

Roger Williams University Law Review

Volume 21

Issue 3 Vol. 21: No. 3 (Summer 2016)

Article 3

Summer 2016

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Patricia A. Sullivan

United States District Court for the District of Rhode Island

Michael J. Primeau

Timothy K. Baldwin

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Recommended Citation

Sullivan, Patricia A.; Primeau, Michael J.; and Baldwin, Timothy K. (2016) "H.O.P.E. Court, Rhode Island's Federal Reentry Court: The First Year," *Roger Williams University Law Review*: Vol. 21: Iss. 3, Article 3.

Available at: http://docs.rwu.edu/rwu_LR/vol21/iss3/3

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Articles

H.O.P.E. Court, Rhode Island's Federal Reentry Court: The First Year

Magistrate Judge Patricia A. Sullivan, Michael J. Primeau
and Timothy K. Baldwin*

*“Hope we have as an anchor of the soul.”*¹

On November 6, 2014, the District of Rhode Island held the first public session of Rhode Island's federal reentry court. Titled Helping Offenders Prepare for reEntry (“H.O.P.E.”) Court,² it is

* Magistrate Judge Patricia A. Sullivan, United States District Court for the District of Rhode Island; Michael J. Primeau, Senior United States Probation Officer; Timothy K. Baldwin, Law Clerk to Magistrate Judge Sullivan. The views expressed herein are solely those of the authors. The authors would like to thank John Marshall, Molly Cote, and George West for their comments and suggestions on drafts of this Article.

1. *Hebrews* 6:19 (King James).

2. See *State Symbols, Origins of the Seal of the State of Rhode Island and Providence Plantations*, R.I. GOV'T, <https://www.ri.gov/facts/factsfigures.php> (last visited January 20, 2016). H.O.P.E. Court's name is not only an appropriate acronym for its function, but also is based on the adoption of “Hope” as the symbol of Rhode Island. See *id.* Since its earliest history, Rhode Island has made “Hope” part of the official Seal of the State. *Id.* The Rhode Island General Assembly first adopted a Seal for the colony containing an anchor with the word “Hope” above it on May 4, 1664. *Id.* The most coherent explanation as to the use of “Hope” comes from the historical notes of Howard M. Chapin published in *Illustrations Of The Seals, Arms And Flags Of Rhode Island*, printed by the Rhode Island Historical Society in 1930. *Id.* On pages 4 and 5 of this work, Mr. Chapin wrote that the words and emblems on the Seal were probably inspired by the biblical phrase “hope

522 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:521

an alternative approach to federal supervision³ that offers a creative blend of treatment and services, coupled with immediate rewards and sanctions, delivered swiftly in a non-adversarial setting, to address offender behavior, facilitate rehabilitation, and reduce recidivism, while also ensuring the safety of the community.⁴ By contrast with traditional supervision, during which a defendant is supervised solely by a probation officer, the H.O.P.E. Court participant⁵ attends regular court sessions every two weeks along with other participants and interacts with the entire H.O.P.E. Court team, which consists of a presiding judge, a Probation Officer, an Assistant Federal Defender, an Assistant United States Attorney, and a treatment provider.⁶ This regular oversight by a judicial officer permits early intervention so that problems are addressed before they develop into violations, ensuring a swift response to each failure by a participant.⁷ In addition, regular oversight allows the setting of incremental tasks to permit the participants to advance towards their individualized goals with the assistance of the H.O.P.E. Court team and the community partners that the team has recruited.⁸

H.O.P.E. Court differs dramatically from a traditional adversarial criminal proceeding in that the entire H.O.P.E. Court team is rooting for each participant to succeed. At H.O.P.E. Court sessions, the judge reviews and responds to the achievements and

we have as an anchor of the soul,” contained in Hebrews, Chapter 6, verses 18 and 19. *See id.*

3. *See* 18 U.S.C. §§ 3561(a), 3583(a) (2012). Under federal law, a defendant who has been found guilty of an offense may be sentenced to either probation (section 3561(a)) or supervised release (section 3583(a)). Probationary sentences are only available for defendants who do not serve prison time. *Id.* § 3561. Incarcerated defendants may receive sentences including supervised release after prison. *Id.* § 3583(b). Probation terms are capped at five years and are frequently shorter. *Id.* § 3561(c). Supervised release terms following prison are usually three years and the statutory cap is five years for most crimes. *Id.* § 3583(b).

4. U.S. DIST. COURT DIST. OF R.I., H.O.P.E., A REENTRY COURT 1 (2016) [hereinafter H.O.P.E., A REENTRY COURT], <http://www.rid.uscourts.gov/menu/generalinformation/hopcourt/HOPECourt.pdf>.

5. Vocabulary matters. In H.O.P.E. Court, individuals who may still be “defendants” or “offenders” in other contexts are referred to as “participants.” *See generally id.*

6. *Id.* at 4.

7. *Id.*

8. *Id.* at 21.

failures that occurred during the two weeks since the last in-court session.⁹ Successful completion requires fifty-two weeks of credit for positive behavior; credit is awarded for two weeks, one week, or no weeks after every bi-monthly court session.¹⁰ Participants who earn fifty-two weeks of credit and complete the other H.O.P.E. Court requirements receive up to a one-year reduction of the term of supervision.¹¹

This Article is a reflection on the H.O.P.E. Court program a year after its official launch, including some of the program's early challenges and the lessons learned from them; for example, the District of Rhode Island is small by any measure and its size has impacted both the design and implementation of H.O.P.E. Court. Part I sets the stage with an examination of the reasons that led the participating agencies to create a reentry court for this District, while Part II parses the data, nationally and in Rhode Island, to define the scope of the challenge. Part III details the structure of H.O.P.E. Court, including the nuts and bolts of how it operates. Part IV describes some of H.O.P.E. Court's early challenges, focusing on three areas: (1) how H.O.P.E. Court has addressed potential conflict of interest issues for attorneys dealing with participants from the defense perspective; (2) the challenges of recruitment and retention of participants complicated by the use of a single infrastructure for participants, whose needs and risks may be different; and (3) the development and implementation of flexible but consistent sanctions and rewards for participants.

I. WHY BOTHER?

The answer to “why bother?” may be derived from a look at the statistics.¹² The sentencing policies developed in the United States beginning in the 1970s have resulted in a phenomenon that appears to have peaked in 2008: labeled as “mass incarceration,”¹³

9. *Id.* at 1.

10. *Id.* at 8.

11. *Id.* at 9.

12. *See generally* LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 (2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>.

13. Transcript of President Barack Obama's Remarks at the NAACP Conference in Philadelphia, Pennsylvania (July 14, 2015), <https://www.white>

524 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:521

it involved the use of incarceration as a tool to combat crime, particularly drug-based crime and crime committed in minority communities.¹⁴ As a result, the United States has woken up in the twenty-first century to discover that over one percent of its total population is incarcerated, that the per person rate of incarceration vastly exceeds that in other first world countries, that some inner-city neighborhoods have been decimated by the loss to jail of a meaningful percentage of its inhabitants.¹⁵ The resulting breakdown of community and family has perpetuated the cycle into a second generation.¹⁶ While the reasons for this phenomenon are controversial,¹⁷ the problem remains. A surge of people, mostly men and mostly minority,¹⁸ are returning to their homes after serving the incarcerative portion of their sentence; at the moment of return, the sad statistical likelihood is that, whatever their intentions at the moment of release, many will fail and will return to jail, either for a violation of the terms of supervision or for a new crime, and begin the cycle of re-incarceration.¹⁹

The individuals who—perhaps deservedly, perhaps not—have

house.gov/the-press-office/2015/07/14/remarks-president-naacp-conference.

14. See *United States v. Bannister*, 786 F. Supp. 2d 617, 649–51 (E.D.N.Y. 2011); see also *United States v. Haynes*, 557 F. Supp. 2d 200, 203 (D. Mass. 2008).

15. See *Haynes*, 557 F. Supp. 2d at 203; Obama, *supra* note 13.

16. See *Bannister*, 786 F. Supp. 2d at 653. Prisoners' children are at "greater risk of diminished life chances and criminal involvement, and at a greater risk of incarceration as a result." *Id.* at 653 (quoting Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, DAEDALUS, Sommer 2010, at 8, 16) (internal quotation marks omitted). See also Saby Ghoshray, *America the Prison Nation: Melding Humanistic Jurisprudence with a Value-Centric Incarceration Model*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 313, 325–26 (2008).

17. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (New Press rev. ed. 2012) (providing a powerful look at mass incarceration with particular focus on racial disparity).

18. See *Bannister*, 786 F. Supp. 2d at 651–53; Richard L. Young, *Young: Federal Re-Entry Programs Continue to Benefit Community*, IND. LAW. (Jan. 13, 2016), <http://www.theindianalawyer.com/federal-re-entry-programs-continue-to-benefit-community/PARAMS/article/39193> (discussing the mass release of approximately 6000 federal inmates on November 1, 2015 because of a sentencing guideline amendment by the United States Sentencing Commission).

19. See Ghoshray, *supra* note 16, at 325 n.30.

been swept up by “mass incarceration” are coming back to communities that they may have left many years prior. They may face one or more or all of a host of potentially insurmountable barriers to success: (1) no home; (2) family relationships fractured or gone; (3) children who have become strangers or are inaccessible; (4) massive unpaid child support obligations; (5) access to a driver’s license blocked by the need to pay substantial fines to and to prepay for insurance; (6) no job, no work experience, and the felony stigma to make work more difficult to find; and (7) the same mental health and substance abuse issues that may have caused or affected behavior that led to incarceration.²⁰

As a result of these and other obstacles, the statistics regarding the likelihood of successful reentry are grim.²¹

In response to these stark challenges, what can only be described as a full-blown movement has sprung up to find solutions. As a result, reentry courts have become common in federal and state courts throughout the United States. Driven initially by the staggering cost of incarceration,²² the seed that has blossomed into H.O.P.E. Court is the result of grassroots efforts by courts across the nation, both state and federal, who have fashioned programs to assist these returning citizens to alter

20. See Bannister, 786 F. Supp. 2d at 653–54; Ghoshray, *supra* note 16, at 330–37 (discussing the collateral consequences of incarceration on individuals, families, and communities).

21. See *id.*

22. See Eduardo Porter, *In the U.S., Punishment Comes Before the Crimes*, N.Y. TIMES (Apr. 29, 2014), <http://www.nytimes.com/2014/04/30/business/economy/in-the-us-punishment-comes-before-the-crimes.html>. “The United States spent about \$80 billion in its system of jails and prisons in 2010—about \$260 for every resident of the nation. By contrast its budget for food stamps was \$227 a person.” *Id.* See also Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. 16711 (Mar. 18, 2013). In 2011, the average cost of incarceration of a federal inmate was \$28,893.40, while the average annual cost to confine an inmate in a Community Corrections Center was \$26,163. *Id.* Community corrections include probation and parole. “In 2012, the annual cost of placing an offender in a Bureau of Prisons institution (\$28,948.00 FY 2012) or federal residential reentry center (\$26,930.00 FY 2012) was roughly eight times the cost of placing the same offender under post-conviction supervision by a federal probation officer (\$3,347.41 FY 2012).” *Supervision Costs Significantly Less than Incarceration in Federal System*, U.S. CTS. (July 18, 2013), <http://www.uscourts.gov/news/2013/07/18/supervision-costs-significantly-less-incarceration-federal-system>.

526 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:521

the outcome predicted by the statistics so that a larger percentage of them can take their place in the community as law abiding citizens.²³ It must be noted that, like many of these programs, H.O.P.E. Court did not require new funding to get itself started; rather, it has deployed existing resources in a different way and looked to the community to find partners willing to assist the participants.²⁴

II. THE FEDERAL SUPERVISEE POPULATION IN THE DISTRICT OF RHODE ISLAND

The population of Rhode Island is just over one million people.²⁵ Because of Rhode Island's size, the staffing at the federal agencies that formed H.O.P.E. Court is also small. The District of Rhode Island has congressional authorization for three Article III judgeships and administrative authorization for two magistrate judges, while the Probation Office is staffed by five supervisory officers (including the Chief and Deputy Chief) and thirteen probation officers. The Rhode Island branch of the Public Defender's Office is staffed by just three attorneys. The U.S. Attorney's office has fifteen attorneys devoted to criminal matters. Similarly, Rhode Island's federal supervisee population is relatively small by comparison to other federal districts. However,

23. There are many outstanding federal programs, several of which have played a leadership role in publishing to assist other courts in creating reentry courts of their own. See, e.g., U.S. DIST. COURT E. DIST. OF N.Y., ALTERNATIVES TO INCARCERATION IN THE EASTERN DISTRICT OF NEW YORK: THE PRETRIAL OPPORTUNITY PROGRAM AND THE SPECIAL OPTIONS SERVICES PROGRAM (2015), https://img.nyed.uscourts.gov/files/local_rules/ATI.EDNY_SecondReport.Aug2015.pdf (providing a rich description of diversion programs in the Eastern District of New York and other jurisdictions); U.S. DIST. COURT DIST. OF MASS., U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS INTERAGENCY AGREEMENT FOR THE CREATION OF C.A.R.E. (COURT ASSISTED RECOVERY EFFORT) FOR HANDLING OF SUPERVISED RELEASE AND PROBATION VIOLATIONS (rev. 2006), <http://www.mad.uscourts.gov/outreach/pdf/CARE-Program.pdf>; see also Young, *supra* note 18.

24. The lack of funding has not been an impediment to this work. See Gerald P. Lopez, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 HASTINGS RACE & POVERTY L.J. 1, 94-96 (2014).

25. *QuickFacts: Rhode Island*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/44> (last visited Nov. 13, 2015). The United States Census Bureau estimates that Rhode Island's population, as of July 1, 2015, is 1,056,298. *Id.*

when the total number of persons per 100,000 under community supervision in 2014 is examined, Rhode Island's rate of individuals under community supervision (both state and federal) is substantially higher than the national average and is one of the highest of any state in the United States.²⁶ Rhode Island may be small, but mass incarceration has left it with a large problem.

Focusing on the federal data, according to the Probation Office, during 2015, on average, there were 435 federal defendants on post-conviction supervision in Rhode Island.²⁷ During the same period, on average, an additional seven defendants were supervised in Rhode Island (in community placement) but remained within the custody of the Bureau of Prisons ("BOP"); as these defendants leave BOP custody, they become potentially eligible for H.O.P.E. Court. Nationally, 20% of those on federal supervision are moderately or highly likely to recidivate.²⁸ Rhode Island's supervisees face a materially higher risk: In 2015, 32% of the total supervisee population (roughly one-third) was at a high risk of recidivating within a relatively short period of time.²⁹

III. HOW H.O.P.E. COURT WORKS

H.O.P.E. Court is a cooperative effort between the Court, the Probation Office, the Federal Defender's Office and the U.S. Attorney's Office.³⁰ H.O.P.E. Court held its first public session after a year-long planning process that culminated in an Interagency Agreement among the District of Rhode Island, the

26. DANIELLE KAEBLE, LAURA M. MARUSCHAK & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2014, app. tbl.3, at 16 (2015), <http://www.bjs.gov/content/pub/pdf/ppus14.pdf>.

27. *Id.*

28. This datum is based on the Post Conviction Risk Assessment ("PCRA"), which is described more fully later in this Article. See *infra* Part III.A.

29. These risk scores measure the statistical likelihood of either a revocation proceeding or rearrest during a defined period. According to the probation department experts in the District of Rhode Island, for the risk score assessed as part of the initial case plan, the period is either thirty or sixty days from release or sentencing (if sentenced on probation). Subsequent evaluations are done every six or twelve months depending on the risk level and predict risk for the next review period. The score is individualized to the defendant under evaluation and is translated into a risk level of low, low/moderate, moderate or high.

30. H.O.P.E., A REENTRY COURT, *supra* note 4, at 2.

528 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:521]

U.S. Attorney, U.S. Probation and the Federal Defender. It is modeled on programs in other federal courts, including those in the District of Massachusetts, the District of Maine, the Northern District of California and the Eastern District of Missouri.³¹ It was also developed based on observation of reentry court sessions in the Districts of Maine and Massachusetts and after a training conducted by the National Drug Court Institute, which was attended by the H.O.P.E. Court team.³²

This Section summarizes H.O.P.E. Court's general approach and the nuts and bolts of how it operates, as outlined in the Interagency Agreement and other policies that guide H.O.P.E. Court.³³

A. *The H.O.P.E. Court Approach*

The goals of H.O.P.E. Court are to reduce the number of revocation proceedings before district judges, improve participants' compliance with conditions of supervision, facilitate rehabilitation and decrease recidivism.³⁴ The program utilizes a philosophy adopted by drug courts, the efficacy of which is well established: Regular contact with the judge is instrumental in bringing about change.³⁵ Ordinarily, a judge's role ends after sentencing, but in a reentry court, the judge directly oversees the person's return to the community and uses the court's authority to impose graduated sanctions, give positive reinforcement and marshal resources to support the person's reintegration.³⁶ The judge's engagement in the ongoing process is a significant force in the positive outcome that includes better lives and decreased recidivism for participants, leading in turn to enhanced community safety.

31. *Id.*

32. *Id.*

33. *See generally* H.O.P.E., A REENTRY COURT, *supra* note 4.

34. *Id.*

35. National Institute of Drug Court data establish that the drug courts where the judge spent an average of three minutes or more speaking with a participant had 153% greater reductions in recidivism than courts where less than three minutes was consistently invested. Nat'l Drug Court Inst., *Best Practices in Drug Courts*, 8 DRUG CT. REV. (SPECIAL ISSUE) 1, 22 tbl.1 (2012).

36. NAT'L DRUG COURT INST., THE DRUG COURT JUDICIAL BENCHBOOK § 2.12, at 30–31, § 2.21, at 37, § 4.11, at 74 (Douglas B. Marlowe & William G. Meyer eds., 2011).

H.O.P.E. Court focuses on individuals who are at “high risk” to recidivate with a history of substance abuse but who are not true addicts. Risk level is determined by administration of the Post Conviction Risk Assessment (“PCRA”)³⁷, a scientific instrument developed by the Administrative Office of the United States Courts that uses evidence-based practices.³⁸ The PCRA, which is administered at or before the onset of supervision, is an actuarial risk and needs assessment tool developed from data collected on federal defendants and offenders.³⁹ It provides probation officers accurate information regarding predicted case outcomes (successful completion of supervision versus revocation), and identifies dynamic risk factors and criminal thinking patterns (which allows officers to target interventions at these areas to improve successful outcomes).⁴⁰ The PCRA score sets the statistical likelihood that a defendant is likely to recidivate.⁴¹ “High risk” for the purposes of H.O.P.E. Court means individuals who are beginning their terms of supervision with PCRA classifications of “Moderate” or “High.”⁴² “High risk” also means only “high risk related to re-offending on supervision” and does not mean “dangerous” or “a high risk to society.”⁴³

H.O.P.E. Court participants who meet the eligibility criteria must voluntarily agree to enter the program.⁴⁴ Some degree of failure is expected from the participants, particularly during the early stages of involvement. The individuals who are H.O.P.E. Court’s target for participation, the so-called “high-risk”

37. See generally Thomas H. Cohen & Scott W. VanBenschoten, *Does the Risk of Recidivism for Supervised Offenders Improve over Time? Examining Changes in the Dynamic Risk Characteristics for Offenders Under Federal Supervision*, 78 FED. PROB. 41 (2014); James L. Johnson et al., *The Construction and Validation of the Federal Post Conviction Risk Assessment (PCRA)*, 75 FED. PROB. (SPECIAL ISSUE) 16 (2011).

38. See generally ADMIN. OFFICE OF THE U.S. COURTS, OFFICE OF PROB. AND PRETRIAL SERVS., AN OVERVIEW OF THE FEDERAL POST CONVICTION RISK ASSESSMENT (2011), http://www.uscc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2014/PCRA_2011.pdf.

39. See *id.* at 1; Cohen & VanBenschoten, *supra* note 37; Johnson et al., *supra* note 37.

40. See generally ADMIN. OFFICE OF THE U.S. COURTS.

41. *Id.*

42. *Id.*

43. *Id.*

44. H.O.P.E., A REENTRY COURT, *supra* note 4, at 2.

530 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:521

population, have failed at many programs and have low expectations of themselves;⁴⁵ accordingly, the program is designed to encourage success and provide resources for success, even as failures occur. The program also addresses participant behavior with incentives and sanctions.⁴⁶ Sanctions are imposed with the goal of keeping the high-risk supervisees engaged in the treatment process until they achieve success.⁴⁷ A goal of this approach to supervision is that sanctions for violations are developed creatively to avoid disruption and to keep the participant in the community whenever possible.⁴⁸ Once successful behavior has been achieved over a time period of at least twelve months, data⁴⁹ suggest that the change is well-integrated and supported.

B. *The H.O.P.E. Court Team*

The H.O.P.E. Court team consists of a presiding judicial officer, a Probation Officer, an Assistant United States Attorney (“AUSA”), an Assistant Federal Public Defender (“AFPD”), and a treatment provider. The district judge who refers the participant and others from the team member agencies may also participate. The team also solicits input from a CJA panel attorney (who has an attorney-client relationship with the participant) whenever a participant’s circumstances call for legal advice. Continuity of the team members, particularly continuity of the presiding judicial officer, is important for H.O.P.E. Court.⁵⁰ To achieve continuity, each participating agency strives to have H.O.P.E. Court staffed by the same person with a designated back-up if a conflict arises. One magistrate judge has primary responsibility, with one district

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. See U.S. DIST. COURT N. DIST. OF CAL., INTERAGENCY AGREEMENT FOR THE CREATION OF A RE-ENTRY COURT 2 (2010), http://www.cand.uscourts.gov/filelibrary/487/Interagency_Agreement_For_Re-entry_Court_12-3-10.pdf.

50. See Nat’l Drug Court Inst., *supra* note 35, at 52. National Drug Court Institute data have established that the longer the same judge presides over a drug court, the better the outcomes; drug courts with the same presiding judicial officer for at least two years have higher participant graduation rates and lower outcome costs than courts with less experienced jurists. *Id.*

judge able to conduct the Court when she is not available.⁵¹ The H.O.P.E. Court team collaborates on all significant issues, including selecting the appropriate incentives or sanctions for participants and determining whether a participant has succeeded in or should be terminated from the program.⁵² The collaboration is non-adversarial, provided that the H.O.P.E. Court team brings the participants' CJA counsel into the process when serious sanctions are under consideration to protect the participants' due process rights.⁵³

To achieve a balance of sustaining judicial decorum while not intimidating participants, the judicial officer who presides at H.O.P.E. Court public sessions wears a robe and sits on the bench, but also permits a degree of informality so that participants are comfortable speaking about their achievements and missteps over the prior two weeks.⁵⁴ In addition, the presiding judge chairs the closed-door team meeting that precedes the public session and is the ultimate authority in the H.O.P.E. Court.⁵⁵ While the presiding judge works collaboratively with the other team members in assessing matters such as whether to accept an individual for participation, whether to terminate a participant from the Court, whether incentives or sanctions should be imposed, and whether a participant has succeeded in the program, the judge is the ultimate decision-maker on these and all other

51. See Barbara Meierhoefer, *Judge-Involved Supervision Programs in the Federal Courts: Summary of Findings from the Survey of Chief United States Probation Officers*, 75 FED. PROB. J. (SPECIAL ISSUE) 37, 41 (2011). Other districts have concluded, and the Federal Judicial Center ("FJC") has confirmed, that the presiding judge may be a magistrate judge. *Id.* In 2010, the FJC surveyed federal reentry courts and determined that of the 39 programs surveyed, 64 judges served as program judges, including 33 magistrate judges. *Id.* This Court performed its own national survey of federal reentry courts in July 2014 and identified at least forty out of 531 magistrate judges nationwide serving as program judges. These surveys show that the defendant's consent forms the basis for jurisdiction and for the magistrate judge's authority. All sanctions imposed on reentry court participants are voluntary and based on the participant's consent; to the extent the participant disagrees with the sanction, he or she may opt out of the reentry court and return to traditional supervised release or probation.

52. H.O.P.E., A REENTRY COURT, *supra* note 4, at 4.

53. *Id.*

54. *Id.* at 9.

55. *Id.* at 4.

532 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:521

matters involving H.O.P.E. Court.⁵⁶

The Probation Office staffs the H.O.P.E. Court with a Probation Officer and a Supervisory Officer.⁵⁷ The Probation Office identifies potential participants, interviews them, and makes an assessment regarding eligibility based on the objective criteria established by the team.⁵⁸ The Probation Officer also has responsibility for supervising all of the H.O.P.E. Court participants.⁵⁹ In addition to the Probation Officer's normal responsibilities for the participants (including day-to-day supervision, immediate interventions when necessary, and developing a case plan to address treatment, employment, education, finances, housing, supervisee objectives, and compliance with terms of supervision), the Probation Officer prepares an individual Progress Report for each participant and distributes it to team members at least twenty-four hours before each H.O.P.E. Court team meeting and public court session, which occur back-to-back on the same day.⁶⁰ The Officer actively participates in all team meetings and attends all court sessions, during which he actively participates when needed by addressing each participant during the colloquy with the judicial officer.⁶¹ The Probation Officer facilitates communication between treatment and service providers and the team.⁶² Upon request, the Probation Office may provide HIPAA protected medical records to the AFPD, or the participant's CJA attorney.⁶³ The Probation Officer encourages members of a participant's support network to attend Court hearings, including employers, teachers, mentors, family members, significant others, treatment specialists, and other service providers.⁶⁴ The Probation Office also maintains a separate clearly-identified section in a participant's file for all H.O.P.E. Court documents, including the participant's agreement to participate, progress reports, and other

56. *Id.*

57. *Id.* at 5.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

2016]

H.O.P.E. COURT

533

records relating to the H.O.P.E. Court program.⁶⁵

The AUSA on the H.O.P.E. Court team is focused on public safety and the interests of the community, with the emphasis during H.O.P.E. Court on collaboration with the AFPD and the Probation Officer to encourage the participant's success in the program because success means the return of a law-abiding citizen to family and community.⁶⁶ The AUSA actively participates in all team meetings, attends all court sessions, and comments on the participant's progress during the court session when appropriate.⁶⁷ During team meetings, the AUSA participates in the determination of appropriate rewards and sanctions for an individual, whether to admit an individual to the program and whether to terminate a participant from the program.⁶⁸ The AUSA is also involved in all decisions about program planning.⁶⁹

The AFPD is the voice of the defense perspective on the H.O.P.E. Court team, coming to every team meeting and every court session and making himself available to meet with participants at intake.⁷⁰ The AFPD actively participates in all team meetings, attends all court sessions and may comment on the participant's progress during the court session.⁷¹ His role is to encourage participants to succeed and to discourage bad decisions and disinterest in the program.⁷² The AFPD does not form an attorney-client relationship with the participants although he does talk to them about the program.⁷³ During intake discussions with participants, the AFPD explains that he will not have an attorney-client relationship and that a CJA attorney is available if the participant wishes to have a privileged discussion that will not be reported to the team.⁷⁴ During team meetings, the AFPD participates in the determination of appropriate rewards and sanctions, whether to admit an individual to the program and

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 6.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

534 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:521

whether to terminate a participant from the program.⁷⁵ The AFPD is also involved in all decisions about program planning.⁷⁶

The final member of the H.O.P.E. Court team is a treatment provider with expertise in mental health and substance abuse counseling.⁷⁷ The treatment provider actively participates in all team meetings to report on the participant's progress with treatment and attends all Court sessions.⁷⁸ At the team meetings, the treatment provider assists the team in the determination of appropriate rewards and sanctions for an individual, whether to admit an individual to the program and whether to terminate a participant from the program.⁷⁹ As requested by the Probation Office, the treatment provider also assesses the participants to determine what substance abuse and mental health treatment are required.⁸⁰ As appropriate (based on the determination of the Probation Office), the treatment provider also delivers services to the participants.⁸¹

The H.O.P.E. Court team is supported by a Deputy Clerk and a law clerk to the presiding judge, both of whom attend all team meetings and court sessions.⁸²

C. Eligibility Criteria and the Decision to Participate in H.O.P.E. Court

Candidates for the program are supervisees on supervised release or probation in the District of Rhode Island who are identified by the Probation Office as high risk based on the PCRA score⁸³ and who present with drug or alcohol abuse-related conditions as an additional risk factor.⁸⁴ The selection of a candidate appropriate for participation is initiated by the Probation Office, although other team members may suggest

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *See* Cohen & VanBenschoten, *supra* note 37; Johnson et al., *supra* note 37.

84. H.O.P.E., A REENTRY COURT, *supra* note 4, at 7.

candidates to the Probation Office.⁸⁵ If the candidate is found eligible and willing to participate, the Probation Office refers the candidate to the team for consideration.⁸⁶ The final decision whether the candidate may enter H.O.P.E. Court is made by the judicial officer.⁸⁷

Drug or alcohol abuse-related conditions mean an offender whose sentence included a special condition for drug or alcohol testing or treatment.⁸⁸ These are individuals whose history at sentencing suggested to the sentencing judge the need to set substance abuse conditions upon release from incarceration.⁸⁹ Importantly, however, H.O.P.E. Court is not staffed or structured to address the needs of individuals suffering from serious addiction.⁹⁰ An offender who has high needs due to intractable substance addiction but is not otherwise a high risk of recidivating is not an appropriate candidate for H.O.P.E. Court; such an individual needs treatment and not the other services and supports offered by H.O.P.E. Court.⁹¹ H.O.P.E. Court must balance its goal of serving the maximum number of participants, against the reality that mixing true drug addicts with non-addicts, and low risk participants with those who are high risk can undermine the integrity of the program and lead to failure. To facilitate these decisions, H.O.P.E. Court's selection process includes a review by the Probation Office of any available assessment of the individual's drug and alcohol use from the Bureau of Prisons, the treatment provider or a halfway house; if

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See* 18 U.S.C. § 3583(d) (2012). General conditions are set by statute and include “the defendant [shall] not commit another Federal, State, or local crime during the term of supervision . . . unlawfully possess a controlled substance . . . [and] refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance.” *Id.* The federal sentencing court also can set standard and special conditions, provided they involve no greater deprivation of liberty than reasonably necessary (among other factors). *Id.* § 3583(d)(2).

90. H.O.P.E., A REENTRY COURT, *supra* note 4, at 7.

91. National Drug Court data suggest that it is more harmful than beneficial to mix the high needs supervisee with the high risk supervisee. Nat'l Drug Court Inst., *supra* note 35, at 7.

536 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:521

one is not available, in the discretion of Probation, one may be procured.

Offenders with a history of violence and firearms are not automatically excluded from H.O.P.E. Court. Offenders with pending federal violation charges⁹² are not automatically excluded; the decision to exclude is made on a case-by-case basis depending on the alleged conduct and surrounding circumstances.⁹³ However, offenders with pending state charges are not automatically excluded but likely will not be able to participate until the pending charges are resolved.⁹⁴ Because the positive group dynamic among the participants and the team is a critical component of H.O.P.E. Court, individuals with Axis II personality disorders, as defined in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (“DSM-IV”), are presumptively excluded.⁹⁵ Screening for Axis II personality disorders may occur through referral by Probation for assessment by a licensed mental health practitioner.⁹⁶ Finally, individuals convicted of arson and those subject to SORNA reporting requirements are excluded.⁹⁷ Because entry into the program is determined by these objective criteria, the recommendation of a district judge to enroll a candidate in H.O.P.E. Court does not guarantee a candidate’s eligibility for, or admission into, the program.⁹⁸

H.O.P.E. Court strives to identify potential participants as early as possible following the release from incarceration (for example by working with individuals living in the community but still in BOP custody prior to commencement of supervision).⁹⁹ If possible, potential participants are encouraged or ordered to come to a session of H.O.P.E. Court to observe.¹⁰⁰ While participation

92. In certain circumstances, defendants facing pending federal violation charges may either avoid the violation or receive a less severe sentence based on the intent to enter H.O.P.E. Court. See H.O.P.E., A REENTRY COURT, *supra* note 4, at 7–8 (describing procedures for transitioning a defendant with a pending violation into H.O.P.E. Court).

93. *Id.* at 7.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 8.

99. *Id.* at 7.

100. The potential pool of participants includes individuals still in the

in the program immediately upon reentry is optimal, a defendant can change course and decide to participate in the program at any time during the term of supervision.¹⁰¹

Once an individual is identified as meeting the eligibility criteria and is interested in participation, the Probation Officer files a petition with the appropriate district judge to refer the participant to H.O.P.E. Court.¹⁰² If the district judge decides to refer the individual to H.O.P.E. Court, the person officially becomes eligible. In general, the district judge refers the potential participant to H.O.P.E. Court with the understanding that if the person successfully completes H.O.P.E. Court, he or she will receive a year reduction off his or her supervisory sentence, provided that if less than one year is remaining on the participant's term, the sentence will be reduced only by the amount of time remaining.¹⁰³ However, the sentencing district judge always retains the discretion to alter this incentive either at entry into H.O.P.E. Court or as the participant proceeds through the program.¹⁰⁴

Once the referral has been made by the district judge, the potential participant must confer, in a confidential attorney-client communication, with a CJA attorney or any other attorney as he or she may choose, in addition to conferring on a non-privileged basis with the AFPD.¹⁰⁵ The goal of this conference is to ensure that the potential participant clearly understands the program, its requirements, including the system of rewards and sanctions.¹⁰⁶ The final decision to participate is made voluntarily by the individual.¹⁰⁷ If after conferring with the AFPD and his or her own CJA attorney, the participant still wishes to proceed, he or she signs a participation contract acknowledging his or her

custody of the Bureau of Prisons who are in the community at a halfway house or on federal location monitoring who will soon be transitioning to supervised release. See 18 U.S.C. § 3624(c) (2012) (allowing federal prisoners to serve up to the last twelve months of their term on "pre-release custody" at a community correctional facility to aid reentry).

101. H.O.P.E., A REENTRY COURT, *supra* note 4, at 8.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

538 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:521

agreement to participate in lieu of continuing in traditional supervision.¹⁰⁸

By signing the participation contract,¹⁰⁹ the potential participant consents to participate in the program, seek employment or education, and abide by the sanctions available to the H.O.P.E. Court judge.¹¹⁰ The contract also informs the participants that any information shared in treatment or to the AFPD will be shared with other H.O.P.E. Court team members.¹¹¹ Participants further agree to allow the Probation Office to check their criminal histories for up to ten years after they successfully complete the program to facilitate an evaluation of the program's effectiveness.¹¹²

The participation contract makes clear that participants can withdraw their consent to participate in H.O.P.E. Court at any time and return to traditional supervision.¹¹³ Importantly, conduct that is sanctioned in the context of H.O.P.E. Court—by a sanction that is imposed by the H.O.P.E. Court team and accepted by the participant—may not be the subject of any revocation hearing or criminal prosecution.¹¹⁴ Relatedly, statements made in H.O.P.E. Court sessions and information disclosed as a requirement of participating in H.O.P.E. Court will not be used in a separate revocation proceeding or criminal prosecution.¹¹⁵ However, such information may be used to conduct an independent investigation; evidence developed as a result of such an investigation may be used in any separate proceeding, including a separate federal revocation proceeding or criminal prosecution.¹¹⁶ The participation contract informs participants that they may be terminated from the program for specified conduct, such as the commission of a crime.¹¹⁷ Termination is not considered a H.O.P.E. Court sanction, and the participant may

108. *Id.*

109. *See id.* exhibit A, at 13. This contract is subject to alteration in the discretion of the district judge. *Id.* n.13.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 9–10.

115. *Id.*

116. *Id.* at 10.

117. *Id.* exhibit A, at 13.

2016]

H.O.P.E. COURT

539

face revocation proceedings or criminal prosecution if a sufficiently serious violation preceded or triggered the termination.¹¹⁸ If a participant's conduct is not sanctioned through H.O.P.E. Court, the participation contract makes clear that such conduct may be used as the basis for revocation proceedings or criminal prosecution.¹¹⁹

D. The H.O.P.E. Court in Action

The total number of participants in H.O.P.E. Court is capped at ten at any point in time. If there are fewer spaces available in the program than eligible candidates, participants will be selected randomly from the pool of eligible candidates who have agreed to participate in the program. Probation will maintain a waiting list so that eligible participants may join the program if spaces become available.

Successful completion requires fifty-two weeks of positive credit. At each sitting of H.O.P.E. Court, which occurs every two weeks, the judge (based on input from the team) awards credit to each participant who has achieved a satisfactory performance for the preceding two-week period. A participant can earn credit for two weeks, one week or no weeks. To successfully complete the program, a participant also needs a minimum of three months of gainful activity, such as employment, and complete sobriety for three months during the final phase of the program.

The progress of participants through the H.O.P.E. Court Program is broken into four phases: (1) Post-release/Initial Reentry; (2) Stabilization; (3) Understanding and Taking Responsibility; and (4) Successful Completion/Maintenance. Each phase has a specified purpose with distinct, achievable goals that are consistent with the stages of reentry. To move from one phase to the next, a participant must earn thirteen weeks of credit in H.O.P.E. Court and complete the specific requirements for each phase. When a participant transitions from one phase to the next, the presiding judge presents the participant with a certificate signed by each member of the H.O.P.E. Court team. Every certificate is emblazoned with the following quotation from Abraham Lincoln: "Always bear in mind that your own resolution

118. *Id.* at 10–11.

119. *Id.*

540 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:521

to succeed is more important than any other”¹²⁰ The judge also comes down from the bench to shake hands with and congratulate the participant. At the end of each phase of the H.O.P.E. Court program, the participants must complete a writing assignment that prompts reflection on past criminal activity and encourages living a responsible, sober and law-abiding lifestyle. The participant typically reads the writing assignment out loud in open court, although the presiding judge does not force the participant to read if he or she would be uncomfortable.

During the Post-Release/Initial Reentry Phase, the participant works towards the achievement of a stable residence, the initiation of necessary substance abuse or mental health treatment, employment or another analogous activity and the restoration of community/family ties broken by the period of incarceration. During Phase One, the participant strives to identify barriers to success and to begin to form a plan to eliminate those barriers. The participant meets with the Probation Officer twice per week, in addition to attending the H.O.P.E. Court public sessions, and takes two drug tests per week or as deemed necessary.

During the Stabilization Phase, the participant is asked to demonstrate a commitment to living a substance free, law-abiding lifestyle through program compliance and continued commitment to goals. The participant also begins to identify and understand the adverse consequences of drug and alcohol use, as well as cognitive distortions that lead to criminal behavior. The participant becomes involved in a life skills educational or employment program, or secures a job. Phase Two also requires participants to begin a cognitive behavioral therapy program called Moral Reconciliation Therapy (“MRT”).¹²¹ MRT addresses

120. CHARLES B. STROZIER, *LINCOLN’S QUEST FOR UNION: PUBLIC AND PRIVATE MEANINGS* 140 (1982).

121. Chris Hansen, *Cognitive-Behavioral Interventions: Where They Come from and What They Do*, 72 *FED. PROB.* 43, 46 (2008).

[Moral Reconciliation Therapy (MRT)] was developed by Little and Robinson (1988) in the mid-1980s in a prison-based Therapeutic Community (TC) program in Tennessee MRT incorporates cognitive elements into a behavioral-based program that highlights moral reasoning The goals of MRT are to enhance the social, moral, and behavioral deficits of offenders . . . The program consists of workbooks designed for the specific types of client and particular

criminal thinking in a group therapy setting and requires participants to successfully complete twelve steps.¹²² During Phase Two, the participant's meetings with the Probation Officer are reduced to once per week and one drug test or as deemed necessary.

During the Understanding and Taking Responsibility Phase, participants are encouraged to develop a pro-social support network for making life decisions, to complete a life skills', employment or educational program and secure employment. Participants complete MRT in Phase Three and address issues such as family and children, finances, and education. Participants are not required to meet with the Probation Officer except as needed in Phase Three, unless they are unemployed, in which case they meet with the Probation Officer weekly. Drug testing is further reduced to a color code program that is less frequent than the testing in Phases One and Two.

During the Successful Completion/Maintenance Phase, the participant is no longer required to attend every H.O.P.E. Court session; he or she comes once a month instead of every two weeks. The only specified goal during Phase Four is to develop a comprehensive relapse prevention/safety plan and identify long-term recovery needs. The participant also continues with reduced drug testing under a color code program. There is one rigid requirement during Phase Four: the participant must maintain sobriety for ninety days. If a participant fails a drug test, or misses a drug test and was not excused, the clock restarts and the participant must achieve ninety days from that date to successfully complete H.O.P.E. Court.

Once the team is satisfied that a participant has successfully completed all of the requirements of the program, Probation makes a report to the sentencing district judge, while the AUSA makes a formal motion to reduce the sentence by the elimination of up to one year of supervised release. If the motion is granted, the sentencing judge (the original sentencing judge if possible) will attend the next H.O.P.E. Court session to memorialize the

program characteristics . . . MRT is a 12-step process with four optional steps and usually takes 14 to 16 sessions.

Id.

122. *Id.*

542 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:521

reduction of the sentence and to congratulate the participant, now referred to as a H.O.P.E. Court graduate. The graduate resumes traditional supervision for whatever period remains until completion. The Probation Officer assigned to the H.O.P.E. Court may continue as the supervisor for the graduate in the discretion of Probation.

Court sessions are bi-weekly at a fixed time. Immediately before each public session, the H.O.P.E. Court team conducts a confidential staff meeting for one hour in a closed session where personal, mental health and other similar information is candidly discussed. At the meeting, the team members review the confidential progress reports of the participants and make a determination whether each participant has achieved a satisfactory performance, whether rewards are appropriate, whether sanctions should be imposed and whether there are other issues appropriate for discussion in open court. All team members speak candidly in the team meeting, with the goal of reaching consensus so that the public session of H.O.P.E. Court is non-adversarial in tone.

The participants attend the public H.O.P.E. Court session immediately following the team meeting. The public session is capped at one hour; the courtroom is open to the public and the proceedings are recorded, although the atmosphere is more informal than a normal criminal hearing. All participants are required to attend the entire session so that everyone sees the presiding judge encouraging positive behavior, affirming the value of individual efforts, and sanctioning any non-compliance with the program's goals. Family members, mentors, employers, teachers, service providers, and other persons in a participant's support network are encouraged to attend. All participants are encouraged to dress appropriately for a court setting, provided that participants who are dressed for work may wear their workplace attire.

The courtroom is set up for the participants to sit together in the jury box. The H.O.P.E. Court team sits together across the courtroom directly facing the participants. The presiding judge stays on the bench. When a participant addresses the Court, the participant leaves the jury box and stands at a podium placed close to the Deputy Clerk and the presiding judge. A court security officer is present at all H.O.P.E. Court sessions, and a

2016]

H.O.P.E. COURT

543

Deputy United States Marshal is present at the request of the judge if it is expected that a participant will be taken into custody as a sanction. When a participant is taken into custody as a sanction, the participant is handcuffed in open court at the beginning of the session before the other participants address the presiding judge.

Each participant addresses the Court individually for at least three, but no more than ten minutes. Any rewards or sanctions are imposed during the participant's colloquy with the judicial officer. The order of speaking is set flexibly; for example, one approach is to have participants who are doing well go first to set a positive example. At the conclusion of the public session, which is held from 11:30 AM to 12:30 PM, food and snacks are made available to participants at the Probation Office, which is located in the same building as the courtroom.

The primary reward for participation in the program is the opportunity to obtain a modification of the supervised release component of the original sentence by eliminating up to a year of supervision. Other rewards and incentives, such as successful completion certificates and special privileges that reduce the amount of supervision, are also used. In addition, while not characterized as "rewards," through the resources available to Probation and from the many community partners who offer volunteer services,¹²³ participants obtain significant assistance with education, job readiness training, securing employment, solving housing problems, procuring a driver's license, getting visitation rights with children and much more.

Sanctions available to the H.O.P.E. Court team include those that fall within the statutory authority of the Probation Office under the standard conditions of supervised release, such as increased reporting or more frequent drug testing.¹²⁴ One of the most effective sanctions is to refuse credit toward the fifty-two

123. To illustrate, through the Rogers Williams University Law School's Criminal Justice Clinic and Pro-Bono Collaborative, attorneys and law students who volunteer their time are available to assist participants with overcoming roadblocks ranging from those such as custody disputes, child support, resolving traffic court barriers to a driver's license and addressing long forgotten warrants.

124. For statutorily available probation sanctions, see 18 U.S.C. § 3583(d), (e), (g) (2012), H.O.P.E. Court will continue to use these statutory sanctions, in addition to more moderate sanctions.

weeks of the program for any one or two-week period during which the participant has committed an infraction. Other such sanctions include making a public apology or acknowledgement of conduct in front of the group and writing an essay on the consequences of the conduct.¹²⁵ Participants may also be asked to accept imposition of a curfew, community service, home or community confinement or imprisonment up to ten days.¹²⁶

Participants retain the right to refuse the sanction. The decision to refuse to accept a sanction can form the basis for termination from H.O.P.E. Court, and conduct not sanctioned through H.O.P.E. Court may form the basis for a revocation petition filed by Probation with the sentencing judge or for criminal prosecution.¹²⁷ In that event, the judge, AFPD, and AUSA who participated as part of H.O.P.E. Court that made the decision to terminate will not participate in the subsequent revocation or prosecution.¹²⁸

IV. CHALLENGES AND ISSUES FACING H.O.P.E. COURT

A. *The Potential Conflict of Interest Facing the Defense Attorney*

One of the fundamental features of H.O.P.E. Court is the paradigm shift from an adversarial model to a model based on consensus reached by a team. The AFPD is the team participant most challenged by the potential conflict of interest that results from what, in effect, become dual roles—that of advocate for the defense perspective but also that of guardian of public safety and the long-term interest of the participant in succeeding in the community.¹²⁹ This potential conflict poses difficult issues for a

125. See NAT'L DRUG COURT INST., *supra* note 36, § 7.6, at 146.

126. H.O.P.E. Court caps the sanction of jail at three consecutive days, with a cap of ten days in jail in total over the course of entire program. H.O.P.E. Court does not resort to jail frequently. During its first year in operation, it has only once imposed a jail sentence of more than one day. The data from the National Institute of Drug Courts have established that the effectiveness of a jail sentence begins to diminish dramatically after three to five days of incarceration. Nat'l Drug Court Inst., *supra* note 35, at 33. In addition, a jail term that interrupts the participant's ability to work or care for family undermines the goals the program is trying to achieve.

127. H.O.P.E., A REENTRY COURT, *supra* note 4, at 11.

128. *Id.*

129. See Michael Tobin, *Participation of Defense Attorneys in Drug Courts*, 8 DRUG CT. REV. (SPECIAL ISSUE) 96, 96–97 (2012).

defense lawyer working with a reentry court. Not all legal commentators agree,¹³⁰ but several have argued that a defense attorney is put in an impossible position when part of a reentry court “team” in addition to serving as a participant’s attorney.¹³¹ As one commentator has noted:

The traditional adversarial defender would never consider disclosing client information to the court, the prosecutor, or others when it would be detrimental to the client’s interests, when it would reveal client confidences or secrets, or before full discussion with and consent by the client. However, a lawyer who is a specialty court team member may disclose information to the court without the defendant’s consent because, unlike in the traditional adversarial model, specialty court principles put the client’s best interests before his stated interests. In this model, honesty and openness on the part of the defender are thought of as necessary to the client’s treatment or addiction recovery.

Staffing conferences are a setting in which the defender is simultaneously expected to wear the hats of the defendant’s advocate and the court’s representative. This is an impossible task for many lawyers. . . .

. . . .

Even if these meetings do not force the defender to reveal privileged client information, her participation still raises ethical concerns regarding the defender’s proper role. Different groups or constituencies, including the court,

130. See, e.g., Ben Kempinen, *Problem-Solving Courts and the Defense Function: The Wisconsin Experience*, 62 HASTINGS L.J. 1349, 1351 (2011) (opining that one major source of criticism among defense attorneys is “that only traditional adversary processes adequately protect a defendant’s interests . . . [and] that effective representation can be achieved only by the aggressive assertion of procedural protections.”); William H. Simon, *Criminal Defenders and Community Justice: The Drug Court Example*, 40 AM. CRIM. L. REV. 1595, 1605–607 (2003); Tobin, *supra* note 129, at 96–130.

131. See, e.g., Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 93–118 (2007); Mae C. Quinn, *Whose Team Am I on Anyway? Musings of A Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 72–73 (2001).

the community, and the defendant, have differing expectations which may pull the defender in multiple directions. The court and other team members might expect that the attorney, as a member of the specialty court team, will act as a representative of the court and explain the court processes to community members. Our hypothetical public defender might have to extol the virtues of the specialty court program even though it does not work for certain clients. . . .

On the other hand, the defender's duty to the specialty court implies that the defender could not use information gained as a court representative for the defendant's benefit if doing so might be detrimental to the court's goals or operations. . . .¹³²

To address the potential conflict of interest, the H.O.P.E. Court team developed a model where the AFPD serves as the voice of the defense perspective but does not have an attorney-client relationship with the participant; the confidential attorney advice comes from a CJA¹³³ attorney appointed for that purpose. As far as H.O.P.E. Court is aware, the split model—an AFPD on the reentry court team and a CJA attorney assigned to each participant—is unique in federal reentry courts.

Pursuant to this model, a CJA panel attorney is appointed for every potential participant who has received approval to enter H.O.P.E. Court from the district judge. At that point in the intake process, every participant must meet and talk to both the AFPD and the CJA attorney in connection with the decision to sign the contract to enter H.O.P.E. Court. The participants are also told that the CJA attorney is available to them in the future if they want to talk to someone about an issue that they want to keep confidential. Otherwise, they can talk to the AFPD, who will report on the conversation to the team. The CJA panel attorney does not attend every H.O.P.E. Court session or team meeting.

132. Meekins, *supra* note 131, at 103–05 (footnotes omitted).

133. “The [Criminal Justice Act] was enacted to help protect the rights of indigent defendants by ensuring that they are provided adequate legal representation. Toward this end, the CJA provides legal fees to attorneys appointed pursuant to the Act, in order to alleviate the burden of representing an indigent defendant.” *United States v. Calle*, 178 F. Supp. 2d 309, 310 (E.D.N.Y. 2001) (citations omitted).

2016]

H.O.P.E. COURT

547

Rather, he or she attends only to the extent required by a circumstance where the client has engaged in conduct that may result in the imposition of a sanction that impinges liberty (such as a period of incarceration or home confinement with location monitoring). In that event, Probation alerts the CJA attorney of the need to be available and the attorney advises the client in an attorney-client communication regarding acceptance of the sanction. If necessary, the CJA attorney may, in her/his discretion based on the needs of the client, attend the portion of the team meeting at which his/her client is discussed and participate in the discussion of what sanction may be appropriate.

To assure continuity, the H.O.P.E. Court team works with two CJA attorneys appointed by the Chief Judge of the District for that purpose. They were chosen after two informational sessions for the entire District of Rhode Island's CJA panel. CJA panel attorneys were encouraged to apply to become the CJA attorney for H.O.P.E. Court participants. As a result of this selection process, H.O.P.E. Court is serviced by two CJA attorneys who take new clients on a rotating basis, with each CJA attorney capable of filling in for the other if necessary.

The two CJA attorneys assigned to H.O.P.E. Court have advised that their experience confirms that the existence of an attorney-client relationship is essential for participants in H.O.P.E. Court and that tricky conflicts would arise if the same attorney was both a member of the H.O.P.E. Court's team and the participant's attorney. They agree that their participation in the conference regarding the decision to participate is vital because the conference is shielded by the attorney-client privilege and the participant understands that someone is exclusively in his or her corner as this decision is made. The CJA attorneys also emphasized the importance of allowing the participant to discuss his/her options in an attorney-client setting when deciding whether to accept a liberty-impinging H.O.P.E. Court sanction. Moreover, as one CJA attorney explained, if a participant engages in conduct that may constitute the commission of a new crime while in H.O.P.E. Court, it would be against the participant's interest to reveal that information to a member of the H.O.P.E. Court team, yet discussion of the issue with a legal advisor is essential. The CJA attorneys observed that the dual structure creates the opportunity for advocacy for both the client's short-

term desires and real long-term interests, in that the CJA attorney, as a defense attorney, may be ethically obliged to act for the client, even though the client's behaviors may be frustratingly contrary to the client's real best interests (such as a client who reverts to substance abuse and asks his attorney to advocate for no residential treatment), while the AFPD can look at the participant's long-term interests (and press for residential treatment if it is medically indicated).

In general, the CJA attorneys participating in H.O.P.E. Court concur that the dual structure for defense counsel is working well. Moreover, over the first year of H.O.P.E. Court's existence, they have found that H.O.P.E. Court presents an interesting and challenging dynamic for a defense attorney that is very different from the familiar regular adversarial setting.

B. H.O.P.E. Court Recruitment Challenges and Using the Infrastructure for Different Participant Populations

The small size of the District of Rhode Island has brought unique challenges to the structuring of a program that efficiently is able to reach and serve the largest possible constituency while remaining consistent and effective. The maximum number of active participants for H.O.P.E. Court is ten. In practice, the program filled slowly during the first year, drawing not only from newly released individuals but also from defendants who had been on supervised release for a period of time. H.O.P.E. Court's early experience suggests that recruitment and retention of participants present a range of challenges to be addressed as the program goes forward.

One of the hallmarks of H.O.P.E. Court is that participants must voluntarily agree to enter the program. H.O.P.E. Court encountered several roadblocks in encouraging participants. First, on average, the pool is small—only seven federal defendants are released from BOP custody in Rhode Island each month. Second, many defendants coming off long sentences have a keen distrust of all government actors, including defense attorneys, and do not want to sign up for a program when they believe no one on the H.O.P.E. Court team has their best interests in mind. Third, potential participants are encouraged to observe public H.O.P.E. Court sessions, and may conclude that the program will be too much work, particularly where they are optimistic that they can

2016]

H.O.P.E. COURT

549

beat the odds and succeed without the supports available through H.O.P.E. Court. Moreover, if a prospective participant attends a public session, the observation of the imposition of a sanction may be off-putting because it obscures all of the benefits the same individual has enjoyed as a H.O.P.E. Court participant.

To address recruiting concerns and broaden its reach, after six months of operation, H.O.P.E. Court made two important changes to its scope. First, H.O.P.E. Court eligibility was integrated into the Presentence Investigation Recommendation made to the sentencing judge. Second, H.O.P.E. Court eligibility was expanded to supervised release and probation violators. The H.O.P.E. Court team made these changes to give additional options for the district judges at initial and revocation sentencing hearings.

Turning first to the integration of H.O.P.E. Court eligibility into the presentence investigation recommendation, the H.O.P.E. Court team developed a new policy for the Probation Office to amend the presentence recommendation to address H.O.P.E. Court eligibility. Probation advises the Court whether the defendant appears eligible; in the recommendation, if the defendant is found to be eligible, the Probation Office will either recommend or not recommend the defendant for H.O.P.E. Court. Where the defendant is eligible for recommendation, the officer discusses the H.O.P.E. Court recommendation with the parties. If there is consensus, the Probation Office recommends, and the sentencing judge imposes, the following special conditions:

The defendant shall participate in a manualized behavioral program as directed by the USPO. Such program may include group sessions led by a counselor or participation in a program administered by the USPO.

The court also makes a judicial recommendation that the defendant consider participation in the H.O.P.E. Court program.

This change accomplishes three important things for H.O.P.E. Court. First, it identifies potential candidates much earlier in the process. Second, the Court and parties will all know of the defendant's eligibility for the program, can have discussions about the defendant's interest in the program, and can positively factor in such interest into the process of reaching the final sentence.

550 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:521

Third, by adding the special condition for a “manualized behavioral program,”¹³⁴ the Court can address significant criminogenic needs (criminal thinking errors) for a high risk defendant, regardless of whether the defendant ultimately enters or completes H.O.P.E. Court. Doing so significantly increases the defendant’s chances for success in the community.¹³⁵ As a practical matter, it also requires that the defendant complete a significant part of the H.O.P.E. Court requirements because completion of MRT is the primary requirement for Phases II and III of the H.O.P.E. Court program. Seen from this perspective, the MRT condition preserves the voluntary nature of the decision to participate in H.O.P.E. Court, while making it more likely that the defendant will opt into the program to complete the remaining requirements and receive all the other benefits the program offers, including the one-year reduction of the time spent in supervision.

The second significant change made to H.O.P.E. Court was to allow eligible and willing Probation and Supervised Release offenders in violation status (that is, pending a 12(C) violation under the Federal Rules of Criminal Procedure) to consider participation in the H.O.P.E. Court program. For these defendants, the District Judge orders a final sentence (in this case, a revocation sentence) that includes a period of supervised release with conditions to consider H.O.P.E. Court and mandatory participation in MRT as cognitive behavioral therapy to address criminal thinking. The intention of this change is to give the District Judge more options at revocation sentencing hearings, with further justification or confidence to order either non-custodial or below guideline sentences, while increasing the number of those who will participate and benefit from the H.O.P.E. Court program.

C. *The Challenge of Consistent Sanctions and Rewards*

H.O.P.E. Court strives to be both flexible and consistent in issuing swift sanctions and rewards. To address this issue, the

134. This refers to MRT that has been incorporated into Phases II and III of the H.O.P.E. Court program. See Hansen, *supra* note 121. Although the capacity to do this training was developed in connection with the development of H.O.P.E. Court, the Probation Office includes non-H.O.P.E. Court participants in MRT groups.

135. See Hansen, *supra* note 121, at 43, 46.

H.O.P.E. Court team has developed a framework for sanctions/rewards. As part of the planning process, the H.O.P.E. Court team looked to existing sanctions guidance from the National Drug Court Institute, the National Association of Drug Court Professionals, and sanction and rewards schedules from other federal and state reentry and drug courts.¹³⁶

To arrive at specific and workable sanctions and rewards, the H.O.P.E. Court team developed general principles to guide the decision. First, the team considers the magnitude of rewards and sanctions. Rewards are most effective at the low to moderate range while sanctions are most effective within the moderate range.¹³⁷ H.O.P.E. Court uses a wide and creative range of moderate rewards and sanctions, which can be ratcheted upward or downward in response to behaviors. Sanctions and rewards are also administered on an escalating or graduated basis, with the magnitude increasing progressively with each successive infraction or accomplishment. Second, the team tracks the relationship between sanctions and rewards. Positive reinforcement is three times more likely to produce sustained behavior modification than a sanction; some studies suggest that rewards should outnumber sanctions by a four-to-one ratio.¹³⁸ Third, the team sets realistic goals; proximal behaviors that participants are capable of performing are distinguished from distal behaviors that they are not yet capable of performing.¹³⁹ Fourth, the team strives to maintain a sense of fairness from the participants' perspective. Finally, the team remains cognizant that H.O.P.E. Court is a form of supervision. Discretionary supervised release conditions should take into account the sentencing factors for supervised release and Sentencing Commission policy statements. Sanctions should be reasonably related to the: (1) offense, history and characteristics; (2) need for adequate deterrence; (3) need to protect the public from further

136. See, e.g., U.S. DIST. COURT DIST. OF MASS., *supra* note 23; Nat'l Drug Court Inst., *supra* note 33.

137. DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST., DRUG COURT PRACTITIONER FACT SHEET BEHAVIOR MODIFICATION 101 FOR DRUG COURTS: MAKING THE MOST OF INCENTIVES AND SANCTIONS 3-4 (2012), <http://www.ndci.org/sites/default/files/BehaviorModification101forDrugCourts.pdf>.

138. *Id.* at 2.

139. *Id.*

552 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:521

crimes; and (4) need to provide the defendant with treatment.¹⁴⁰ Thus, sanctions may not involve a greater deprivation of liberty than is reasonably necessary to achieve the goals of deterrence, incapacitation, and rehabilitation.¹⁴¹

Turning to the nuts and bolts of rewards, behaviors that warrant positive reinforcement run the gamut from fulfilling reporting requirements, seeking and achieving employment, attending mental health and drug use treatment, working towards more education, and engaging in pro-social acts such as developing pro-social networks. The H.O.P.E. Court team divides rewards into three categories of low, moderate and high. Low-level rewards include verbal praise, applause in open court, and awarding weeks' credit towards completion of H.O.P.E. Court. Examples of moderate rewards include reduced drug testing and supervision, travel privileges and reduced court appearances. High-level rewards include phase completion certificates signed by all team members (along with a \$15 gift card), successful completion ceremonies, one year off supervised release or probation, and ambassadorships to represent H.O.P.E. Court after successful completion of the program.

Factors that influence the H.O.P.E. Court team's selection of a sanction include the seriousness of the violation, the number of violations, the amount of time the participant has remained compliant, and whether the participant disclosed the violation voluntarily. Dishonesty will result in enhanced sanctions, and repeat violations will generally result in more serious sanctions. Specific behaviors that warrant sanctions include a missed or failed drug test, missing treatment without rescheduling, failing to seek employment, training or education, contra-social acts such as putting oneself in high risk situations, and new arrests or committing new crimes. Participants can also be sanctioned for not completing H.O.P.E. Court writing assignments or other goals assigned by the team. Like the rewards, H.O.P.E. Court sanctions are organized by low, moderate, or high. Examples of low sanctions include a verbal admonishment from the presiding judge, a public (sometimes written) apology, or the establishment

140. See 18 U.S.C. §§ 3553, 3583 (2012); *Tapia v. United States*, 564 U.S. 319, 325 (2011); *United States v. Johnson*, 756 F.3d 532, 539 (7th Cir. 2014).

141. See *id.*

2016]

H.O.P.E. COURT

553

of a deadline for a task. Moderate sanctions include loss of a week or two week's credit towards completion of H.O.P.E. Court, increased reporting with probation, and more frequent drug testing. If the team is considering imposing a sanction designated as high, the participant's CJA attorney is notified to determine if conferral is needed to decide whether the participant will accept the sanction. High sanctions directly impact the participant's liberty, and include travel or association restrictions, curfew, home confinement and location monitoring, a holding cell at the courthouse for an afternoon, incarceration for up to three days, and residential treatment with a pause in the program.

CONCLUSION

H.O.P.E. Court has been a learning experience for all involved during its first year of operation. It has also been very rewarding and drawn the attention of the local media.¹⁴² The solutions it has adopted to address some of the challenges it has faced may be helpful to other districts with reentry courts or considering whether to start or revise a program. While time will tell, the H.O.P.E. Court team is optimistic that the program will attain its stated goals to reduce the number of revocation proceedings, improve participants' compliance with conditions of supervision, facilitate rehabilitation and decrease recidivism. But in the end, it is up to the participants to make the choice to take full advantage of what H.O.P.E. Court, in conjunction with its community partners, can offer.

142. See Katie Mulvaney, *Rhode Island's HOPE Court offers convicts a way out*, PROVIDENCE J. (Feb. 27, 2016, 10:15 PM), <http://www.providencejournal.com/article/20160227/NEWS/16022933>.