

Termination in Treatment Courts

Helen Harberts, JD

Chico CA

helenharberts@gmail.com

Disclosure

- This project was supported by Grant No. 2016-DC-BX-K007 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office.
- Points of views or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Termination in Treatment Courts

Discussion: Types of termination

When to terminate

Why are you terminating? What have you tried?

How to terminate within the law.

What's next-what will you do when they come back?

Types of Termination

Administrative transfers are not terminations

Some folks cannot manage your treatment court and need to transfer to a different caseload or court.

Successful termination of services: AKA completion or graduation

Medical terminations-their choice.

Unsuccessful termination from entire program.

When to terminate:

- Not a vote, a Judicial decision after team input.
- Personal opinion based on experience: like surgery, termination is the first and only thing you do, or the very last thing you do after you have tried everything else.
 - Actual Violence, true public safety issues=termination. (Esp: impaired driver courts)
 - Behavior that threatens the very integrity of the Court and the program=termination. (E.G.: Selling drugs in group, significant fraud on the Court)

Policy and local conditions play into decisions.

Termination:
*take your
time and
think before
you leap!*

- **Consider these facts:**
- Helen is driving her car, loses control and slides off the road, hitting a tree. She is impaired by drugs and alcohol, should she be punished?

**Now
consider
these facts:**

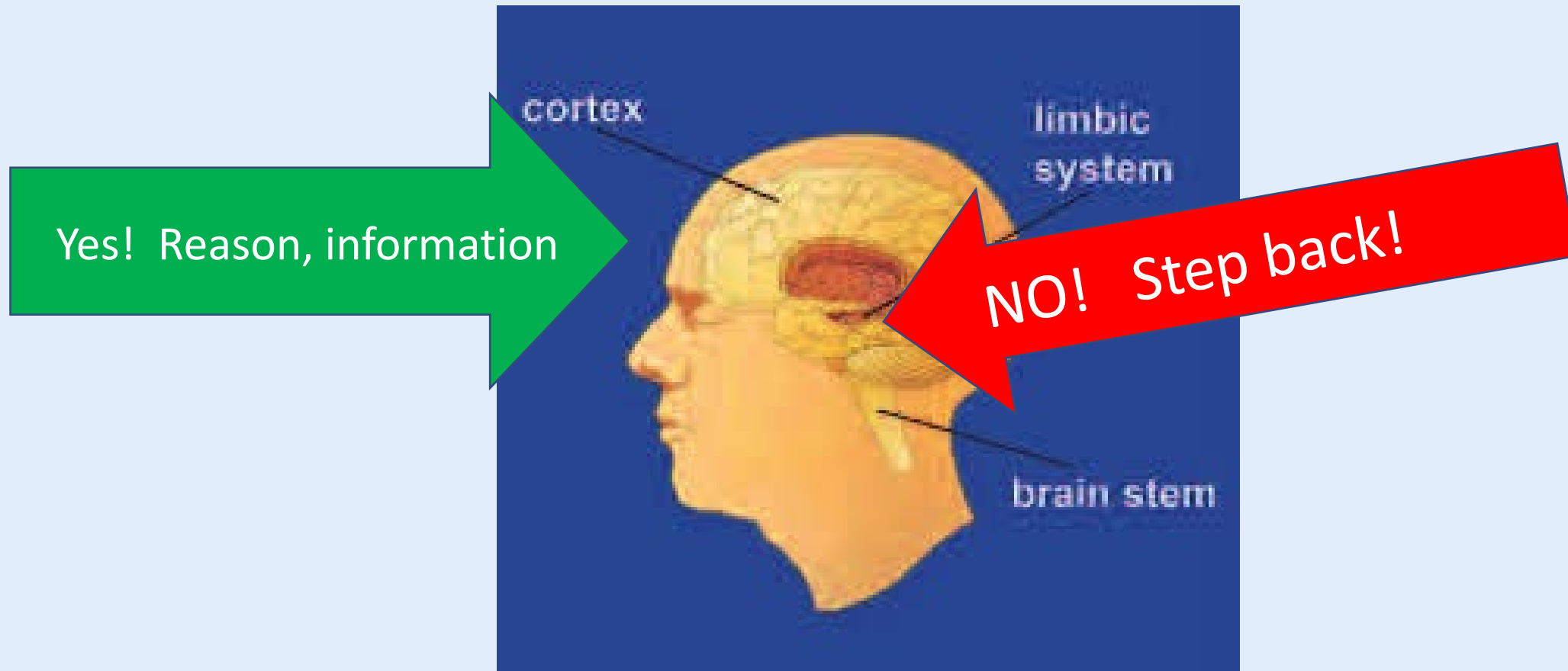
- Helen is driving her car, loses control and slides off the road, hitting a tree. She is impaired by drugs and alcohol. Sadly, a small child was near the tree on a tricycle and was killed.
- Should Helen be punished?
- *STOP: is there a difference in how you feel when you consider these facts vs the no death version?*

When
examined on
a brain scan,
the answers
to these
questions
varied.

- Decisions on the first scenario: frontal lobe
- Decisions on the second: limbic region.

DON'T DO THIS with termination. *Take your time and consider everything first.*

Decisions with the correct region!



Team members are human too!

- It is sometimes difficult to stay calm in the storm that is the lives of participants.
 - They frustrate us.
 - They break our hearts
 - They anger us.
 - They do dangerous things.
 - They go backward, rather than forward.
 - They lie.
 - They die....and scare us for future decisions.

Before you terminate: THINK carefully with that frontal lobe.

Before you terminate:

- What have you tried?
- What have you NOT tried?
- What did the assessment say? When was the last assessment?
- Did you look for things beyond your usual battery of screens? Does your battery of screens look at trauma, TBI, sociopathy, developmental challenges, etc?
- Did you address everything that came up in the assessments?
- Have you asked the participant what would help?
- Have you fallen for the “self sabotage” move?
- Did you approach trauma and got an adverse reaction?

What are the four responses to behavior change?

- Incentives
- Monitoring
- Teaching
- Sanctions

What are the four responses to behavior change?

- Are you using all of them, and focusing on the top three?
- What does your data show?
- Are you incentivizing at 4-1 or 10-1?
- What do your updated assessments say?

What are the four responses to behavior change?

- Have you tried alternative screens?
- What does the recovery environment look like? When did you last check? Facetime visits?
- MAT? Telemedicine consults?
- Hidden MH or developmental issues?

Termination: the process under law

- Due process is required for termination proceedings.
- *PROSPECTIVE WAIVERS OF RIGHTS IN THIS AREA ARE INVALID!*

The seminal cases:

Morrissey v. Brewer, 408 U.S. 471 (1972) Parolees get due process

Gagnon v Scarpelli, 411 US 778 (1973) Probationers get due process

- Procedural protections are due under the 5th and 14th Amendments when the defendant will potentially suffer a loss to a recognized liberty or property right.
- If due process applies, the question remains what process is due. Less than a fully jury trial, different burden of proof.

All 50 states provide counsel by statute

What's that mean? Minimal Due Process?

- (a) written notice of the claimed violations of probation or parole;
- (b) disclosure of the evidence against them;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence; (including subpoena power)
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a 'neutral and detached' hearing
- (f) a written statement by the factfinder(s) as to the evidence relied on and the reasons for the decision.

The question is: what process is due?

- **Neal v. State, 2016 Ark. 287 (Ark. Sup. Ct. 6/30/16)** (Citing *Laplaca* and *Staley, infra* , Ark. Sup. Ct. holds: “[T]he right to minimum due process before a defendant can be expelled from a drug-court program is so fundamental that it cannot be waived by the defendant in advance of the allegations prompting the removal from the program.”)

-
- **Gross v. State of Maine, Superior Court case # CR-11-4805 (2/26/13)**(drug court procedures relating to **termination** violative of due process and, therefore, unconstitutional. Drug Court participant entitled to: notice of the termination allegations and the evidence against him, right to call and x-examine witnesses, a hearing at which he is present, a neutral magistrate, written factual findings and the right to counsel. Here, the drug court team discussed the termination decision during the termination hearing, without defendant's presence or that of his counsel. That procedure coupled by the fact the Superior Court felt that the drug court judge should have recused, resulted in a finding of constitutional infirmity. Moreover, the appellate court ruled the defendant did not, arguably could not prospectively waive his rights, citing LaPlaca and Staley.

He waived his rights! NOPE!

- Hendrick v. Knoebel, (SD Indiana 5/10/2017) (“Though we need not rule on Defendants' argument concerning the waiver provision in the DTC Agreement, we note our serious doubts as to its enforceability under Indiana contract law, given the conspicuous lack of parity between the parties, the absence of specificity in the provision's language, the fact that it purports to absolve the DTC's employees of liability for intentionally tortious conduct, and the fact that the DTC Program is an entity of the local government performing a public service. See generally *LaFrenz v. Lake Cty. Fair Bd.*, 360 N.E.2d 605, 608 (Ind. Ct. App. 1977). Moreover, because the provision implicates federal common law by purporting to waive federal statutory and constitutional rights, the likelihood of its enforceability is increasingly remote. Federal courts are rightly skeptical, albeit not uniformly dismissive, of claims that a plaintiff has waived his constitutional rights or has released a defendant from liability for violating them. We "indulge every reasonable presumption against waiver of fundamental constitutional rights," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Bayo v. Napolitano*, 593 F.3d 495, 503 (7th Cir. 2010), and we acquiesce in a waiver only if it has been "knowing, intelligent, and voluntary." *Schriro v. Landrigan*, 550 U.S. 465, 484 (2007). The lack of specific language in the agreement before us, in conjunction with its prospectivity, not only falls short of eliciting "an intentional relinquishment or abandonment of a known right or privilege," *Patterson v. Illinois*, 487 U.S. 285, 292-93 (1988), but also encourages DTC staffers to violate the DTC participants' constitutional rights, knowing they are acting with impunity. Enforcing such an agreement is inconsistent with the public interest given its potential for abuse and cancellation of the participants' primary means of vindication.”)

Follow the law

- Recusal? The law and ethics control.
- Get a good record of termination procedure and reasons.
- Leave them with a message of hope
- Plan for their return.
 - Consider legal tools for re-entry, if they exist.
- Re-Admission policy review. They will be back.

Termination:

- Really resist throwing folks out.
- Do it when there is no real choice.
- Do it if you must but leave the door open and with hope.

Questions?

helenharberts@gmail.com