

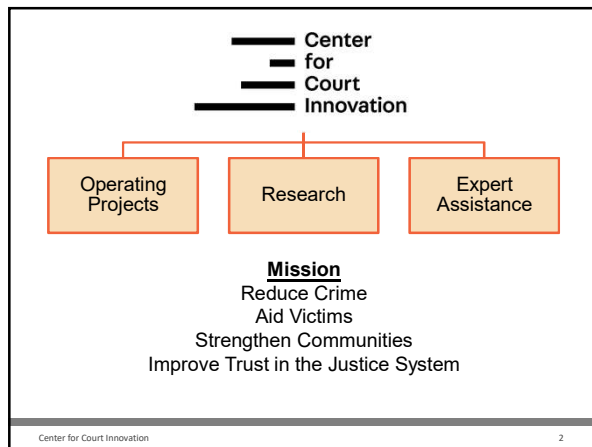
Constitutional and Legal Issues in Drug Courts

New York State Drug Court Conference
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Aaron Arnold
Director of Technical Assistance



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Constitutional vs. Recommended

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



ADULT DRUG COURT
BEST PRACTICE STANDARDS
VOLUME I

NADCP
National Association of Drug Court Professionals
Washington, DC



ADULT DRUG COURT
BEST PRACTICE STANDARDS
VOLUME II

NADCP
National Association of Drug Court Professionals
Washington, DC

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1. Eligibility

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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

Legal considerations

- ▶ Equal protection

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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**

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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!"

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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

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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)

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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

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Equal Protection and 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

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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)

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Equal Protection and Indigence

- ▶ Can a drug court exclude a person on the grounds that they cannot afford to pay fines/fees?
- ▶ NO, courts have held that excluding a person from an alternative-to-incarceration program because of inability to pay violates equal protection
 - State v. Shelton, 512 S.E.2d 568 (Ga. 1998) (can't deny home detention for inability to pay for monitoring)
 - People v. Trask, 119 Cal.Rptr.3d 91 (2010)

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Equal Protection and Health Conditions

- ▶ Can a drug court exclude a person on the basis of their 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).

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What about the Americans With Disabilities Act?

- ▶ It's unclear how the ADA applies in drug courts.
- ▶ ADA has 3 major requirements:
 1. Physical or mental impairment (drug/alcohol addiction and emotional illness qualify)
 2. Impairment must substantially limit a major life activity (caring for oneself, manual tasks, walking, seeing, hearing, speaking, breathing, learning, working)
 3. Qualified individual (otherwise eligible for the government service being offered)

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What about the Americans With Disabilities Act?

- ▶ It seems like a drug addicted defendant who can't work would be eligible, right?
- ▶ Maybe
 - Not easy to show a substantial impairment of a major life activity. E.g., *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)
 - Also, there's some suggestion that the ADA may not apply to criminal sentencing matters. *State v. Barclay*, 2017 Iowa App. LEXIS 43 (Iowa Ct. App. 2017)

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Prescription Drugs

- ▶ Can a drug court exclude a person on the basis of their use of lawfully-prescribed medications (e.g., 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).

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Medical Marijuana

- ▶ Similar to prescription drug analysis.
 - *People v. Beaty*, 105 Cal. Rptr. 3d 76 (Cal. Ct. App. 2010) (when medical marijuana is legal, its use cannot serve as the "sole basis" for excluding defendant from drug court; however, exclusion is permitted based on related factors, such as current or past abuse of marijuana, relation between marijuana use and abuse of other substances, or interference with treatment progress could provide an adequate basis for exclusion).

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Medication-Assisted Treatment

- ▶ Similar to prescription drug analysis
- ▶ BUT...
 - It's possible that a challenge based on the ADA, Rehabilitation Act, 14th Amendment, or 8th Amendment could succeed.
 - More importantly, it's very bad practice to deny MAT!

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Medication-Assisted Treatment (cont.)



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

November 1, 2017

New York
 100 West 42nd Street, New York, NY 10018-4202
 Phone: 212.693.6000 Fax: 212.693.6001

Washington
 1000 Pennsylvania Avenue, NE, Suite 1000, Washington, DC 20002
 Phone: 202.693.6000 Fax: 202.693.6001

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2. Admission

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Waiver of Rights

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

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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) (waiver of right to 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)

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Waiver of Rights

- ▶ No waiver of right to termination hearing
 - 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)

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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")
- ▶ MAYBE NOT, in pre-plea drug courts.
 - Best approach: make individualized finding why search waiver is needed

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3. Participation

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Mandatory Drug Testing

- ▶ Can drug courts require random drug testing?
- ▶ YES, drug testing is permitted as a condition of probation/release as long as it is "reasonably related" to the case.

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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).

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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).

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What to do, then?

- ▶ Offer secular alternatives
 - ▶ O'Connor v. California, 855 F. Supp. 303 (C.D. Cal. 1994) (finding that the Establishment Clause was not violated because the DUI 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) (concluding that the Department of Corrections did not coerce participation in a religious program where non-religious classes were available to defendant).

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Secular Alternatives

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

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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.
- ▶ Factors:
 - Geographic size of the area
 - Whether there is a compelling need to enter the area
 - Whether supervised entry is feasible

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Geographic Restrictions

- ▶ Examples:
 - *State v. Morgan*, 389 So. 2d 364 (La. 1980) (prohibiting entrance into the French Quarter, noting that it is a relatively 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).

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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.

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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)

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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)

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Dress Restrictions

- ▶ Dress restrictions are permitted as long as they are reasonably related to the offense and to the goal of preventing future criminality.
- ▶ 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”)

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Employment Requirements

- ▶ Can a drug court require participants to get a job?
- ▶ YES (sort of): They can require good faith efforts.
 - U.S. v Melton, 666 F.3d 513 (8th Cir. 2012) (finding that “a defendant’s failure to put forth a good faith effort to seek employment is a valid ground for revoking a 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)

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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 that prohibited the offender from working in commercial fishing following his conviction for theft crimes that were related to his work in that industry).

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Community Service Requirements

- ▶ Can a drug court require a participant to perform community service work?
- ▶ YES, generally permitted as reasonably related to the rehabilitation of the offender.
 - U.S. v. Restor, 679 F.2d 338 (3rd Cir. 1982) (community service may serve the rehabilitative purpose of probation by helping to reinstate offenders in society, integrate them in a working environment, and inculcate a sense of social responsibility).

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Community Service Requirements

- ▶ But, community service requirements can be excessive.
 - In re Ragland, 973 S.W.2d 769 (Tx Ct. App. 1998) (requiring weekly community service over the course of a year constitutes a restraint on liberty entitling probationer to pursue relief by petition for writ of habeas corpus")

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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

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Staffing Meetings

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

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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 that 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)

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Ex Parte Communications

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

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Ex Parte Communications

▶ Colorado Code of Judicial Conduct: Rule 2.9\

- **Comment 4:** A judge may initiate, permit, or consider ex parte communications expressly authorized by law or by consent of the parties, including when serving on therapeutic or problem-solving courts such as many mental health courts, drug courts, and truancy courts. In this capacity, judges may assume a more interactive role with the parties, treatment providers, probation officers, social workers, and others.

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4. Sanctions

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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)

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Sanctions and Due Process

▶ But others disagree

- State v. Brookman, 190 A.3d 282 (Md. 2018)
- In re Miquel 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*

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5. Termination

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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

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Termination and Due Process

- ▶ 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?

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Termination and Due Process

- ▶ 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)

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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)

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Termination and Evidence Needed

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

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Termination and Judicial Recusal

- ▶ 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.”)

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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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CONTACT INFO

Aaron Arnold
Director of Technical Assistance
Center for Court Innovation
520 8th Ave., 18th Fl.
New York, NY 10018
(646) 386-3242
arnolda@courtinnovation.org



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