

COMMONWEALTH OF MASSACHUSETTS  
**SUPREME JUDICIAL COURT**

No. SJC-12279

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COMMONWEALTH OF MASSACHUSETTS,  
*PLAINTIFF - APPELLEE,*

v.

PROBATIONER,  
*DEFENDANT - APPELLANT*

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ON A REPORTED QUESTION AND ON APPEAL FROM A FINDING OF  
PROBATION VIOLATION BY THE CONCORD DIVISION OF THE  
DISTRICT COURT DEPARTMENT

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**AMICUS CURIAE BRIEF OF NATIONAL  
ASSOCIATION OF DRUG COURT PROFESSIONALS  
IN SUPPORT OF NEITHER PARTY**

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### Interest of Amicus Curiae

The National Association of Drug Court Professionals ("NADCP") was founded in 1994 as the principal professional organization representing the interests of drug courts and other problem-solving courts in the United States. The NADCP's multidisciplinary membership includes judges, prosecutors, defense attorneys, court administrators, treatment providers, social service caseworkers, community corrections officers, and research scholars. The NADCP's core mission is to provide training and technical assistance to treatment courts across the nation, and to promulgate evidence-based practice guidelines for professionals working at the intersection of criminal justice and substance use disorder<sup>1</sup> treatment.

The NADCP published its flagship document outlining the *Ten Key Components* of drug courts in

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<sup>1</sup> Like the Commonwealth and the Probationer, the NADCP uses "substance use disorder" and "addiction" interchangeably throughout this brief. However, the NADCP notes that "addiction" is not appropriate blanket terminology. The Diagnostic and Statistical Manual of Mental Disorders (5<sup>th</sup> ed. 2013) published by the American Psychiatric Association ("DSM V") reserves the term "addiction" for severe substance use disorder. DSM V, at 483-84.

1997.<sup>2</sup> That publication was followed in 2013 and 2015 by *Adult Drug Court Best Practice Standards*, Volumes I<sup>3</sup> and II.<sup>4</sup> These documents, which are based on state-of-the-art research and reflect industry best practices in correctional rehabilitation and substance abuse treatment, emphasize that drug courts must closely monitor participants' behavior and impose graduated sanctions for noncompliance.<sup>5</sup> For repeated violations, these sanctions may escalate to brief intervals of incarceration. When used in this manner, graduated sanctions are an evidence-based and effective intervention in substance use disorder. The intent is not to impose a sentence or final disposition upon

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<sup>2</sup> National Association of Drug Court Professionals - Drug Court Standards Committee, *Defining Drug Courts: The Key Components* (1997), <https://www.ndci.org/wp-content/uploads/2016/05/Defining-Drug-Courts-The-Key-Components.pdf>.

<sup>3</sup> National Association of Drug Court Professionals, *Adult Drug Court Best Practice Standards Volume I* (2013) <http://www.allrise.org/sites/default/files/nadcp/AdultDrugCourtBestPracticeStandards.pdf>;

<sup>4</sup> National Association of Drug Court Professionals, *Adult Drug Court Best Practice Standards Volume II* (2015) [http://www.allrise.org/sites/default/files/2014/Best%20Practice%20Standards%20Vol.%20II.\\_0.pdf](http://www.allrise.org/sites/default/files/2014/Best%20Practice%20Standards%20Vol.%20II._0.pdf).

<sup>5</sup> *Best Practice Standards Volume II* at 26-34.



drug court participants, but rather to encourage them to achieve treatment goals.

Because of NADCP's experience and expertise, we are uniquely situated to provide the Court with the science and research supporting: (1) graduated sanctions, including incarceration, as an appropriate and effective part of a continuum of evidence-based responses to treatment of substance use disorder, and (2) the ability of a person with substance use disorder to comply with conditions of community supervision, including the condition to refrain from taking illicit substances.

#### **Question Presented**

May the Probationer permissibly be required to "remain drug free" as a condition of her probation, and may she permissibly be punished for violating that condition, where the Probationer suffers from substance use disorder, and where her continued use of substances despite negative consequences is a symptom of that disorder?

#### **Statement of the Case**

NADCP adopts the statement of the case set forth in the brief of Plaintiff-Appellee Commonwealth. Appellee's Br. at 2-5. The Probationer was required to

remain drug free as a condition of her probation. *Id.* at 3. She tested positive for Fentanyl and Suboxone during random drug testing and was detained, placed in an inpatient treatment program, and found to be in violation of her probation. *Id.* at 3-4. The Probationer now argues that the drug free requirement of her probation is unconstitutional because drug use is an uncontrollable symptom of her substance use disorder.

#### **Statement of the Facts**

The Commonwealth and the Probationer have used their facts statements to present warring scientific theories about drug addiction. The Probationer champions the "brain disease" model of addiction, which conceives of drug addiction as a neurological disease "whose hallmark feature is an inability to exert control over the impulse to use drugs." Appellant's Br. at 1. The Commonwealth disputes this model, arguing that while compulsive drug use is a hallmark of addiction, that compulsion is behavioral, not neurobiological, and can be influenced by social,

environmental, and relational factors. Appellee's Br. at 7.

The NADCP strongly cautions the Court against allowing any particular theory of addiction to influence its decision. Scientists themselves cannot agree whether addiction is behavioral, neuopharmacological, or some combination of both.<sup>6</sup> Given the lack of scientific consensus, it would be short-sighted to create legal precedent based on any individual theory.

Instead, the Court should be aware that the combination of treatment, testing, and sanctions used by drug courts and other judicially-supervised intervention programs is both highly successful and flexible enough to adapt to new scientific developments. Permitting the criminal justice system to maintain this flexibility is the best way to ensure that offenders continue to receive effective treatment

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<sup>6</sup> See, e.g., Roy A. Wise and George F. Koob, *The Development and Maintenance of Drug Addiction*, 39 *Neuropsychopharmacology* 254, 254 (2014) (noting definition of addiction is unsettled and "means different things to different people—even to different experts").

that can change and respond to growth in our understanding of addiction.

Argument

It is essential to the effectiveness of the over 3,000 drug courts and other treatment courts<sup>7</sup> in the United States, as well as the 27 treatment courts in Massachusetts, that the criminal justice system retain the authority both to mandate that individuals with substance use disorder remain drug free as a condition of supervised release, and to respond to violations of that condition with evidence-based behavior modification solutions, including where appropriate, incarceration. Supervision, drug testing, and graduated sanctions are an effective treatment for addiction, a fact supported both by scholarship and empirical studies. The success of drug courts using these methods proves that individuals suffering from substance use disorder retain the ability to exercise free choice, regardless of the theory of addiction to which one subscribes to. The NADCP urges the Court to find that offenders may be required to remain drug free as a condition of their probation, and allow drug

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<sup>7</sup> Including DWI courts and veterans treatment courts.

courts and other treatment courts to continue doing their job.

**I. GRADUATED SANCTIONS, INCLUDING INCARCERATION, ARE AN APPROPRIATE AND EFFECTIVE TREATMENT FOR SUBSTANCE USE DISORDER**

**A. Scholarship On Both Sides of the Addiction Model Debate Agree That Graduated Sanctions and Drug Testing Are An Effective Method of Treatment**

While the experts cited by the Commonwealth and the Probationer disagree on the nature and definition of addiction, they *do* agree on how the criminal justice system should approach individuals with substance use disorder: through a combination of treatment, drug testing, and supervision. The National Institute on Drug Abuse,<sup>8</sup> the Center for Substance

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<sup>8</sup> National Institute on Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide*, National Institutes of Health, 3 (2014), [https://www.drugabuse.gov/sites/default/files/txcriminajjustice\\_0.pdf](https://www.drugabuse.gov/sites/default/files/txcriminajjustice_0.pdf) (recommending drug testing and sanctions).

Abuse Treatment,<sup>9</sup> and the United States Department of Justice<sup>10</sup> all recommend some combination of monitoring and sanctions in the training materials they provide to criminal justice professionals who work with addicted individuals. For example, in its research-based guide, *Principles of Drug Abuse Treatment for Criminal Justice Population*,<sup>11</sup> the National Institute on Drug Abuse (NIDA) recommends that offenders with substance use disorder be carefully monitored for drug use via testing and urinalysis to allow the justice system to intervene and correct behavior as

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<sup>9</sup> Center for Substance Abuse Treatment, *Substance Abuse Treatment for Adults in the Criminal Justice System*, Treatment Improvement Protocol Series No. 44 (2005), <https://www.ncbi.nlm.nih.gov/books/NBK64137/> (noting that an offender's motivation is a key factor in recovery and can be influenced by "justice systems sanctions and incentives, including court orders . . . probation revocation, more intensive mandatory treatment . . . and incarceration in jail or prison.")

<sup>10</sup> National Institute of Justice, *Drugs and Crime Research: Drug Treatment*, Office of Justice Programs (June 24, 2015), <https://www.nij.gov/topics/drugs/treatment/Pages/welcome.aspx> ("research shows that court-monitored drug abuse programs can help offenders from committing new crimes . . . certain punishment for violations is an effective way to improve compliance with the terms of probation.")

<sup>11</sup> Cited by Probationer in support of her argument. See Appellant Br. at 16.

necessary.<sup>12</sup> The NIDA makes these recommendations despite noting that "drug addiction is a brain disease that affects behavior."<sup>13</sup>

Two of the individual experts the Probationer relies upon in her discussion of addiction also support treatment that combines drug testing with incentives and sanctions. Both Dr. Nora Volkow, director of the National Institute of Drug Abuse, and Dr. Thomas McLellan, founder of the Treatment Research Institute and former deputy director of the White House Office of National Drug Control Policy—whose joint article the Probationer cites for the statement "centuries of efforts to reduce addiction . . . by punishing addictive behaviors [have] failed to produce adequate results," Appellant Br. at 3—are strong advocates of merging treatment with judicial oversight. In *Treating Drug Abuse and Addiction in the Criminal Justice System*,<sup>14</sup> Dr. Volkow notes that

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<sup>12</sup> *Principles of Drug Abuse Treatment* at 3.

<sup>13</sup> *Id.* at 1.

<sup>14</sup> Redonna K. Chandler, Bennett W. Fletcher, and Nora D. Volkow, *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301 J. of the Am. Med. Ass'n 183, 184 (2009).

decades of research "[have] consistently reported the beneficial effects" of drug courts and other criminal justice system interventions which use "monitoring, supervision, and threat of legal sanctions . . . to encourage drug abusers to enter and remain in treatment."<sup>15</sup> Dr. McLellan has similarly advocated for monitoring, noting that "simple drug testing with rapid, certain, but modest sanctions has shown positive results," an effect which can be duplicated by probation and parole agencies.<sup>16</sup>

Furthermore, while the Probationer attempts to draw a distinction between old and new schools of thought regarding addiction and treatment, contemporary reports continue to recommend monitoring and sanctions. For example, one of the most celebrated recent publications on addiction, *Facing Addiction in America: The Surgeon General's Report on Alcohol,*

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<sup>15</sup> *Id.*

<sup>16</sup> National Conference of State Legislature, *Q and A with A. Thomas McLellan* (March 2010), <http://www.ncsl.org/research/civil-and-criminal-justice/q-and-a-with-a-thomas-mclellan.aspx>.



*Drugs, and Health*,<sup>17</sup> recommends drug courts to federal, state, local, and tribal governments as an effective method of intervention. The Report states that "regular monitoring, alongside the adverse consequences of a failed urine test, provide powerful motivation to abstain."<sup>18</sup>

**B. Drug Courts and Other Judicially Supervised Interventions Enhance Participants' Compliance with Treatment**

Drug courts and other treatment courts are a diverse group of specialized programs that focus specifically on offenders with substance use disorders. Rather than traditional punitive sanctions, drug courts provide a combination of regimented treatment, monitoring, drug testing, and graduated sanctions for noncompliance, all overseen by a judge.<sup>19</sup> The idea behind these courts is "to harness the coercive power of the criminal justice system" to

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<sup>17</sup> U.S. Department of Health and Human Services, Office of the Surgeon General, *Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health* (2016).

<sup>18</sup> *Id.* at 4-39.

<sup>19</sup> *Id.*

encourage offenders battling substance use disorder to comply with treatment.<sup>20</sup>

Drug courts target individuals who have severe substance use disorder and are assessed as unlikely to succeed at lower levels of intervention. As of 2015, more than 3,400 drug courts across America were processing an estimated 55,000 adult defendants per year.<sup>21</sup> Over 127,000 individuals<sup>22</sup> across the nation and a large proportion of the more than 4.8 million on probation<sup>23</sup> rely on these courts' continued ability to monitor treatment conditions and sobriety. Without the ability to monitor participants' progress, these courts' could not provide such effective treatment-based alternatives to incarceration.

Drug courts and other judicially-supervised methods of intervention are proven to enhance

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Douglas B. Marlowe, Carolyn D. Hardin & Carson L. Fox, *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States* 7 (June 2016), <https://www.ndci.org/wp-content/uploads/2016/05/Painting-the-Current-Picture-2016.pdf>.

<sup>23</sup> *Substance Abuse Treatment for Adults in the Criminal Justice System* at 214.

participants' compliance with treatment. In multiple studies—including at least six meta analyses,<sup>24</sup> which

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<sup>24</sup> These meta-analyses span nearly a decade, and have consistently found drug courts to be effective at reducing recidivism:

Christopher T. Lowenkamp, Alexander M. Holsinger, and Edward J. Latessa, E.J., *Are Drug Courts Effective? A Meta-Analytic Review*, 15 J. of Community Corrections 5, 5-6 (2005) (finding drug courts garner support from the community, reduce drug use and criminal activity).

Steve Aos et al, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, Olympia: Washington State Institute for Public Policy, 9 (2006)

[http://www.wsipp.wa.gov/ReportFile/952/Wsipp\\_Evidence-Based-Public-Policy-Options-to-Reduce-Future-Prison-Construction-Criminal-Justice-Costs-and-Crime-Rates\\_Full-Report.pdf](http://www.wsipp.wa.gov/ReportFile/952/Wsipp_Evidence-Based-Public-Policy-Options-to-Reduce-Future-Prison-Construction-Criminal-Justice-Costs-and-Crime-Rates_Full-Report.pdf) (finding drug courts reduce recidivism and save money).

Jeff Latimer et al., *A Meta-Analytic Examination of Drug Treatment Courts: Do they reduce recidivism?* (2006)

[http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr06\\_7/rr06\\_7.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr06_7/rr06_7.pdf) (finding drug courts reduced recidivism by 14%).

David B. Wilson et al., *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. of Experimental Criminology 459 (2006) (finding drug court participants less likely to reoffend).

Deborah K. Shaffer, *Looking Inside the Black Box of Drug Courts: A Meta-Analytic Review*, 28 Just. Q. 493, 493 (2011) (finding drug courts reduce recidivism by 9%).

combine data from multiple sources for greater statistical accuracy—drug courts have been shown to reduce drug use, reduce recidivism,<sup>25</sup> improve family functioning, increase employment, and enhance other factors related to long-term recovery.<sup>26</sup> For example, in one study comparing eight different treatment programs for methamphetamine addiction, drug court produced the highest rate of abstinence from methamphetamine as measured by urine drug screen

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Ojmarrh Mitchell, David B. Wilson, Amy Eggers, and Doris L. MacKenzie, *Assessing the effectiveness of drug courts on recidivism: A meta-analytic review of traditional and non-traditional drug courts*, 40 J. of Crim. Just. 60 (2012) (finding drug courts reduce recidivism from 50% to 38%).

<sup>25</sup> See, e.g., Shannon M. Carey, Juliette R. Mackin, and Michael W. Finigan, *What Works? The Ten Key Components of Drug Court: Research-Based Best Practices*, 8 Drug Court Review 6 (2012) (noting drug courts improve outcomes and reduce recidivism).

<sup>26</sup> Shelli B. Rossman et al., *The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts, Volume 4* (2011)

<https://www.ncjrs.gov/pdffiles1/nij/grants/237112.pdf> (finding drug courts reduce drug relapse and criminal behavior, reduce the likelihood of family conflict, and potentially boost employment opportunities).

tests.<sup>27</sup> The same study found that the drug court also produced the longest period of consecutive abstinence from methamphetamine, in some instances doubling, tripling and even quadrupling the length of time that participants avoided using methamphetamine as compared to individuals in other treatment programs.<sup>28</sup>

Importantly, these positive effects were attributed to the fact that the drug court greatly enhanced participants' compliance with substance abuse treatment. Participants in the drug court attended, on average, more than twice the number of counseling sessions than participants in other treatment programs.<sup>29</sup>

In a separate study, drug abuse was cut in half for participants in a drug court program as compared to individuals receiving treatment alone without drug

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<sup>27</sup> Richard A. Rawson et al., *A Multi-Site Comparison of Psychosocial Approaches for the Treatment of Methamphetamine Dependence* 99 *Addiction* 708, 713 (2004).

<sup>28</sup> *Id.* at 717.

<sup>29</sup> *Id.* at 711.

court supervision.<sup>30</sup> These effects lasted more than a year after the participants completed treatment.<sup>31</sup> Again, this success was attributed to the fact that drug court participants remained in treatment for considerably longer periods of time. Specifically, the study found that treatment attendance for drug court participants increased by approximately 40 percent, and successful graduation rates increased by nearly 80 percent.<sup>32</sup>

Drug courts demonstrate how the combination of treatment, monitoring, and sanctions can produce consistent positive results within the justice system. However, drug courts and other treatment courts rely

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<sup>30</sup> Patricia Marinelli-Casey et al., *Drug Court Treatment for Methamphetamine Dependence: Treatment Response and Post-Treatment Outcomes*, 34 J. Substance Abuse Treatment 242, 245-246 (2008).

<sup>31</sup> *Id.* at 246.

<sup>32</sup> *Id.* at 245; see also C. West Huddleston, *Drug Courts: An Effective Strategy for Communities Facing Methamphetamine*, Bureau of Justice Assistance Bulletin (2005), <http://www.ojp.usdoj.gov/BJA/pdf/MethDrugCourts.pdf>.

on the ability to utilize drug testing along with appropriate incentives and sanctions to be effective.<sup>33</sup>

## II. INDIVIDUALS SUFFERING FROM SUBSTANCE USE DISORDER RETAIN THE ABILITY TO EXERCISE FREE CHOICE

The Probationer argues that individuals with substance use disorder are unable to exercise free choice over their drug use. According to the Probationer, she "did not 'choose' to relapse any more than a person who has hypertension chooses to have high blood pressure." Appellant Br. at 5. However, the empirical success of drug courts and other evidence-based treatments for drug addiction directly contradicts Probationer's argument. These treatment methods rely on participants' ability to control their actions.<sup>34</sup> If individuals suffering from drug addiction

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<sup>33</sup> See generally *Best Practice Standards Volume 1; Best Practice Standards Volume II*.

<sup>34</sup> In fact, the two most celebrated and successful non-punitive types of treatment for substance use disorder, cognitive behavioral therapy and contingency management, depend upon the assumption that patients have the ability to control their actions. Cognitive-behavioral therapy teaches individuals in treatment to recognize and stop negative patterns of thinking and behavior. For instance, cognitive-behavioral therapy might help a person with substance use disorder be aware of the stressors, situations, and feelings that lead to drug use, then use coping strategies to avoid them or act differently when they occur.

were genuinely unable to control when and if they used drugs, then drug testing, sanctions, and other treatment strategies aimed at behavioral-modification would have no effect.

Multiple studies support this conclusion. For example, one study in the District of Columbia<sup>35</sup> randomly assigned pre-trial drug court clients to one of three conditions:

(1) *Standard condition*: These clients attended the usual regimen of drug court pre-trial services.

(2) *Sanctions condition*: These clients were required to provide urine specimens on a random weekly basis, and received sanctions for drug-positive urines

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Similarly, contingency management relies on motivational incentives, providing rewards to individuals for desired behavior like clean drug tests and disciplinary measures to those who engage in bad behavior. Both these methods of treatment assume that patients can exercise some degree of free choice over their drug use. See generally Danielle R. Davis, et al., *A Review of the Literature on Contingency Management in the Treatment of Substance Use Disorders, 2009-2014*, 92 *Preventive Med.* 36 (2016); Stephen T. Higgins and Nancy M. Petry, *Contingency Management: Incentives for Sobriety*, 23 *Alcohol Res. and Health* 122 (1999).

<sup>35</sup> Adele Harrell et al., *Final Report: Findings From the Evaluation of the D.C. Superior Court Drug Intervention Program* (1998), [http://www.urban.org/UploadedPDF/409041\\_findings.pdf](http://www.urban.org/UploadedPDF/409041_findings.pdf).



that escalated in magnitude in response to each positive result. The sanctions included jail stays of up to 3 to 7 days.

(3) *Treatment condition*: These clients were required to attend an intensive day-treatment program that provided clinical services, meals, and recreational activities for several hours per week.

Contrary to the researchers' expectations, participants preferred the sanctions condition to the treatment condition. Participants resented being made to attend several hours of treatment per week, and only 40 percent of the clients assigned to the treatment condition agreed to participate. By contrast, 66 percent of the clients assigned to the sanctions condition agreed to comply with the sanction requirements.<sup>36</sup> This was true despite the risk of receiving jail time.

Participants in both the treatment condition and the sanctions condition had lower rates of drug use than clients receiving usual services. However, participants in the sanctions condition had the *best*

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<sup>36</sup> *Id.* at 130-133.

outcomes because they also had lower re-arrest rates extending out to 1 year post-arrest.<sup>37</sup>

The same research team conducted a similar study in a family drug court. Results from that study revealed that when substance-abusing parents were subjected to urine monitoring and consequences for drug use, their children were more likely to be reunited with their family and were under court supervision for a shorter period of time as compared to children of substance-abusing parents who were not subjected to urine monitoring and associated consequences.<sup>38</sup>

The results of these studies were recently reproduced in Hawaii. With funding from the National Institute of Justice, Hawaii developed Project HOPE, or Hawaii's Opportunity Probation with Enforcement.<sup>39</sup>

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<sup>37</sup> *Id.* at 135-137.

<sup>38</sup> Lisa C. Newmark, *Parental Drug Testing in Child Abuse and Neglect Cases: The Washington, D.C. Experience* (1995), <http://www.urban.org/publications/406463.html>; see also National Institute of Justice and American Bar Association, *Legal Interventions in Family Violence: Research Findings and Policy Implications* (1998), <https://www.ncjrs.gov/pdffiles/171666.pdf>.

<sup>39</sup> See Angela Hawken, *H.O.P.E. for Reform*, *The American Prospect* (April 10, 2007), <http://prospect.org/article/hope-reform>.

Probationers selected for this program were: (1) abusing methamphetamine, (2) identified as being at high-risk for recidivism by their probation officers, and (3) already in poor compliance with their probation.<sup>40</sup> These individuals were then subjected to weekly urine testing, and received graduated sanctions for positive tests that included brief jail stays. Approximately one-half of these probationers became compliant with probation without ever needing to be sanctioned, and rates of drug-positive urine tests decreased by 80 percent.<sup>41</sup>

Subsequently, the investigators initiated a randomized study comparing Project HOPE to probation as-usual.<sup>42</sup> Results revealed that, in the first year, HOPE participants were 55 percent less likely to be arrested for a new crime, 72 percent less likely to test positive for illicit drugs, 61 percent less likely to miss a probation appointment, and 53 percent

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Angela Hawken, *Evaluation of the Hawaii Opportunity Probation with Enforcement (HOPE) Community Supervision Strategy, 2007-2009*, <https://doi.org/10.3886/ICPSR27921.v1>.

less likely to have their probation revoked.<sup>43</sup>

Subsequent analyses determined that the positive effects on crime lasted for at least 10 years, several years after most participants had been discharged from probation.<sup>44</sup>

Taken together, the results of these rigorous studies in Hawaii and the District of Columbia provide strong scientific evidence that regular drug testing and graduated sanctions, including a realistic threat of brief jail detention, can greatly reduce drug abuse and improve treatment adherence for individuals with

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<sup>43</sup> Angela Hawken and Mark Kleiman, *Managing drug involved probationers with swift and certain sanctions: Evaluating Hawaii's HOPE* (December 2009), <http://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf>.

<sup>44</sup> Angela Hawken et al., *HOPE II: A Follow-Up to Hawaii's HOPE Evaluation* (May 2016), <https://www.ncjrs.gov/pdffiles1/nij/grants/249912.pdf>.

substance use disorder.<sup>45</sup> If these individuals could not control their actions, studies would not produce such positive effects.

Other researchers have conducted confidential focus-groups with drug court participants to learn whether the participants themselves perceived the threat of jail sanctions to be an important motivator to perform well in treatment. The results confirmed that participants indeed viewed the threat of serious sanctions as powerful motivator.<sup>46</sup> As one investigator concluded:

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<sup>45</sup> See also generally Beau Kilmer et al., *Efficacy of Frequent Monitoring with Swift, Certain, and Modest Sanctions for Violations: Insights from South Dakota's 24/7 Sobriety Project*, 103 Am. J. Public Health e37 (2013); Zachary Hamilton et al., *Impact of Swift and Certain Sanctions: Evaluation of Washington State's Policy for Offenders on Community Supervision*, 15 Criminology & Public Policy 1009 (2015). But see Pamela K. Lattimore et al., *Outcome Findings From the HOPE Demonstration Field Experiment: Is Swift, Certain, and Fair an Effective Supervision Strategy?* 15 Criminology & Public Policy 1103 (2016) (finding sanctions did not reduce recidivism); Daniel O'Connell et al., *Decide Your Time: A Randomized Trial of a Drug Testing and Graduated Sanctions Program for Probationers*, 15 Criminology & Public Policy 1073 (2016) (same).

<sup>46</sup> John Goldkamp et al., *An Honest Chance: Perspectives on Drug Courts*, 14 Fed. Sentencing Rep 369 (2001). See also generally Caroline Cooper, *1997 Drug Court Survey Report: Executive Summary*, Drug Court Clearinghouse and Technical Assistance Project

The fair and selective use of incarceration as a sanction had a clear and powerful effect on the drug court participants, with few exceptions. The drug offenders, regardless of prior experience with the criminal justice system, nearly universally did not like jail, feared jail, and would go to great lengths to avoid it. This fear motivated them both to enter the drug court program and to try to succeed while in the program.<sup>47</sup>

The results of these studies are not surprising in light of more than 100 years of basic behavioral research examining what is known as *operant conditioning* or *contingency management*. In the social sciences and psychological sciences, few findings have been so reliably demonstrated that they may qualify as "laws" of human behavior, but the principles of operant conditioning are one such set of findings. These principles have been proven time and again across numerous settings, to the degree that they are no longer the subject of scientific dispute.

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(October 1997), Adele V. Harrell and Barbara Smith, *Evaluation of the District of Columbia Superior Court Drug Intervention Program: Focus Group Interviews* (1997); Sally Satel, *Observational Study of Courtroom Dynamics in Selected Drug Courts* 1 *Drug Court Rev.* 43 (1998); Christine A. Saum et al., *Drug Court Participants' Satisfaction With Treatment and the Court Experience*, 4 *Drug Court Rev.* 39 (2002).

<sup>47</sup> Goldkamp at 371.

There are three critical factors that influence the effectiveness of any behavioral intervention: certainty, immediacy, and magnitude.<sup>48</sup> If these factors are applied incorrectly, intervention will likely fail. The single-most important factor influencing the efficacy of any behavioral intervention is certainty.<sup>49</sup> Therefore, if probationers with substance use disorder are not sanctioned or rewarded on a regular basis, the success of their supervision vis-a-vis conditions of treatment and other probationary conditions connected with achieving long-term sobriety will be minimal.

Behind the Probationer's argument that someone with substance use disorder is incapable of making his or her own choices is the contention that a combination of drug testing, supervision, treatment, and sanctions do not and cannot help persons with

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<sup>48</sup> See generally Douglas B. Marlowe and Kimberly Kirby, *Effective Use of Sanctions in Drug Courts: Lessons From Behavioral Research*, 2 Nat. Drug Court Rev. 1 (1999); Garry Martin and Joseph Pear, *Behavior Modification: What It Is and How To Do It* (6th ed., 1999).

<sup>49</sup> Adele Harrell and John Roman, *Reducing Drug Use and Crime Among Offenders: The Impact of Graduated Sanctions*, 31 J. of Drug Issues 207, 210 (2001); Marlowe and Kirby at 10-11; Marlowe and Wong at 338-340; Faye Taxman et al., *Graduated Sanctions: Stepping Into Accountable Systems and Offenders*, 79 Prison J. 182, 187-188 (1999).

substance use disorder find sobriety. Nothing could be further from the truth. The Probationer's argument is both unsupported by research and directly contradictory to the personal experiences of over one million individuals who have found sobriety through drug courts.

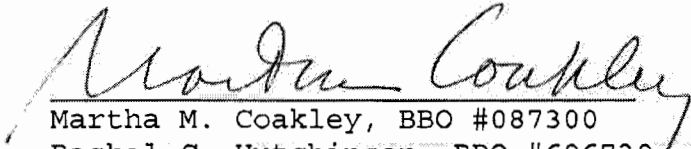
Conclusion

For the foregoing reasons, *amicus* respectfully requests that this Court can and should find that individuals who suffer from substance use disorder may be required to remain drug free as a condition of probation.

Respectfully submitted,

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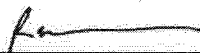
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September 18, 2017



MASS R. APP. P. 16(K) CERTIFICATION

I hereby certify that this brief complies with the rules of the Court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).


  
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Rachel C. Hutchinson

MASS. R. APP. P. 13(D) CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that on September 18, 2017, I caused two copies of the Amicus Curiae Brief of the National Association of Drug Court Professionals to be served by U.S. mail on the following counsel for Defendant-Appellant Probationer and for Plaintiff-Appellee the Commonwealth of Massachusetts:

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