

Constitutional and Legal Issues in Problem-Solving Courts

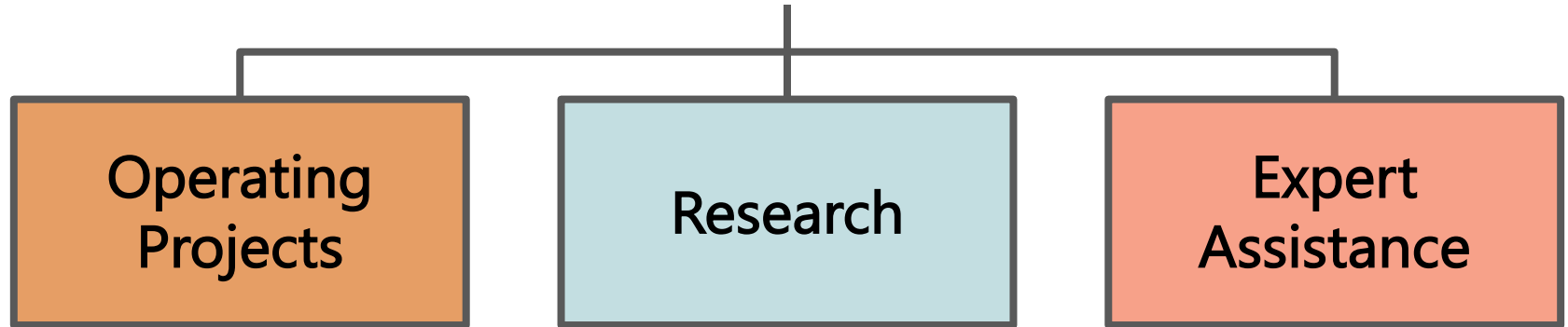
Georgia Council of Accountability Court Judges
Annual Training Conference (Virtual!)
September 2020

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Center
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Court
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Mission

Reduce Crime

Aid Victims

Strengthen Communities

Improve Trust in the Justice System

**ADULT DRUG COURT
BEST PRACTICE STANDARDS**

VOLUME I



NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS
ALEXANDRIA, VIRGINIA

**ADULT DRUG COURT
BEST PRACTICE STANDARDS**

VOLUME II

NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS
ALEXANDRIA, VIRGINIA

**Constitutional vs.
Recommended**

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

1. Eligibility

Eligibility Considerations

Practical considerations

- ▶ Current charge and criminal history
- ▶ Criminogenic risk-need profile (usually HR/HN)
- ▶ Availability of appropriate treatment services
- ▶ Drug court's overall capacity

Constitutional and statutory considerations

- ▶ Equal protection
- ▶ Americans with Disabilities Act

Equal Protection

- ▶ 14th Amendment EP clause: requires states to treat similarly situated persons in like manner.
- ▶ Courts use three tests:
 - Strict scrutiny: used when there's a "fundamental right" or a "suspect class" at issue (race, religion, national origin, alienage)
 - Intermediate scrutiny: used when there is a "semi-suspect" class at issue (gender)
 - **RATIONAL BASIS: ALL OTHER CASES**

Eligibility and Equal Protection

- ▶ Common equal protection challenges:
 - Defendant: “I want drug court, but they won’t let me in!”
 - Defendant: “I want drug court, but my jurisdiction doesn’t have one!”

Eligibility and Equal Protection

- ▶ No fundamental right to participate in drug court
 - Lomont v. State, 852 N.E.2d 1002 (Ind. Ct. App. 2006)
- ▶ Likewise, “drug offender” is not a suspect class
- ▶ Therefore, courts use the **rational basis test**
→ a defendant can be excluded from drug court for any legitimate reason

Eligibility and Equal Protection

- ▶ Moreover, a jurisdiction has no obligation to open a drug court.
 - State v. Harner, 103 P.3d 738 (Wash. 2004) (decision not to create a drug court because of budgetary consideration was rational)

Eligibility and Equal Protection

- ▶ Bottom line: most equal protection challenges related to drug court eligibility/access will fail
- ▶ But, be careful to avoid policies/practices that affect a suspect class (race, ethnicity, gender, religion, alienage); these are presumptively unconstitutional

Alienage

- ▶ “Alienage” refers to a person’s status as a non-citizen of the U.S.
- ▶ Alienage is a suspect class → strict scrutiny
- ▶ Therefore, a ban on non-citizens entering drug court would be impermissible
- ▶ BUT...what about illegal aliens?
- ▶ NOT a suspect class → rational basis review

So can drug courts exclude illegal aliens?

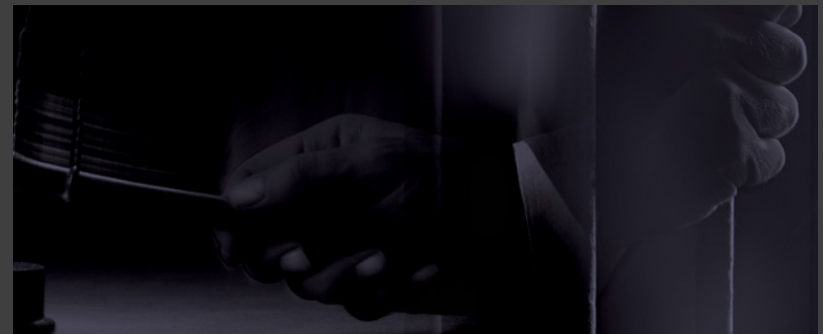
- ▶ YES, if there is a legitimate government purpose for excluding
- ▶ Likelihood of deportation
 - People v. Espinoza, 132 Cal. Rptr. 2d 670 (Cal. Ct. App. 2003) (upholding exclusion where the substantial likelihood of the defendant's deportation would prevent him from completing the program)

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



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

December 1, 2011

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2. Admission

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)

3. Participation

12-Step Programs

- ▶ Can drug courts mandate participation in Alcoholics Anonymous/Narcotics Anonymous?
- ▶ NO. Why? Because of 1st Amendment's Establishment Clause
 - Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996) (holding that a prison violates the Establishment Clause by requiring attendance at Narcotics Anonymous meetings which used “God” in its treatment approach)

12-Step Programs

- ▶ Also can't condition other benefits on participation in AA/NA.
 - Griffin v. Coughlin, 673 N.E.2d 98 (N.Y. 1996) (finding a violation of the Establishment Clause where privileges such as family visitation were conditioned on prisoner's participation in a program that incorporated Alcoholics Anonymous)

What to do, then?

▶ Offer secular alternatives

- ▶ O'Connor v. California, 855 F. Supp. 303 (C.D. Cal. 1994) (no Establishment Clause violation because probationer had several choices of programs, including self-help programs that are not premised on monotheistic deity)
- ▶ In re Garcia, 24 P.3d 1091 (Wash. Ct. App. 2001) (finding no coerced participation in a religious program where non-religious classes were available to defendant)

Secular Alternatives

- ▶ LifeRing Recovery (www.lifering.org)
- ▶ Rational Recovery (www.rational.org)
- ▶ Secular Organizations for Sobriety (www.secularhumanism.org/sos)

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
 - Whether there is a compelling need to enter the area
 - Whether supervised entry is feasible

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).

4. 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 Communications

- ▶ Normally, *ex parte* communications are strictly forbidden.
- ▶ But the ABA and many states have made an exception for judges in problem-solving courts.

Staffing/Ex Parte Communications

- ▶ 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*

5. 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

Termination and Due Process

- ▶ What process is due?
 - written notice of the alleged violations
 - disclosure of evidence
 - right to appear
 - right to 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

- ▶ 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 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 and 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?
- ▶ The leading case is from Oklahoma:
 - Alexander v. State, 48 P. 3d 110 (Okla. Crim. App. 2002) (if the defendant objects to the Drug Court judge hearing the matter, the motion to remove the defendant from the Drug Court program should be assigned to another judge for resolution)

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/>

▶ Legal Action Center resources

www.lac.org

- Medication Assisted Treatment in Drug Courts
- Confidentiality and Communication

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