Montana Law Review

Volume 74
Issue 2 *Summer 2013*

Article 6

July 2013

Failing to Protect Participants' Fundamental Rights in Drug Treatment Court

Michel Panaretos Fullerton
michel.fullerton@umontana.edu

COMMENTS

FAILING TO PROTECT PARTICIPANTS' FUNDAMENTAL RIGHTS IN DRUG TREATMENT COURT

Michel Panaretos Fullerton*

I. Introduction

Drug treatment courts originated as alternatives to the traditional, adversarial criminal justice system for non-violent drug and alcohol offenders. These courts were born of altruistic intentions to both help drug and alcohol offenders achieve abstinence and reduce recidivism.[1] Unfortunately, some drug treatment courts bypass defendants' fundamental rights upon entry into, and exit from, the programs. For example, in Mineral County, Montana, non-violent drug offenders enter into complicated contracts with the Mineral County DUI/Drug Treatment Court, sometimes without having received counsel, thus violating their Sixth Amendment Right to Counsel. Furthermore, the treatment program itself inherently renders participants vulnerable to inadvertently waiving their Fifth Amendment privilege against self-incrimination, which may lead to additional charges.

---

* Michel Panaretos Fullerton, candidate for J.D. 2013, The University of Montana School of Law. The author specially thanks Stephanie Holstein and Jeff Kuchel for their unfailing support over the past three years. The author offers additional thanks to the staff and editors of the *Montana Law Review* for their input throughout the development of this comment. And, to Karlyle Plouffe, the author sends her best hopes and wishes for his future.

1. There are 11 adult drug treatment courts in Montana: City of Billings (established 2005), Cascade County (established 2005), Custer County (established 2004), Flathead County (established 2009), Fergus County (established 2005), Gallatin County (established 1999), Glacier County (established 2009), City of Kalispell (established 2010), Mineral County (established 2006), Richland County (established 2007), and Yellowstone County (established 2011). Because each court presents its own complex structure, this paper will focus only on the Mineral County DUI/Drug Treatment Court as a case study. Although there are a number of issues that could be addressed, this comment focuses on Fifth and Sixth Amendment Rights.

This comment begins with the story of Karlyle Plouffe, a young adult participant in the Mineral County DUI/Drug Treatment Court. Next, the paper details the Sixth Amendment fundamental rights afforded to all criminal offenders and the manner in which those rights apply to defendants upon entry into drug treatment court. The paper then details the Fifth Amendment privilege against self-incrimination and presents the sole exception to the rule—namely, that one must affirmatively waive that privilege. The paper outlines the history of drug treatment courts, as well as the Bureau of Justice Assistance's best practices for drug treatment courts. Next, those best practices are compared to and contrasted with the Mineral County DUI/Drug Treatment Court practices. Finally, the paper proffers solutions to bring the Mineral County DUI/Drug Treatment Court into alignment with the Bureau of Justice Assistance's best practices.

II. Karlyle Plouffe's Story

On March 30, 2011, nineteen-year-old Karlyle Plouffe ("Plouffe") was arrested after a deputy sheriff discovered marijuana in the pocket of Plouffe's pants. While awaiting arraignment, Plouffe learned about the Mineral County DUI/Drug Treatment Court ("Treatment Court"). In exchange for pleading guilty to the possession charge in Superior Town Court, he could enroll in Treatment Court. If he successfully completed the Treatment Court program, the guilty plea would be expunged from his record.

A. Drug Treatment Court

As codified in the Drug Offender Accountability and Treatment Act,[2] Plouffe entered a conditional guilty plea to the possession charge and a related trespass charge[3] and consequently gained entry to Treatment Court.[4] As all Treatment Court participants must do, Plouffe signed an Agreement for Enrollment in Mineral County DUI/Drug Treatment Court ("Treatment Agreement"), a seven-page contract that binds the participant to numerous provisions and rules. For example, the participant must:

2. Mont. Code Ann. § 46–1–1104(1) (2011).

3. It is of note that during Plouffe's initial appearance in Superior Town Court on March 31, 2011, he pled not guilty to criminal trespass and requested a court-appointed attorney. However, the Agreement for Enrollment in Mineral County DUI/Drug Treatment Court and Order Approving & Adopting Said Agreement, which Plouffe signed on or around April 21, 2011, erroneously indicated that Plouffe had pled guilty to the trespass charge.

4. Def.'s Mot. to Dismiss, *State v. Plouffe* at ex. 3 (Mont. 4th Jud. Dist., Mineral Co. Jan. 19, 2012) (No. DC-2011-21).

> complete all tasks assigned by the DUI/Drug Court Team and . . . honestly answer all questions asked by team members, counselors, therapists or law enforcement personnel including the probation officer.[5]

The Treatment Agreement also mandated that the participant "consult with and remain in regular contact with . . . the Defense Attorney."[6]

By April 21, 2011, Plouffe had yet to meet with a defense attorney. The Superior Town Attorney signed the Treatment Agreement and dated it April 21, 2011. Both Plouffe and a private defense attorney also signed the Treatment Agreement, separately, although it is unclear when either of them did so.[7] During the spring of 2011, however, the Treatment Court did not have a contract with any defense attorney.[8] Thus, many defendants, including Plouffe, appeared, entered pleas, and signed their Treatment Agreements without having spoken with defense counsel.[9]

Despite the fact that he had not yet signed the Treatment Agreement, Plouffe made his initial appearance in Treatment Court on April 13, 2011. At that time, the court ordered a weekly status report ("Status Order"), as it does each week for every Treatment Court participant.[10] Throughout the ensuing six months, the Treatment Court sanctioned Plouffe on several occasions, including 15 days of incarceration, community service, and home arrest.[11]

B. Second Arrest & Felony Charges

At approximately 2:15 p.m. on October 5, 2011, as Plouffe had done every Wednesday since April 2011, he provided a urine sample to the Treatment Court probation officer.[12] Then, as had become his routine, Plouffe remained in the building and attended a support group meeting for all drug treatment court participants. Meanwhile, Plouffe's field urinalysis showed positive for benzodiazepines.[13]

Immediately after viewing the field urinalysis and unbeknownst to Plouffe, the Treatment Court probation officer sought and located a recent police report regarding a report of stolen prescription pills about which he

---

5. Def.'s Mot. to Suppress, *State v. Plouffe* at ex. 3 (Mont. 4th Jud. Dist., Mineral Co. Jan 19, 2012) (No. DC-2011-21).

6. Def.'s Mot. to Suppress, *supra* n. 5, at ex. 3.

7. *Id.*

8. Telephone Interview with Julie Bettis, Mineral County DUI/Drug Treatment Court Clerk (Nov. 17, 2011).

9. *Id.*

10. Def.'s Mot. to Suppress, *supra* n. 5, at ex. 4.

11. *Id.* at exs. 5–29, 33, 36.

12. *Id.* ex. 37.

13. *Id.*

had overheard.[14] A local woman had reported missing oxycodone pills to the Mineral County Sheriff's Office two days earlier. The woman had told dispatch she believed a man who was a friend of Plouffe's had stolen them.[15] After speaking with the woman, a deputy sheriff had concluded he lacked probable cause to arrest anyone and noted the investigation was complete:

> By the time our conversation was over, I had ascertained that since there is such a high volume of traffic through the household, that there were at least eight people who could have stolen the medication. No further action will be taken at this time by myself at this time to investigate this case any further.[16]

The deputy sheriff later said that, upon completion of his investigation on October 3, 2011, he wanted the Treatment Court probation officer to exercise the probation officer's authority over Plouffe to acquire a urine sample to connect Plouffe to the missing oxycodone—with the limited physical evidence to which the deputy sheriff lawfully had access, he lacked confidence that a viable case could be made without a positive urinalysis.[17]

As Plouffe sat in the support group meeting on October 5, 2011, the Treatment Court probation officer and a felony probation officer entered the meeting room and instructed Plouffe to leave the meeting and follow them. Once alone, the Treatment Court probation officer informed Plouffe he had tested positive for something, but he did not tell Plouffe for which substance(s).[18] Plouffe told the Treatment Court probation officer that he and two friends had consumed Valium together.[19] After the Treatment Court probation officer conferred with both the felony probation officer and the Mineral County Sheriff, the probation officers decided to interview Plouffe again.[20]

The felony probation officer Mirandized Plouffe[21] but neglected to contact Plouffe's attorney of record. Additionally, neither she, the Treatment Court probation officer, nor the Mineral County Sheriff informed

---

14. Def.'s Mot. to Dismiss, *supra* n. 4, at exs. 30, 31, 35.

15. *Id.* at ex. 34.

16. *Id.* at ex. 35.

17. *Id.* at ex. 36. It is worth noting the woman reported missing only oxycodone pills on October 3, 2011. When oxycodone is present in urine, one derivative of oxycodone, oxymorphone, is revealed. However, on October 5, 2011, Plouffe's field urinalysis revealed the presence of benzodiazepines only. When probation officers, and later a deputy sheriff, interrogated Plouffe, they repeatedly asked him where he obtained the Valium (which is within the class of benzodiazepines). It wasn't until October 15, 2011, when a comprehensive MedTox Laboratories report was returned and showed the presence of oxymorphone in Plouffe's urine, that law enforcement had physical evidence to prove Plouffe's consumption of oxycodone. Thus, it is questionable whether law enforcement had probable cause for a custodial interrogation of Plouffe about the woman's missing oxycodone in the first instance.

18. *Id.* at ex. 30.

19. *Id.* at ex. 31.

20. Def.'s Mot. to Dismiss, *supra* n. 4, at ex. 32.

21. *Id.* at ex. 31.

Plouffe that some of their questions would exceed the scope of a routine discussion after a positive urinalysis and, instead, would pertain to a new investigation regarding missing prescription pills.[22] When asked why he believed he was being questioned, Plouffe answered, "Um, I failed [the urinalysis]."[23] Throughout the probation officers' interrogation of Plouffe, Plouffe believed he was merely being questioned as part of Treatment Court.[24]

As a result of the interview, the Treatment Court probation officer arrested Plouffe under Title 45 for Criminal Contempt.[25] Treatment Court Judge Wanda James consequently sanctioned Plouffe with seven days' incarceration for testing positive for benzodiazepines,[26] and Plouffe was booked into jail.[27]

Later that evening, a deputy sheriff Mirandized Plouffe and asked Plouffe why he thought he was there.[28] Again, Plouffe answered, "I'm getting blamed . . . . Um, I failed the U.A. the day I brought in."[29] The deputy sheriff did not contact Plouffe's attorney of record either. Then, the deputy sheriff and the Treatment Court probation officer interrogated Plouffe and reminded Plouffe of his obligation to answer all questions honestly in accordance with his Treatment Agreement.[30] When the deputy sheriff concluded his questioning, Plouffe asked, "Am I staying here?"[31] His question indicates Plouffe failed to appreciate the severity of his situation. Finally, no officer ever contacted Plouffe's attorney of record. Ten days later, a comprehensive MedTox Laboratories report revealed the presence of oxazepam, a benzodiazepine, and oxymorphone, an opiate derivative of oxycodone.[32]

Based on Plouffe's incriminating statements and the positive urinalysis, the State filed an Information on November 7, 2011, charging Plouffe with Criminal Distribution of Dangerous Drugs and two counts of Criminal Possession of Dangerous Drugs, all felonies.[33] The maximum sentence that

---

22. *Id.* at ex. 39; *see also id.* at exs. 32, 38.

23. *Id.* at ex. 48.

24. *Id.* at ex. 40.

25. Mont. Code Ann. § 45–7–309; Def.'s Mot. to Dismiss, *supra* n. 4, at ex. 41. Drug treatment court participants are sanctioned for contempt of court under § 46–1–1104(4)(g). It remains questionable whether Plouffe's failed urinalysis rose to the level of criminal contempt under § 45–7–309(1).

26. Def.'s Mot. to Dismiss, *supra* n. 4, at ex. 42.

27. *Id.* at ex. 41.

28. *Id.* at ex. 49.

29. *Id.*

30. *Id.*

31. *Id.*

32. Def.'s Mot. to Dismiss, *supra* n. 4, at ex. 33.

33. *Id.* at ex. 44.

can be imposed on a defendant for those charges is life in prison.[34] Nearly a year later, Plouffe pled guilty to one felony count of Criminal Distribution of Dangerous Drugs because he had sold one oxymorphone pill to a friend for five dollars.[35] The court sentenced Plouffe to three years in the boot camp program at Treasure State Correctional Facility.[36] He remains there as of the date of publication.

III. Drug Treatment Courts

Drug treatment courts originated from the desire and need to cease criminal activity relating to drug and alcohol abuse.[37] Some courts identified the unmet need of drug abusers gaining access to rehabilitative services.[38] Those who conceived of drug courts hoped to reduce drug use and the criminal behavior that often results from it through a hybrid, specialized system to meet the unique needs of addicts who commit crimes.[39] In addition, by channeling all non-violent drug offenders into one court, judges, prosecutors, and public defenders would have more time and resources for non-drug cases.[40] The judiciary contemplated aiding addicted offenders instead of exclusively focusing on punishing them.[41] Judges would sentence drug-addicted offenders to treatment instead of sentencing them to jail.[42] Today, some characterize drug treatment courts as "revolutionary because they offer a dynamic alternative to the failed punitive policies of traditional courts' responses to drug use."[43]

A. History and Purpose of Drug Treatment Courts

The drug court in Miami-Dade County, Florida, which began in 1989, is recognized as the first of its kind, combining the authority of the criminal justice system with the benefits of substance abuse treatment systems.[44] The Miami drug court took jurisdiction over first-time felony drug offenders and implemented three phases of treatment, which, together, last ap-

34. Mont. Code Ann. §§ 45–9–101(2), 102(4).

35. Judgment, *State v. Plouffe* (Mont. 4th Jud. Dist., Mineral Co. Sept. 4, 2012) (No. DC-2011-21).

36. *Id.*

37. Natl. Assoc. Drug Ct. Profs., Drug Ct. Stands. Comm., *Defining Drug Courts: The Key Components* 1 (U.S. Dept. Just., Bureau Just. Assistance Oct. 2004).

38. Greg Berman & Aubrey Fox, *Trial & Error in Criminal Justice Reform: Learning from Failure* 28 (The Urb. Inst. Press 2010).

39. *Defining Drug Courts*, *supra* n. 37, at 1.

40. *Id.* at 4.

41. Berman & Fox, *supra* n. 38, at 29.

42. *Id.*

43. *Problem-Solving Courts: Justice for the Twenty-First Century?* 37 (Paul Higgins & Mitchell B. Mackinem eds., ABC-CLIO, LLC 2009).

44. Natl. Drug Ct. Inst. Rev., vol. 1, issue 1, 13–14 (Summer 1998).

proximately one year.[45] The first phase allowed defendants to detoxify, the second phase included an outpatient drug treatment program, and the third phase provided job training and educational assistance.[46]

Despite the lack of either centralized planning or a presidential directive,[47] by 1993, nine other drug treatment courts had sprung up throughout the United States.[48] However, the increased popularity of drug treatment courts gave rise to certain problems. For example, in Minneapolis and Denver, the caseload in drug treatment courts was staggering, and dozens of bench warrants were issued daily for defendants who failed to appear.[49] Some drug treatment courts failed to distinguish between drug dealers and drug users, consequently gaining the reputation that anyone could gain entry into drug treatment court.[50] Nevertheless, over 2,100 drug treatment courts existed in the United States by 2008.[51]

As a response to the growing prevalence of drug treatment courts, the Bureau of Justice Assistance, a branch of the U.S. Department of Justice, took notice of this alternative court system and developed a set of best practices it defines as Key Components for drug treatment courts.[52] The Bureau of Justice Assistance encourages a non-adversarial approach when constructing drug treatment courts.[53] The prosecution and defense are encouraged to work together to balance public safety and participants' due process rights.[54]

Similarly, Montana legislative history reflects the legislature's concern regarding protection of drug treatment court participants' due process rights.[55] Treatment courts were implemented by Montana State District Courts in 2005 "to reduce recidivism and restore drug offenders to being productive, law-abiding, and taxpaying citizens."[56] Montana drug treatment courts are deferred-judgment programs in which defendants enter conditional guilty pleas,[57] providing a pretrial diversion for drug offenders.[58] Montana drug treatment courts offer a program of incentives and sanctions

45. Berman & Fox, *supra* n. 38, at 30.

46. *Id.*

47. Greg Berman & John Feinblatt, *Good Courts: The Case for Problem-Solving Justice* 38 (The New Press 2005).

48. Berman & Fox, *supra* n. 38, at 31.

49. *See id.* at 32–34.

50. *Id.* at 37.

51. Berman & Fox, *supra* n. 38, at 42.

52. *Defining Drug Courts*, *supra* n. 37, at iii.

53. *Id.* at 3.

54. *Id.*

55. Mont. Sen. Comm. on Jud., *Hearing on HB 721, Montana Drug Offender Accountability and Treatment Act*, 2005 Reg. Sess. (Mar. 22, 2005).

56. Mont. Code Ann. § 46–1–1102.

57. *Problem-Solving Courts*, *supra* n. 43, at 37.

58. Mont. Code Ann. § 46–1–1104(1).

to assist participants in both finding recovery from drug addiction and ceasing criminal behavior associated with drug use and addiction.[59] If a participant successfully completes both the treatment program and the aftercare period, the participant can withdraw his guilty plea, and the charge will be dismissed with prejudice.[60]

Since 2009, the Montana DUI Task Forces Program within the Montana Department of Transportation has funded, either wholly or in part, some of the adult treatment courts in Montana, including the Mineral County DUI Court.[61] In 2011, the Montana State DUI Task Force provided a grant, which currently funds the Mineral County DUI/Drug Treatment Court.[62] DUI task forces operate to "reduce and prevent impaired driving."[63] The State Highway Traffic Safety Office's annual report for fiscal year 2012 lists Mineral County as receiving supplemental funding for: increasing responsible alcohol sales and service training, increasing alcohol compliance checks, increasing law enforcement presence at high risk times/events, and education and prevention activities with youth.[64]

The DUI Task Force provides funding with the following understanding:

> DUI courts are a proven strategy to reduce impaired driving among habitual drunk drivers who are not typically affected by education or public safety efforts, nor by traditional legal sanction.
>
> Entry into DUI court is voluntary, and the offender signs a contract with the DUI court. This allows the court to seek effective long-term change in behavior by treating underlying substance abuse issues rather than focusing only on punishing the offender.
>
> Chemical dependency treatment is emphasized and is accompanied by intensive monitoring/testing. This typically includes a transdermal alcohol monitoring bracelet for 60–90 days, frequent urinalysis testing, EtG blood testing, and requiring the DUI court client to blow into a preliminary breath tester (PBT) at every possible opportunity, such as court appearances, home visits, and visits with the compliance officer.
>
> Continued alcohol and drug usage is discouraged through a progressive system of sanctions. Positive changes are recognized and rewarded via incentives. This model involves increased accountability (usually weekly DUI court sessions before the DUI court team and the Judge) and access to a vari-

59. Mont. Code Ann. § 46–1–1103(5).

60. Mont. Code Ann. § 46–1–1104(5); Def.'s Mot. to Suppress, *supra* n. 5, at ex. 3.

61. St. Hwy. Traffic Safety Off., *Montana Highway Traffic Safety Annual Report* 43 (Mont. Dept. Transp. 2012), available at http://www.mdt.mt.gov/publications/docs/brochures/safety/hsp_report.pdf (accessed Mar. 16, 2013).

62. Telephone Interview with Julie Bettis, Mineral County DUI/Drug Treatment Court Clerk (Nov. 17, 2011).

63. Mont. Dept. Transp., *DUI Task Forces*, http://www.mdt.mt.gov/safety/dui_taskforces.shtml (accessed Mar. 16, 2013).

64. *Annual Report*, *supra* n. 61, at 42.

> ety of other services to help the individual achieve sobriety, learn pro-social behaviors, and become a productive member of society.
>
> With the repeat offender as its primary target population, DUI courts follow the Ten Key Components of Drug Courts and the Ten Guiding Principles of DWI Courts, as established by the National Association of Drug Court Professionals and the National Drug Court Institute.[65]

Based on the foregoing, it remains unclear if the courts that receive DUI Task Force funding claim jurisdiction over DUI repeat offenders, first-time drug offenders, or both. In Mineral County, the Treatment Court participants are first-time or second-time misdemeanor drug offenders.

B. Best Practices of Drug Treatment Courts

The National Association of Drug Court Professionals, in conjunction with the Bureau of Justice Assistance, has identified Ten "Key Components"[66] for drug treatment courts.

1. Drug treatment courts should help those arrested for drug- or alcohol-related offenses become both abstinent and law-abiding citizens.[67]
2. Those eligible for drug treatment court should be identified as quickly as possible after arrest.[68]
3. A drug treatment court program should incorporate both primary and mental healthcare to identify concomitant disease states and other challenges participants may face.[69]
4. Urinalyses should be administered to drug treatment court participants as one marker of continued struggles or achieved success.[70]
5. Drug treatment court participants achieve the goal of abstinence, in part, by receiving both immediate sanctions and rewards for his/her relapses and accomplishments.[71]
6. A continuous judicial presence reminds drug treatment court participants of the link between their treatment and the criminal justice system.[72]
7. Drug treatment court participant team personnel should continuously monitor and evaluate participants.[73]
8. Drug treatment court team personnel should receive continuing education and training, specifically interdisciplinary education of the legal system and effective treatment for alcohol and drug abuse.[74]

---

65. *Id.* at 43.
66. *Defining Drug Courts*, *supra* n. 37, at iii.
67. *Id.* at 2.
68. *Id.* at 5.
69. *Id.* at 7.
70. *Id.* at 11.
71. *Id.* at 13–14.
72. *Defining Drug Courts*, *supra* n. 37, at 15.
73. *Id.* at 17.
74. *Id.* at 21–22.

9. Drug treatment court team personnel should initiate cooperation among the drug treatment court, law enforcement, and community-based programs related to drug and alcohol abuse.[75]
10. The drug treatment court prosecutor and defense counsel, together, should employ a non-adversarial approach to balance public safety and drug treatment court participants' due process rights.[76]

With respect to the final key component, the drug treatment court prosecutor and defense counsel effect a participant's abstinence and law-abiding behavior by working as a team and assuming separate responsibilities.[77] For example, the prosecuting attorney should initially review the case and determine if the defendant meets eligibility requirements for drug treatment court[78] while the defense attorney reviews the citation and charging document.[79] "Problem-solving courts, at least the ones that are any good, have taken special pains to involve defense attorneys at the earliest possible stage of their development. As a result, problem-solving courts have been sensitive to issues of due process . . . ."[80]

In addition, the prosecuting attorney and defense attorney play pivotal roles in protecting the drug treatment court participant's fundamental rights. The prosecuting attorney "[a]grees that a positive drug test or open court admission of drug possession or use will not result in the filing of additional drug charges based on that admission."[81] The defense counsel must advise the drug treatment court participant of the rules, consequences for breaking the rules, rights that the participant will temporarily or permanently waive, and the implications of choosing to either participate or not participate in drug treatment court.[82] In addition, the defense counsel should apprise the defendant of alternative legal and treatment paths.[83] Finally, the defense attorney should encourage the participant to admit to alcohol or drug use in open court and with any drug treatment court team personnel since the prosecutor will not pursue additional criminal charges as the result of such admissions.[84]

---

75. *Id.* at 23.
76. *Id.* at 3–4.
77. *Id.* at 3.
78. *Defining Drug Courts*, *supra* n. 37, at 4.
79. *Id.*
80. Berman & Feinblatt, *supra* n. 47, at 55.
81. *Defining Drug Courts*, *supra* n. 37, at 3.
82. *Id.* at 4.
83. *Id.*
84. *Id.*

IV. Fifth and Sixth Amendment Protections Afforded Criminal Defendants

The Bill of Rights enumerates individual rights, some of which the U.S. Supreme Court has categorized as fundamental.[85] To ensure due process, the Court has held that fundamental rights require all states to adopt them as applied through the Fourteenth Amendment.[86] In addition, if, during the process of convicting a criminal defendant, law enforcement, the prosecutor, or the judiciary violates a defendant's fundamental right, the conviction may be rendered constitutionally infirm.[87] The Montana Supreme Court has expanded the rights that the U.S. Supreme Court considers fundamental, providing additional protection to the criminally accused.[88] If one conviction is constitutionally infirm, subsequent charges borne of that conviction may, too, be tainted.[89]

In Montana, when an adult is charged with a non-violent drug offense in a jurisdiction that maintains a drug treatment court, he is allowed to enter a guilty plea without the benefit of counsel. Generally, nothing is facially inappropriate about a misdemeanor offender entering a guilty plea without counsel. Nonetheless, when a defendant does so in order to gain acceptance into a drug treatment court, the potential consequences include forced disclosure of felony charges and significant prison time. Moreover, entering a guilty plea as a condition to enter drug treatment court involves an atypical plea bargain.[90] A defendant who is contemplating pleading guilty in order to enter drug treatment court should understand the drug treatment court program rules, which include the waiver of certain fundamental rights.[91]

A. Defendants' Sixth Amendment Rights When Entering Drug Treatment Court

The Sixth Amendment to the U.S. Constitution bestows upon the criminally accused the right to a defense attorney.[92] In *Gideon v. Wainwright*,[93] the U.S. Supreme Court held that the right to counsel constitutes a fundamental right.[94] After Florida charged Gideon with a felony, he requested a

85. *See e.g. Gideon v. Wainwright*, 372 U.S. 335, 340–341 (1963).

86. *Id.* at 342.

87. *Burgett v. Tex.*, 389 U.S. 109, 114–115 (1967).

88. *State v. Maine*, 255 P.3d 64, 72 (Mont. 2011).

89. *See State v. Okland*, 941 P.2d 431, 434 (Mont. 1997).

90. Trent Oram & Kara Gleckler, *An Analysis of the Constitutional Issues Implicated in Drug Courts*, 42 Idaho L. Rev. 471, 493 (2006).

91. *Id.* at 494.

92. U.S. Const. amend. VI.

93. *Gideon*, 372 U.S. 335.

94. *Id.* at 344–345.

court-appointed attorney.[95] The district court judge informed Gideon that only those accused of capital offenses were entitled to court-appointed counsel.[96] Gideon proceeded *pro se* and was subsequently convicted.[97] He petitioned for habeas corpus, and, after the Florida Supreme Court denied relief, the U.S. Supreme Court granted certiorari.[98] The U.S. Supreme Court overturned its own ruling in *Betts v. Brady*,[99] where it held that the criminally accused, if unrepresented, are unfairly prejudiced because the legal system requires a certain amount of expertise.[100]

Later, the U.S. Supreme Court extended the *Gideon* decision by holding that those criminally accused of misdemeanors have the right to assistance of counsel: "The assistance of counsel is often a requisite to the very existence of a fair trial."[101] Furthermore, the Court noted that complex legal and constitutional questions arise even when the crime is punishable only by a maximum jail sentence of six months or less.[102] In *Scott v. Illinois*,[103] however, the Court limited the right to counsel to the criminally accused who face incarceration.[104]

The U.S. Supreme Court has held that the fundamental right to counsel must be extended to the states through the Fourteenth Amendment.[105] Thus, pursuant to Montana statutes, a judge must inform the defendant of his right to counsel at the defendant's initial appearance after arrest.[106] A defendant may subsequently waive this right but only if the court determines the defendant did so knowingly, voluntarily, intelligently, and unequivocally.[107] When challenging a conviction obtained in violation of the right to counsel, the defendant need only proffer an unequivocal, sworn statement that he did not waive this fundamental right.[108]

---

95. *Id.* at 336–337.

96. *Id.* at 337.

97. *Id.*

98. *Id.*

99. *Betts v. Brady*, 316 U.S. 455 (1942).

100. *Gideon*, 372 U.S. at 345.

101. *Argersinger v. Hamlin*, 407 U.S. 25, 30–31 (1972).

102. *Id.* at 33.

103. *Scott v. Ill.*, 440 U.S. 367 (1979).

104. *Id.* at 382.

105. *Gideon*, 372 U.S. at 342.

106. Mont. Code Ann. §§ 46–7–102, 46–8–101.

107. Mont. Code Ann. § 46–8–102; *see e.g. State v. Weaver*, 917 P.2d 437, 441 (Mont. 1996); *State v. Langford*, 882 P.2d 490, 492 (Mont. 1994); *Okland*, 941 P.2d at 433.

108. *State v. Walker*, 188 P.3d 1069, 1073 (Mont. 2008).

1. Rights at Trial & Entry of Plea—Federal

The U.S. Supreme Court has held that the accused is afforded the right to counsel at all critical stages of the criminal process.[109] The entry of a guilty plea, whether to a misdemeanor or felony, qualifies as a "critical stage," to which the right to counsel adheres.[110] In *Iowa v. Tovar*,[111] the U.S. Supreme Court addressed the requisite specificity of a plea colloquy before a trial court can accept the guilty plea of an accused appearing without counsel and still meet Sixth Amendment requirements.[112] The Court held that the constitutional requirement is met when "the trial court informs the accused of the nature of the charges against him, of his *right to be counseled regarding his plea*, and of the range of allowable punishments attendant upon the entry of a guilty plea."[113] In its decision, the Court observed, and the State agreed, "that a defendant must be alerted to his right of the assistance of counsel in entering a plea."[114]

2. Rights at Trial & Entry of Plea—Montana

In *State v. Allen*,[115] the Montana Supreme Court held that Allen's inability to remember waiving his right to counsel was insufficient evidence to rebut the presumption of regularity of a prior conviction.[116] The minor defendant alleged that he did not actually waive his right to counsel.[117] Allen pled guilty to Driving under the Influence of Alcohol in the Helena City Court, which is not a court of record.[118] The Montana Supreme Court looked at which boxes the judge had checked on a "court form" and the judge's handwritten notations on a "court record" when deciding this case.[119]

In *State v. Howard*,[120] the defendant challenged the constitutionality of a plea she entered *pro se* in Missoula Municipal Court in 1997 because it could potentially enhance her punishment on a subsequent felony DUI charge.[121] Howard argued that, when she appeared before the 1997 municipal court and pled guilty, she could not afford counsel, was not represented

109. *Me. v. Moulton*, 474 U.S. 159, 170 (1985); *U.S. v. Wade*, 388 U.S. 218, 224 (1967).
110. *Argersinger*, 407 U.S. at 34; *see also Ala. v. Shelton*, 535 U.S. 654 (2002).
111. *Iowa v. Tovar*, 541 U.S. 77 (2004).
112. *Id.* at 81.
113. *Id.* (emphasis added).
114. *Id.* at 91.
115. *State v. Allen*, 206 P.3d 951 (Mont. 2009).
116. *Id.* at 954.
117. *Id.* at 953–954.
118. *Id.* at 954.
119. *Id.* at 954–955.
120. *State v. Howard*, 59 P.3d 1075 (Mont. 2002).
121. *Id.* at 1076.

by counsel, and was not advised of her right to a court-appointed attorney prior to entry of her guilty plea.[122] Howard also maintained that she never waived her right to court-appointed counsel.[123]

In support of its case, the State presented testimony that Howard was told that if she pled guilty she was thereby waiving all of her rights.[124] The State reasoned that, because Howard pled guilty, it could be inferred that Howard validly waived her right to counsel.[125] The Montana Supreme Court disagreed:

> Although employing the formula, "If you plead guilty, you also waive your right to counsel" may streamline the process of obtaining a defendant's waiver and guilty plea, such a shortcut is not permissible where a person is waiving her fundamental right to counsel. The difference between, "By pleading guilty you waive your right to counsel," and "Do you waive your right to counsel?" is important; only the latter provides the defendant with the opportunity to affirmatively and expressly waive the right. Combining the two issues in one affirmative statement increases the possibility that an unrepresented defendant may become confused and decreases the likelihood that [he] will be able to specifically, voluntarily, and knowingly waive [his] right to counsel.[126]

Ultimately, the Montana Supreme Court held that the district court erred, as a matter of law, in finding Howard waived her right to counsel.[127] To meet Sixth Amendment requirements, a waiver must be secured *before* the entry of the guilty plea.[128] Because Howard's waiver was not secured prior to entry of her plea, it was constitutionally infirm.[129]

3. Rights at Trial & Entry of Plea—Montana Drug Treatment Courts

Regarding drug treatment courts, Montana statutes stop short of expressly mandating a defendant's right to counsel. A "public defender or defense attorney" is listed as someone who *may* serve on the drug treatment court team.[130] Subsequent Montana Code Annotated sections, which establish the drug treatment court structure, also reference defense counsel. "Participation in drug treatment court is . . . subject to the consent of the prosecutor, the defense attorney, and the court pursuant to a written agreement."[131] This section seems to imply that a defense attorney is required.

122. *Id.* at 1076–1077.
123. *Id.*
124. *Id.* at 1077.
125. *Id.* at 1078.
126. *Howard*, 59 P.3d at 1078.
127. *Id.* at 1079.
128. *Id.* (emphasis added).
129. *Id.*
130. Mont. Code Ann. § 46–1–1103(7)(c) (emphasis added).
131. Mont. Code Ann. § 46–1–1104(2).

It could be argued that because drug treatment courts do not contemplate jail time, the defendant does not have a right to counsel.[132] Nevertheless, any defendant who fails to complete a drug treatment court program and aftercare period can ultimately face incarceration because the defendant has already entered a conditional plea of guilty. Thus, any charge considered in drug treatment court necessarily includes the contemplation of jail time. In addition, Montana statutes: 1) confer authority upon the drug treatment judge to "reduce [the] period of incarceration,"[133] and 2) give them jurisdiction over drug offenders "[a]s a condition of . . . incarceration."[134] At a minimum, these sections certainly imply that drug treatment courts do, in fact, have potential incarceration within their contemplation.

B. Drug Treatment Court Participants' Fifth Amendment Rights

A criminal defendant has assurance he will not be compelled to testify against himself.[135] The U.S. Supreme Court has broadly construed this protection, limiting when self-incriminating evidence can be used against a criminal defendant.[136] "The object of the [Fifth] Amendment '[w]as to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.' "[137]

The Fifth Amendment was made applicable to the States by the Fourteenth Amendment.[138] Under the Fourteenth Amendment, the U.S. Supreme Court explicitly prohibited states from conditioning this constitutionally-protected right by the "exaction of a price."[139] This protection also applies to interrogation by police officers out of court if criminal charges follow.[140]

Both the Fifth Amendment and the Montana Constitution protect a person from compelled self-incrimination in a criminal proceeding.[141] Although a person must generally invoke the privilege affirmatively, exceptions to this general rule exist.[142] For example, does a person waive his

132. *See Scott*, 440 U.S. at 373; *Okland*, 941 P.2d at 433.

133. Mont. Code Ann. § 46–1–1104(5).

134. Mont. Code Ann. § 46–1–1104(1).

135. U.S. Const. amend. V.

136. *Maness v. Meyers*, 419 U.S. 449, 461 (1975) (citing *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951)).

137. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)).

138. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

139. *Garrity v. N.J.*, 385 U.S. 493, 500 (1967).

140. *Maness*, 419 U.S. at 464.

141. U.S. Const. amend. V; Mont. Const. art. II, § 25.

142. *Minn. v. Murphy*, 465 U.S. 420, 429 (1984).

privilege against self-incrimination if he fails to affirmatively invoke that privilege, yet was under duress at the time? In *Union Pacific Railroad Co. v. Public Service Commission of Missouri*,[143] the U.S. Supreme Court acknowledged the inherent absurdity that exists when the government cites conduct while under duress to prove supposed volitional acts.[144] After defendant charged the plaintiff railroad with an excessive fee to pass through a small portion of the State of Missouri, plaintiff sued and claimed it paid the fee under duress.[145] The Supreme Court of Missouri held that the railroad volitionally opted to conduct interstate commerce through Missouri and thus consented to pay whatever fees defendant charged.[146] The U.S. Supreme Court overturned the lower court's holding by rationalizing that, if upheld, a government entity could always impose an unconstitutional burden by threatening penalties worse than the penalties for opting out of a supposed volitional act.[147] In other words, the privilege against self-incrimination can be "self-executing."[148]

Together, the Fifth and Fourteenth Amendments prohibit the use of a person's coerced statements in a subsequent state criminal trial because such statements retain automatic protection.[149] Coerced statements are those that force a person to make an impossible decision—"a choice between the rock and the whirlpool."[150] The individual need not formally invoke the privilege if the government prevents a "voluntary invocation of the Fifth Amendment by threatening to penalize the individual should he or she invoke it."[151] If the government induces a person to waive his Fifth Amendment right to remain silent by threatening him with sanctions "capable of forcing the self-incrimination," the consequent incriminating statements are considered coerced.[152]

The U.S. Court of Appeals for the Tenth Circuit determined that, although sex offender inmates "technically volunteered" for a sex offender treatment program, the participants' Fifth Amendment rights were violated because the program imposed sanctions for silence or invocation of the right to remain silent.[153] "Requiring an offender to choose between answer-

143. *Union Pac. R.R. Co. v. Pub. Serv. Commn. of Mo.*, 248 U.S. 67 (1918).

144. *Id.* at 70.

145. *Id.* at 68–69.

146. *Id.* at 69.

147. *Id.* at 69–70.

148. *State v. Fuller*, 915 P.2d 809, 813 (Mont. 1996).

149. *See Chavez v. Martinez*, 538 U.S. 760 (2003); *Or. v. Elstad*, 470 U.S. 298, 306 (1985).

150. *Garrity*, 385 U.S. at 496.

151. *Fuller*, 915 P.2d at 813.

152. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977).

153. Amanda C. Graeber, McKune v. Lile *and the Constriction of Constitutional Protections for Sexual Offenders*, 23 Rev. Litig. 137, 156–158 (2004).

ing an incriminating question or going back to jail, may constitute coercive government conduct prohibited by the Fifth Amendment."[154]

Furthermore, the U.S. Supreme Court has held, even if one's fears regarding repercussions from remaining silent are unfounded, his subsequent incriminating statements are deemed coerced.[155] In *Garrity v. New Jersey*,[156] police officers were interrogated regarding alleged irregularities in the handling of cases in municipal courts.[157] Although the officers were advised of their respective rights to remain silent, they feared being discharged if they invoked those rights.[158] Therefore, the officers answered the questions and incriminated themselves; these self-incriminating statements were subsequently used to prosecute them.[159] Despite their failure to affirmatively invoke their right to remain silent, the U.S. Supreme Court held the police officers' self-incriminating statements could not be used in subsequent criminal proceedings because their statements were coerced.[160]

The Montana Supreme Court has interpreted the Montana Constitution as providing protection from compelled self-incrimination.[161] In *State v. Fuller*,[162] the Montana Supreme Court held that if the threat of punishment hangs in the air, then self-incriminating statements cannot be used in a later criminal proceeding.[163] Fuller was convicted of three counts of attempted sexual assault.[164] The district court suspended Fuller's sentence on the condition that he participate in a sexual offender treatment program.[165] Fuller's treatment program required honest disclosure of his offense history.[166] In fact, participants were expelled from the program for dishonesty or failure to disclose.[167] Fuller complied and disclosed his prior offenses. Fuller's self-incriminating statements were provided to the Billings Police Department, which subsequently investigated.[168] The State then charged Fuller with three new sexual offenses.[169]

---

154. Jamie Tanabe, *Right against Self-Incrimination v. Public Safety: Does Hawai'i's Sex Offender Treatment Program Violate the Fifth Amendment?*, 23 U. Haw. L. Rev. 825, 826–827 (2001).

155. *Garrity*, 385 U.S. at 496.

156. *Garrity*, 385 U.S. 493.

157. *Id.* at 494.

158. *Id.* at 494–495.

159. *Id.*

160. *Id.* at 500.

161. *Fuller*, 915 P.2d at 812 (citing Mont. Const. art. II, § 25).

162. *Fuller*, 915 P.2d 809.

163. *Id.* at 816.

164. *Id.* at 811.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Fuller*, 915 P.2d at 811.

169. *Id.*

Fuller moved to dismiss the charges, alleging the State had violated his constitutional protection against compelled self-incrimination.[170] Fuller conceded that the State had not expressly threatened to punish him if he invoked his Fifth Amendment privilege but argued punishment was implied due to the mandatory condition of the treatment program that he honestly disclose his offense history.[171]

The Montana Supreme Court reversed the lower court's denial of Fuller's motion to dismiss by specifically citing language from the treatment program rules. "Patients will be terminated from the program if . . . they are in denial or do not honestly disclose their offending history."[172] The Montana Supreme Court rejected the State's argument that Fuller could have invoked his privilege against self-incrimination, explaining that the lower court necessarily threatened Fuller with revoking his probation by including the mandatory provision to honestly disclose his offense history.[173] In Fuller's case, revocation of probation equated to imprisonment:[174]

> There is thus a substantial basis in our cases for concluding that if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.[175]

The *Fuller* Court adopted a test from the U.S. Supreme Court to establish when a self-executing privilege exists. The line is drawn where a defendant's "probation conditions merely require him to appear and give testimony about matters relevant to his probationary status or whether they went further and required him to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent."[176]

---

170. *Id.*

171. *Id.* at 814.

172. *Id.*

173. *Id.* at 815.

174. *Fuller*, 915 P.2d at 814.

175. *Id.* at 813 (citing *Murphy*, 465 U.S. at 435).

176. *Fuller*, 915 P.2d at 816 (quoting *Murphy*, 465 U.S. at 436). The Montana Supreme Court distinguished *Fuller* in *State v. Hill* when it allowed the State to offer evidence gathered from Hill's participation in a sexual offender treatment program when imposing a sentence. 207 P.3d 307, 314 (Mont. 2009). However, the Court reconciled its decision with *Fuller* by noting the material factual differences—Hill did not face substantial penalties if he failed to disclose, and Hill was not prosecuted for the prior offenses he disclosed. *Id.*

V. Comparing Best Practices to the Mineral County DUI/Drug Treatment Court's Practices

The Mineral County DUI/Drug Treatment Court falls short of achieving the Bureau of Justice Assistance's key components. Specifically, the prosecutor and the lack of a defense attorney fail to protect drug treatment court participants' due process rights.

A. Prosecutor's Failure to Protect Participants' Fundamental Rights

In the traditional adversarial context, the judge ultimately determines sanctions imposed upon a criminal defendant. Drug treatment courts call for something different, though. Despite the recommendation that the prosecutor should participate in a coordinated response to a drug treatment court participant's positive urinalysis, the Mineral County Treatment Court judge, alone, determines the sanction(s) imposed. More importantly, the Mineral County Attorney does not follow the recommendation that prosecutors agree not to file additional drug charges if a drug treatment court participant tests positive for drugs or alcohol or confesses in open court to drug or alcohol use.

If the prosecutor assured drug treatment court participants that they would not face additional drug-related charges if they confess or test positive, participants would certainly feel more secure in discussing their struggles. When asked about the strengths of the Washington, D.C. drug treatment court, participants "emphasized that the importance of knowing the rules and seeing them applied consistently and fairly was critical in their compliance with drug testing requirements."[177] If the Treatment Court adopted a policy to refrain from filing additional charges, the drug treatment court, prosecutor, defense attorney, and participant would each operate from the same set of consistent rules.

In Mineral County, the prosecutor does not follow this significant recommendation, effecting seemingly arbitrary decisions regarding subsequent additional prosecutions. If the Mineral County prosecutor adhered to the recommendation, Treatment Court participants would necessarily insulate themselves from coerced self-incrimination. Instead, participants must respond honestly to questions about positive urinalyses[178] and, as a result, may face additional charges.[179] Plouffe tested positive for marijuana in June 2011 (four months before he tested positive for benzodiazepines), and the Treatment Court merely sanctioned him with community service.[180]

177. Berman & Feinblatt, *supra* n. 47, at 177–178.
178. Def.'s Mot. to Dismiss, *supra* n. 4, at ex. 1.
179. *See id.* at ex. 43.
180. *Id.* at ex. 8.

Conversely, after Plouffe confessed to consuming one prescription pill and selling another, the prosecutor charged Plouffe with multiple felony drug-related offenses.[181] Treatment Court participants experience understandable confusion regarding which drug-related behaviors will result in additional charges.

B. Defense Attorneys' Failure to Protect Participants' Fundamental Rights

When the Montana Legislature contemplated drug treatment courts, legislators discussed how the presence of counsel would protect participants' rights.[182] Specifically, legislators contemplated a public defender serving as a member of the drug treatment court team.[183] According to the Bureau of Justice Assistance, defense attorneys also have key responsibilities to protect drug treatment court participants' due process rights. The defense attorney:

- Advises the defendant as to the nature and purpose of the drug court, the rules governing participation, the consequences of abiding or failing to abide by the rules, and how participating or not participating in the drug court will affect his or her interests.
- Explain all of the rights that the defendant will temporarily or permanently relinquish.
- Gives advice on alternative courses of action, including legal and treatment alternatives available outside the drug court program, and discusses with the defendant the long-term benefits of sobriety and a drug-free life.
- Explains that because criminal prosecution for admitting to AOD [alcohol or drug] use in open court will not be invoked, the defendant is encouraged to be truthful with the judge and with treatment staff, and informs the participant that he or she will be expected to speak directly to the judge, not through an attorney.[184]

In Mineral County, some drug treatment court participants never meet a defense attorney. This necessarily means Treatment Court participants do not receive the type of advice and explanation that the Bureau of Justice Assistance contemplated. When the Montana Legislature enacted the Drug Offender Accountability and Treatment Act, it enumerated a defense attorney only as a permissive member of a drug court treatment team.[185] Although a defense attorney must sign a Treatment Court participant's Agreement in Mineral County, this does not necessarily signify the attorney and defendant have ever communicated with each other.

---

181. *Id.* at ex. 44.
182. *Hearing on HB 721*, *supra* n. 55.
183. *Id.*
184. *Defining Drug Courts*, *supra* n. 37, at 3–4.
185. Mont. Code Ann. § 46–1–1103(7).

The Bureau of Justice Assistance recommends that defense attorneys encourage their clients to confess to drug or alcohol use in open court.[186] However, the Bureau of Justice Assistance also recommends that prosecutors refrain from filing additional charges as the result of such confessions. Regardless, no defense attorney advised Plouffe about what he should or should not disclose either in open court or to drug treatment court personnel. Neither the Treatment Court probation officer nor the deputy sheriff contacted Plouffe's attorney of record. All treatment courts would significantly reduce the risk of Sixth Amendment right to counsel violations by ensuring a defense attorney serve as a member of the drug treatment court team.

VI. Solutions for Ensuring Fifth & Sixth Amendment Protections for Drug Treatment Court Participants

The repeated violations of future drug treatment court participants' fundamental rights could be rectified, in part, by the Montana Legislature. The Drug Offender Accountability and Treatment Act should require that a defense attorney serve as an integral member of any drug treatment court team. By mandating the inclusion of a defense attorney, not only would Montana treatment courts be compliant with the Bureau of Justice Assistance's recommendations, but drug treatment court participants would receive legal advice to make informed decisions and protect their fundamental rights.

Like drug treatment courts, court-ordered sex offender treatment programs have faced challenges to effect a fair balance between reducing recidivism and protecting participants' Fifth Amendment privileges against self-incrimination. Four solutions have emerged.

First, protecting both the public's safety and drug treatment court participants' Fifth Amendment rights could result by applying the psychologist-client privilege.[187] In Montana, a psychologist, social worker, or counselor is often a member of a drug treatment court team.[188] By applying the psychologist-client privilege[189] to protect drug treatment court participants' Fifth Amendment right against self-incrimination, the participant's urinalysis results would be administered by and discussed with a psychologist. Consequently, the counselor would abide by Montana's psychologist–client privilege and refrain from disclosing particular results. The psychologist

186. *Defining Drug Courts*, *supra* n. 37, at 4.

187. Merrill Maiano, *Sex Offender Probationers and the Fifth Amendment: Rethinking Compulsion and Exploring Preventative Measures in the Face of Required Treatment Programs*, 10 Lewis & Clark L. Rev. 989, 1017 (2006).

188. Mont. Code Ann. § 46–1–1103(7).

189. Mont. Code Ann. § 26–1–807.

could report generally to the drug treatment court team regarding the participant's progress and struggles. Moreover, rehabilitation rates may increase because drug treatment court participants would feel more willing to disclose and discuss their relapses and challenges.

Enacting laws that more clearly define the scope of drug treatment court participants' rights presents a second possible solution. In addition to a new provision mandating defense counsel, new statutory provisions could dictate that drug treatment court participants retain protection against self-incrimination, regardless of whether they affirmatively invoke that protection. Finally, a new provision could mandate that a drug treatment court participant cannot be questioned about positive urinalyses until his defense attorney has been contacted.

The third solution would apply a unique, purpose-based test to decide whether a statement falls under the definition of coercion. Generally, courts apply the "penalty test" when determining whether a self-incriminating statement meets the standard of compulsion. The U.S. Supreme Court has defined a penalty situation as one in which the state not only compels an individual to appear and testify but also seeks to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions capable of forcing the self-incrimination that the Fifth Amendment forbids.[190] The penalty test sets a high standard, which is arguably not met regarding drug treatment court participants. But a purpose-based test has been defined by Justice O'Connor as determining the purpose for which the government sought the compelled testimony.[191] If the government sought the compelled testimony wholly for rehabilitation, then the testimony would be admissible for future prosecution. If the government sought the compelled testimony in part for investigation of a new crime, the self-incriminating testimony would be suppressed.[192]

The fourth solution, limited immunity, provides the best assurance that drug treatment court participants' fundamental rights will be upheld. Some sex offender treatment programs offer immunity from additional prosecution.[193] If this solution was applied to drug treatment courts, participants could freely discuss relapses with treatment court members without the fear of additional prosecution. And nothing would prevent law enforcement from conducting routine, independent investigations of reported crimes. The immunity provision would simply prevent drug treatment court personnel from sharing incriminating information about participants with law en-

190. *Lefkowitz*, 431 U.S. at 805.

191. Maiano, *supra* n. 187, at 1012.

192. *Id.* at 1009.

193. Tanabe, *supra* n. 154, at 850–852.

forcement.[194] Additionally, the government attorney that sits on the treatment court team could be a civil attorney, available to act only if a civil commitment proceeding became necessary.[195] By including the civil government attorney, the public's safety would be protected.

When the Montana Senate Judiciary Committee discussed the bill that would later become the Drug Offender and Accountability Act, the state senators actually contemplated an immunity provision.[196] The senators inquired of each other about any known lawsuits regarding violations of defendants' constitutional rights, and none were aware of any lawsuit.[197] Consequently, the state senators concluded an immunity provision was unnecessary.[198]

Nevertheless, even under a system affording immunity, if a drug treatment court participant tests positive for alcohol or drugs and/or confesses to drug or alcohol use, the drug treatment court can still expel the participant from the program. Upon expulsion, the participant's original conditional guilty plea converts to a guilty plea. Similarly, if a drug treatment court participant invokes his Fifth Amendment privilege against self-incrimination, he only risks expulsion from drug treatment court. No threat of additional charges should exist. Again, nothing would prevent law enforcement from conducting an independent investigation on reported crimes.

VII. Conclusion

The judiciary identified a societal need to assist drug abusers and consequently created an alternative to the traditional adversarial system. In part, reducing recidivism drove the early treatment courts, but altruistic intentions represented an additional motivator. It is unlikely, therefore, that using participants' self-incriminating statements to file multiple felony charges was within the judiciary's contemplation.

Any treatment program for addictive behavior necessarily contemplates participants' setbacks.[199] When participants candidly share their relapses within the rehabilitative confines of the drug treatment court, law enforcement should not be privy to such disclosures. If an independent investigation of a reported crime warrants the filing of new charges against a participant, then the self-incriminating statements will not be tainted.

Coercing the criminally accused to make self-incriminating statements not only violates that person's fundamental privilege against self-incrimina-

194. Graeber, *supra* n. 153, at 160.
195. *See* Maiano, *supra* n. 187, at 1020.
196. *Hearing on HB 721*, *supra* n. 55.
197. *Id.*
198. *Id.*
199. *Problem-Solving Courts*, *supra* n. 43, at 39.

tion, it also defies the non-adversarial, cooperative model of drug treatment courts. Moreover, when a prosecutor uses a first-time, non-violent misdemeanor drug offender's confession to file multiple felony charges, a precedent is set for an unsuccessful treatment court.

A limited immunity provision could fix what ails the Mineral County DUI/Drug Treatment Court. Had a limited immunity provision been in place in 2011, it remains unclear whether Karlyle Plouffe would be serving a three-year sentence as a convicted felon. Perhaps the Mineral County Sheriff's Office would have independently acquired sufficient evidence for the prosecutor to charge Plouffe with felony Criminal Possession of Dangerous Drugs and felony Criminal Distribution of Dangerous Drugs. Instead, Treatment Court team members shared damning evidence against Plouffe with the Sheriff's Office and the Mineral County Attorney. Plouffe confessed to illegally consuming narcotics, so he violated Montana law. Nevertheless, U.S. Supreme Court Justice William Douglas's words should serve as a guiding force for reform in Mineral County: "What is at stake for an accused facing . . . imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."[200]

200. *Boykin v. Ala.*, 395 U.S. 238, 243–244 (1969).