

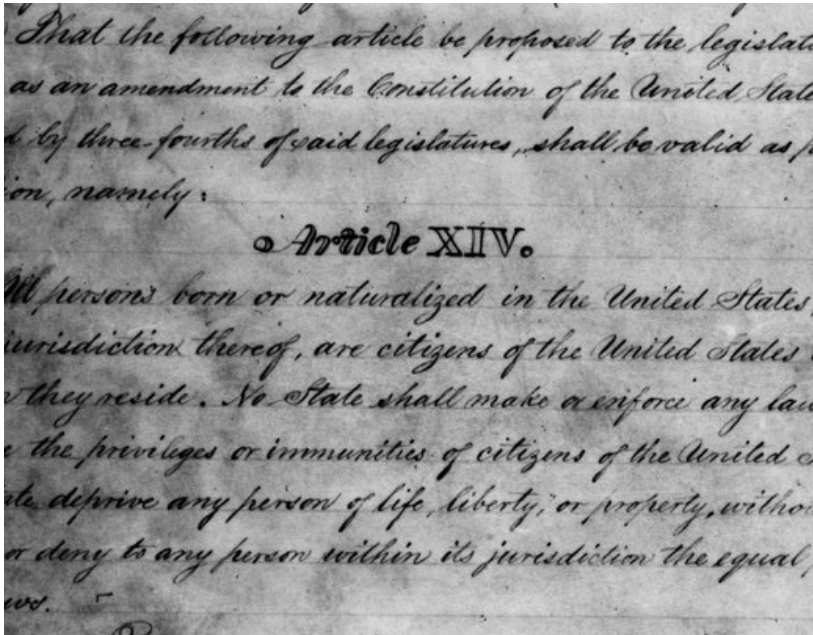
Protecting Due Process (and More) in Treatment Courts

Minnesota Treatment Court Conference (Virtual!)
April 22, 2021

Aaron Arnold
Director of Technical Assistance

 Center
for
Court
Innovation

Due Process



14th Amendment

“No state shall...deprive any person of life, liberty, or property, without due process of law.”

What is “due process”?

Due Process

- 1. Procedural due process**
- 2. Bill of Rights**
- 3. Substantive due process**

Procedural Due Process

- ▶ When government infringes on liberty or property interest
- ▶ Fundamental fairness
- ▶ Flexible, whatever the situation demands
- ▶ “Full-blown due process” (e.g., criminal trial)
- ▶ Less due process (lots of other situations)

Waiver of Rights

Waiver of Rights

- ▶ Defendants traditionally must waive several constitutional rights when pleading guilty:
 - Right to trial
 - Right to confront witnesses
 - Right against self-incrimination
 - Right to appeal

Waiver of Rights

- ▶ But there are special considerations for drug courts.
- ▶ Waiver of appeal may be limited
 - People v. Kitchens, 46 A.D.3d 577 (N.Y. App. Div. 2007) (general waiver of appeal does not foreclose appellate review of due process claim that sentencing court failed to hold a hearing regarding the circumstances surrounding defendant's failure to complete drug treatment program)

Waiver of Rights

- ▶ Can a drug court participant be required to waive the right to a termination hearing?
- ▶ NO
 - State v. Laplaca, 27 A.3d 719 (N.H. 2011) (rejecting hearing waiver: “defendant could not have knowingly and intelligently waived his right to a hearing to contest the allegations of misconduct against him without full knowledge of what those allegations were”)

Search Waivers

- ▶ Can drug courts require participants to submit to warrantless searches? To random searches?
- ▶ YES, in post-plea drug courts.
 - People v. Ramos, 101 P.3d 478 (Cal. 2004) (by accepting probation, defendant waives Fourth Amendment rights and has no reasonable expectation of traditional Fourth Amendment protection)

Search Waivers

- ▶ But in pre-plea drug courts, maybe not
 - U.S. v. Scott, 450 F.3d 863 (9th Cir. 2006) (pre-trial releasee's liberty interests are "far greater" than a probationer's; holding invalid Nevada's the pre-trial release condition requiring defendant to consent to warrantless search)
- ▶ Recommended approach: make case-specific finding why search waiver is needed
 - State v. Ullring, 741 A.2d 1065 (Maine 1999)
 - In re York, 892 P.2d 804 (Cal. 1995)
 - U.S. v. Laurent, 861 F. Supp. 2d 71 (E.D.N.Y. 2011) (in dicta)

Participation-Related Restrictions

Geographic Restrictions

- ▶ Can a drug court prohibit a person from going to certain locations?
- ▶ YES, if the restriction is reasonably related to the participation's rehabilitation needs and narrowly drawn.
 - Geographic size of the area
 - Compelling need to enter the area

Geographic Restrictions

▶ Examples:

- State v. Morgan, 389 So. 2d 364 (La. 1980) (prohibiting entrance into the French Quarter, noting that it is a small geographic area and is known for prostitution, the defendant's charged offense)
- State v. Wright, 739 N.E.2d 1172 (Ohio Ct. App. 2000) (invalidating a probation term that prohibited entry to any place where alcohol is served or consumed; ambiguous condition; could subject him to punishment for innocent conduct such as going to the grocery store or gas station)

Association Restrictions

- ▶ Can a drug court prohibit a person from associating with specific individuals?
- ▶ YES, if the restriction is reasonably related to the participant's rehabilitation needs and narrowly drawn.
- ▶ Must be specific.

Association Restrictions

▶ Examples:

- U.S. v. Soltero, 510 F. 3d 858 (9th Cir. 2007) (condition prohibiting defendant from associating with “any known member of any criminal street gang” is permissible; but condition prohibiting defendant from associating with any known member of “any disruptive group” was overbroad)
- U.S. v Showalter, 933 F. 2d 573 (7th Cir. 1991) (upholding condition of probation barring defendant from association with neo-Nazis and skinheads)

Association Restrictions

- ▶ Incidental contact with prohibited associates is not enough to revoke probation.
 - Arciniega v. Freeman, 404 U.S. 4 (1971) (reversing defendant's parole revocation, which was based on his association with ex-convicts who worked at same restaurant)
 - U.S. v. Green, 618 F. 3d 120 (2nd Cir. 2010) (finding that condition only applied to association with gang members known to defendant)

Dress Restrictions

- ▶ Can a drug court impose restrictions on a participant's clothing?
- ▶ YES, dress restrictions are permitted if reasonably related to the offense and preventing future criminality.

Dress Restrictions

- ▶ Must give the offender adequate notice of what kinds of dress permitted.
 - U.S. v Brown, 223 Fed. Appx. 722 (9th Cir. 2007) (restriction on clothing “which may connote affiliation or membership in” specific gangs was overly vague, failed to give adequate notice of precisely what apparel is prohibited”)

Employment Requirements

- ▶ Can a court require a participant to get a job?
- ▶ YES (sort of): They can require good faith efforts.

Employment Requirements

▶ Examples:

- U.S. v. Melton, 666 F.3d 513 (8th Cir. 2012) (defendant's lack of good faith effort to seek employment is a valid ground for revoking supervised release)
- Garrett v. State, 680 N.E.2d 1 (Ind. Ct. App. 1997) (vacating defendant's probation revocation because there was insufficient evidence that her failure to secure employment was due to her lack of effort)

Employment Restrictions

- ▶ Can a drug court prohibit a participant from getting certain types of jobs?
- ▶ YES, when the restriction is reasonably related to the defendant's crime and the goals of probation.
 - Thomas v. State, 710 P.2d 1017 (Alaska Ct. App. 1985) (upholding a condition of probation prohibiting the offender from working in commercial fishing after conviction for theft related to his work in that industry).

Monitoring and Sanctions

Staffing Meetings

- ▶ Staffing meetings are typically:
 - Held outside regular court sessions
 - Informal, off the record meetings
 - For the team to share information about clients
 - To prepare for formal status hearings
 - NOT for making formal findings or decisions

Staffing Meetings

- ▶ When conducted properly, normal due process rights do not apply to staffing meetings
 - Defendant is not entitled to be present
 - Need not be open to the public or on the record

Staffing Meetings

▶ Cases:

- In re Interest of Tyler T., 781 N.W.2d 922 (Neb. 2010) (therapeutic goals of drug court make it unnecessary for every action to be a matter of record, but a hearing must be on the record “when a liberty interest is implicated”)
- State v. Sykes, 339 P.3d 972 (Wash. 2014) (drug courts are different from ordinary courts; because of their unique characteristics, staffing meetings need not be open to the public)

Staffing/Ex Parte Communication

- ▶ Normally, *ex parte* communications are strictly forbidden.
- ▶ But the ABA and many states (including Minnesota) have made an exception for judges in problem-solving courts.
 - Minn. R. Jud. Conduct 2.9, comment 4

Staffing/Ex Parte Communication

- ▶ Harder question: can attorneys engage in *ex parte* communications in drug court context?
- ▶ In other words, what if the prosecutor is present for staffing but the defense attorney isn't? Or vice versa?
- ▶ It's a problem. Safer approach is to have both parties represented at all times.

Sanctions and Due Process

- ▶ What kinds of due process protections are required when a drug court imposes sanctions on a participant?
- ▶ There is a split of authority on this question.

Sanctions and Due Process

- ▶ Some cases say sanctions can be imposed without a formal hearing or full due process
 - State v. Rogers, 170 P.3d 881 (Idaho 2007) (intermediate sanctions do not implicate the same due process concerns as termination and therefore informal hearings are permitted)
 - Commonwealth v. Nicely, 326 S.W.3d 441 (Ky. 2010) (the elements of due process required for probation revocation hearing are required for a drug court sanction because drug court participants waive those rights)

Sanctions and Due Process

▶ But others disagree

- State v. Brookman, 190 A.3d 282 (Md. 2018)
- In re Miguel R., 63 P.3d 1065 (Ariz. Ct. App. 2003)

Judge William Meyer: When a participant challenges allegations of noncompliance, “the court should give the participant a hearing with notice of allegations, the right to be represented by counsel, the right to testify, the right to cross-examine witnesses, and the right to call his or her own witnesses.”

--From *The Drug Court Judicial Benchbook*

Termination

Termination and Due Process

- ▶ Due process protections are required whenever a defendant faces the possible loss of a recognized “liberty interest”
- ▶ Freedom from jail is certainly a liberty interest
- ▶ So due process is required for drug court termination

What “Process” is Due?

- ▶ Written notice of the alleged violations
- ▶ Disclosure of evidence
- ▶ Right to appear and testify
- ▶ Right to present/confront witnesses
- ▶ Neutral and detached magistrate
- ▶ Written findings with reasons

Gagnon v. Scarpelli, 411 U.S. 778 (1973)

Termination and Due Process

- ▶ What if the defendant waived a termination hearing as a condition of entering drug court?
- ▶ Waiver not valid
 - State v. Laplaca, 27 A.3d 719 (N.H. 2011) (rejecting waiver of the right to a hearing because it was impossible for the defendant to have knowledge of the allegations brought against him when the facts giving rise to those allegations had yet to occur)

Termination: Evidence Needed

- ▶ Preponderance of the evidence standard
 - State v. Varnell, 155 P.3d 971 (Wash. Ct. App. 2007) (“burden is on the State to prove noncompliance with the agreement by a preponderance of the evidence”)

Termination: Evidence Needed

- ▶ Hearsay evidence permitted
 - State v. Rogers, 170 P.3d 881 (Idaho 2007) (revocation process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial).
 - State v. Shambley, 795 N.W.2d 884 (Neb. 2011) (hearsay evidence is admissible, but the court may not rely solely on hearsay).

Termination and Judicial Recusal

- ▶ Can the drug court judge preside over the termination/sentencing hearing?
- ▶ Minnesota has a case addressing this!
- ▶ State v. Cleary, 882 N.W.2d 899 (Minn. Ct. App. 2016)

State v. Cleary

▶ Background

- Cleary pleaded guilty to second-degree drug sales
- Sentenced to 81 months in prison, sentence stayed
- Placed on 10 years probation with drug court mandate
- After 13 months in drug court, terminated by drug court judge for violations
- Demanded new judge for probation violation hearing
- Motion denied, sentenced by drug court judge to 68 months in prison

State v. Cleary

- ▶ Issue: Did the hearing violate defendant's due process right to a "neutral and detached magistrate"?
- ▶ Holding: Yes, due process requires a new judge.

State v. Cleary

▶ Reasoning

- According to the Supreme Court, due process requires that probation revocation decision “should be made by someone not directly involved in the case.”
- Code of Judicial Conduct requires a judge to disqualify him/herself if “the judge’s impartiality might reasonably be questioned” by unbiased layperson with full knowledge of the facts.
- In drug court, judge learns “intimate details” of the participant’s life, has a “personal” relationship

State v. Cleary

▶ Bottom Line

- “When a probationer seeks to disqualify a judge who participated in the decision to terminate him or her from drug court from presiding over a probation hearing based on the probationer’s termination from drug court, ***the judge shall recuse.***”

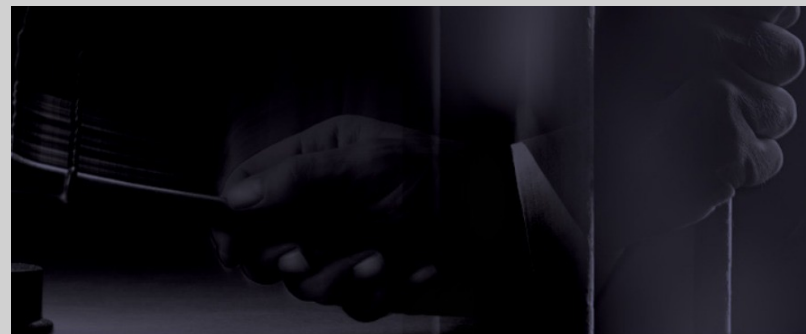
Bonus Material!

Indigence

- ▶ Can a drug court exclude a person because they can't afford fines or fees?
- ▶ NO, violates equal protection
 - Mueller v. State, 837 N.E.2d 198 (Ind. Ct. App. 2005) (can't deny prosecutor diversion program for inability to pay)
 - State v. Shelton, 512 S.E.2d 568 (W. Va. 1998) (can't deny home detention for inability to pay for monitoring)

For more information
about program fees
and ability to pay:

<https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/finesfeesresguide.pdf>



RESOURCE GUIDE:
REFORMING THE
ASSESSMENT AND
ENFORCEMENT OF
FINES AND FEES



Health Conditions

- ▶ Can a drug court exclude a person because of a physical or mental health condition?
- ▶ YES, if there is a legitimate government purpose
 - Evans v. State, 667 S.E.2d 183 (Ga. Ct. App. 2008) (finding no equal protection violation where exclusion was based on the program's lack of resources to handle "serious mental health issues" as well as the program's lack of access to HIV-related resources)

Prescription Drugs

- ▶ Can a drug court exclude a person because they take a prescribed medication? (example: oxycodone for chronic pain)
- ▶ YES, if there is a legitimate government purpose
 - People v. Webb, 2011 Cal. App. Unpub. LEXIS 1896 (2011) (upholding exclusion from drug court, in part, because of defendant's inability to focus as a result of strong pain medications)

Medical Marijuana

- ▶ Can a drug court exclude a participant who uses medical marijuana (or require them to discontinue use)?
- ▶ Generally, yes, if there is a reasonable relationship between the defendant's marijuana use and the goals of sentencing and rehabilitation.
- ▶ The court should make a finding on the record that such a nexus exists in each specific case

Medical Marijuana

- ▶ Cases upholding probation conditions restricting medical marijuana use.
 - California: *People v. Leal*, 149 Cal. Rptr. 3d (Cal. 2012)
 - Colorado: *Walton v. People*, 451 P.3d 1212 (Colo. 2019)
 - Maine: *U.S. v. Friel*, 699 F. Supp. 2d 328 (D. Me. 2010)
 - New York: *People v. Stanton*, 80 N.Y.S.3d 888 (Sullivan County Ct. 2018)

Medical Marijuana

- ▶ Arizona rule: medical marijuana use CANNOT be prohibited as a condition of probation.
 - Arizona: Reed Kaliher v. Hoggatt, 347 P.3d 121 (Ariz. 2015)
- ▶ Even if the person has been convicted of possession of marijuana for sale.

Medication-Assisted Treatment

- ▶ Now we're in dangerous territory
- ▶ The existing case law CONFLICTS WITH SCIENCE and best practice.
 - Beisel v. Espinoza, 2017 U.S. Dist. LEXIS 73391 (D. Fla. 2017) (family drug court ordered D off Suboxone and revoke child visitation)
 - Bazzle v. State, 434 P.3d 1090 (Wyo. 2019) (D required to stop Suboxone as condition of probation/drug court)

What about the Americans With Disabilities Act?

- ▶ ADA has 3 major requirements:
 1. Disability: A physical or mental impairment that *substantially limits* a major life activity
 2. Otherwise qualified individual
 3. Denied access because of the disability

MAT/Americans With Disabilities Act

- ▶ It seems like a drug addicted defendant who can't work would be covered, right?
 - Substance use disorder is a recognized disability
 - It can substantially limit one's ability to work, care for oneself, act as a parent, etc.
 - Qualified for drug court in every other way.

- ▶ Well, maybe

MAT/Americans With Disabilities Act

- ▶ First, it's not always easy to show a substantial impairment of a major life activity.
 - Evans v. State, 667 S.E.2d 183 (Ga. Ct. App. 2008) (mental illness and HIV-positive status did not affect a major life activity)
- ▶ Second, there's some suggestion that the ADA may not apply to criminal sentencing matters.
 - State v. Barclay, 895 N.W.2d 923 (Iowa Ct. App. 2017)
 - Wilson v. Commonwealth, 522 S.E.2d 385 (Va. Ct. App. 1999)

MAT/Americans With Disabilities Act

- ▶ There are some newer cases dealing with MAT in prisons that suggest it must be permitted under the ADA
 - Pesce v. Coppinger, 355 F. Supp. 3d 35 (D. Mass. 2018) (requiring prison to permit D to continue prescribed methadone while in custody)
- ▶ But these cases are very specific to the jail/prison context. Not at all clear what they mean for drug courts.

Medication-Assisted Treatment

- ▶ So, what's the bottom line?
- ▶ There are currently no cases requiring a drug court to permit MAT under the Fourteenth Amendment, Eighth Amendment, ADA, or any other law.
- ▶ However, it shouldn't matter...

****NEVER DENY MAT****

(when properly prescribed)

For more information
about MAT and the
Americans with
Disabilities Act:

[https://lac.org/wp-
content/uploads/2014/12/
MAT Report FINAL 12-
1-2011.pdf](https://lac.org/wp-content/uploads/2014/12/MAT_Report_FINAL_12-1-2011.pdf)



*Legality of Denying Access to
Medication Assisted Treatment
In the Criminal Justice System*

December 1, 2011

New York

225 Varick Street New York, New York 10014
Phone: 212-243-1313 Fax: 212-675-0286
E-mail: lacinfo@lac.org • Web : www.lac.org

Washington

236 Massachusetts Avenue, NE Suite 505 Washington, DC 20002
Phone: 202-544-5478 Fax: 202-544-5712

QUESTIONS?

Resources

- ▶ The Drug Court Judicial Benchbook

https://www.ndci.org/sites/default/files/nadcp/14146_NDCI_Benchbook_v6.pdf

- ▶ NDCI's legal resource webpage

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

CONTACT INFO

Aaron Arnold

Director of Technical Assistance

Center for Court Innovation

520 8th Ave., 18th Fl.

New York, NY 10018

(315) 559-0160

arnolda@courtinnovation.org

Center
for
Court
Innovation