

## Requiring Abstinence From Substance Use as a Condition of Probation

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### **Probationers May Be Required to Abstain From Illicit Substances as a Condition of Probation**

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In *Commonwealth v. Eldred*, 101 N.E.3d 911 (Mass. 2018), Julie Eldred argued that carrying a diagnosis of substance use disorder (SUD) precluded her abstinence from illegal drugs. Ms. Eldred proposed that imposing a condition of her probation that she not use illegal drugs was cruel and unusual punishment because SUD removed her free will with respect to use of illegal drugs, making relapse inevitable. The district court judge had ruled that Ms. Eldred violated probation by using fentanyl but allowed the motion to report the question of drug-free conditions on probationers to the Appeals Court. The Supreme Judicial Court of Massachusetts accepted jurisdiction of this case and affirmed the opinion of the district court, allowing for the continued use of drug-free conditions of probation.

#### **Facts of the Case**

Julie Eldred was charged with larceny for stealing jewelry, which she claimed she did for the purpose of obtaining funds to support her heroin addiction. Her case was continued without a finding, and she was placed on a one-year term of probation. As a condition of probation, she was required to abstain from substance use, which would be monitored via random drug testing, and to participate in outpatient substance-use treatment three times per week. At the time of her sentencing, Ms. Eldred had no objections to the conditions.

On September 2, 2016 (11 days after being placed on probation), Ms. Eldred produced a urine drug test that was positive for fentanyl. Despite her probation officer's attempts to encourage her to participate in inpatient substance-use treatment, she declined, which subsequently led to the filing of a notice of a probation detention hearing with the district court. The hearing was expedited to later that day due to an upcoming holiday weekend, the unavailability of prosocial support on that day in Ms. Eldred's life, and her recent fentanyl use. The district court judge found sufficient probable cause that Ms. Eldred had violated her probation due to her fentanyl use and ordered her to attend inpatient substance-use treatment. Given the lack of available space at a residential treatment facility, she was ordered to remain in custody until her transfer to a treatment program was possible.

On November 22, 2016, a different judge presided at the probation violation hearing, at which time Ms. Eldred argued that her SUD prevented her from abstaining from illicit substance use because it inhibited her free will and thus precluded her from willfully violating the requirement of her probation to remain drug-free. Despite her argument, the district court judge found Ms. Eldred to be in violation of her probation, given her positive drug test, and added as a condition of probation that Ms. Eldred attend inpatient substance-use treatment. The judge, based on the defendant's motion, referred the case for appellate review regarding the question of whether it is permissible to require abstinence from substances as a condition of probation for an individual with SUD.

#### **Ruling and Reasoning**

The Supreme Judicial Court of Massachusetts received multiple amicus briefs from a number of professional organizations (i.e., the American Civil Liberties Union of Massachusetts, Inc., Center for Public Representation, Prisoners' Legal Services, the Massachusetts Medical Society joined by American Academy of Addiction Psychiatry, Association for Behavioral Health Care, Grayken Center for Addiction Medicine at Boston Medical Center, Massachusetts Organization for Addiction Recovery, Massachusetts Society for Addiction Medicine, Northeastern University School of Law's Center for Health Policy and Law, and 28 others) supporting the claim that SUD is a brain disorder and thus precludes the individual from exercising free will to

abstain from use. These amicus briefs included data regarding changes in the brains of those addicted to substances. The Supreme Judicial Court of Massachusetts also received amicus briefs from other legal and mental health professionals (i.e., 11 addiction experts and the National Association of Drug Court Professionals) arguing that changes to the brain do not signify involuntariness; that, although experiencing strong urges to use, those with SUD are not incapable of exerting control; and that there is evidence that those with SUD can respond to incentives.

The Supreme Judicial Court of Massachusetts reframed the questions as follows:

Where a person who committed a crime is addicted to illegal drugs, may a judge require that person to abstain from using illegal drugs as a condition of probation? If that person violates the “drug-free” condition by using illegal drugs while on probation, can that person be subject to probation revocation proceedings? Additionally, at a detention hearing, if there is probable cause to believe that a person with a “drug-free” condition of probation has violated that condition by using an illegal drug, may that person be held in custody while awaiting admission into an inpatient treatment facility, pending a probation violation hearing? (*Eldred*, p 918).

The Supreme Judicial Court of Massachusetts responded affirmatively to each of these questions. In support, the court noted that the rehabilitative goals of probation are to “promote public safety, provide access to treatment, protect due process, reduce recidivism, [and] ensure offender accountability” (*Eldred*, p 919, relying on Supreme Judicial Court Standing Committee on Substance Abuse, Standards on Substance Abuse, 1998). Ms. Eldred had stated that the ultimate objective of her larceny was to obtain funds to purchase more illicit substances. By compelling Ms. Eldred to abstain from substance use and remain in custody until such time that inpatient treatment was available, the district court judge addressed each goal of probation (i.e., public safety, treatment, ensuring accountability, reducing recidivism, and protecting due process). Furthermore, the court highlighted that Ms. Eldred was not punished for her substance use but rather for the underlying crime. Given her standing as a probationer, her freedom was dependent on her compliance with the conditions of her probation. Citing *Commonwealth v. Wilcox*, 841 N.E.2d 1240 (Mass. 2006), the court said that deviation from such conditions provides an opportunity for the judge to revoke or revise conditions of probation. In this case, the court applied an individualized approach and focused on the needs of

Ms. Eldred. In fact, the Supreme Judicial Court of Massachusetts noted that the trial judge and probation officer acted in an “exemplary” manner by focusing on rehabilitation, rather than punishment, while working to protect public safety. In their discussion, the Supreme Judicial Court of Massachusetts recognized that relapse is common among persons with SUD and is part of recovery, and they acknowledged that conditions of probation should be tailored to try to prevent such relapses.

#### Discussion

In *Commonwealth v. Eldred*, the Supreme Judicial Court addressed the legal question of the court’s ability to impose a condition of probation requiring abstinence from substance use. The final opinion supporting the permissibility of imposing abstinence from substance use recognized the need for the courts to balance rehabilitation and public safety concerns.

The question was initially clouded by the conflicting views on models of drug addiction and subsequent behavior. Ms. Eldred put forth the notion that her diagnosis of SUD precluded free will in terms of illegal drug use. The amicus briefs presented various models of behavior with respect to addiction, and none of these models could be deemed definitive. Thus, the Supreme Judicial Court of Massachusetts did not address the larger question of whether there is scientific consensus that individuals with SUD lack the ability to refrain from substance use.

Restricting a judge from imposing a condition of probation that prohibits substance use would directly violate the goal of ensuring offender accountability, and it may contravene additional goals. In *Commonwealth v. Eldred*, in which the rationale for the original offense was to obtain additional illicit substances, voiding this condition may have had the potential to also hinder the goals of promoting public safety. Moreover, the court noted that, had Ms. Eldred not been detained pending placement in an inpatient setting, she may have overdosed and died. Thus, while recognizing that SUD is a disorder that often entails relapse, the court nevertheless upheld the trial court judge’s discretion in determining conditions of probation and when violation could result in detention.

A ruling in the other direction would have had significant implications for the management of probationers with SUD in Massachusetts courts, including drug courts. Specifically, without a mechanism

for monitoring and enforcing abstinence, courts would have likely been less inclined to provide opportunities to defendants to remain in the community with conditions related to substance-use treatment. In sum, the opinion in this case validated the drug-free condition but recognized the judge's role in considering multiple factors to devise an individual plan without criminalizing substance use.

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## Qualified Immunity in a State Hospital

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### ***Private Employees Working in a State Hospital May Assert the Defense of Qualified Immunity***

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In *Perniciaro v. Lea*, 901 F.3d 241 (5th Cir. 2018), the Fifth Circuit Court of Appeals agreed with the district court for the middle district of Louisiana in holding that privately employed employees providing services for a state psychiatric hospital are entitled to assert the qualified immunity defense. Moreover, the court reversed a denial of summary judgment asserted by defendant employees, holding that the plaintiff had failed to establish that defendants engaged in conduct that was objectively unreasonable or violated his clearly established rights.

#### **Facts of the Case**

In 2013, Dominik Perniciaro was committed to the Eastern Louisiana Mental Health System (ELMHS) to restore his competence to stand trial. In 2014, he was discharged to prison after being found competent but was later found incompetent to stand trial again. He was readmitted to ELMHS, found restored to competence, and discharged a second time that same year. After standing trial, he was found not guilty by reason of insanity and recommi-

ted for treatment in 2015. Throughout these hospitalizations, he received psychiatric treatment for schizophrenia from Dr. Jeffrey Nicholl, who was in turn overseen by Dr. John Thompson, the chief of staff. Both were employees of Tulane University, which provided services to ELMHS under a contract with the state. Dr. Thompson reported to the chief executive officer, Dr. Steve Lea, who was a state employee and oversaw operations and safety policies at ELMHS.

During his 2013 hospitalization, Mr. Perniciaro engaged in multiple physical altercations that he often initiated. As a result, he was monitored on arm's-length observation and "close-visual observation" for almost the entirety of this commitment. Soon after his recommitment in 2014, he was assaulted by a patient whom he had assaulted during his prior commitment. Due to the assault, Mr. Perniciaro required outside hospitalization and surgery to repair his jaw. After his return to ELMHS, he engaged in additional physical altercations in which he was identified as the aggressor. Later that year, he alleged that ELMHS guards had attacked him and left bruises on his body. Although the bruises were attributed to manual holds occurring during the response to physical altercations, his allegations were reported to Adult Protection Services. Additionally, a report generated by the Office of Aging and Adult Services was reviewed by an investigative review committee and Dr. Lea, who collectively found the allegations of abuse to be unsubstantiated.

Around that time, Mr. Perniciaro also complained of a shoulder injury after slipping and falling on the ground. After this complaint, a variety of health care providers (i.e., Dr. Lea, other medical doctors, a physical therapist, and an orthopedic specialist) examined his case. The results of the examinations found signs of displacement and separation of the acromioclavicular joint. The recommended treatment was analgesics as needed. Mr. Perniciaro's father filed an official complaint regarding the quality of medical care to the Total Quality Management department at ELMHS. The response was that Dr. Lea had already addressed these concerns and that they would continue to be investigated.

By that time, Mr. Perniciaro had started on a new medication and showed remarkable improvements. A few months prior to his 2015 adjudication of not guilty by reason of insanity, he filed a lawsuit alleging that Drs. Nicholl, Thompson, and Lea had failed to