

# Due Process and Termination in Drug Courts

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Center  
for  
Court  
Innovation



# Operating Programs

Our operating projects are comprised of dozens of different court based, community based, and other programs. These programs serve thousands of New Yorkers and we learn many lessons from their work

## Expanding Access to Drug Court

An Evaluation of Brooklyn's Centralized Drug Screening and Referral Initiative

## Prosecutor-Led Diversion

### A National Survey

By Michela Lawry and Ashmini Kerodal

## The Allegheny County Mental Health Court Evaluation

### Process and Impact Findings

By Amanda B. Cissner, Ashesh Kironzi, & Karim Orlis

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## Procedural Justice at the Manhattan Criminal Court: Results and Implications

The New York City Mayor's Office of Criminal Justice Strategic Plan states the city's intention to put into practice principles of fairness and procedural justice and to identify issues concerning how judges' perceptions of the fairness of the justice system. This project first describes an effort to enhance perceptions of justice among users of the Manhattan Criminal Courtroom at 100 Centre Street.

Procedural justice theory focuses on the way that people perceive the fairness of the justice system. It is based on the idea that people who feel that the justice system is fair are more likely to cooperate with the system and to follow the law. This report examines the results of a study that sought to improve perceptions of procedural justice among users of the Manhattan Criminal Court at 100 Centre Street.

**What did we do?**  
The Center for Court Innovation, with support from the New York City Mayor's Office of Criminal Justice, conducted a study to identify issues concerning how judges' perceptions of the fairness of the justice system. This project first describes an effort to enhance perceptions of justice among users of the Manhattan Criminal Court at 100 Centre Street.

Specific interventions were implemented to improve perceptions of procedural justice. These interventions included providing information about the court's processes, providing feedback on the court's performance, and providing opportunities for people to voice their concerns. The results of the study are discussed below.

**Who were the people we surveyed?**  
The survey included judges, court clerks, and other court staff. The survey was conducted in the courtroom at 100 Centre Street.

**1,111 people**  
**89% Black and Latinx**  
**74% male**

Most were in court for a criminal case. The survey was conducted in the courtroom at 100 Centre Street.

## A Statewide Evaluation of New York's Adult Drug Courts

Identifying Which Policies Work Best

By Amanda B. Cissner, Michael Rempel, and Allison Walker Franklin  
Center for Court Innovation

John K. Roman and Samuel Bielek  
The Urban Institute

Robyn Cohen and Carolyn E. Cadgett  
New York State Unified Court System

JUNE 2019

## Beyond the Algorithm

### Pretrial Reform, Risk Assessment, and Racial Fairness

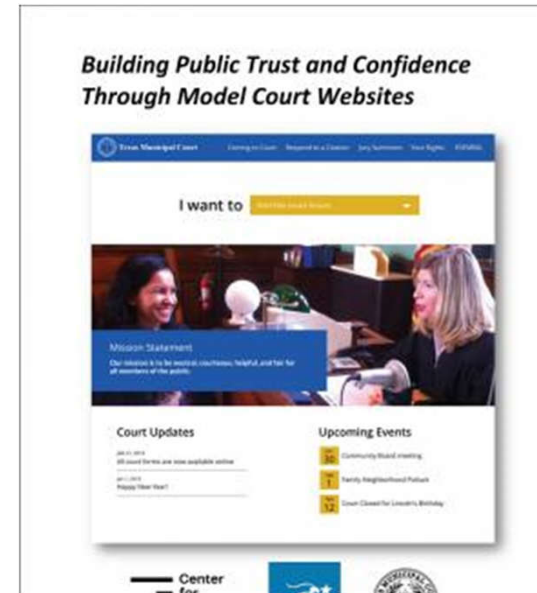
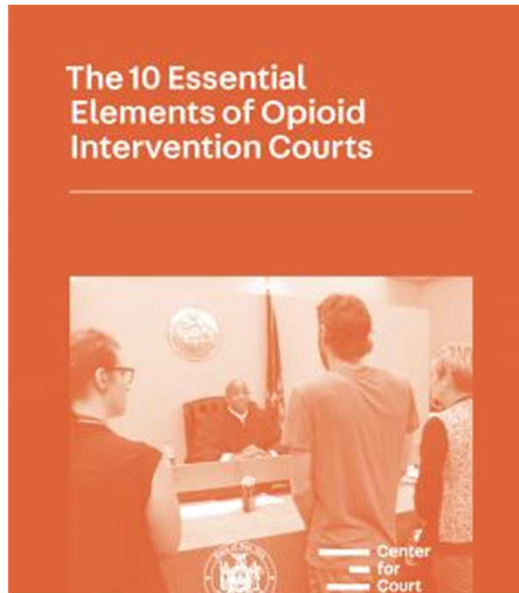
by Sarah Picard, Matt Watkins, Michael Rempel, and Ashmini Kerodal



# Research

The Center has a prolific research department that has conducted original research to improve the criminal justice system.

# Expert Assistance



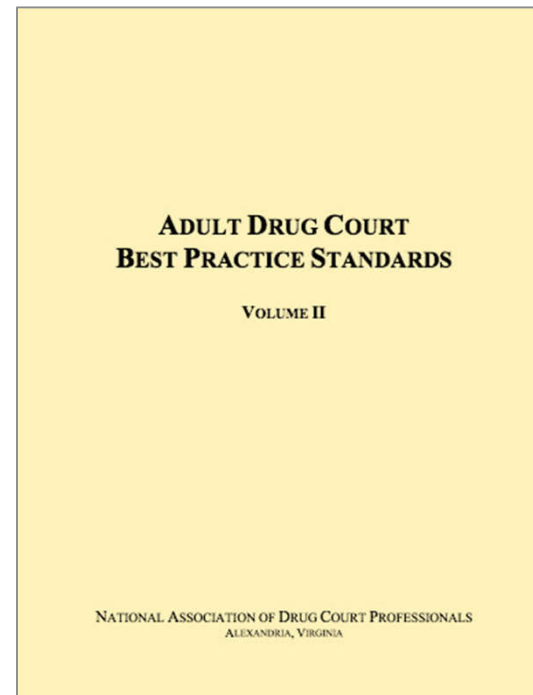
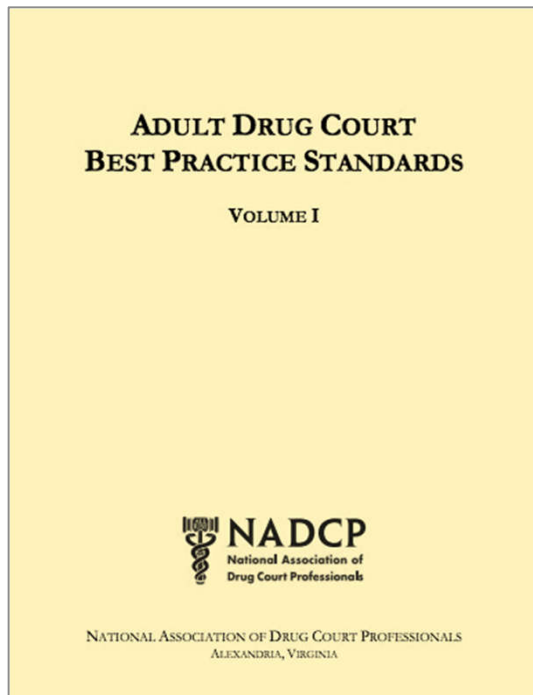
- BJA's statewide treatment court TTA provider
- Implementation and enhancement of treatment courts
- Provide TTA around the country for community courts, treatment courts, tribal justice, prosecutor-led diversion, and other problem-solving justice initiatives



# Constitutional vs. Recommended

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- ▶ 25+ years of research
- ▶ Adult Drug Court Best Practice Standards



# Constitutional vs. Recommended

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- ▶ **Adult Drug Court Best Practice Standards**
  - ▶ Drug Courts that had a policy of terminating participants for positive drug tests or new arrests for drug possession =
    - ▶ 50% higher criminal recidivism and
    - ▶ 48% lower cost savings
  - ▶ Compared to Drug Courts that responded by increasing treatment or applying sanctions of lesser severity

(Carey et al., 2012)

# Termination and Due Process





# Termination and Due Process

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- ▶ Due process protections are required whenever a person 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

# Termination and Due Process

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- ▶ What about Pre-plea court models?
  - ▶ Liberty interest is not limited to incarceration
  - ▶ Meyer v. Neb., 262 U.S. 390 (1923) (noting that “liberty” is manifest not only in freedom from bodily restraint but also as the right of the individual “to enjoy those privileges long recognized...as essential to the orderly pursuit of happiness by free men.”)

# Termination and Due Process

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- ▶ What process is due?
  - Mathews v. Eldridge, 424 U.S. 319 (1976) (explaining that due process is flexible and calls for “such procedural protections as the particular situation demands.”)
- ▶ Not very helpful?

# Termination and Due Process

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## ▶ Let's try again...

- written notice of the alleged violations
- disclosure of evidence
- right to appear
- present witnesses and confront adverse witnesses
- neutral and detached magistrate
- written findings with reasons

Morrissey v. Brewer, 408 U.S. 471 (1972)

# Termination and Due Process

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- ▶ That standard may sound familiar...
  - Based on parole revocation due process standard Morrissey v. Brewer, 408 U.S. 471 (1972)
  - Extended to probation revocation Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973)
  - Held as the standard for termination from drug treatment court in several states State v. Shambley, 281 Neb. 317 (2011)
  - Also incorporated into state statute
    - N.J. Stat. Ann. § 2C:35-14f(1)-(6) (requires a finding on the record, considers the nature and seriousness of the violations, and gives special weight to treatment provider's termination recommendation).

# Termination and Due Process

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## ▶ Evidentiary standard:

- Preponderance of the evidence
- Hearsay is generally admissible
  - U.S. v. Pierre, 47 F.3d 241, 241 (7th Cir. 1995) (stating that the Federal Rules of Evidence do not apply at a probation hearing and hearsay is admissible.)
- Should not ALL be hearsay
  - State v. Shambley, 281 Neb. 317 (2011) (noting that although procedure may be relaxed to allow consideration of evidence that would not be admissible in an adversary criminal trial, the court may not rely solely on hearsay.)

# Basis of Termination

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- ▶ Basis of termination
  - Valid penological justification
- ▶ Is there a difference between termination based on unwillingness to attend treatment v. unavailability of treatment?



# Basis of Termination

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- ▶ U.S. v. Gallo, 20 F.3d 7, 13 (1st Cir. 1994) (upholding probation revocation based on the violation of a condition requiring probationer to submit to psychiatric hospitalization.)
- ▶ People v. Bacchi, 112 A.D.2d 940, 941(2d Dept 1985) (finding that defendant failed to satisfy special probation conditions that required psychiatric treatment without reasonable explanation.)
- ▶ State v. Noonan, 2019-Ohio-2960 (Ct. App.) (The trial court abused its discretion in finding that defendant violated her community control, because her discharge from the residential drug treatment facility was due solely to her medical issues.)
- ▶ U.S. v. Clarkson, 208 F.3d 218 (8th Cir. 2000) (stating that probation is properly revoked when the defendant does not comply with release terms, whether the failure is the result of willfulness, carelessness, or impaired mental capacity).

# Basis of Termination

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- ▶ If a participant is terminated from Drug Court because adequate treatment was unavailable to meet his or her clinical needs, fairness dictates the participant should receive credit for the efforts in the program and should not receive an augmented sentence or disposition for the unsuccessful termination.
  - ▶ (Bowers, 2007; Justice Policy Institute, 2011; National Association of Criminal Defense Lawyers, 2009)

# Basis of Termination

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- ▶ Inability to pay fines and fees is not a permissible basis for termination
  - State v. Shelton, 204 W. Va. 311, 313 (1998) (finding a violation of equal protection when defendant was denied home detention because he could not afford a monitor and was therefore remanded to jail.)
- ▶ Inability of a participant to gain employment
  - 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.)

# Termination and Due Process

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- ▶ 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 and Judicial Recusal

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- ▶ Can the drug court judge preside over the termination/sentencing hearing?
- ▶ The case law is split, but here's the recommended approach:
  - Alexander v. State, 48 P. 3d 110 (Okla. Crim. App. 2002) (holding that “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 and the motion to remove the defendant from the Drug Court program should be assigned to another judge for resolution.”)

# Termination and Judicial Recusal

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- ▶ Final decision must come from the judge
  - ▶ State v. Stewart, 2008 Tenn. Crim. App. LEXIS 784 (Tenn. Crim. App. 2008) (determining that it was a due process violation for a trial judge to delegate decision-making authority to a drug court team.)

# Termination and Double Jeopardy

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- ▶ Short answer, doesn't apply.
- ▶ Longer answer:
  - ▶ Doyle v. State, 2009 Ark.App. 94 (Ark. Ct. App. 2009) (double jeopardy does not apply to revocation proceedings.)
  - ▶ United States v. Carlton, 442 F.3d 802, 809 (2d Cir 2006) (double jeopardy problem is avoided by treating post-revocation sanctions as part of the penalty for the initial offense.)
  - ▶ In re O.F., 773 N.W.2d 206, 206 (N.D. 2009) (imposing drug court sanctions did not bar a subsequent prosecution and conviction for the identical conduct upon which the sanctions were based.)



# Termination and Custody Credit

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- ▶ No custody credit for participation in treatment programs during drug court.
  - ▶ Stinson v. State, 279 Ga. App. 107, 630 S.E.2d 553 (2006) (holding the trial court did not err when it denied probationer custody credit as he had elected to plead guilty and undergo alternative treatment in a Drug Court program. Thus, he was not entitled to credit for time spent in treatment if he was subsequently terminated from the program and sentenced on his original crime.)

# Resources

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- ▶ The Drug Court Judicial Benchbook

[https://www.ndci.org/sites/default/files/nadcp/14146\\_NDCI\\_Benchbook\\_v6.pdf](https://www.ndci.org/sites/default/files/nadcp/14146_NDCI_Benchbook_v6.pdf)

- ▶ NDCI's legal resource webpage

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

- ▶ Legal Action Center resources ([www.lac.org](http://www.lac.org))

- Medication Assisted Treatment in Drug Courts
- Confidentiality and Communication

# Questions?

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