

the capacity to conduct his trial and may undercut the fairness of the trial.

If the issue in *Halvorsen*, whether a higher standard of competence is required for a defendant to proceed *pro se*, were presented today, it would probably be determined by whether the individual state had elected to adopt a higher standard. In the future, some states are likely to define standards for competence to proceed *pro se*.

Drug Diversion Program Rights

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Participants in Diversion Programs Requiring a Guilty Plea to Qualify Have a Protected Liberty Interest and Right to Due Process if Termination Results in a Loss of Liberty

In *State v. Rogers*, 170 P.3d 881 (Idaho 2007), the Idaho Supreme Court considered whether a defendant who pleaded guilty in return for admittance into a diversionary drug program had a protected liberty interest (an interest protected by the Due Process Clause of the Fourteenth Amendment) in remaining in the program and was entitled to due process proceedings if terminated from the program. The court found that since the defendant had pleaded guilty to enter the program, he had a liberty interest in staying in the program. He was entitled to due process protection, just as individuals on probation or parole are. The Idaho Supreme Court based its decision primarily on the U.S. Supreme Court cases of *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Facts of the Case

Paul Lawrence Rogers was originally charged with possession of methamphetamines and driving without privileges. As part of a plea bargain, he pleaded guilty to possession of drugs in exchange for having his other charges (and prior unrelated charges) dropped. It was also understood that upon successful completion of the Ada County Drug Court Pro-

gram, the possession charge would be dismissed. During Mr. Rogers' involvement in the drug court, he twice violated the program rules and was sanctioned. After those sanctions, Mr. Rogers' behavior in the program improved. However, he was later terminated from the program after the drug court judge learned that he had been soliciting other drug court participants to enter into a "prostitution ring" or the "adult entertainment business." Mr. Rogers was then sentenced to a five-year prison term, with a one-year incarceration before eligibility for parole.

On appeal, Mr. Rogers asserted that his termination from the diversionary program violated his Fourteenth Amendment due process rights. He also claimed that the evidence indicating he was soliciting other members of the drug court program was not substantial and compelling enough to justify his termination from the program.

The court of appeals upheld the original ruling of the drug court, and the Idaho Supreme Court granted *certiorari*. Even though Mr. Rogers was on parole when the Idaho Supreme Court heard the case, the court believed that he still had a valid grievance, since his termination resulted in a felony conviction on his record.

Ruling and Reasoning

The Idaho Supreme Court agreed with Mr. Rogers that his due process rights had been violated when he was terminated from the drug court. The court ruled that he was deprived of a liberty that he held, not one that he merely desired, as opposed to defendants who enter a diversionary program before pleading. Mr. Rogers' situation was equated with individuals who had their parole or probation revoked. (In the cases of *Morrissey v. Brewer* and *Gagnon v. Scarpelli*, the United States Supreme Court ruled that individuals on parole or probation, respectively, are entitled to due process proceedings before those statuses can be terminated.) Since the court found that Mr. Rogers' due process rights had been violated, they vacated his conviction and remanded the case to the drug court for further proceedings. The Idaho Supreme Court did not therefore have to address whether there was enough information for the judge to terminate Mr. Rogers' participation in the diversionary program.

Discussion

Therapeutic jurisprudence, or utilizing the law as a therapeutic agent to address underlying causes of

crime, is the principle foundation of drug courts. American drug courts were initially developed in the 1980s after a significant rise in drug-related offenses on the theory that addiction treatment, in lieu of punishment, would decrease recidivism. When offenders do not fulfill the requirements of the drug program, sanctions are applied. However, jurisdictions vary both in requirements for participation in drug court and termination procedures.

The Idaho Supreme Court in this case referred to the Fourteenth Amendment in this manner: “It is fundamental to our legal system that the State shall not deprive ‘any person of life, liberty, or property, without due process of law’ ” (*Rogers*, p 883). The fact that participation in the program was voluntary did not diminish the participant’s right to due process protection. Traditionally, the criteria set forth in the case of *Mathews v. Eldridge*, 424 U.S. 319 (1976), are used to balance the loss of an individual’s liberty and governmental needs. Under *Mathews*, the court must consider: the private interest that will be affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used, and the significance of the government’s interest. This case highlights how a liberty interest and balancing considerations are parsed out.

Since the United States Supreme Court has not addressed the rights of individuals who enter diversionary programs as it has done with individuals on parole and probation, there is variability throughout the country in determining what process is due. The *Gagnon* court guaranteed certain hearings before permanent punitive actions for probationers. A key element to Mr. Rogers’ case was that he had to plead guilty to enter the program, and therefore termination resulted in incarceration, a guaranteed loss of liberty. If he had been placed in the program before entering a plea, one could argue that he would not have been entitled to due process, since termination would not have resulted in a loss of liberty. In some other jurisdictions, though, those who enter diversionary programs before entering a plea receive the same due process as probationers or parolees.

The Idaho Supreme Court remanded the case to the drug court for a termination hearing without directly addressing what constitutes substantial and compelling evidence in the termination of a diversionary program. However, it was implied to be a less

formal standard than would be required for determining guilt in a criminal proceeding. This was based on the United States Supreme Court’s rulings in *Morrissey* and *Gagnon*, which stated that parolees and probationers require due process but not the same level of protection as for the initial finding of guilt. Due process protections are “restricted,” since the individual has already been found guilty of a crime, and the government has a significant interest in protecting the public from a known criminal. For example, probation violations may be found by a preponderance of the evidence rather than beyond a reasonable doubt. In addition, based on the *Mathews v. Eldridge* balancing criteria the court indicated that the level of due process required for the termination “[was] to be flexible on the condition that the safeguards are provided.” This ruling indicates that an individual who has pleaded guilty has a less significant personal interest than does the government in maintaining the law.

The Idaho Supreme Court also stated that their decision applies only to cases in which termination from a diversionary program is at stake. The court noted that many diversion programs are run in an informal manner and that “use of informal hearings and sanctions need not meet the procedural requirements articulated [for termination]” (*Rogers*, p 886), because sanctions do not directly result in a loss of liberty. In sum, *State v. Rogers* indicates that after defendants are required to plead guilty to enter drug diversion programs, they have a protected liberty interest in remaining in the program, and procedural due process is necessary to expel them, similar to the due process afforded to probationers and parolees.

Physicians’ Duty to Prevent Harm to Nonpatients

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