL CONSIDERATIONS] (discussing staffings).

²⁰ U.S. CONST. amend. VI.

client.²¹

This Note will proceed in three parts. Part I will explain the drug court model by detailing the key components of drug courts in general and by providing an outline of the three predominant drug court models.²² Additionally, this Part will provide an overview of the right to counsel in traditional criminal proceedings, including probation revocation hearings. Part II will contemplate why the non-traditional stages of a drug court proceeding may constitutionally require counsel and why the defense attorney's role within the context of drug court is problematic. Using the standards that govern traditional criminal proceedings, Part III will argue that the Sixth Amendment right to counsel should attach during all stages of the proceeding including staffings, status hearings, and hearings regarding termination from drug court.²³ Additionally, this Part proposes that the Sixth Amendment right to effective assistance of counsel through zealous and effective advocacy is also constitutionally required during all drug court proceedings.²⁴

I. THE DRUG TREATMENT COURT

In order to understand and appreciate the constitutional issues at stake, it is crucial to first understand the aspects of a drug court proceeding that differentiate it from a traditional criminal court proceeding. This Part will first detail the drug court model generally, then discuss the distinctions between the specific drug court models that predominate. It will then provide an overview of the federal standards regarding the Sixth Amendment right to counsel in traditional criminal court proceedings. Since many stages of drug court are non-traditional,²⁵ as compared to criminal court, this Note will use the critical stage doctrine²⁶ and probation revocation law²⁷ as analogous contexts in which to analyze the stages of a drug court proceeding.

²¹ MODEL RULES OF PROF'L CONDUCT r. 1.7; r. 1.2 (AM. BAR ASS'N 2016).

²² The three models are as follows: (1) pre-plea or deferred prosecution; (2) post-plea; (3) post-sentencing (participation in drug court as a condition of probation). This section will discuss the differences between each, though will primarily identify and focus on the right to counsel issues in post-plea and post-sentencing models.

²³ Each of these non-traditional drug court stages are discussed *infra* Part I.A.

²⁴ See discussion *infra* Section I.B.4.

²⁵ See discussion *infra* Section I.A (discussing the drug court model generally).

²⁶ Referring to Supreme Court cases that carve out what right to counsel means and when it attaches in the traditional criminal court context. See, e.g., Rothgery v. Gillespie Cty., 554 U.S. 191 (2008); Brewer v. Williams, 430 U.S. 387 (1977); Hamilton v. Alabama, 368 U.S. 52 (1961).

²⁷ See, e.g., Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

A. *The Drug Court Model Explained*

The mission of drugs courts²⁸ is to end alcohol and drug abuse that leads to criminal activity by integrating alcohol and drug treatment services into the justice system.²⁹ This is accomplished through a non-adversarial approach that facilitates a less punitive, more rehabilitative process.³⁰ The drug court team must work together to provide a “therapeutic experience,” meaning the court staff is in frequent communication about a participant’s progress to ensure that their responses³¹ to the defendant’s behavior are coordinated.³² The team consists of more than just lawyers, as it includes treatment providers and case managers who are assigned to monitor compliance and remain in communication with the judge.³³ Frequent alcohol and drug testing occurs regularly to monitor compliance.³⁴ There is a coordinated

²⁸ The National Association of Drug Court Professionals (NADCP) promulgated a publication in 1997 titled *Defining Drug Courts: The Key Components*, which was intended to identify and promote the best practices, designs, and operations of adult drug courts. THE NAT’L ASS’N OF DRUG COURT PROF’LS, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997) [hereinafter *KEY COMPONENTS*]. It serves as an ideal starting point for discussing the drug court model and how it functions. While drug courts may, and certainly do, vary in different jurisdictions, the practices described in this publication are intended to provide a flexible framework. *Id.* at 3.

²⁹ *Id.* at 9. Key Component #1: “Drug courts integrate alcohol and other drug treatment services with justice system case processing.” *Id.* The criminal justice system is a particularly effective vehicle to compel people who might not initially volunteer to participate in the treatment program. The treatment process usually contains multiple phases that a participant gradually works through including stabilization, intensive treatment, and transition. *Id.* Additionally, Key Component #3 suggests that eligible participants be identified early and promptly placed into the program. The period of time following an arrest is a “critical window of opportunity for intervening and introducing” alcohol and drug treatment. *Id.* at 13.

³⁰ *See id.* at 11. Key Component #2: “Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants’ due process rights.” *Id.* The purpose of the non-adversarial approach is to facilitate an individual’s progress in the program by working together as a team. “[T]he prosecutor and defense counsel must shed their traditional adversarial courtroom relationship and work together as a team. . . . Both the prosecuting attorney and the defense counsel play important roles in the court’s coordinated strategy for responding to noncompliance.” *Id.* at 11. Key Component #4: “Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.” *Id.* at 15.

³¹ In other words, the drug court staff must be in frequent communication in order to remain on the same page about the defendant’s treatment. For example, if the defendant comes into court and tests positive for drugs, the judge, attorneys, and treatment staff need to be on the same page regarding how this deviant behavior will be dealt with (i.e. through a sanction).

³² *Id.* at 15.

³³ *Id.* at 15 (“In a drug court, the treatment experience begins in the courtroom and continues through the participant’s drug court involvement. In other words, drug court is a comprehensive therapeutic experience, only part of which takes place in a designated treatment setting. The treatment and criminal justice professionals are members of the therapeutic team.”).

³⁴ *Id.* at 21. The purpose of Key Component #5 is to use “[a]n accurate testing program . . . to establish a framework for accountability and to gauge each participant’s progress.” *Id.* The standards for alcohol and drug testing in the drug treatment court should be based on established

strategy between the judge, prosecutor, and defense attorney in terms of rewarding compliance or responding to noncompliance.³⁵ Additionally, there are generally graduated responses of rewards and sanctions ranging from praise in open court for progress to incarceration for continued noncompliance.³⁶

The coordinated strategy between drug court professionals is most frequently established at a meeting, called a “staffing,” that takes place before participants’ status hearings.³⁷ Participants themselves do not attend these meetings, despite the fact that this is when their course of treatment and progress, or lack thereof, is heavily discussed among the judge, prosecutor, defense attorney, and drug treatment staff.³⁸ The issues that are raised and discussed during the staffing are generally not shared in open court or put on the record.³⁹ Before the in-court status hearing—where the participant is present—⁴⁰ the defense attorney is expected to report back to her client, explaining the arguments that were made on her client’s behalf during the staffing.⁴¹

Another distinct characteristic of drug courts—as compared to traditional criminal courts—is the extensive interaction between the

and tested guidelines, such as those established by the American Probation and Parole Association. Drug testing results should ideally be available to the court the day of in order to facilitate a swift court process and respond immediately to noncompliance. *Id.* at 21–22.

³⁵ *Id.* at 23. Key Component #6: “A coordinated strategy governs drug court responses to participants’ compliance.” *Id.*

³⁶ *Id.* at 23–24 (“Drug courts must reward cooperation as well as respond to noncompliance. Small rewards for incremental successes have an important effect on a participant’s sense of purpose and accomplishment. Praise from the drug court judge for regular attendance or for a period of clean drug tests, encouragement from the treatment staff or the judge at particularly difficult times, and ceremonies in which tokens of accomplishment are awarded in open court for completing a particular phase of treatment are all small but very important rewards that bolster confidence and give inspiration to continue.”). Sanctions may include warnings in open court, demotion to earlier program phases, increased frequency of court appearances, confinement to jury box to witness court, fines, community service, escalating periods of jail confinement, and termination. *Id.* at 24–25.

³⁷ CYNTHIA HUIJAR ORR ET AL., NAT’L ASS’N OF CRIMINAL DEFENSE LAWYERS, AMERICA’S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 31 (2009) (“Before the participants appear in court to meet with the judge, however, the ‘team’ meets behind closed doors in a ‘staffing’ to discuss the progress of the participants. This meeting may be ‘the most animated, knock-down, drag-out fight,’ but participants are not part of this crucial discussion about their lives, which is not on the record.”) (citation omitted).

³⁸ *See id.* at 30.

³⁹ *See id.* at 31.

⁴⁰ The regular status hearings are a way in which drug courts are distinct from the traditional criminal court proceeding. Lawyers are *not* frequently present during these status hearings, and the courtroom interaction is mainly between the defendant and the judge directly. *See* James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1543 (2003).

⁴¹ However, this rarely happens and is a cause for major concern of the zealous advocacy of the defendant during a drug court proceeding. *See infra* Section II.B. (discussing the defense attorney’s role as counsel).

judge and the defendant.⁴² Judicial intervention is the touchstone of a drug court proceeding, as the judge is required to step beyond her traditional role of independent and objective arbiter.⁴³ This presents the potential concern that, given the interaction and relationship between the judge and a drug court participant, the judge might let factors outside the merits of an individual's case, such as personal bias, influence her judgment.⁴⁴ For example, due to the increased interaction between the judge and the drug court participant, the judge may unconsciously identify with a particular defendant, which may lead to disparate treatment.⁴⁵ The National Drug Court Institute recommends that judges be trained to recognize and address their potential bias, as this interaction is necessary for the proper function and effectiveness of a drug court.⁴⁶

A typical drug court program runs between six months and one year, though some participants may remain in the program longer.⁴⁷ In order to be eligible to participate in drug court, defendants generally must be charged with drug possession or a non-violent offense where they test positive for drugs and establish a substance abuse problem at the time of arrest.⁴⁸ Drug court eligibility is determined by a review of

⁴² KEY COMPONENTS, *supra* note 28, at 27 (Key Component #7). The supervisory position of the judge is incredibly important to the process since it demonstrates that someone in authority actually cares about this defendant and the struggles they are facing. *Id.*

⁴³ *Id.* (“A drug court judge must be prepared to encourage appropriate behavior and to discourage and penalize inappropriate behavior. A drug court judge is knowledgeable about treatment methods and their limitations.”). The remaining Key Components not yet referenced all concern best practice recommendations for effectively running a successful drug treatment court. Key Component #8 suggests developing and monitoring program goals in order to gauge effectiveness. This is accomplished by clearly defining the design and operation of the drug court, as well as remaining flexible for modifications if needed. *Id.* at 29. Key Component #9 emphasizes the importance of continually educating and training the entire drug court team in order to ensure understanding of the standards and procedures across the board. Given the teamwork approach to drug treatment courts, judges and court personnel should become familiar with the treatment approaches, and treatment providers should likewise have a knowledge of the criminal justice system. *Id.* at 35. Finally, Key Component #10 encourages the formation of partnerships with community organizations and agencies in order to generate local support. *Id.* at 37.

⁴⁴ ETHICAL CONSIDERATIONS, *supra* note 19, at 9 (“Due to the continuing personal engagement between participants and the drug court judge, the judge runs the risk of being influenced by factors other than the merits of each participant's case. Participants with friendly dispositions or particularly compelling experiences may attract the judge's compassion and leniency, while those with less friendly personalities may provoke the opposite response.”).

⁴⁵ *Id.* (“[A] judge's identification with a participant (which may be unconscious) may lead to disparate treatment, including excessively harsh treatment . . .”).

⁴⁶ *Id.*

⁴⁷ KING & PASQUARELLA, *supra* note 19, at 4.

⁴⁸ *Id.* at 3–4 (“[T]he definition of a violent offense can include the mere possession of a weapon at the time of arrest, even if it was not presented, brandished, or used. Also, persons who are currently facing charges for a drug offense may be denied entry into the drug court because of a past, wholly unrelated offense.”); *see also* KEY COMPONENTS, *supra* note 28, at 13 (noting that

the defendant's criminal records, as well as a clinical screening to determine severity of the substance abuse problem and whether these problems can be meaningfully addressed through the drug court process.⁴⁹ It is important to note that participation in a drug treatment court is not mandatory, nor is there a fundamental right to participate.⁵⁰

While drug courts vary across different localities, there are three main drug court models nationally. The first is a deferred prosecution model,⁵¹ where the participant's case is diverted to a treatment court program before the defendant enters into a plea and the case is processed.⁵² Since defendants are not required to plead guilty, successful completion of the drug court program results in no further prosecution and often no conviction on his criminal record.⁵³ Alternatively, if the defendant is terminated from the program, his case will revert to the traditional criminal justice system and he will be prosecuted and face a criminal conviction.⁵⁴ In this model, the defendant may stipulate to a set of facts when he enters drug court, but this does not mean he is relinquishing his right to an independent finding of guilt.⁵⁵ A trial court processing a case permissibly withdrawn

eligible participants are also screened for suitability). Specifically, Key Component #3 details eligibility: "Eligible participants are identified early and promptly placed in the drug court program." *Id.*

⁴⁹ ROGER H. PETERS & ELIZABETH PEYTON, GUIDELINE FOR DRUG COURTS ON SCREENING AND ASSESSMENT 10 (1998) (discussing best practices for drug court eligibility screening). The review of the criminal record usually includes looking at the current charge(s), criminal history, circumstances of the current offense, and outstanding warrants or additional charges that might disqualify a defendant from participation in the program. *Id.* at 10–11. The clinical screening usually seeks to address the severity of the substance abuse problem and the defendant's willingness to participate in a drug treatment program by looking at several factors including: signs of drug or alcohol intoxication or withdrawal, recent drug testing results, and self-reported substance abuse. *Id.* at 11–12.

⁵⁰ See Oram & Gleckler, *supra* note 17, at 476, 483.

⁵¹ Also known as a pre-plea dispositional model. See WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 24 (2011).

⁵² KING & PASQUARELLA, *supra* note 19, at 3. In this model, the defendant is still innocent because the diversion to drug court occurs before the individual enters a guilty plea or is convicted by a judge or jury. See U.S. DEP'T OF HEALTH AND HUMAN SERVS., CTR. FOR SUBSTANCE ABUSE TREATMENT, SUBSTANCE ABUSE TREATMENT FOR ADULTS IN THE CRIMINAL JUSTICE SYSTEM 129 (2005) [hereinafter SUBSTANCE ABUSE TREATMENT].

⁵³ KING & PASQUARELLA, *supra* note 19, at 3; see also HUDDLESTON & MARLOWE, *supra* note 51, at 24 ("[T]he charges will be dismissed upon successful completion of treatment.").

⁵⁴ See *Washington v. Drum*, 225 P.3d 237 (Wash. 2010) (en banc) (holding that a drug court contract is not equivalent to a guilty plea, but is more akin to a deferred prosecution); HUDDLESTON & MARLOWE, *supra* note 51, at 24 ("Because no guilty plea is formally entered, the case resumes processing through the criminal justice system in the event of an unsuccessful termination.").

⁵⁵ *Drum*, 225 P.3d at 242 ("By entering a drug court contract, a defendant is not giving up his right to an independent finding of guilt beyond a reasonable doubt. A trial court still has the authority to find the defendant not guilty if it determines that the stipulated evidence does not establish all elements of the crime beyond a reasonable doubt."). In this case, Drum was arrested

from a drug court must still make a determination of the legal sufficiency of the stipulated evidence in order to convict.⁵⁶ However, the participant runs the risk of being sentenced more harshly if, after termination from drug court, prosecution proceeds and results in a conviction.⁵⁷ While the original drug court in Miami Dade County was a deferred prosecution model,⁵⁸ only twelve percent of adult drug courts nationwide employed this model as of 2009.⁵⁹

A second model of drug court is the post-plea model, which is one of the most widely used models in the United States.⁶⁰ In the post-plea model, defendants are required to enter a guilty plea, but their sentences are deferred or suspended while they participate in the drug court program.⁶¹ By pleading guilty, the defendant thereby waives his right to be prosecuted in the traditional system, and he voluntarily enters into drug court.⁶² The plea agreement explains the terms of the drug court

for burglary and petitioned for entry into a drug court program, after which the State conceded that his offense was likely substance abuse related. *Id.* at 239. The court approved pre-plea diversion to a treatment court, though after forty days of waiting to be placed in a program, Drum requested to be released from the drug court contract. *Id.* at 240. The trial court found Drum guilty of residential burglary and sentenced him to thirteen months, which the Court of Appeals affirmed and held that, when Drum signed the contract, he waived any right to challenge the sufficiency of the evidence. *Id.* at 240–41. The Supreme Court of Washington ultimately clarified that a defendant in this drug court model does not give up his right to an “independent finding” of guilt. *Id.* at 242.

⁵⁶ *Id.* at 242.

⁵⁷ See SUBSTANCE ABUSE TREATMENT, *supra* note 52, at 129 (“The decision to order treatment as part of pretrial diversion typically, though not always, rests with the prosecutor’s office. The prosecutor offers to cease all prosecution of the case if the defendant completes the prescribed treatment regimen. However, if the defendant fails to complete the treatment and to satisfy the other conditions of diversion, he may risk being sentenced more harshly (if prosecution proceeds and a conviction results) than if the individual had never entered the diversion program.”). However, this concern does not implicate the same liberty interests *during* the drug court proceeding. It is guaranteed that defendants in the deferred prosecution model, if terminated from drug court, will have the traditional criminal justice system to process their case, regardless of their drug court participation. See KING & PASQUARELLA, *supra* note 19 (explaining that if a defendant enters drug court through a deferred prosecution model and fails to complete the program, they will be prosecuted).

⁵⁸ See DRUG STRATEGIES, *supra* note 4, at 10.

⁵⁹ HUDDLESTON & MARLOWE, *supra* note 51, at 24–25. This Note will generally focus on the other two models, post-plea and post-sentencing, yet it is important to mention the deferred prosecution model in order to understand the context of the other model and its sub-components. In the deferred prosecution model, the liberty interests at stake are not as grave since the defendant has not entered into any plea or admission of guilt, and still has an opportunity for an independent finding of guilt if terminated from the drug treatment court. As *Washington v. Drum* exemplifies, a defendant who enters a drug treatment court contract in the deferred prosecution model still has the opportunity for an independent finding of guilt beyond a reasonable doubt, regardless of the drug treatment court outcome. *Drum*, 225 P.3d 237.

⁶⁰ As of 2009, 58% of adult drug courts followed either a post-plea model or term of probation/post-adjudication model. HUDDLESTON & MARLOWE, *supra* note 51, at 24.

⁶¹ KING & PASQUARELLA, *supra* note 19, at 3.

⁶² Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1481 (2004).

program and most jurisdictions use a contract between the court and the defendant, specifying their respective duties and expectations.⁶³ The guilty plea is typically held in abeyance, and successful completion of the drug court program results in vacatur of the plea, dismissal of the charges, and sometimes expungement of the offense.⁶⁴ In some cases, the defendant might be permitted to withdraw his plea and re-plead to a lesser offense.⁶⁵ However, if the defendant is terminated from drug court due to non-compliance, he will be sentenced to a term of punishment, including, possibly, incarceration.⁶⁶

The third drug court model is a post-sentencing model.⁶⁷ Here, the defendant enters a guilty plea and is sentenced to probation, but successful completion of drug treatment court is a condition of his probation.⁶⁸ For example, *Gardner v. State*⁶⁹ demonstrates the ability of a defendant to have an opportunity to enter drug court as a term of his probation.⁷⁰ In this case, the defendant was sentenced to concurrent

⁶³ *Id.* at 1482.

⁶⁴ See KING & PASQUARELLA, *supra* note 19, at 3; HUDDLESTON & MARLOWE, *supra* note 51, at 24 (“[T]he guilty plea or stipulated agreement is held in abeyance and is vacated or withdrawn upon successful completion of treatment. In addition, many of these programs may expunge the record of the arrest or conviction if the participant remains arrest-free for an additional waiting period. Although the record is usually not literally erased from criminal databases, record expungement ordinarily entitles the individual to respond truthfully on an employment application or similar document that the arrest or conviction did not occur.”); see also N.Y. CRIM. PROC. LAW § 216.05 (McKinney 2015) (“Upon the court’s determination that the defendant has successfully completed the required period of alcohol or substance abuse treatment and has otherwise satisfied the conditions required for successful completion of the judicial diversion program, the court shall comply with the terms and conditions it set for final disposition when it accepted the defendant’s agreement to participate in the judicial diversion program. Such disposition may include, but is not limited to . . . allowing the defendant to withdraw his or her guilty plea and dismissing the indictment.”).

⁶⁵ Casey, *supra* note 62, at 1482 (“If the defendant successfully completes the treatment program, the court will expunge the conviction or the defendant will be permitted to withdraw his plea and re-plead to a lesser offense.”).

⁶⁶ DRUG STRATEGIES, *supra* note 4, at 12 (“Some courts are crowded with repeat drug offenders. . . . Although they are often not violent criminals, they face increasingly severe penalties for each subsequent conviction. Most prosecutors are unwilling to defer prosecution in such cases. But they may agree to consider more lenient sentencing if drug abusers plea guilty and participate in treatment prior to sentencing. These offenders have more entrenched drug habits, and are harder to treat. By proceeding to prosecution, the district attorney is assured that those who do not succeed in treatment will be sentenced.”).

⁶⁷ Also known as a post-adjudication or term of probation model. HUDDLESTON & MARLOWE, *supra* note 51, at 24.

⁶⁸ *Id.* (“The record of the conviction stands, but participants can avoid incarceration or reduce their probation obligations.”).

⁶⁹ 577 S.E.2d 69 (Ga. Ct. App. 2003).

⁷⁰ Another case that illustrates this model is *Anglin v. Arkansas*, where the defendant was arrested and charged with possession of a controlled substance and possession of drug paraphernalia. *Anglin v. Arkansas*, 249 S.W.3d 836 (Ark. Ct. App. 2007). The defendant plead guilty to the charges and agreed to a thirty-six month probation and placement in drug treatment court. *Id.* at 837. After committing several drug court violations, her probation was revoked. *Id.* at 838.

eight year probation on two convictions for violations of the Georgia Controlled Substances Act.⁷¹ The defendant was subsequently arrested after failing to report to his probation officer and, as a result, the court revoked eight years of probation and sentenced him to serve six months, conditioned upon entering and successfully completing a drug court program.⁷² Once he was again released on probation, the defendant failed to report to the drug court program and was thereafter brought to court for a revocation hearing.⁷³ The main difference of the post-sentencing model, as compared to the post-plea model, is that regardless of successful participation in drug court, the conviction still remains on the defendant's record.⁷⁴ The main incentive for participating in drug court within a post-sentencing model is avoiding incarceration or reducing probation obligations.⁷⁵

B. *Federal Standards for Right to Counsel in a Criminal Proceeding*

Though designed to be non-adversarial, drug court proceedings are nonetheless part of a criminal prosecution, regardless of which drug court model is employed by a particular jurisdiction.⁷⁶ Accordingly, drug courts implicate the right to counsel and an overview of the constitutional right to counsel in traditional criminal proceedings is crucial to understanding the role of counsel within the drug court context.

1. Right to Counsel and Due Process

The Sixth Amendment explicitly provides a defendant the right to counsel in all criminal prosecutions.⁷⁷ The Supreme Court has further

⁷¹ *Gardner*, 577 S.E.2d at 69.

⁷² *Id.*

⁷³ *Id.* at 70. At the probation revocation hearing, the court revoked his four-year probation as a result of the violation of his probationary condition of drug court attendance. *Id.* at 69. The main issue on appeal was whether drug court participation was a "special condition" of probation to authorize the court to revoke four years of probation or whether it was a "general condition" of probation, meaning the court could only revoke two years. *Id.* at 69.

⁷⁴ See HUDDLESTON & MARLOWE, *supra* note 51, at 24.

⁷⁵ See *id.*

⁷⁶ The earliest point at which a defendant may enter drug court is once adversarial proceedings against a defendant have begun. Either the prosecution is deferred pending drug court completion, a plea is entered and sentencing is diverted pending drug court completion, or a defendant has already been sentenced and drug court is a condition of their probation. See discussion *supra* Section I.A. (discussing the three main drug court models).

⁷⁷ U.S. CONST. amend. VI. The Sixth Amendment reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

expanded and clarified the meaning of the right to counsel and its application in both federal and state courts.⁷⁸ The assistance of counsel is a constitutional element of a federal criminal court proceeding unless the right is intelligently and competently waived.⁷⁹ The landmark case, *Gideon v. Wainwright*,⁸⁰ held that this right to counsel is so fundamental and essential to a fair trial that it is also applicable to the states pursuant to the Fourteenth Amendment.⁸¹

The right to counsel is a constitutional safeguard that's necessary to assist individuals in facing the government as their adversary.⁸² This

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." *Id.*

⁷⁸ See generally *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to counsel extends to all felony prosecutions and to misdemeanor prosecutions where incarceration may be imposed); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (applying right to counsel to the state level through the Fourteenth Amendment); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (counsel must be provided in federal courts for defendants unable to employ counsel, unless the right is competently and intelligently waived).

⁷⁹ *Johnson*, 304 U.S. at 467–68 (“Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court’s authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court’s jurisdiction to proceed to conviction and sentence.”). However, if a defendant without counsel acquiesces in a trial, the burden of proof is on *him* to establish that he did not waive his right to counsel competently or intelligently. *Id.* at 468–69 (emphasis added). The standard for right to counsel in federal court is embodied in the Federal Rules of Criminal Procedure: “A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.” FED. R. CRIM. P. 44(a).

⁸⁰ 372 U.S. 335 (1963).

⁸¹ See *id.* at 339; see also U.S. CONST. amend. XIV § 1 (“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.”). In a case prior to *Gideon*, the Court considered this question and after analyzing historical data, concluded that the appointment of counsel is not a fundamental right and therefore not obligatory upon the States pursuant to the Fourteenth Amendment. See *Betts v. Brady*, 316 U.S. 455 (1942). After considering a long line of precedent concerning the constitutional principles that ensure a fair system of justice, the Court in *Gideon* concluded that a defendant cannot be assured a fair trial without the right to counsel and that this right is incumbent on the states in all felony cases. *Gideon*, 372 U.S. at 344 (“Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”). This right to counsel was further expanded when *Argersinger* held that due process requires counsel in any criminal case, whether misdemeanor or felony, that actually leads to imprisonment. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁸² See *Powell v. Alabama*, 287 U.S. 45 (1932) (recognizing that defense counsel could provide some parity between a layperson and the government prosecuting his case); Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1642 (2003) (“[T]he Court echoed the colonists’ views about counsel and addressed the tremendous advantage a public prosecutor had over an unrepresented defendant. The Court

right embodies the recognition that a defendant may not have the professional capability to adequately defend himself without the assistance of counsel when brought in front of a court with the power to deprive him of his liberty.⁸³ Without defense counsel, the procedural safeguards that assure a fair trial before an impartial tribunal are threatened.⁸⁴

A liberty interest is a broad constitutional concept that refers to the basic interests possessed by citizens of a free society.⁸⁵ This interest is not confined to mere freedom from bodily restraint, but includes a full range of conduct which an individual is free to pursue.⁸⁶ Once a protected liberty interest is identified, the subsequent determination is exactly how much process is due.⁸⁷ When a state seeks to deprive someone of a recognized liberty interest, Courts may turn to the balancing test set forth in *Mathews v. Eldridge*.⁸⁸ This test requires a balancing of (1) the private interest affected, (2) the risk of an erroneous deprivation of the interest through the procedures used, and (3) the

acknowledged that the complexity of the legal system increased the prosecutor's advantage. Faced with the complex 'science of law' and the rules of evidence, a layperson could not mount a meaningful defense. The Court also considered the risk of substantial prejudice that might befall an unrepresented defendant.").

⁸³ See *Johnson*, 304 U.S. at 462–63 (explaining that the purpose of the Sixth Amendment is to provide defendants an opportunity to effectively advocate their cases through the assistance of effective defense counsel, considering the experienced and professional prosecutor for any given case); see also U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

⁸⁴ *Gideon*, 372 U.S. at 344.

⁸⁵ See 16C C.J.S. *Constitutional Law* § 1889 (2016) (“Liberty protected by due process is a broad concept that extends to the full range of conduct which the individual is free to pursue and cannot be restricted except for a proper governmental objective. . . . ‘Liberty’ within the Due Process Clauses applies to those basic interests which are possessed by citizens of a free society and to those additional interests which are created by the State for the benefit and enjoyment of its people.”).

⁸⁶ See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972) (“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 . . . as essential to the orderly pursuit of happiness by free men.”) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); see also Adam D. Young, Comment, *An Analysis of the Sixth Amendment Right to Counsel as It Applies to Suspended Sentences and Probation: Do Argersinger and Scott Blow a Flat Note on Gideon’s Trumpet?*, 107 DICK. L. REV. 699, 713 (2003) (explaining that the Supreme Court is concerned with deprivations of liberty in a broad context, extending beyond actual imprisonment).

⁸⁷ The Due Process Clause of the Fourteenth Amendment protects an individual from being deprived of a constitutional liberty interest without due process of law. See 16C C.J.S. *Constitutional Law* § 1887 (2016) (“However, due process does not protect against all deprivations of liberty but only against deprivations of liberty accomplished without due process of law, and only governmental actions which intrude upon personal liberties arbitrarily or in an utterly unreasonable manner violate the Due Process Clause.”).

⁸⁸ 424 U.S. 319 (1976).

Government's interest.⁸⁹ Due process is not a static concept, rather, it is flexible and affords the appropriate procedural protections necessary for different situations.⁹⁰ Accordingly, the Supreme Court has repeatedly concluded that due process demands that a defendant have the right to counsel at "critical stages" of a criminal proceeding.⁹¹

2. The Critical Stage Doctrine

Exactly when a defendant is entitled to her right to counsel is a complex matter. Broadly speaking, under the Sixth Amendment,⁹² defendants have a right to counsel at "critical stages" of a criminal proceeding.⁹³ What constitutes a critical stage of any given criminal proceeding has been molded and defined by numerous Supreme Court decisions.⁹⁴ In general, a critical stage is one which affects the ultimate disposition of the charge against the defendant through an adverse consequence or lost opportunity that could have been either prevented or gained had counsel been present.⁹⁵

⁸⁹ *Id.* at 335 ("[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

⁹⁰ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.").

⁹¹ *See* *United States v. Wade*, 388 U.S. 218, 224 (1967) ("[T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings."); *see also* *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972) ("The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution."); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967) ("[Supreme Court cases including *Gideon* and *Hamilton*], clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.").

⁹² As noted above, the Sixth Amendment right to counsel was incorporated into the states through the due process clause of the Fourteenth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁹³ While *all* stages are arguably "critical," one Supreme Court case defined "critical stage" to be an event when the accused requires aid in coping with legal problems or help in meeting his adversary. *See United States v. Ash*, 413 U.S. 300 (1973). Only stages of a "criminal prosecution" can be critical stages. As specified in the Sixth Amendment, a defendant is entitled to defense counsel only in a "criminal prosecution." U.S. CONST. amend. VI.

⁹⁴ *See generally* *Brewer v. Williams*, 430 U.S. 387 (1977); *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) (holding that where the investigation is no longer a general inquiry into an unsolved crime, but is rather focused on a particular suspect, an interrogation of that person after being denied counsel may not be used against them at trial); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment is a critical stage in a criminal proceeding under Alabama law).

⁹⁵ 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.2(b) (4th ed. 2015) ("In

There are several examples of when the right to counsel attaches, and consequently which proceedings are so “critical” as to require the assistance of counsel. The Supreme Court has held that the right to counsel attaches at the commencement of judicial proceedings against a defendant, whether by “formal charge, preliminary hearing, indictment, information, or arraignment.”⁹⁶ In a fairly recent case, the Court further clarified that a defendant’s initial appearance in front of a judge, whereupon he learns of his charges, marks the start of the adversary proceeding and thus implicates a right to counsel.⁹⁷ However, beyond the initiation of adversary proceedings, exactly when a defendant is entitled to counsel at the various proceedings that comprise a criminal trial is more difficult to determine.

One way that courts have defined whether any particular stage of the proceeding is “critical” is by evaluating whether it held significant consequences for the accused.⁹⁸ *Brewer v. Williams*⁹⁹ concerned a situation where several incriminating statements were made by a defendant during a drive with a police officer, despite the defendant’s

determining whether a judicial proceeding meets the ‘critical stage’ standard, a court must ask: (1) whether the proceeding either (i) had a consequence adverse to the defendant as to the ultimate disposition of the charge which could have been avoided or mitigated if defendant had been represented by counsel at that proceeding, or (ii) offered a potential opportunity for benefitting the defendant as to the ultimate disposition of the charge through rights that could have been exercised by counsel, and (2) whether that adverse consequence could have been avoided, or the lost opportunity regained, by action that subsequently provided counsel could have taken.”).

⁹⁶ See *United States v. Gouveia*, 467 U.S. 180, 188–89 (1984); *Brewer*, 430 U.S. at 398 (“[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’”) (citation omitted). Accordingly, arraignment is considered a critical stage of a traditional criminal proceeding. See *Hamilton*, 368 U.S. at 53 (“Arraignment under Alabama law is a critical stage in a criminal proceeding.”). The reason for this is that whatever happens at arraignment may affect the whole trial. *Id.*

⁹⁷ *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 212 (2008). The court also clarified that the prosecutor’s involvement in the case is not an indicator of when adversary proceedings commence. See *id.* While the defendant had never committed a felony, a background check on him disclosed an erroneous record indicating that he was a felon. *Id.* at 195. The defendant’s repeated requests for counsel were denied until six months after the initial hearing, whereupon the appointment of counsel swiftly confirmed the erroneous record and the indictment was dismissed. *Id.* at 196–97. In the meantime, defendant was indicted and spent three weeks in jail since he could not afford bail. *Id.* at 196. Once the defense lawyer was appointed and the proper paperwork was filed, the indictment was dismissed. *Id.* at 196–97. Subsequently, the defendant brought suit alleging that the court’s policy of denying appointed counsel until at least the entry of an information or indictment violated his Sixth Amendment right to counsel. *Id.* at 197.

⁹⁸ See *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015); *Bell v. Cone*, 535 U.S. 685, 695–96 (2002) (“A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at ‘a critical stage,’ a phrase we used . . . to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused.”) (citations omitted).

⁹⁹ 430 U.S. 387 (1977).

hesitation to speak in the absence of an attorney.¹⁰⁰ The defendant had already been arraigned, so it was without question that proceedings had already been initiated against him.¹⁰¹ Therefore, the Court held that at the time the police interrogated the defendant during the car ride, he was entitled to counsel.¹⁰² While this car ride was clearly not a formal proceeding within the criminal trial, the statements made by the defendant in response to the interrogations were made in the absence of legal representation and ultimately affected the disposition of his charge, therefore this was a critical stage of the criminal proceeding.¹⁰³

The period of time leading up to trial is vitally important, thus some pre-trial stages, once adversary proceedings have begun, are considered critical stages requiring defense counsel.¹⁰⁴ However, the Court did suggest that there are certain pre-trial activities which the right does not cover, indicating that whether or not an activity is a critical stage is often an extremely fact specific exercise.¹⁰⁵ For example, *United States v. Ash* required the Court to consider whether

¹⁰⁰ *Id.* at 392–93. The police officers also knew that the defendant had a history of mental illness and was deeply religious, both characteristics that were taken advantage of when essentially coercing the defendant to admit to the crime without the presence of his attorney. *Id.* at 392. At this point, defendant had just been arraigned in Davenport after surrendering himself to local police and was being transported to Des Moines. *Id.* at 390–91. It was made explicitly clear that the police officers transporting him would not question him during the trip. *Id.* at 391.

¹⁰¹ *Id.* at 399 (“There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines. A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail.”).

¹⁰² *Id.* at 401 (“[O]nce adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him. . . . Williams was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments.”). The Court declined to find that the defendant had properly waived his right to counsel during the car ride interrogation. *Id.* at 404–05. The standard for determining whether a waiver is constitutional requires the State to prove that the defendant intentionally abandoned or relinquished a *known* right. *Id.* at 404 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The Court subsequently held that this standard for proving intentional waiver of right to counsel applied not only at trial, but at a critical stage of pretrial proceedings. *Id.* Here, defendant did not knowingly relinquish his right to counsel, as evidenced by his constant reliance on defense counsel up to this point coupled with the police officer’s lack of informing defendant he had any rights at all at that time. *Id.* at 404–05.

¹⁰³ *Id.* at 393–94, 401. Additionally, the State must prove an intentional waiver at a critical stage of pretrial proceedings or at trial. *Id.* at 404.

¹⁰⁴ See *Maine v. Moulton*, 474 U.S. 159, 159–60 (1985) (“The assistance of counsel is necessary to safeguard the other procedural safeguards provided to the accused by the criminal justice process. Accordingly, the right to the assistance of counsel is not limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.”); see also *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (“[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.”).

¹⁰⁵ See generally *United States v. Ash*, 413 U.S. 300 (1973).

counsel is required when the Government conducts a post-indictment photograph display for witness identification of the offender.¹⁰⁶ After examining the expansion of the Sixth Amendment, the Court concluded that the test for determining whether a proceeding is a critical stage hinges on whether the accused needed assistance in facing his adversary.¹⁰⁷ Thus, in *Ash*, the Court held that the defendant did not have a right to counsel during the photo lineup.¹⁰⁸ In reaching its conclusion, the Court considered the nature of the photographic lineup and its overall implication on the adversary process.¹⁰⁹ Since the photographic display did not present an opportunity for the prosecutor to unfairly prejudice the defendant, it was not a critical stage requiring the safeguards of the Sixth Amendment.¹¹⁰ Therefore, in determining whether or not any particular proceeding is a “critical stage,” a court must evaluate whether the proceeding will prejudice the defendant substantially, and whether the presence of counsel can prevent that prejudice.¹¹¹

3. Probation Revocation Hearings

Whether post trial proceedings are part of the “criminal prosecution”¹¹² within the meaning of the Sixth Amendment depends on

¹⁰⁶ *Id.* at 300–01. The Court focused on the historical interpretation of the right to counsel guarantee, noting that in order to keep pace with modern criminal proceedings, the Sixth Amendment right has been construed to apply to “critical stages.” *Id.* at 309–11 (citation omitted).

¹⁰⁷ *Id.* at 313 (“This review of the history and expansion of the Sixth Amendment counsel guarantee demonstrates that the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary.”); see also Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 336 n.15 (2011) (“The standard focuses on the importance of the rights of an accused that are at risk without counsel’s presence, such as pretrial liberty and the privilege against self-incrimination, rather than on the ultimate outcome of the infrequent trial.”).

¹⁰⁸ *Ash*, 413 U.S. at 317. The Court reasoned that since the accused himself was not present at the lineup and asserted no right to be present, there is no possibility that he would be led astray by his lack of knowledge about the law in that situation. *Id.*

¹⁰⁹ *Id.* at 317–21 (“We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required.”).

¹¹⁰ *Id.* at 320–21. A defendant is presumed to have suffered an unconstitutional prejudice if right to counsel is denied at a critical stage within a traditional criminal proceeding. See also *United States v. Cronin*, 466 U.S. 648 (1984).

¹¹¹ See *Cronin*, 466 U.S. at 658–60; *United States v. Wade*, 388 U.S. 218, 227 (1967) (“It calls upon us to analyze whether potential substantial prejudice to defendant’s rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.”).

¹¹² Thereby requiring assistance of counsel, since the Sixth Amendment right to counsel guarantee applies to all “criminal prosecutions.” U.S. CONST. amend. VI. (“In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.”).

whether the proceeding pertains to the original offense or to the defendant's subsequent conduct while on probation.¹¹³ For example, although probation revocation hearings usually deal with conduct of the defendant subsequent to his case and are generally not part of the initial criminal prosecution,¹¹⁴ the right to counsel may still attach at a stage beyond a "criminal prosecution" when due process requires the assistance of counsel in order to ensure a fair hearing.¹¹⁵ Accordingly, in considering whether procedural protections should be in place in parole and probation revocation hearings, courts may consider whether the defendant will suffer a "grievous loss" on behalf of the State.¹¹⁶

The Supreme Court has declined to make a hard and fast constitutional rule requiring counsel in probation or parole revocation hearings.¹¹⁷ In *Gagnon v. Scarpelli*, the defendant—who was charged with armed robbery and subsequently sentenced to probation for seven years—had his probation revoked without a hearing.¹¹⁸ The *Gagnon*

¹¹³ Compare *Mempa v. Rhay*, 389 U.S. 128 (1967) (holding that a probation revocation proceeding is part of a criminal proceeding when it required setting the defendant's prison time), with *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (holding that the probation revocation hearing was not part of the criminal prosecution when the issue is probation revocation, since that only deals with the defendant's subsequent conduct while in the rehabilitative probation stage, not the commission of the original offense). In *Mempa*, the Court delineated a rule regarding counsel at probation revocation hearings that occurred *pre-sentencing*. *Mempa*, 389 U.S. at 137. This is because sentencing is considered a stage of the criminal prosecution, therefore probation in this situation occurred *before* the end of the criminal prosecution. For the purposes of this Note, I will assume that when a defendant is in drug court as a condition of their probation, this term of probation has occurred post-sentencing. See discussion *supra* Section I.A. (discussing the post-sentencing drug court model).

¹¹⁴ See *Gagnon*, 411 U.S. 778. Probation is an alternative to incarceration in which a convicted individual may serve all or part of his sentence at liberty, subject to supervision. Daniel F. Piar, *A Uniform Code of Procedure for Revoking Probation*, 31 AM. J. CRIM. L. 117, 117 (2003). A probationer is usually required to report to a probation officer regularly, as well as comply with certain elements set as conditions of his probation. *Id.* at 118. "If a probationer fails to comply with his conditions, he can be charged with a probation violation and brought back before the court. If the state can prove that the terms of probation were violated, then the probation can be revoked, and what began as conditional liberty can become a term of incarceration." *Id.* By contrast, parole is release from prison, before the completion of a sentence, on the condition that the parolee follows certain regulations. See *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). The purpose of parole is to allow a defendant to integrate back into society before the end of his sentence. *Id.* Parolees are entitled to retain their liberty so long as they abide by certain conditions, and if such conditions are violated, the parole officer has broad discretion to revoke parole. *Id.* at 479.

¹¹⁵ See *Powell v. Alabama*, 287 U.S. 45, 70–71 (1932).

¹¹⁶ See *Morrissey*, 408 U.S. at 481 ("Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' . . . The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment.") (citations omitted); *Gagnon*, 411 U.S. at 781–82.

¹¹⁷ *Gagnon*, 411 U.S. 778.

¹¹⁸ *Id.* at 779–80 (explaining that respondent was apprehended by police during the course of a house burglary, which was in direct violation of his probation regulations). Respondent was subsequently incarcerated to begin serving the 15-year term that was sentenced to him by the trial judge—without a hearing. *Id.*

Court¹¹⁹ held that a probationer is entitled to minimum due process requirements including a preliminary hearing and a final revocation hearing.¹²⁰ However, the Court rejected an absolute right to counsel in all probation revocation hearings, and instead proposed a case-by-case analysis that should be limited to cases where fundamental fairness and due process require it.¹²¹ While the right to counsel may be undesirable and constitutionally unnecessary in some cases, the Court nevertheless held that counsel is presumptively required where (1) a defendant makes a colorable claim that he has not committed the violations at issue and (2) where the mitigating factors might be difficult to develop or present.¹²² Additionally, the Court said to consider whether the defendant appears to be capable of speaking for himself.¹²³

While the Supreme Court opted out of a per se rule requiring counsel in probation hearings, several states have established a blanket right to counsel, either by statute or on state constitutional grounds.¹²⁴

¹¹⁹ In *Gagnon*, the Court considered precedent when making its decision. See *Gagnon*, 411 U.S. 778. *Mempa* involved consolidated cases that all raised the question of whether counsel was required in cases where sentencing was deferred, subject to probation. *Mempa v. Rhay*, 389 U.S. 128, 130 (1967). The court held that a probationer is entitled to counsel at combined revocation and sentencing hearings because substantive rights of the defendant may be affected. *Id.* at 134–37 (deferred sentencing, even when part of probation revocation hearing, requires defense counsel). In *Morrissey*, the court considered parole revocation. *Morrissey*, 408 U.S. 471. While parole is not part of a criminal prosecution, the potential loss of liberty is a serious deprivation that warrants due process. *Id.* at 482–83. The Court held that a parolee is entitled to both a preliminary hearing when the parolee is arrested and detained, and a revocation hearing if so desired by the parolee. *Id.* at 485–89. However, the Court declined to render a decision about whether the parolee is entitled to the assistance of counsel at these hearings. *Id.* at 489.

¹²⁰ Prior to this decision, no court had held that a *probationer* was entitled to a revocation hearing, so the Court extended the *Morrissey* decision that required a hearing for parole revocation. See *Gagnon*, 411 U.S. at 782; see also *Morrissey*, 408 U.S. at 488.

¹²¹ *Gagnon*, 411 U.S. at 790 (“We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.”). However, the Court has recognized the principle that even conditional liberty is liberty. See *Morrissey*, 408 U.S. at 479–80, 482 (“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. . . . [T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty . . .”).

¹²² *Gagnon*, 411 U.S. at 790. Moreover, the Court provided guidelines for when counsel should be provided, most notably, if the probationer or parolee makes a request for counsel after being informed of his right to request such. Counsel should be provided if probationer or parolee makes such a request, based on a claim “(i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation. . . .” *Id.*

¹²³ *Id.* at 790–91. The Court in *Gagnon* weighed the interests of both the defendant and the government. *Id.* at 787.

¹²⁴ See *Piar*, *supra* note 114, at 136 (“By contrast, some states have established a blanket right to counsel, either by statute or on independent state constitutional grounds. Congress likewise has

These state statutes generally provide the right to be represented by counsel at a probation or parole hearing and require counsel to be appointed if the defendant is unable to obtain counsel on his own.¹²⁵ If a state does not establish a blank right to counsel through statute, whether right to counsel in a probation revocation hearing attaches requires an analysis of the factors presented above and a consideration of whether the particular revocation requires due process.¹²⁶

4. Effective Assistance of Counsel

Beyond when the right to counsel attaches, drug courts also implicate how this right applies, especially considering the diminished role of the defense attorney in a drug court proceeding.¹²⁷ The right to counsel includes the right to effective assistance of such counsel.¹²⁸ If counsel fails to zealously advocate for the defendant through meaningful adversarial testing of the prosecutor's case, Sixth Amendment rights have been denied.¹²⁹ Effective assistance of counsel

provided a right to counsel in all federal probation revocation hearings.”).

¹²⁵ See OHIO CRIM. R. 32.3(B) (2016) (“The defendant shall have the right to be represented by retained counsel and shall be so advised. Where a defendant convicted of a serious offense is unable to obtain counsel, counsel shall be assigned to represent the defendant, unless the defendant after being fully advised of his or her right to assigned counsel, knowingly, intelligently, and voluntarily waives the right to counsel.”); CONN. GEN. STAT. ANN. § 53a-32 (2013) (“[S]hall be advised by the court that such defendant has the right to retain counsel and, if indigent, shall be entitled to the services of the public defender”); KANS. STAT. ANN. § 22-3716(b) (2015) (“The defendant shall have the right to be represented by counsel and shall be informed by the judge that, if the defendant is financially unable to obtain counsel, an attorney will be appointed to represent the defendant.”).

¹²⁶ See *Gagnon*, 411 U.S. 778. As recognized by other legal scholars, the case-by-case approach suggested in *Gagnon v. Scarpelli* is untenable and inefficient, and the state statutes entitling probationers and parolees with counsel in any revocation hearing are preferred. See *Piar*, *supra* note 114, at 138 (“Providing counsel in all cases would ensure that someone who is being haled into court to face the loss of liberty will not go alone, and at the least, that all possible arguments and evidence will be presented to the court before revocation is imposed. The case-by-case approach of *Gagnon* is neither efficient nor fair, and a probationer should be entitled to counsel in any revocation hearing.”).

¹²⁷ See discussion *infra* Section II.B.

¹²⁸ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”).

¹²⁹ See *United States v. Cronin*, 466 U.S. 648, 659 (1984) (“Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.”). The heart of this case deals with whether defense counsel's performance is presumptively unconstitutional given lack of time to prepare for a case, so as to render the adversary process prejudiced as a matter of law. *Id.* at 656–62. The Court concluded that “[o]nly when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial.” *Id.* at 662. Another situation where counsel's performance may be presumptively unconstitutional is when no counsel, whether competent or not, could effectively assist the accused during trial. *Id.* at 660–61 (discussing *Powell v. Alabama*, 287 U.S. 45 (1932)).

is not required to be perfect or error-free; rather, “effectiveness” is measured by a standard of general competency of defense attorneys in criminal cases generally.¹³⁰ The general test for determining whether a defendant has a viable claim of ineffective assistance of counsel asks whether counsel’s performance was deficient, and whether the defendant was unfairly prejudiced by this deficiency.¹³¹ Therefore, by constitutionally requiring counsel during critical stages of a criminal prosecution, the defendant is assured zealous representation as part of that Sixth Amendment right.

II. IDENTIFYING THE RIGHT TO COUNSEL PROBLEM IN THE DRUG COURT MODEL

The right to counsel and effective assistance of such counsel are based on adversarial proceedings, which is problematic when attempting to apply to the non-adversarial drug court model.¹³² However, the legal principles that underlie the critical stage doctrine, probation revocation law, and the effective assistance of counsel can be applied to the stages of a drug court proceeding to reconcile the drug court model with the constitutional protections due to each participant.

A. *Lack of Defense Counsel During Drug Court Proceedings May Implicate Liberty Interests of Defendants*

While there is a well-established doctrine for what constitutes a critical stage in a traditional criminal proceeding, courts have not definitively addressed which drug court proceedings constitute critical stages for Sixth Amendment right to counsel purposes. Whether the non-traditional aspects of drug court proceedings, including staffings¹³³ and status hearings,¹³⁴ implicate a constitutional right to counsel is a

¹³⁰ See generally *Burt v. Titlow*, 134 S.Ct. 10, 18 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance”); *Hinton v. Alabama*, 134 S.Ct. 1081, 1081 (2014) (discussing *Strickland v. Washington*, 466 U.S. 668, 685–87 (1984)) (“[D]efendants are entitled to be represented by an attorney who meets at least a minimal standard of competence.”).

¹³¹ See *Strickland*, 466 U.S. at 687.

¹³² See discussion *supra* Section I.A. (discussing the drug court model and its features generally).

¹³³ Staffings are the meetings behind closed doors between the judge, prosecutor, defense attorney and treatment staff, held prior to a defendant’s status hearing. See ORR ET AL., *supra* note 37, at 30–31.

¹³⁴ At status hearings, sanctions may be imposed on defendants who do not comply with the drug court rules and procedures by testing positive for drugs. They range from admonishment from the judge in open court to incarceration. See KEY COMPONENTS, *supra* note 28, at 13–15.

question that is currently left unanswered. As presented in Part I, a defendant's right to counsel in various stages of a criminal proceeding often hinges on whether a defendant had a liberty interest at stake.¹³⁵ However, as the example below illustrates, if defense counsel is *not* required at the non-traditional proceedings of drug court, a defendant's liberty interests may be gradually eroded without due process of law.

The lack of defense counsel during several stages of a drug court proceeding, including staffings and all status hearings,¹³⁶ may adversely affect a defendant's liberty interests due to the potentially cumulative effect of sanctions. Consider the following hypothetical: Defendant enters the drug treatment court one day for her regularly scheduled appearance and tests positive for cocaine. This is the first time she has tested positive for drugs while participating in the program. The presiding judge sanctions her to court observation for the day.¹³⁷ No defense counsel is present at the staffing or the status hearing, but the liberty interest at stake is fairly minimal.¹³⁸ On her next court appearance, the Defendant again tests positive for cocaine. This time, the judge sanctions her to write an essay reflecting on why she chose to break compliance with the drug court rules.¹³⁹ Again, no defense

¹³⁵ See *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (“The Sixth Amendment guarantees that: ‘In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.’ This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.”); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”); *Argersinger v. Hamlin*, 407 U.S. 25, 36–37 (1972) (“We must conclude, therefore, that the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial. . . . We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”).

¹³⁶ Regardless of what type of sanction is being imposed, if any at all.

¹³⁷ Often, court observation is used as a sanction. Sanctions for noncompliance, as detailed in Key Component #6, include: Warnings and admonishment from the bench in open court, demotion to earlier program phases, increased frequency of testing and court appearances, confinement in the courtroom or jury box, increased monitoring and/or treatment intensity, fines, required community service or work programs, escalating periods of jail confinement, termination from the program and reinstatement of regular court practices. KEY COMPONENTS, *supra* note 28, at 13–14.

¹³⁸ Michael Tobin, *Participation of Defense Attorneys in Drug Courts*, 8 DRUG CT. REV. 96, 114 (2012) (“[I]n most Drug Courts, the attorney does not attend the court’s regular review hearings, even when the defendant faces a sanction for noncompliance.”).

¹³⁹ The National Drug Court Research Center provides a list of incentives and sanctions compiled from various drug court practices across the country. Essay writing is considered a “low” sanction in terms of magnitude and severity. Essay assignment examples include reflection upon the following: definition of recovery, relapse triggers, drug refusal skills, managing cravings, lying and dishonesty, the disease of addiction, the impact of addiction on the family, the role of treatment, and the role of peer support groups. *List of Incentives and Sanctions*, NAT’L ASS’N OF DRUG CT. PROFS., NAT’L DRUG CT. INST., <https://jpo.wrlc.org/bitstream/handle/11204/3546/NADCP%20List%20of%20incentives%20and%20sanctions.pdf?sequence=1> (last visited Oct. 12, 2015).

counsel is present, but perhaps this is not too concerning given the minimal intrusion on the defendant's liberty interests. On the third consecutive appearance, Defendant tests positive a third time for cocaine. Considering the prior two sanctions, the judge now sanctions the Defendant to jail for three days. Perhaps now a defense attorney is called into court, but they will be at a disadvantage due to their absence from the proceedings involving the first two sanctions. The judge has now made her decision based not only on this current drug abuse, but also the prior two staffings and status hearings in which the defense counsel was not present at all. This is problematic since these proceedings are permitted to occur without defense counsel, yet may have an overall impact on the liberty interests of the defendant.

The National Drug Court Institute (NDCI)¹⁴⁰ promulgated best practices for the operation of drug courts,¹⁴¹ which include offering adversary representation to a defendant in drug court whenever the defendant faces incarceration as a sanction.¹⁴² However, merely requiring defense counsel when a defendant faces jail time as a sanction does not address the problem, for by that time a defendant's liberty interests may have been gradually eroded without due process.

B. *The Defense Attorney's Problematic Role Within a Drug Court Proceeding*

There is no clearly established right to have counsel present at all stages of a drug court proceeding, including regularly scheduled court appearances.¹⁴³ However, this is potentially problematic because the sanctions or discussions that occur during the proceedings in which counsel is not present might ultimately have an overall impact on the liberty interest of the defendant. The problem is further exacerbated by the defense attorney's diminished capacity to zealously and effectively

¹⁴⁰ The NDCI is an organization under the National Association of Drug Court Professionals whose mission is to promote education and research in the drug court field. The NDCI has an annual publication, *Drug Court Review*, that keeps drug court practitioners apprised of important new developments in the field. It provides scientific research, scholarship, and commentary from drug court practitioners. See generally *Drug Court Review*, NAT'L DRUG CT. INST., <https://www.ndci.org/resources/publications/drug-court-review> (last visited Apr. 13, 2017).

¹⁴¹ Douglas B. Marlow, *Special Issue on Best Practices in Drug Courts*, 8 DRUG CT. REV. 1, 1–2 (2012).

¹⁴² Tobin, *supra* note 138, at 111.

¹⁴³ See Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 64 (2000–2001) (“[W]ithin the treatment court a culture of informality has developed whereby most players in the court view the presence of a defense attorney at status hearings as nonessential, even for scheduled hearings.”).

advocate for her client.¹⁴⁴ As presented in Part I, a defendant has a right to counsel once adversarial proceedings have commenced against the individual.¹⁴⁵ However, since drug treatment courts employ a non-adversarial, teamwork approach, they don't conform to the traditional criminal court model.¹⁴⁶ As a result, the traditional roles of the judge, prosecutor, and defense attorney are recalculated to facilitate the rehabilitative treatment goals of the drug court model.¹⁴⁷ The changing role of the defense attorney is particularly important in the context of a defendant's right to counsel. The "Key Components" promulgated by the Department of Justice provide the basic requirements for defense attorneys working in a drug court.¹⁴⁸ They emphasize taking a step back and working within the team approach.¹⁴⁹ Yet the Key Concepts neglect to provide ethical and constitutional guidelines for defense counsel, leaving them with a difficult choice in how they formulate their role within the drug court proceeding.¹⁵⁰

¹⁴⁴ To illustrate the main tension: Is right to counsel a zealous and effective advocate or simply a "body" standing next to the defendant?

¹⁴⁵ *Brewer v. Williams*, 430 U.S. 387, 398 (1977) ("[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'").

¹⁴⁶ See *Casey*, *supra* note 62, at 1459.

The problem-solving courts represent a dramatic change in the function of the criminal courts, incorporating an experimentalist theory of governance, where evolving standards, continuous monitoring and collaboration replace existing structures. The procedural due process protections accorded to criminal defendants and traditional barriers to the use of coercion are eliminated, as the adversarial process is abandoned in favor of a collaborative endeavor involving the judge, prosecutor, defense attorney, probation officer, treatment provider and defendant. Significantly, the judge becomes part of the treatment team, rendering decisions not based on law or fact, but on a program of clinical treatment.

Id.

¹⁴⁷ *Id.*

¹⁴⁸ See discussion *supra* Section I.A.

¹⁴⁹ *Quinn*, *supra* note 143, at 47.

Defenders need to look at this as a new approach that requires a level of team work and partnership that is not often seen. It requires defenders to take a step back, to not intervene actively between the judge and the participant, and allow that relationship to develop and do its work, and basically to understand the importance of working within a team concept.

Id. (quoting Judge Jeffery S. Tauber, former presiding judge for the Oakland, California, drug treatment court and director of the National Drug Court Institute).

¹⁵⁰ See *Quinn*, *supra* note 143, at 50; see also KEY COMPONENTS, *supra* note 28, at 11 ("The responsibility of the defense counsel is to protect the participant's due process rights while encouraging full participation."). What's interesting is that no further guidelines are promulgated to describe exactly how this is achieved. Defense attorneys first must decide what posture to adopt when their client is faced with either entry into a drug court program or continuation through the traditional criminal court system. During a drug court proceeding, they are faced with choosing whether to play an active or passive role in limiting the potentially severe sanctions that may be imposed on their client. See Richard C. Boldt, *Rehabilitative Punishment and the Drug*

Defense attorneys must usually make these difficult decisions on the fly, during the regular court appearances of their clients, most often when there is noncompliance by a client and the judge intends to impose some form of sanction.¹⁵¹ The notion that the defense attorney must not intervene makes rational sense from the judge's perspective, who views her role as within the best interests of the defendant.¹⁵² However, from the defendant's perspective, even well-intentioned sanctions may seem too harsh or unfair.¹⁵³ If defense counsel decides to advocate for her client, she runs the risk of undermining the therapeutic treatment grounded in the direct relationship between the judge and the defendant.¹⁵⁴ Consequently, defense attorneys in drug court have a difficult job of balancing when to be zealous advocates and when to cooperate with the judge's sanction decision.¹⁵⁵ This tension results from the obligation to pursue the client's "stated interests" as opposed to his "best interests."¹⁵⁶ In a report by the National Association of Criminal Defense Lawyers (NACDL), great emphasis is placed on the defense attorney's ethical obligation to pursue her client's expressed interests, rather than imposing counsel's view of the client's "long-term best interest."¹⁵⁷ While defense attorneys are required to remain loyal to

Treatment Court Movement, 76 WASH. U. L. Q. 1205, 1254-55 (1998) ("An important question here is whether defense counsel should interpose himself or herself between the defendant and the treatment court judge, or acquiesce in the common practice of permitting the judge to interact directly with defendants in open court.").

¹⁵¹ Another point where defense counsel's advocacy is particularly important is during the defendant's entry into drug court. "Competent representation requires counsel to 'fully advise the client of the advantages and disadvantages,' which encompasses informed counsel concerning pretrial motions, the likelihood of conviction, and the consequences of participation." ORR ET AL., *supra* note 37, at 31 (citation omitted). The issue with advising the client about drug court at this stage is that counsel might be making assessments about treatment, rather than just the likely outcome. *Id.* Additionally, the quick turnaround to drug court expedites the decision making process, perhaps before a full discussion of drug court benefits and risks can be fully discussed and evaluated by the counsel and their client. *Id.*

¹⁵² See Boldt, *supra* note 150, at 1264.

¹⁵³ See *id.* at 1264-65.

The conundrum for defenders is how to mediate this clash of perspectives: Should they proceed principally as members of the treatment team and seek to persuade their clients that the court's position has integrity, or should they adopt the point of view of at least some defendants and seek to undermine the judge's efforts by raising potentially available points of law?

Id.

¹⁵⁴ See *id.* at 1265.

¹⁵⁵ The concern in having to make such difficult decisions rests in the risk of not complying with the legal and ethical standards for defense attorneys.

¹⁵⁶ ORR ET AL., *supra* note 37, at 32 ("If the attorney fails to advocate on behalf of the client, there is a risk that clients will grow to doubt the value of their own rights and will view the process as a sham because no one is speaking on their behalf.").

¹⁵⁷ *Id.* at 33; MODEL RULES OF PROF'L CONDUCT r. 1.7, r. 1.2 (AM. BAR ASS'N 2016). This ethical obligation arises from the Model Rules of Professional Conduct, particularly Rules 1.7 (creates a duty of loyalty, which may be compromised if the attorney cannot consider or carry out

their clients, this does not necessarily mean minimizing sanctions, but rather advocating for the client's interest, whether that is advocating for sanctions, or contesting them.¹⁵⁸

The largest obstacle preventing the zealous representation of defendants at a drug court proceeding is the general lack of knowledge about the drug court model coupled with defense attorneys' failure to actively participate in all stages of any given proceeding.¹⁵⁹ Actively participating, most importantly, requires attendance and advocacy on the part of the defense attorney during staffings. Although this meeting is behind closed doors, it is perhaps the best opportunity for counsel to advance the interests of her client.¹⁶⁰ According to the NACDL report, however, defense attorneys routinely fail to show up to staffings.¹⁶¹ Moreover, just showing up is not enough. Defense counsel needs to be involved in the discussion and decision-making, constantly explaining their client's circumstances and bringing to light facts the other members of the drug court team may not have knowledge of.¹⁶²

A defendant's liberty interests are seriously implicated during staffings, yet these meetings are off the record and frequently not attended by defense counsel.¹⁶³ These liberty interests are equally at stake during regular status hearings.¹⁶⁴ The crux of the problem is that defense counsel is not required to be present at every stage of a drug

an appropriate course of action due to their other responsibilities to be a "team player") and 1.2 (concerning the scope of a lawyer's representation, requiring the lawyer to abide by a client's decisions concerning the objectives of representation). See ORR ET AL., *supra* note 37, at 33.

¹⁵⁸ See ORR ET AL., *supra* note 37, at 33.

¹⁵⁹ See *id.* at 31. This includes knowledge not only about the drug court model, but knowledge about a particular client's case and all of the nuances that accompany it.

¹⁶⁰ See *id.* ("This meeting may be 'the most animated, knock-down, drag-out fight,' but participants are not part of this crucial discussion about their lives, which is not on the record.") (citation omitted). In these meetings, defense counsel should be standing up for her client's interests.

¹⁶¹ *Id.* ("A lawyer from California reported, 'I did not attend staffing meetings. Thank God.' Once a participant is admitted to some drug courts in Tennessee they 'do not see the defense lawyer anymore.'") (citations omitted); see also Tobin, *supra* note 138, at 114 ("The attorney may negotiate on the client's behalf regarding participation in Drug Court. . . . However, in most Drug Courts, the attorney does not attend the court's regular review hearings, even when the defendant faces a sanction for noncompliance.").

¹⁶² ORR ET AL., *supra* note 37, at 31–32. This brings us back to the point of a defense attorney remaining educated not only in the drug court functions and their obligations as counsel, but in their particular client's case. The defense counsel is the one who gets to know the client and is in the best position to advocate for the client's position during staffings. There is a huge problem when defense counsel is uneducated and unfamiliar with her client's interests, given the overwhelming importance of attending and advocating for them during staffings. See *id.* at 32.

¹⁶³ *Id.* at 31.

¹⁶⁴ See *id.* at 34 ("As the Bronx Drug Court judge explained, 'the vast majority just don't come.'"). It is often custom for defense attorneys to merely check in every now and then, rather than appear vigilantly at every stage of the drug court proceeding for their defendants. As the NACDL report states, "Surprisingly, judges often accept counsel's absence as part of drug court practice. There was no judicial testimony about ordering counsel to appear or sanctioning counsel for nonappearance, as commonly occurs in any other proceeding." *Id.* at 34.

court proceeding, and even when counsel is present, there is often a lack of zealous advocacy due to the overall culture of teamwork in the court.¹⁶⁵ These repeated failures, often attributable to case overload,¹⁶⁶ would be resolved if it were a constitutional requirement that counsel be present at all stages of a drug court proceeding, including staffings and status hearings.

III. PROPOSAL FOR TREATING DRUG COURT PROCEEDINGS AS CRITICAL STAGES WHICH REQUIRE ZEALOUS & EFFECTIVE DEFENSE COUNSEL IN ORDER TO PROTECT DEFENDANTS' LIBERTY INTERESTS

Despite the teamwork approach and the rehabilitative nature of the drug court proceeding, it is nonetheless a proceeding that may significantly affect a participant's liberty interests, as demonstrated above. In conforming to the principles underlying the Sixth Amendment right to counsel jurisprudence, it is logical to conclude that all stages of a drug court proceeding are so critical to the liberty interests of the defendant involved that counsel must be constitutionally required at each stage. Additionally, since the post-sentencing drug court model allows defendants to divert to drug court as a condition of their probation, probation revocation hearings provide an analogous context for considering the right to counsel in drug court termination hearings within the post-sentencing model.¹⁶⁷ Holding that the Sixth Amendment right to counsel applies to all stages of a drug court proceeding would require not only the presence of counsel, but the zealous and effective advocacy of such counsel for each defendant diverted to drug court.¹⁶⁸

¹⁶⁵ This lack of advocacy is a result of either complete absence from the proceedings, lack of ability to prepare for each defendant, or reluctance to interject the interests of the client in opposition to the teamwork approach.

¹⁶⁶ See ORR ET AL., *supra* note 37, at 35 ("At some point defense attorneys are no longer able to provide competent representation because of their caseload.").

¹⁶⁷ See discussion *supra* Section I.B.3. (discussing probation revocation standards).

¹⁶⁸ MODEL RULES OF PROF'L CONDUCT r. 1.7, r. 1.2 (AM. BAR ASS'N 2016). Zealousness "is treated as a professional virtue and even as an obligation of an ethical attorney toward his or her client in all of the extant ethical code." JOHN M. BURKOFF, CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY § 5:2 (2d ed.), Westlaw (database updated July 2016). If defense counsel is constitutionally required at critical stages of the drug court proceeding, this will inherently address the problematic issue of the defense attorney's role within the drug court proceeding. By remaining present and involved in the drug court process in its entirety, *not* just when a defendant faces incarceration, the overall system will better address the needs of the drug court participant as a *defendant*.

A. *The Critical Stages of a Drug Court Proceeding: When the Right to Counsel Applies*

The critical stage doctrine, by its very nature, concerns the adversarial criminal prosecution process and is designed to assist a defendant in facing his adversary.¹⁶⁹ Therefore, the non-adversarial nature of drug court is perhaps the most problematic consideration to this proposal. Although there may not be any “adversaries,” a defendant in drug court is still being interrogated by the judge¹⁷⁰ in the presence of prosecution. As demonstrated through the hypothetical in Part II, a defendant may be sanctioned to jail, and the stages leading up to that sanction may greatly impact the judge’s decision to incarcerate.¹⁷¹ If counsel is not required at those important stages leading to a sanction,¹⁷² the defendant may be deprived of his liberty, through incarceration, without due process in the form of adequate representation.¹⁷³ Therefore, it is logical to conclude, considering the critical stage doctrine, that the defendant should have the assistance of counsel at all staffings and status hearings, regardless of whether a sanction is imposed or not due to the potentially cumulative liberty interests at stake.¹⁷⁴

When a defendant enters drug court through the deferred prosecution¹⁷⁵ or post-plea¹⁷⁶ drug court models, the adversary

¹⁶⁹ See *United States v. Ash*, 413 U.S. 300 (1973) (holding that a photo line-up for witness identification was not a critical stage because the photo line-up did not have an overall impact on the “adversary” process).

¹⁷⁰ See ETHICAL CONSIDERATIONS, *supra* note 19, at 2 (“[T]he direct contact between judges and participants makes participants vulnerable . . .”). As explained in the Key Components, the judge is required to step beyond their role as independent and objective arbiter. See KEY COMPONENTS, *supra* note 28, at 27.

¹⁷¹ See discussion *supra* Section II.A.

¹⁷² I.e., staffings and status hearings.

¹⁷³ See discussion *supra* Section II.A.

¹⁷⁴ The critical stage doctrine also focuses on whether a defendant might be unfairly prejudiced by a certain proceeding. See *Ash*, 412 U.S. at 320. Despite the non-adversarial nature of drug court proceedings, the judge is still questioning and speaking to the defendant in the presence of a prosecutor. Given the extremely deferential role of the judge in drug court, a defendant certainly may be unfairly prejudiced in any staffing or status hearing regardless of whether a sanction is imposed. This is especially true if a defendant’s defense counsel is not required to be present at all staffings and status hearings and is generally out of the loop for a majority of the drug court proceedings (i.e., is only called into court if there is some sort of liberty interest deprivation, such as jail time).

¹⁷⁵ The defendant has not entered into a plea or admitted anything. This is a diversion before prosecution and successful completion of the drug court program results in no further prosecution. Termination from drug court results in reversion to the traditional criminal justice system for prosecution. See discussion *supra* Section I.A.

¹⁷⁶ Here, the defendant has entered a guilty plea but the sentencing is deferred or suspended while they participate in the drug court program. See discussion *supra* Section I.A. (discussing the post-plea model).

proceedings have already begun against the defendant.¹⁷⁷ The right to counsel in the traditional criminal court context attaches once adversary proceedings commence and typically lasts through sentencing.¹⁷⁸ Since both the deferred prosecution and post-plea models divert to drug court before sentencing, it is logical to consider the diversion to drug court to be part of the criminal prosecution. More importantly, the proceedings that occur once a defendant has been diverted to drug court may affect the ultimate disposition of the defendant's criminal charge, thus rendering them "critical."¹⁷⁹ The outcome of the drug court diversion, whether successful or not, inherently affects the defendant's disposition within the criminal justice system.¹⁸⁰ Therefore, in conforming to the principles of the critical stage doctrine, all stages¹⁸¹ of a drug court proceeding are critical, thereby requiring the assistance of counsel in the deferred prosecution and post-plea models.¹⁸²

¹⁷⁷ Adversary proceedings commence at the time judicial proceedings have been initiated, including: formal charge, preliminary hearing, indictment, information, arraignment. *See Brewer v. Williams*, 430 U.S. 387, 398 (1997) ("[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'") (citation omitted).

¹⁷⁸ *See* 3 CRIM. PROC. § 11.2(b) (Westlaw 4th ed.) ("Once started, the Sixth Amendment's 'criminal prosecution' continues through to the end of the basic trial stage, including sentencing.").

¹⁷⁹ *See Brewer*, 430 U.S. 387 (1997) (where the police interrogation in a car ride in the absence of counsel was a critical stage because it affected the ultimate disposition of the defendant's charge). Considering the way certain stages will affect a defendant's charge is one way of thinking about whether a stage is so critical to the criminal prosecution that it requires the assistance of counsel.

¹⁸⁰ In the deferred prosecution model, successful completion of drug court may result in no further prosecution, but termination will result in reversion to criminal court for prosecution. *See KING & PASQUARELLA, supra* note 19, at 3. In the post-plea model, their performance in drug court may actually affect their sentence length. *See DRUG STRATEGIES, supra* note 4, at 13. In the deferred prosecution model, if terminated from drug court, the defendant still has an opportunity to an independent finding of guilt in a traditional criminal court, since no pleas were entered. *See Washington v. Drum*, 225 P.3d 237, 242 (Wash. 2010) (en banc). Conversely, in the post-plea model, the drug court judge is the one who will impose the sentence if the defendant is terminated from drug court. *See N.Y. CRIM. PROC. LAW* § 216.05(9)(c) (McKinney 2015) ("[T]he court may . . . terminate the defendant's participation in the judicial diversion program . . . Notwithstanding any provision of law to the contrary, the court may impose any sentence authorized for the crime of conviction in accordance with the plea agreement, or any lesser sentence authorized to be imposed on a felony drug offender . . . taking into account the length of time the defendant spent in residential treatment and how best to continue treatment while the defendant is serving that sentence."). For the purposes of this Note, the New York State drug court statute will be provided as support. New York State employs a post-plea drug court model, requiring eligible defendants to enter a plea of guilty before being admitted to drug court. *See N.Y. CRIM. PROC. LAW* § 216.05(4) (McKinney 2015). Therefore, the post-plea model, which is most widely used in the United States, more acutely affects the disposition of the defendant's case in a criminal prosecution. *HUDDLESTON & MARLOWE, supra* note 51, at 24 ("As of December 31, 2009, the majority (58%) of Adult Drug Courts followed a post-plea model.").

¹⁸¹ I.e., staffings, status hearings, and termination.

¹⁸² *See Woods v. Donald*, 135 S.Ct. 1372, 1376 (2015) (per curiam); *Bell v. Cone*, 535 U.S.

On the other hand, in the post-sentencing model,¹⁸³ where a defendant enters drug court after sentencing as a term of probation, the drug court proceeding is not part of a “criminal prosecution.”¹⁸⁴ However, according to probation revocation standards,¹⁸⁵ due process requires the assistance of counsel at stages beyond a “criminal prosecution” if necessary to ensure fairness.¹⁸⁶ In the post-sentencing model, although a defendant enjoys only conditional liberty,¹⁸⁷ he still may be incarcerated, which is certainly an imposition on this conditional liberty.¹⁸⁸ Without counsel present during all stages of the drug court proceeding, the defendant may not be capable of speaking for himself, and the same cumulative liberty interest concern as seen in the deferred prosecution and post-plea models, is at play.¹⁸⁹ Therefore, due process requires the presence of counsel at drug court proceedings, in the post-sentencing model as well.¹⁹⁰

Whether or not any drug court proceeding is so critical as to require the assistance of counsel is a question that has yet to be addressed by the Supreme Court. However, in *People v. Garcia*, the New York Court of Appeals attempted to provide guidance on what constitutes a critical stage in drug court by drawing a distinction between proceedings that are administrative in nature, and those that affect a defendant’s substantive due process rights.¹⁹¹ The Court held

685, 695–96 (2002) (“A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at a ‘critical stage,’ a phrase we used . . . to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused.”) (citations omitted).

¹⁸³ In the post-sentencing model, a defendant enters a guilty plea and is sentenced to probation, but successful completion of drug treatment court is a condition of their probation. Also known as a post-adjudication or term of probation model. See HUDDLESTON & MARLOWE, *supra* note 51, at 24.

¹⁸⁴ Again, the “criminal prosecution” lasts until sentencing. 3 CRIM. PROC. § 11.2(b) (Westlaw 4th ed.).

¹⁸⁵ See discussion *supra* Section I.B.3 (discussing probation revocation standards).

¹⁸⁶ See *Powell v. Alabama*, 287 U.S. 45, 65 (1932).

¹⁸⁷ Since drug court is a condition of his probation.

¹⁸⁸ *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (“[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty . . .”). Additionally, since many states have since established a blanket right to counsel in probation and parole revocation hearings, it is logical to assume this protection should extend to drug court termination hearings as well. See OHIO REV. CODE ANN. 32.2 (West 2015); CONN. GEN. STAT. ANN. § 53a-32 (2013); KANS. STAT. ANN. § 22-3716(b) (2015).

¹⁸⁹ This factor, whether a defendant was capable of speaking for himself, was a factor considered in the traditional probation revocation context, as promulgated in *Gagnon v. Scarpelli*, 411 U.S. 778, 790–91 (1973); see also discussion *supra* Section II.A. (discussing the cumulative effects of sanctions).

¹⁹⁰ See *Gagnon*, 411 U.S. at 790 (“[T]here will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.”).

¹⁹¹ *People v. Garcia*, 92 N.Y.2d 726 (N.Y. 1999). In this case, the defendant entered a guilty plea and agreed to a sentence of four and one-half years to nine years of incarceration if he failed to successfully complete a drug treatment program through TASC. *Id.* at 728. Treatment

that defendant's right to counsel was not violated because the proceeding in question was not an accusatory proceeding and did not involve any factual determinations, but was rather administrative in nature.¹⁹²

However, this administrative distinction is too limited and does not adequately consider the function of the right to counsel as protecting a defendant's liberty interests by according due process of the law.¹⁹³ The argument that staffings and status hearings are merely "administrative" in nature and therefore not accusatory is especially relevant for staffings and status hearings where a defendant is praised for their good behavior and there are no sanctions imposed.¹⁹⁴ There, since a defendant's liberty interests are not affected,¹⁹⁵ the staffing or status hearing may in fact seem administrative in nature. However, merely requiring defense counsel when a defendant's liberty interests are most affected is problematic given the cumulative effect of drug court proceedings on a particular defendant's case.¹⁹⁶

Considering the principles discussed above, Sixth Amendment jurisprudence aptly supports the proposal calling for the requirement of defense counsel at all stages of a drug court proceeding.

Alternatives for Safer Communities (TASC), originally known as "Treatment Alternatives to Street Crime," is an organization dedicated to diverting defendants with nonviolent charges to community-based programs. *See generally* TASC, <http://www2.tasc.org> (last visited Nov. 21, 2015). Defendant was rejected from his TASC-approved treatment facility for violating certain rules and was brought before the court to determine whether he should be placed in a different program. *Garcia*, 92 N.Y.2d at 728. At a court appearance on February 20, 1997 after being adjourned several times, the defendant was present in court *without* counsel yet the court discharged TASC from the case and set a date for sentencing. *Id.* at 728–30. The matter was adjourned several times in order to allow TASC time to find defendant an alternative program to participate in. *Id.* at 728. Defense counsel was not present at any of these adjournment dates, the last of which was the February 20th court appearance, that is the matter of contention here. *Id.*

¹⁹² *Garcia*, 92 N.Y.2d at 731 ("Significantly, it was not an accusatory proceeding affording defendant an opportunity to explain charges against him or requiring the court to make factual or legal determinations affecting his liberty. . . . The only issues addressed at the February 20 proceeding were administrative concerns that the court sought to have answered by the TASC representative."). The court reasoned that since there was no dispute as to defendant's violation of his drug treatment program, there were no factual or legal questions at issue. *Id.*

¹⁹³ *See Quinn*, *supra* note 143, at 68 ("The *Garcia* decision reads too great a limit into the concept of right to counsel under the Sixth Amendment. Indeed, as already discussed, there are many stages of the criminal prosecution that are 'critical' even when a defendant is not called upon to answer allegations.").

¹⁹⁴ *See KEY COMPONENTS*, *supra* note 28, at 23–24.

¹⁹⁵ Meaning, they are not deprived of their life or liberty (i.e., jail time). *See discussion supra* Section II.A.

¹⁹⁶ The cumulative effect of sanctions is described in the hypothetical discussed *supra* Section II.A.

B. *Zealous & Effective Advocacy in all Drug Court Proceedings:
How the Right to Counsel Applies*

One of the defining characteristics of drug court is the attention to each defendant's case throughout the entirety of his participation in drug court.¹⁹⁷ Without defense counsel present at all stages of a criminal proceeding, however, this characteristic may potentially prejudice a defendant.¹⁹⁸ Despite the non-adversarial nature of drug court and the recommended teamwork approach, diversion to drug court has a serious impact on the disposition of a defendant within the criminal justice system.¹⁹⁹ Once it is held that the Sixth Amendment right to counsel applies in a particular proceeding, there must then be effective assistance of counsel. Zealous and effective advocacy is part and parcel of the Sixth Amendment right to counsel.²⁰⁰

Competent representation within drug court begins with informing a client of the advantages of drug court as well as the consequences of participating, depending on which model is employed and where in the criminal process the client is.²⁰¹ Once a defendant is diverted to drug court, the next most important way counsel can zealously advocate for their client is by simply showing up.²⁰² Despite the highly involved role of the judge in drug court,²⁰³ and the non-adversarial nature of the diversion program in general,²⁰⁴ defense counsel must not only be present at all staffings and status hearings, but they must also zealously and effectively advocate for the interests of their client. The non-

¹⁹⁷ See discussion *supra* Section I.A. (discussing the drug court model generally).

¹⁹⁸ If the judge is the only team member with any indication of what's occurring on a regular basis, how is the defense attorney supposed to come in when an incarceration sanction is ordered and argue on behalf of his client if he is so out of the loop? Requiring counsel during *all* stages of a drug court proceeding, not just during incarceration, is necessary given the cumulative effects of all status hearings.

¹⁹⁹ As discussed in Section III.A., a defendant's disposition in the criminal justice system, especially if in the deferred prosecution or post-plea drug court model, is dependent on their completion, or lack thereof, of drug court.

²⁰⁰ See discussion *supra* Section I.B.4.

²⁰¹ ORR ET AL., *supra* note 37, at 31. This also includes getting a sense of the defendant's history and genuinely attempting to figure out whether this defendant has the willpower and tenacity to successfully complete a drug court diversion program. *Id.* at 31.

²⁰² See discussion *supra* Section II.B. (discussing the lack of attendance on the part of many drug court defense attorneys).

²⁰³ KEY COMPONENTS, *supra* note 28, at 27 ("A drug court judge must be prepared to encourage appropriate behavior and to discourage and penalize inappropriate behavior. A drug court judge is knowledgeable about treatment methods and their limitations."). The supervisory position of the judge is incredibly important to the process, since it demonstrates that someone in authority actually cares about this defendant and the struggles they are facing. *Id.*

²⁰⁴ *Id.* at 11 ("Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights."). The prosecutor and defense counsel must shed their traditional adversarial roles in order to work together as a team and remain coordinated in the court's response to noncompliance. *Id.* at 11.

adversarial nature of drug court complicates this analysis, but effective assistance of counsel must not be disregarded altogether. Defense counsel in drug court must still protect the interests of their clients, whose liberty depends on the effective representation by their counsel.²⁰⁵

However in the drug court context, effective representation does not necessarily mean assisting a client in avoiding sanctions altogether, or ignoring the treatment recommendations of the drug court staff.²⁰⁶ Rather, defense counsel must actively participate in communications with the drug court staff by explaining their client's circumstances which might be unknown to the prosecutor and judge.²⁰⁷ Accordingly, this requires defense counsel to be present during all stages of the drug court proceeding so as to remain informed and prepared to advocate for their clients' interests in the event of a liberty depriving sanction.²⁰⁸

CONCLUSION

Drug courts have proven to be an effective alternative to traditional criminal proceedings for non-violent drug offenders and are undoubtedly here to stay.²⁰⁹ Precisely for these reasons, the

²⁰⁵ ORR ET AL., *supra* note 37, at 32 (“If the attorney fails to advocate on behalf of the client, there is a risk that clients will grow to doubt the value of their own rights and will view the process as a sham because no one is speaking on their behalf.”).

²⁰⁶ This tension is the crux of the problematic role of the defense attorney in drug court. *See* Bolt, *supra* note 150, at 1264–65 (“The conundrum for defenders is how to mediate this clash of perspectives: Should they proceed principally as members of the treatment team and seek to persuade their clients that the court's position has integrity, or should they adopt the point of view of at least some defendants and seek to undermine the judge's efforts by raising potentially available points of law?”).

²⁰⁷ This opportunity most frequently presents itself during staffings. *See* ORR ET AL., *supra* note 37, at 32 (“Counsel may know things the rest of the team does not know and must bring to light that information in order to reduce a sanction or dissuade against termination.”).

²⁰⁸ A liberty depriving sanction could mean incarceration. Sanctions for noncompliance, as detailed in Key Component #6, include: Warnings and admonishment from the bench in open court, demotion to earlier program phases, increased frequency of testing and court appearances, confinement in the courtroom or jury box, increased monitoring and/or treatment intensity, fines, required community service or work programs, escalating periods of jail confinement, termination from the program and reinstatement of regular court processing. KEY COMPONENTS, *supra* note 28, at 24–25.

²⁰⁹ Studies show that drug courts reduce recidivism significantly. According to The Sentencing Project, graduates of drug court are less likely to be rearrested than persons processed through traditional court mechanics. KING & PASQUARELLA, *supra* note 19, at 5 (“Findings from drug court evaluations show that participation in drug courts results in fewer rearrests and reconvictions, or longer periods between arrests.”); *see also* DRUG STRATEGIES, *supra* note 4, at 20 (stating that drug abuse is eliminated for the 50–65% of participants who graduate after a year). Recidivism rates for drug courts were determined to be 8 to 26 percentage points lower than traditional justice system responses. HUDDLESTON & MARLOWE, *supra* note 51, at 9. Along with decreased recidivism, several studies suggest that drug courts save money through both

constitutional issues that arise due to the innovative court model they employ cannot be disregarded or ignored. The cumulative liberty interests at stake are not merely trivial. Virtually every aspect of a drug court proceeding may affect the ultimate disposition of a defendant's criminal record and the amount of time he spends incarcerated.²¹⁰ All stages of a drug court proceeding, including staffings, status hearings, and termination hearings, are critical stages, and should be regarded as such within the jurisprudence of the Sixth Amendment.²¹¹ Despite the non-adversarial nature of the drug court model, holding that counsel is constitutionally required during all critical stages of a drug court proceeding, will nonetheless imply zealous and effective advocacy on the part of the defense attorneys, which is equally crucial to the protection of participants' liberty interests.²¹²

direct and indirect savings. *See* DRUG STRATEGIES, *supra* note 4, at 20; KING & PASQUARELLA, *supra* note 19, at 8.

²¹⁰ Depending on what sanctions are imposed, if any. *See* discussion *supra* Section II.A.

²¹¹ *See* discussion *supra* Section III.A. (discussing the proposal for considering all stages of a drug court proceeding as critical stages, thus requiring zealous and effective counsel).

²¹² However, considering the discussion *supra* Section II.B., defense attorneys will still be able to protect their clients' interests while remaining within the spirit of the treatment based drug court model. Before adaptations to their traditional adversarial role can be thoroughly fleshed out, there must be a recognition that the defense attorney's place in the drug court proceeding is crucial to protect the liberty interests of her client.