

# SANCTIONS AND DUE PROCESS: WHAT PROCESS IS DUE?

CACJ CONFERENCE  
SEPTEMBER 27, 2021



# INTRODUCTION



## SESSION GOALS

Give overview of basic concepts and relevant appellate legal authority

Will not and cannot provide a roadmap for how to impose sanctions in every type of court in every jurisdiction across the state

- What is a sanction hearing anyway?
- Not a trial.
- Not a probation revocation hearing.
- Maybe not even a preliminary/committal hearing.
- Once you, as the judge, decide what amount and type of process your participants are due, you can determine how to conduct a sanction hearing.

## A NOTE ON TERMINOLOGY

---

# WHAT IS DUE PROCESS?

- The Fourteenth Amendment of the U.S. Constitution prohibits the states from depriving “any person of life, liberty, or property, without due process of law.”
- Due process requires, at a minimum:
  - (1) notice;
  - (2) an opportunity to be heard; and
  - (3) an impartial tribunal.
    - *Mullane v. Central Hanover Bank* (SCOTUS, 1950).

# HOW MUCH PROCESS IS DUE?

- Key question: what procedures satisfy due process?
- Due process is a spectrum
- “The requirements of due process are flexible and call for such procedural protections as the particular situation demands. . . . [due process] requires only that the proceedings are fundamentally fair.”
  - Miller v. Deal, 295 Ga. 504 (2014) (citing SCOTUS)
- Look to other jurisdictions and secondary sources/best practices

Intermediate sanctions = something less than termination

Termination = the ultimate sanction

## A NOTE ON TERMINOLOGY

---



---

# THE LAW: GEORGIA AND BEYOND





# GEORGIA LAW

- Wilkinson v. State, 283 Ga.App. 213 (2006).
- As a matter of first impression, the State's burden of proving that participant has violated the terms and conditions of the drug court contract sufficiently to justify termination from the program is a preponderance of the evidence.

## OTHER JURISDICTIONS

- Due Process Afforded in Drug Court Proceedings
  - 78 A.L.R. 6<sup>th</sup> |
  - Combines termination and sanction hearings
- NDCI Law Directory
  - <https://www.ndci.org/law-2-2/>

## OTHER JURISDICTIONS: PROSPECTIVE WAIVERS

- State v. LaPlaca, 162 N.H. 174, 176 (2011).
  - The Supreme Court of NH invalidated a prospective drug court waiver that required defendants to waive their right to “any and all hearings” while in the program.
- Staley v. State, 851 So.2d 805 (Fla. 2d DCA 2003).
  - A Florida District Court of Appeal invalidated a drug court contract that required defendants to prospectively waive their right to a termination hearing.

# DUE PROCESS: RIGHT TO COUNSEL

- Mississippi Com'n on Judicial Performance v. Thompson, Supreme Court of Mississippi, 169 So.3d 857 (2015)
  - Supreme Court removed judge from office for ethical violations stemming from conduct while presiding over drug court
  - Issues included not permitting participant, who had retained counsel, to use counsel of her choosing
  - Court had required participant to use public defender, who admitted to not being prepared

# REASONABLE CONCLUSIONS

- Prospective waivers of sanction and termination hearings are impermissible
- Seems likely (though not guaranteed) to apply to waivers of other critical constitutional rights that are often part of a hearing, such as right to counsel, notice, opportunity to be heard, maybe even the right to cross-examine witnesses and present evidence
- Right to counsel

## OTHER JURISDICTIONS: DUE PROCESS SAME AS VOP

- Brookman v State, 158 A.3d 1099 (Md. Ct. Spec.App. 2017).
  - “Where... there exists an independent possibility of sanctions that deprive the defendant of liberty or extend his or her participation in the program, the defendant stands in a position akin to someone who has (allegedly) violated probation.”
- Taylor v. State, 229 So.3d 269 (Ala. Ct.App. 2016).
  - Upheld a procedure similar to VOP
  - Concurrence: encourages judges to implement basic but abbreviated hearing-style procedures

## SOME CONCURRING DICTA

- State v. Stewart, (Tenn. Crim. App. 2010) (not selected for publication) No. W2009-00980-CCA-R3-CD
  - Having reviewed the record, we are additionally troubled by the four or five occasions where the defendant in this case was "sanctioned" to significant jail time by the drug court team during the two years he participated in the program. Leaving aside (as we must) the obvious due process concerns attendant to any additional deprivation of the defendant's liberty that has been imposed through a collaborative, non-adversarial, and at times ex parte process rather than through a traditional adversarial evidentiary hearing, there is considerable tension between this outcome and the general guidelines under which drug courts should operate.



# SOME CONCURRING DICTA

- In re Tyler T., 279 Neb. 806 (2010)
  - Given the therapeutic component of problem-solving-court programs, we are not prepared to say that each and every action taken in such a proceeding must be a matter of record. But we have no difficulty in concluding that when a judge of a problem-solving court conducts a hearing and enters an order affecting the terms of the juvenile's probation, the proceeding must be on the record. We agree with other courts which have held that where a liberty interest is implicated in problem-solving-court proceedings, an individual's due process rights must be respected.

## OTHER JURISDICTIONS: INTERMEDIATE SANCTIONS = NO VOP-LEVEL HEARING

- State v. Rogers, 170 P.3d 881 (Idaho 2007).
  - “The principles articulated in this opinion apply only when a participant in a diversionary program is facing termination from the program because that is when the participant faces a loss of liberty. Intermediate sanctions imposed in these programs do not implicate the same due process concerns, and continued use of informal hearings and sanctions need not meet the procedural requirements articulated here.”

## MORE DICTA: HEARING PROBABLY NOT REQUIRED

- Gaither v. State, 296 So.3d 553 (Fla. Dist. Ct.App. 2020).
  - In footnote, court opined that drug court sanctions “short of termination” may not require the same level of procedural due process as for termination proceedings, particularly in the observation that “[d]ue process is a flexible concept, and lesser sanctions do not implicate the same due process concerns.”

## SO MUCH DICTA

- Courts rule on termination hearings more frequently
- Generally, consensus is that termination hearings require due process protections similar to a violation of probation
- But how much due process must be afforded for intermediate sanctions?

# REASONABLE CONCLUSIONS

- Due process applies
- Some hearing-type procedure must be offered—cannot be a star chamber style issuance of sanction
- But what else? What does this hearing look like?

# BEST PRACTICES



# NADCP: JUDICIAL BENCHMARK

- The Drug Court Judicial Benchbook: National Drug Court Institute (NDCI), 2011 (updated 2017), Douglas B. Marlowe, J.D., Ph.D., Judge William G. Meyer, Ret.
- <https://www.ndci.org/wp-content/uploads/2016/05/Judicial-Benchbook-2017-Update.pdf>
- VII. [§8.7] DRUG COURT SANCTIONS

for a drug court participant to not be entitled to

*Participants are entitled to a hearing where jail is a possible sanction.*

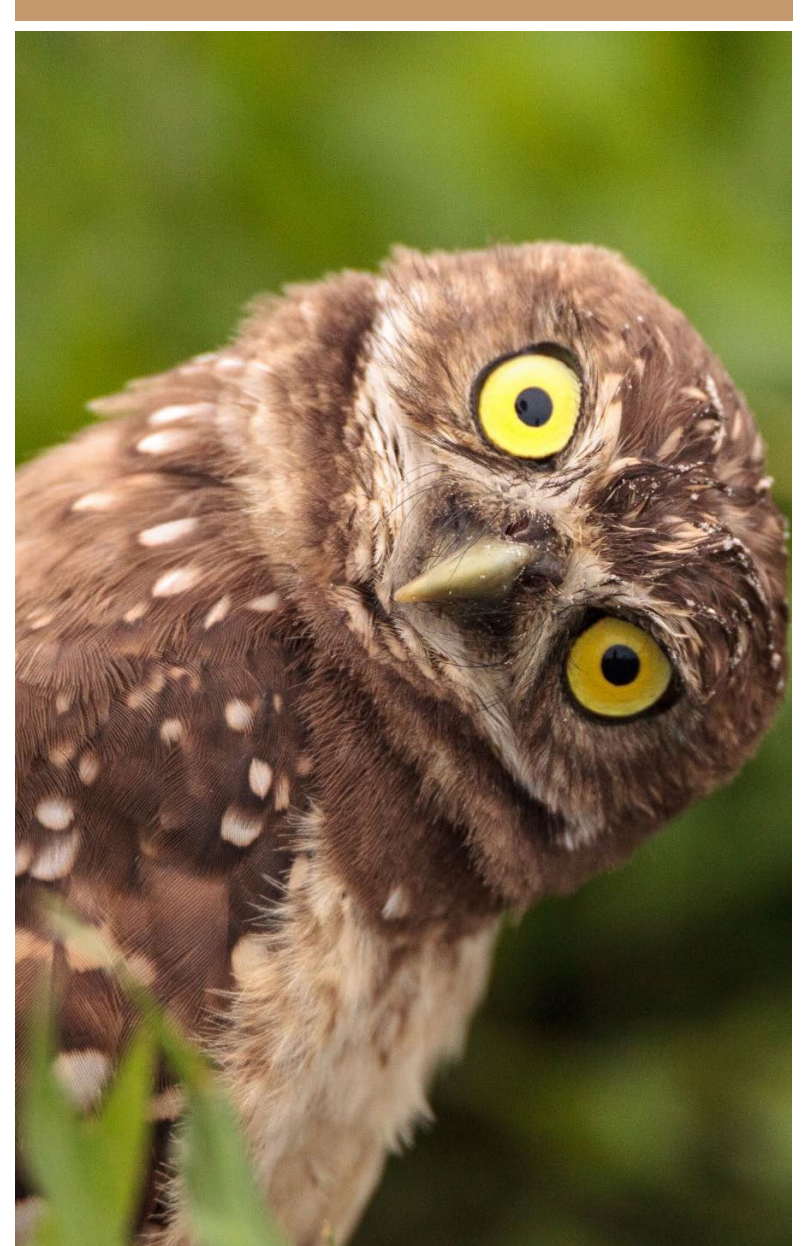
dictate that, when the drug court participant contends the conduct that is subject to a jail sanction, the

sanction be so effective that the participant advances the due process of the law by revoking the automatic



# WHAT'S MISSING?

- Any guidance on what these hearings should look like
- In Maryland: full probation revocation
- Everywhere else: something less than that
- Can't be waived prospectively (prior to entry into the program)



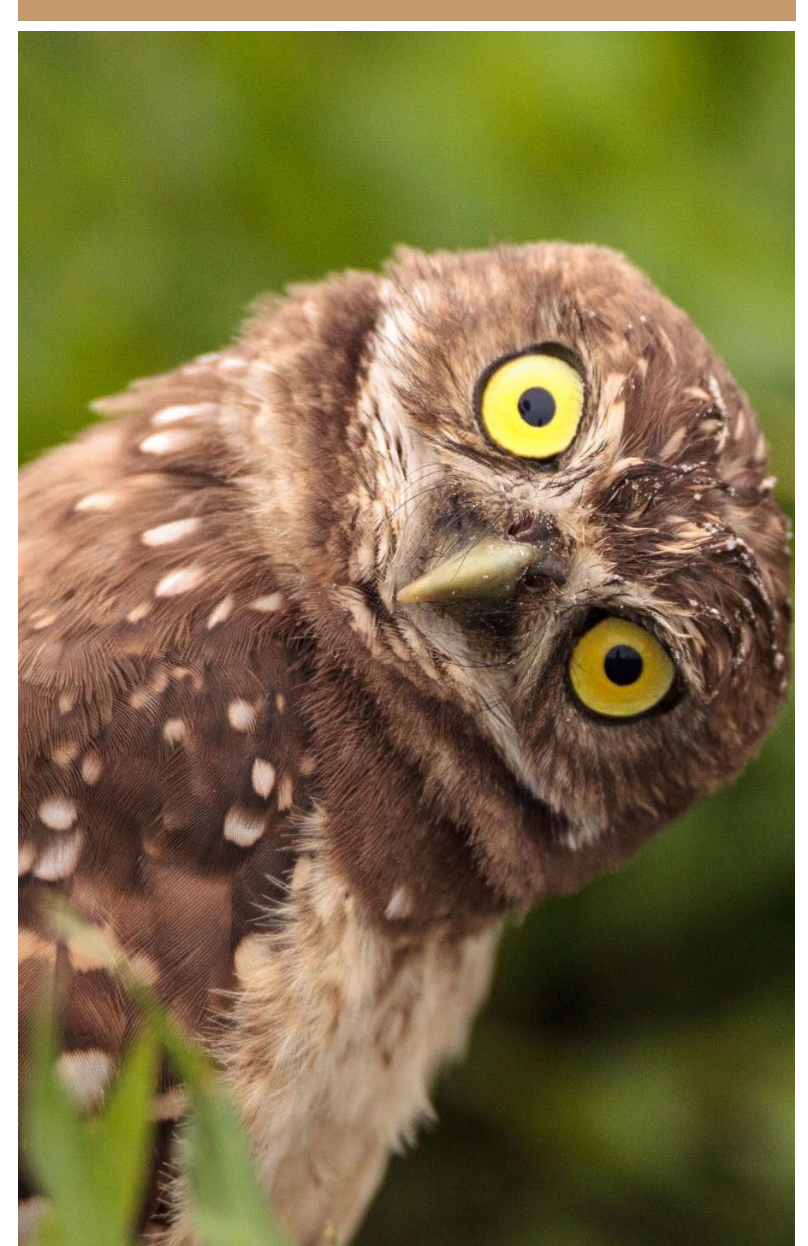
# SOME GUIDANCE

- NADCP (Judicial Benchbook):

- “the court should give the participant a hearing with notice of the 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. The author believes that the hearing should be expedited (within two days), consistent with the participant’s need to prepare for the hearing.”

- Michael D. Sousa, Procedural Due Process, Drug Courts, and Loss of Liberty, 14 N.Y.U. J. L. & Liberty 733 (2021).

- “judicial precedent requires only minimal due process protections prior to the imposition of loss of liberty sanctions, and such protections can be satisfied by having drug court clients sign a knowing waiver of these rights prior to the imposition of such sanctions”



# LIKELY MINIMUM REQUIREMENTS

- Right to counsel
- Notice of alleged violation prior to imposition of sanction
- Opportunity to be heard
- Opportunity to cross-examine witnesses
- Opportunity to present evidence in defense
- Can be waived with a knowing and voluntary waiver after notice of specific violation (not a waiver executed prior to entering program)

## WAYS TO IMPLEMENT

- Ensure adequate defense counsel representation
  - Don't forget possible conflicts
- Leave time between staffing and court for defense attorney to discuss with participant
- Prepare robust written waiver
- Engage in meaningful dialogue with participant
- Consider rescheduling for more formal hearing if cannot be resolved
- Consider creating a record (court reporter, digital recording)



# QUESTIONS AND ANSWERS



# THANK YOU!

- Alison Lerner, Esq., Senior Staff Attorney, JC/AOC
- [Alison.Lerner@georgiacourts.gov](mailto:Alison.Lerner@georgiacourts.gov)