

The Uneasy Case for Requiring Mental Health Court Participants to Take Psychotropic Medications

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1. The creation of Mental Health Courts has been based, in part, on the following premises:
 - a. Some persons with serious mental illnesses commit crimes due to untreated mental illnesses
 - b. If proper treatment is provided to criminal defendants with mental illnesses, they are less likely to commit crimes in the future
 - c. Some level of court supervision is needed to insure that mental health court participants will comply with treatment—often including psychotropic medication
2. However, the third premise—that a court mandate is necessary or appropriate to insure treatment—is not always clear
 - a. Psychotropic medications are often an important, if not essential, part of treatment for the serious mental illnesses with which mental health court participants are diagnosed
 - b. There is substantial evidence that, without supportive services, persons with serious mental illnesses are less likely to reliably take such medications
 - c. There is substantial evidence that, with supportive services, even the persons with serious mental illnesses and a history of failure to take medications can be successfully engaged in treatment and maintained on medication
 - d. Community mental health services are dramatically underfunded in Illinois—we rank not better than 35th in per capita spending on community mental health services.
 - e. The supportive services which are frequently necessary to engage persons with serious mental illnesses in treatment are substantially more expensive than the

medications themselves. These services include Assertive Community Treatment (ACT), peer support services and housing.

- f. Due to the expense, many defendants with serious mental illnesses have never been offered the supportive services necessary to maintain their engagement in treatment, including adherence to prescribed medications
 - g. While medications can be highly effective in the treatment of mental illnesses, they are accompanied by serious risks and side effects which increase mortality and morbidity
 - h. Competent persons with serious mental illnesses might, after weighing the risks and benefits, chose not to take some or all psychotropic medications
 - i. Thus, while the coercion inherent in participation in mental health court is highly successful in insuring that mental health court participants remain engaged in treatment, it is not always clear that such coercion is necessary or appropriate.
3. Mandating psychotropic medication as part of participation in a mental health court program raises issues relating to due process and informed consent
- a. Mental health court participation is voluntary; however, it is also the result of coercion
 - b. Ordinarily, mental health court participants, agree to abide by the treatment recommendations of the agency or persons in whose care or custody they are placed as part of their participation in mental health court.
 - c. Ordinarily, mental health court participants are told and understand that psychotropic medications will be part of their required treatment

- d. Informed consent is the ordinary pre-requisite for medical treatment, including medication
- e. Informed consent to medication usually includes insuring that the patient understands the benefits, risks and side effects of the particular medication(s) which are being recommended
- f. Ordinarily, when a criminal defendant is being asked to agree to participate in a mental health court program, s/he is not advised of the benefits, risks and side effects of particular medications--if only because those medications have not yet been determined
- g. There is substantial uncertainty about the following aspects of the use of psychotropic medications with persons who have agreed to participate in mental health court programs
 - i. When medications are prescribed/recommended, what should mental health court participants be told about their options
 - ii. May a mental health court participant be threatened with criminal justice sanctions based solely upon her/his refusal to accept psychotropic medications
 - iii. May a court impose criminal justice sanctions based solely upon her/his refusal to accept psychotropic medications
 - iv. Before a court imposes criminal justice sanctions upon a mental health court participant based upon her/his refusal to accept psychotropic medications, must the court afford the participant a hearing to determine

whether:

- (1) the medication is in the participant's medical interest (benefits outweigh risks)
- (2) the refusal is based upon a competent choice
- (3) some other medication (or other treatment) would be equally effective

h. In *Washington v. Harper*, 494 U.S. 210 (1990), the U. S. Supreme Court held that, even a convicted criminal who had been lawfully sentenced to imprisonment, had a right under the due process clause to refuse psychotropic medications unless it was determined that such medications were in the inmate's medical interest.

Harper suggests that medication cannot be compelled without such a determination.

i. In *Matter of K. L.*, 1 N.Y 3d 362, 806 N.E.2d 480 (2004), the New York Court of Appeals rejected a constitutional challenge to *Kendra's Law* which permitted outpatient commitment orders to include psychotropic medication despite the absence of a finding that the respondent was incompetent to make her/his own decision about the medication. That holding was predicated upon the fact that the only consequence of a refusal of medication was "heightened scrutiny on the part of the physician, who must determine whether the patient may be in need of involuntary hospitalization"—*Kendra's Law* permitted no other sanction.. *Matter of K.L.* suggests that the imposition of greater consequences would violate due process in the absence of additional procedural protections.