

**Due Process
and other Legal Issues
in Drug Courts**

Hon. Patrick C. Bowler, ret.

Why Talk About 'Due Process'?

Reason #1.

A Drug Treatment Court is
a Court of Law!



The Kentucky Supreme Court has stated that drug court “is a **court function**, clearly laid out as an alternative sentencing program under the applicable statutes.”

Commonwealth v Nicely, 326 SW3d 441, 444 (Ky 2010)

Due Process issues related to judicial decision making in a drug court context are beginning to be addressed in state court decisions throughout the country.” Maine v Gross, *infra*

Why Talk About 'Due Process'?

Reason #2.

Due Process is a 'Key Component of Drug Courts'

Key Component #2 of Drug Courts

Use of a nonadversarial approach by prosecution and defense that promotes public safety while protecting any participant's due process rights.

Due Process

- Procedural protections are due under the 5th and 14th Amendments when the defendant will **potentially suffer a loss to a recognized liberty or property right.**
- If due process applies, the question remains **what process is due?** *Fuentes v. Shevin*, 407 U.S. 67 (1972). *Morrissey v. Brewer*, 408 U.S. 471 (1972).
- When we talk about Due Process we are referring to the procedural protections which ensure that the defendant is treated fairly by the criminal justice system.

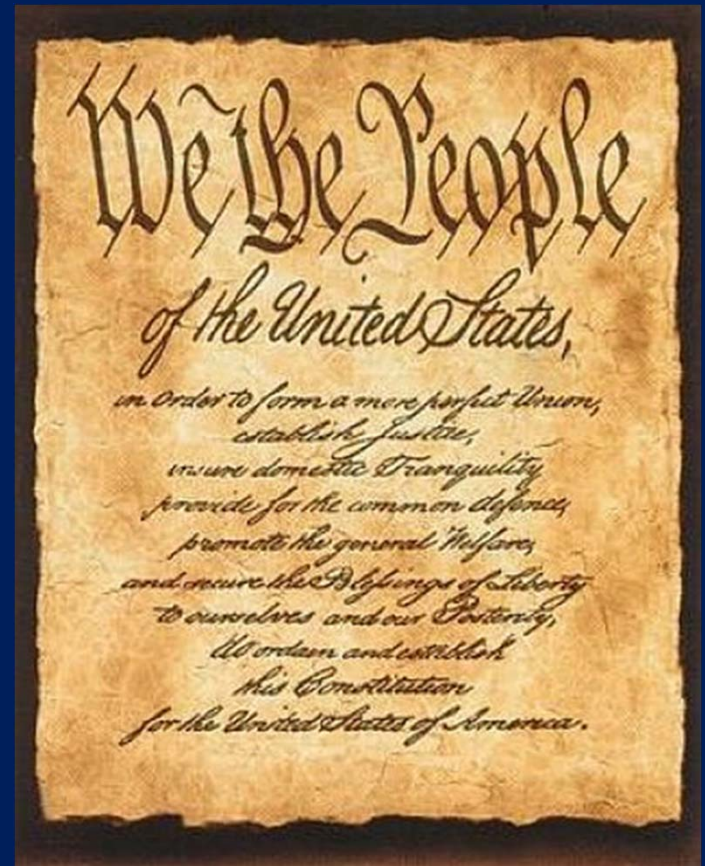
“Fairness = Better Outcomes “

NADCP Adult Drug Court Best Practice Standards, Vol. II, P 40.

How do we Protect Due Process Rights in the unique settings of a DTC?

Issues:

- 1st Amendment: AA/NA
- 1st A. Place/Area Restrictions
- 4th A. Search/Seizure
- 14th A. Probation Termination
- 14th A. Sanctions (hearing)
- 14th A. Waiver of Rights
- Equal Protection
- 14th A. Judicial Impartiality
- Confidentiality



First Amendment and AA/NA

- It is “**Establishment of Religion**” to order participant to AA/NA. Well settled. Fundamental/CANNOT order as condition of probation (Warner), parole (Inouye).
- Provide alternatives; self-help programs that are not premised on monotheistic deity.
- Drug Court: Hanas v Inner City Christian Outreach, 542 F.Supp. 2d 683 (E.D. Mich 2008) Drug court program manager and drug court consultant held liable for actions related to referral to faith based program, where they knew of participant’s objections while in the program and when the program denied the participant the opportunity to practice his chosen faith – Catholicism.
- Note: There are certain fundamental rights that cannot be ‘contracted’ away.

“Secular” alternatives

- Smart Recovery
- Rational Recovery
- LifeRing Secular Recovery
- Secular Organization for Recovery (SOS)
- Linaire Technique
- Agnostic AA
- (Internet AA)

First Amendment and Area Restrictions

Place and area restrictions – “Reasonable” when narrowly drawn:

1. Whether the defendant has a compelling need to go through/to the area;
2. A mechanism for supervised entry into the area;
3. The geographic size of the area restricted, and
4. The relatedness between the restriction and the rehabilitation needs of the offender.

See People v. Rizzo, 362 Ill. App. 3d 444 (2005).

(See also State v. Klie, 174 P.3d 358 (Hawaii 2007) (supporting a prohibition against entering Waikiki area))

First Amendment and Association Restrictions

- What if ‘didn’t know’ that they are druggies or felons?
- The government tells us that associational restrictions like this one (Not to be with children) do not prohibit incidental or unintentional contact with minors. That observation finds support in our survey of the case law. U.S. v. Burroughs, 613 F.3d 233 (D.C. Cir. 2010)
- (Note: “But from drug dealers to Ponzi schemers and smugglers to stalkers—nearly any criminal can use the Internet to facilitate illegal conduct. That an offense is sometimes committed with the help of a computer does not mean that the district court can restrict the Internet access of anyone convicted of that offense. Burroughs, *supra*, p 243.
- *Jones v. State*, 41 P.3d 1247 (Wyo. 2001) (persons of “disreputable character”); *State v. Hearn*, ___ P.3d ___ (Wash. App. 2006) (prohibition against associating with drug users or dealers constitutional); *Birzon v. King*, 469 F.2d 1241, 1242 (2nd. Cir. 1972); *Commonwealth v. LaPointe*, 759 N.E.2d 294 (Mass. 2001).

Fourth Amendment And Related Issues

- Samson v. California, 547 U.S. 847, 847 (2006) (holding consent to search by parolee negated necessity of establishing reasonable suspicion, but search could not be for harassment)
- U.S. v. Knights, 534 U.S. 112 (2001) Probation; O.K, if reasonable suspicion. Reduced expectation of privacy and special need to control recidivism.

Issue: Does N.M. Constitution provide greater 4th A. protection than federal?

- “Today, of course, warrantless probation searches in New Mexico cannot, under Knights and Griffin, be without a proper showing of an adequate degree of likelihood of criminal activity.” State v. Noel Baca, Court of Appeals, New Mexico, No. 23,429 (Mar 1, 2004)

The 4th Amendment & Probation Waivers

- "[A] probationer's rights concerning searches are more limited than the rights of a person not on probation." Gardner, 95 N.M. at 174.
- "Probationers are not automatically granted full constitutional protection." Gallagher, 100 N.M. at 699, 675 P.2d at 431;
- see also State v. Baca, 90 N.M. 280, 282, 562 P.2d 841, 843 (Ct.App.1977) ("Probation assumes the offender can be rehabilitated without serving the suspended jail sentence. It is not meant to be painless. It has an inherent sting and the restrictions on the probationer's freedom are realistically punitive.").

Due Process and Termination from Drug Court

“The consequences of termination from drug court are comparable to those sustained in a probation revocation.” The Drug Court Judicial Benchbook, p 164.

Majority of appellate rulings favor probationary rights. State v. LaPlaca, 27 A.3d 719 (New Hampshire 2011) (See also Staley v State, 851 So2d 805):

1. P/C determination
2. Written notice of the claimed violations*
3. Disclosure of the evidence against him
4. An opportunity to be heard and present evidence
5. The right to confront and cross-examine witnesses, and
6. A neutral and detached hearing body
7. (What about ‘right to counsel?’)

Gagnon v. Scarpelli, 411 U.S. 778, 781-782 (1973). (probation)

Gosha v. State, 48A02-0912-CR-1210 (Ind.App. 7-30-2010); NMSA 31-21-15.

Return of probation violator. (Written notice of violations, hearing (informal))

Due Process and Sanctions

What Process is Due? Hearing vs. No Hearing?

Issue: will the participant potentially suffer a loss to a recognized liberty or property right under the 14th Amendment?

Gagnon v. Scarpelli, 411 U.S. 778, 781-782 (1973); Wolff v. McDonnell, 418 U.S. 539, 557 (1974) overruled on other grounds Sandlin v. Conner, 515 U.S. 472 (1995); In Re Miguel, 63 P.3d 1065, 1074 (Ariz. App. 2003). (juvenile entitled to hearing).

If a restricted substantive right exists (i.e. a liberty interest) we analyze whether there exist adequate procedures to assure that all the process that is constitutionally due has been provided before the final deprivation of a protected interest through State action. Thompson, 490 U.S. at 460, 109 S.Ct. 1904; Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)

Due Process and Sanctions

Is the Alleged Violation Contested?

Question: Is it really about the factual basis or factors in mitigation?

- **Recommendation:**

Hearing Yes – If there is a factual challenge to a violation & liberty interest at stake. (Does the adversarial process kick in, contra to KC #2?)

Hearing Optional – If factual violation admitted, issue is mitigation

- **Rationale:**

A. If the participant **FACTUALLY CHALLENGES** the alleged violation (not simply seeking mitigation by explanation) and jail is the proposed sanction, implicating a 'loss of a liberty interest,' at a minimum, an informal hearing should be held where the participant has a right to be heard and the evidence challenged.

B. The 'Prospective Waiver Rule' should apply; cannot waive a future right not yet implicated. It is 'unknown' at the time of drug court entry. (Analogy: Termination - Florida v Staley, etal)

Prospective Waiver Doctrine

Issue: When is the 'Right' Implicated?

Act → Charge → Right to Hearing/Trial:
Waive Rights → O.K.? Yes or No

Waive Rights → Act → DTC Violation
Right to Hearing → O.K.? Yes or No

“Courts are guided in our interpretation of a disputed plea agreement by general principles of contract law. At the same time it is clear that a plea agreement (*editorial note: Waiver*) is a unique kind of contract.” U.S. v Girogi, 840 F.2d 1022 1988)

Waiver of Rights - Issues

- What rights can a participant 'waive' in signing a drug court agreement?

Question: Is there a difference between waiving the right to search without 'reasonable suspicion' vs. the right to counsel?

- Can a waiver of some rights be revoked? (*i.e. Right to counsel, see NADCP "Adult Drug Court Best Practice Standards," Vol. II, p 40*)
- Can one 'knowingly' waive a right that has not yet been 'implicated?'

"Waiver upon entry to a Treatment Court could not contractually waive the substantive due process rights attendant to a revocation hearing." Staley v State, 851 So2d 805 (2003); State v LaPlaca, 27 A3d 719 (2011), Gross v Maine, Superior Court Case #CR-11-4805 (02/26/13).

The “Shot heard over the Bow”

THE SUPREME COURT OF MISSISSIPPI, NO. 2014-JP-01309-SCT
PERFORMANCE COMMISSION ON JUDICIAL ETHICS v. RICKEY
W. THOMPSON

“Judge Thompson’s conduct of depriving participants in drug court of their due-process rights when he signed orders of contempt without the persons being properly notified of the charge of contempt or a right to a hearing, and by conducting “hearings” immediately after “staffing meetings” without adequate time for the persons to have proper counsel or evidence presented, violated Canons 1, 2A, 3B(1), 3B(2), 3B(4), 3B(8), and constitutes willful misconduct in office and conduct prejudicial to the administration of justice. “

“We agree with the Commission that Judge Thompson’s lack of understanding and appreciation for the basic legal principles of contempt of court and due-process safeguards cannot be overlooked.”

Who makes the final decision in Problem-Solving Court

The Judge makes the final decision

- Termination....team may reach consensus....but judge makes the final decision
- Sanctions.....team may agree onbut judge makes the final decision
 - ✓ Reference: N.M. 31-21-15 Return of Probation Violator B. The court shall then hold a hearing, which may be informal, on the violation charged. If the violation is established, the court may continue the original probation , revoke the probation...
 - ✓ (“...a neutral and detached hearing body. Gagnon, 411 U.S. at 786, 93 S. Ct. 1761)
 - ✓ Caselaw: State v Stewart, 2008 WL 4467179: A trial judge violated the defendant’s due process rights when it allowed the defendant’s drug court team to effectively decide a matter that was vested by statute in the trial judge’s authority.

Equal Protection

Poverty and Equal Protection

In multiple settings involving fundamental rights, the Supreme Court has held that it is unconstitutional to deny access to indigents.

- See, e.g., M.L.B. v. S.L.J., 519 U.S. 102, 114-16, 123-24 & n. 14, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996)
- Lubin v. Panish, 415 U.S. 709, 718, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974)
- Boddie v. Connecticut, 401 U.S. 371, 374, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)
- Griffin v. Illinois, 351 U.S. 12, 17-19, 76 S.Ct. 585, 100 L.Ed. 891 (1956)
- cf. Kadrmas, 487 U.S. at 465, 108 S.Ct. 2481
- **Court Fees:** Subject to state law, a drug court may assess fees on a flat fee basis. A drug court may assess fees on a sliding scale basis only with statutory authority. (May waive fees, must account for indigency re: graduation, promotion thru phases, etc. (N.M. Judiciary Drug Court Standards; E.2, E.3, E.4, E.6)

Equal Protection

Discretionary entry or exclusion into D.Ct. - depends on what 'class'

Suspect class or fundamental right – test: strict scrutiny

Semi-suspect class / liberty interest – test: intermediate scrutiny

No suspect class – test: rational relationship to legitimate
governmental interest

EVANS v. STATE, 293 Ga. App. 371 (2008) (Ga. App. 8/22/08)

Defendant excluded from drug court- was HIV positive

Equal protection—“medical management problem”

ADA--major life activity

- *Rational Test used to exclude from DTC? Privilege not a fundamental Right. State's authorize DTC; not mandate.*

State v. Harner , 103 P. 3d 738 (Wash. 2005)

In Re Miguel, 63 P.3d 1065, 1074 (Ariz. App. 2003).

Lomont v. State, 852 N.E.2d 1002 (Ind. App. 2006)

Due Process & Judicial Impartiality

“...Neutral and Detached...”

The Issue: “Would the facts, as asserted, lead an objective reasonable observer to question the judge’s impartiality?” U.S. v. Ayala, 289 F.3d 16, 27 (1st Cir. 2002)

- Requiring the District Court to act as Drug Court team member, evaluator, monitor and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a Drug Court participant’s program. Alexander v. State, 48 P. 3d 110 (Okla. 2002)
- Therefore, in the future, if an application to terminate a Drug Court participant is filed, and the defendant objects to the Drug Court team judge hearing the matter by filing a Motion to Recuse, the defendant’s application for recusal should be granted. Alexander v. State, 48 P. 3d 110 (Okla. 2002)
- (See also Tenn v. Brent Stewart, Aug 18, 2010, Yes on Recusal, but also: Addiction is ‘chronic and relapsing’ vs ‘excessive sentences’)

Recusal

- “In the Court’s view, the instant circumstances created an inherent risk to the Petitioner’s due process rights. Through exposure to ex parte communications and by virtue of the judge’s participatory role in the (drug treatment court) process, a legitimate risk of erroneous deprivation arose to Petitioner’s right to an impartial decision maker and to cross-examine witnesses and be heard.” Gross v Maine, Superior Court, Feb 26, 2013.*
- What if participant wants to keep the drug court judge?
- **Recommendation:** Have participant sign waiver at the time of the termination hearing.
- *Contra: Judicial Ethics Opinion, Kentucky, Je-122, 10/10/11.

Confidentiality Issues

Status Review Sessions – Closed or Open?

Some states require ‘reasons stated on the record and limited closing’ based on Constitution, Statutes, and Case Law.

(See: U.S. Supreme Court: Presley v Georgia, 558 US 209 (2010); Waller v Georgia, 467 US 39 (1984))

- N.M. Judiciary D. Ct. Standards, G3, practice 4 “Confidential information.... may be disclosed--and become a part of the public record—to the extent necessary and pertinent in a probation revocation, initial disposition or sentencing proceeding.”
- Standard of Minimization: Eliminating confidential information at the status review hearings.
- State of Florida v Noelle Bush, Case #48-02 CF 6371-0 (10/15/02)
Open and public courtroom trumps federal confidentiality requirements.

Confidentiality Issues

Staffings Closed or Open?

May a drug court close team staffings?

- **Recommendations:** Discretionary with the treatment court team,

2 options:

1. Closed Staffings: O.K. per See State of Washington v Adonija Lacroy Sykes (filed 12/18/14)

(Sykes holds that closed staffings are not a violation of Constitution requirement of open courtrooms. However this should be added to your waiver; participant waives right to staffing operating as an open court proceeding and his or her presence at staffing.)

(Information discussed should be limited to relevant issues needed to be addressed in court proceeding. And, no final decisions concerning disputed facts or legal issues in the case, Judge Meyer, NDCI Benchbook)

2. Open Staffings

Policies should include who may be allowed to attend a staffing if allowed by the treatment court team; participants, interested organizations?

Trends: Other Drug Court Legal Issues

- Ineffectiveness of Counsel – ‘Stated Interest vs. Best Interest’
- Lack of a ‘record’ or incomplete ‘record’
- Credit for Time Served for sanctions? Double Jeopardy?
- What if treatment terminates - do you evaluate other treatment resources, plan? Who makes Criminal Justice decision?
- Lengthy Sentences – Is drug court failure an ‘aggravating’ factor?
- Who admits defendant to program? Voluntary decision?
- If denied entry, can defendant withdraw the G.P.?
- Should ‘confidential’ information be excluded from sentencing decision?
- Excessive Fees?
- Medically Assisted Treatment – In conjunction with Behavioral Therapy (Endorsed by NADCP, SAMHSA, etal.)
- Participant wants treatment of his or her choice? Attorney?

Best Practices

- Provide secular alternative to AA & know your treatment
- Place and Area restrictions rationally related to rehabilitation
- Provide DP protection at termination hearing
- Provide DP protections at sanctions hearing if participant denies factual basis and jail is possible sanction
- Provide equal access to all in your target population
- Establish policy for recusal of judge for POV hearing & get written waiver
- Insure understandable, knowing and intelligent participation by defendants (What waivers can include; should include, etc.)
- Other Issues: Establish reasonable, rational & uniform best practices

Due Process – Our Procedure Defines Our Fairness

Getting it Right Defines our Future

U.S. Supreme Court

- Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. In Re Gault, 387 U.S. 1, 30 (1967)
- Justice Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure." Malinski v. New York, 324 U. S. 401, 324 U. S. 414 (1945)

New Mexico

- “.....clarifying that the substantive right of liberty cannot be deprived except pursuant to constitutionally adequate procedures and that, once it is determined that the substantive right exists and "that the Due Process Clause applies, the question remains what process is due. The court under procedural due process must engage in a balancing and weighing of private and government interests, including concerns about "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Quoted in State v Druktenis, 86 P.3d 10150, 1065, NM Ct of Appeals 2004

Drug Court Resources

- The Drug Court Judicial Benchbook www.ndci.org
- Judge Bill Meyer's Weblibliography – List of all drug court related cases. www.ndcrc.org
- NADCP Adult Drug Court Best Practice Standards, Vol 1 and 2.
- American University, Drug Court Resources

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