

STATE OF NEW YORK
SUPREME COURT

COUNTY OF CLINTON
INTEGRATED DOMESTIC VIOLENCE PART

THE PEOPLE OF THE STATE OF NEW YORK

-against-

[REDACTED],

Defendant

AFFIRMATION

Index No.
Docket No.

Robert H. Ballan, affirms that the following is true under penalties of perjury:

1. That I am an attorney and counselor at law, duly admitted to practice in the State of New York.

2. That I am of counsel to the law firm of Dumas & Narrow, that represents the Defendant in the above-captioned criminal action.

3. That I make this affirmation, in part upon information and belief. The sources of my information are the papers filed in the above-captioned proceeding, my conversations with the Defendant, and my conversations with the Defendant's prior attorney.

4. That I make this Affirmation in support of the Defendants request to permit him to continue the use of medically prescribed Suboxone during the term of his probation.

5. That at sentencing, on November 28, 2016, the Court added provision to the Defendant's terms and conditions of probation that states: "The defendant shall not consume or possess Suboxone on or after February 28, 2017."

6. That after suffering accidental injuries, and being prescribed a pain medication containing oxycodone, an opioid, the Defendant became addicted to opioids. Later, the Defendant was prescribed Suboxone by a medical doctor, to treat his addiction while also relieving his pain. A copy of the electronically signed letter of [REDACTED] M.D., the Defendant's primary care

doctor, is annexed to this Affidavit for the Court's consideration. A copy of an electronically signed letter from Dr. [REDACTED], who prescribes the Defendant's Suboxone, is also attached. When Dr. [REDACTED] returns from vacation a conventionally signed document can be provided to the Court.

7. That based upon my conversations with the Defendant, he has sought alternative treatments to avoid the inevitable symptoms of discontinuation of Suboxone therapy but no alternatives can be in place by February 28, 2017. The Defendant describes the consequences of abrupt discontinuation of suboxone therapy as "agonizing." On the other hand, as stated in his Affidavit, suboxone does not affect the Defendant's ability to function normally.

8. That there are reasons founded in law why the Court should reconsider probation condition number 32. These are: (1) Requiring the discontinuation of a medically prescribed suboxone is not reasonably related to the goals of a probationary sentence as required by Penal Law § 65.10; the condition is impermissibly discriminatory and violates the Americans with Disabilities Act, codified at 42 U.S.C. § 12101, et seq; and the condition violates and substantive due process of law required by the New York and United States Constitutions.

9. That the Court's entry of an Order of probation that includes the condition that the Defendant not "consume or possess Suboxone on or after February 28, 2017" is contrary to New York's Penal Law, which requires that probation conditions be reasonably necessary to the rehabilitation of the offender or designed to prevent the conduct that gave rise to the offense.

10. That Section 65.10 of the New York Penal Law governs the imposition of particular conditions on a sentence of probation. Specifically, New York law provides that a condition should be, *inter alia*, "reasonably necessary to insure that the defendant will lead a law-abiding life," Penal Law § 65.10.1, "reasonably related to his rehabilitation," § 65.10.2(l), or "necessary and appropriate to ameliorate the conduct which gave rise to the offense." § 65.10.5. As the Third Department has stated, probation conditions should be "tailored in relation to the offenses" or be "reasonably related to the defendant's rehabilitation." People v. Franco, 69 A.D. 981, 983 (3d Dept., 2010) (citing People v. Hale, 93 N.Y.2d 454 (1999)); see also: People v. Brown, 62 A.D.3d 1209, 1210 (3d Dept., 2009) (Parole conditions should be "reasonably necessary to insure that the

defendant will lead a law-abiding life ... or are reasonably related to his or her rehabilitation".) (internal quotations omitted). The requirement that Mr. [REDACTED] discontinue medically prescribed Suboxone does not meet these standards.

11. That the requirement that Mr. [REDACTED] discontinue a medically supervised treatment is not necessary to insure his future compliance with the law, nor is it tailored to prevent his offense. Mr. [REDACTED] s violation of the order of protection was in no way related to his addiction or his ongoing treatment of that addiction. The Defendant has been undergoing treatment for his opioid addiction for the past 13 years. It is logical to assume that forcing Mr. [REDACTED] to abandon medical treatment to ameliorate the effects of addiction, without a medically approved and supervised tapering strategy will increase the likelihood of a criminality causally related to his addiction. As explained below, research shows that treatment of addiction with Suboxone and similar medications increases the likelihood that individuals will refrain from illicit drug use and criminal behavior. Under the circumstances present in this case, probation condition number 32 is not "tailored in relation" to Mr. [REDACTED] s offense. People v. Franco, at 983.

12. That forcing Mr. [REDACTED] to abandon his current course of medical treatment is not "reasonably related to his rehabilitation." As explained by the Defendant's medical doctor, [REDACTED] [REDACTED], the Defendant's medically prescribed, supervised and monitored Suboxone dose is necessary to treat his opioid addiction, and has been successful in preventing relapse (i.e., unprescribed use of illegal street drugs). Further, that medical opinion before the Court indicates that the immediate cessation of suboxone treatment substantially increases the risk that Mr. [REDACTED] would relapse. Thus, the Probation Order as it stands, will likely not achieve the goal of promoting Mr. [REDACTED] s rehabilitation. Instead it would significantly threaten to defeat his continued recovery. Therefore, condition 32 is inconsistent with the legislatively stated purpose of conditions of probation as set forth in § 65.10 of Penal Law.

13. That the Court's requirement that Mr. [REDACTED] stop treatment with Suboxone against his physician's recommendations violates Title II of the Americans with Disabilities Act ("ADA" or "Title II") and Section 504 of the Rehabilitation Act of 1973 ("Section 504"). Title II prohibits discrimination against qualified individuals with disabilities. As defined by the statute, a person with

a disability is one who has a physical or mental impairment that substantially limits a major life activity. 42 U.S.C. § 12132. The ADA also protects people who have a history of such an impairment, or who are regarded as having such an impairment. 42 U.S.C. § 12102(1); 28 C.F.R. § 35.108.

14. That the New York State Unified Court System has stated that it is committed to fully complying with the ADA by providing services, programs and activities in a way that assures equal and full accessibility for all court users. For each courthouse, there is an ADA liaison who can help facilitate access to court services, programs and activities.

See: <http://www.courts.state.ny.us/accessibility/index.shtml>

15. That Section 504 of the Rehabilitation Act is similar to the ADA, as it "prohibits programs and activities receiving federal financial assistance from excluding, denying benefits to, or discriminating against 'otherwise qualified' " individuals with a disability. McElwee v. County of Orange, 700 F.3d 635, 640 (2d Cir.2012) (quoting 29 U.S.C. § 794(a)). The standards adopted by the two statutes are nearly identical, and courts analyze a particular set of facts under both statutes. Disabled in Action v. Board of Elections in the City of New York, 752 F.3d 189, 196-97 (2d Cir. 2014).

16. That to establish a violation under Title II or Section 504, an individual must demonstrate that (1) she or he is a qualified individual with a disability; (2) the entity is subject to one of the Acts; and (3) she or he was denied the opportunity to participate in or benefit from the entity's services, programs, or activities, or was otherwise discriminated against by the defendant because of disability. Id. at 196. All of these requirements are met in this case.

17. That the Court's sentencing and probation activities are subject to the ADA because Title II covers all activities conducted by State governments. See Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37, 44-45 (2d Cir. 1997). See also Giraldi v. Board of Parole, 2008 WL 907321, at 5 (N.D.N.Y., March 31, 2008) (applying Title II to parole); People v. Brathwaite, 11 Misc.3d 918 (Crim. Ct., Kings Cnty., 2006) (applying Title II to a condition imposed on a sentence of conditional discharge).

18. That Mr. [REDACTED] is an "individual with a disability" because he has a current and past impairment (opioid addiction) that substantially limits his major life activities of neurological and brain functioning. See Carl Sherman, Impacts of Drugs on Neurotransmission, National Institute on Drug Abuse, (October 1, 2007), available at <https://www.drugabuse.gov/news-events/nida-notes/2007/10/impacts-drugs-neurotransmission> (describing some of the neurological effects of drug addiction); see also, 28 CFR § 35.108 (defining disability). Mr. [REDACTED] also is regarded as having such an impairment, as evidenced by the Court's requirement that he stop his prescribed medical treatment.

19. That Mr. [REDACTED] is a "qualified" individual with a disability because he would be eligible to complete probation but for the discriminatory requirement to stop prescribed addiction treatment. See 42 U.S.C. § 12131(2); 28 C.F.R. § 35.104 (an individual is "qualified" if, "with or without reasonable modifications to rules, policies, or practices," the individual "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the public entity.")

20. That the court's requirement to stop taking physician-prescribed addiction medication is not "essential" to the objectives of probation. Treatment of opioid addiction with Suboxone enhances, rather than diminishes, Mr. [REDACTED]'s rehabilitation. Mr. [REDACTED]'s physician, Dr. [REDACTED] has stated that forcing Mr. [REDACTED] off Suboxone will increase the probability of relapse and overdose and is not medically recommended. Dr. [REDACTED]'s recommendation is consistent with the medical literature and consensus about evidence-based treatment of opioid addiction.

Use of Suboxone to treat opioid addiction is scientifically proven and uniformly endorsed by leading medical and public health authorities, including the National Institute of Health, National Institute of Drug Abuse, Center for Disease Control, and Substance Abuse and Mental Health Services Administration. See, e.g., National Institute of Drug Abuse, Topics in Brief, Medication-Assisted Treatment for Opioid Addiction (Apr. 2012), available at

https://www.drugabuse.gov/sites/default/files/tib_mat_opioid.pdf

Studies show that requiring people in situations similar to that of Mr. [REDACTED] to stop taking Suboxone and similar addiction medication increases their risk of relapse, overdose, and death. See, e.g., Id.; Mady Chalk et al., Treatment Research Institute, FDA Approved Medications for

the Treatment of Opiate Dependence: Literature Reviews on Effectiveness and Cost-Effectiveness, (Jun. 2013) at 8, 11, 24-25, available at ...

asam.org/docs/default-source/advocacy/aaam_implications-for-opioid-addiction-treatment_final.pdf

See also: Jeannia F. Ju et al., John Kakko, MD et al., 1-year retention and social function after buprenorphine-assisted relapse prevention treatment for heroin dependence in Sweden: a randomized, placebo-controlled trial, 361 No.9358 LANCET, 662-668 (Feb. 22, 2013), available at <http://www.ncbi.nlm.nih.gov/pubmed/12606177> (last visited Feb. 26, 2017).

21. That it is important to note that Mr. [REDACTED] has suffered discrimination because of his disability. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Ironically, the court ordered Mr. [REDACTED] to stop taking medication precisely because of his disability - opioid addiction.

22. That the court's order also discriminates by creating substantial barriers to Mr. [REDACTED]'s completion of probation. See 28 C.F.R. § 35.130(b)(3)(ii) (prohibiting criteria that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities) and §35.130(b)(8) (prohibiting public entities from imposing "eligibility criteria that screen out or tend to screen out an individual with a disability . . . from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.") As noted above, Mr. [REDACTED]'s treatment with Suboxone increases his chances of successful completion of probation.

23. That because the Court ordered Mr. [REDACTED] to forego Suboxone treatment without regard to scientific and medical evidence supporting the benefits and need for continued treatment, and without conducting an individualized evaluation, the Court's order is at odds with the requirements of the ADA and Section 504 of the Rehabilitation Act.

24. That Court's entry of an Order that includes a condition that Mr. [REDACTED] not "consume or

possess Suboxone on or after February 28, 2017, runs afoul of substantive due process protections found in the Fourteenth Amendment of the Constitution.

25. That both the Fourteenth Amendment and New York law recognize the fundamental right of an individual to control his or her medical care. The Supreme Court has recognized that "the Due Process Clause protects an interest in life" and in decisions related to medical care. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 281 (1990). Similarly, the Second Circuit Court of Appeals has observed that it "is a firmly established principle of common law of New York that every individual of adult years and sound mind has a right to determine what shall be done with his own body and to control the course of his medical treatment." Kulak v. City of New York, 88 F.3d 63, 74 (2d Cir. 1996) (citing Rivers v. King, 67 N.Y.2d 492 (1986)). The Fourteenth Amendment and New York law have thus been invoked to permit a patient to refuse life-saving treatment, Cruzan, 497 U.S. at 281, to prevent the "unwanted administration of antipsychotic drugs," Washington v. Harper, 494 U.S. 210, 221-22 (1990), and to protect a parent's right to direct a child's medical care. Tenenbaum v. Williams, 193 F.3d 581, 599 (2d Cir. 1999).

26. That applying these principles, Federal Courts in New York have recognized that the refusal by the State to provide or permit treatment for addiction may, in some circumstances, constitute a violation of due process rights. As one district court observed, the "Fourteenth Amendment's due process clause protects . . . against a state actor's unreasonable deprivation of medical needs." Cumberbatch v. Port Authority, 2006 WL 3543670, at *9 (S.D.N.Y., December 5, 2006). A federal district court has declined to dismiss a due process claim based on the alleged refusal of a state official to provide methadone to an inmate suffering from withdrawal. Messina v. Mazzeo, 854 F. Supp. 116, 140-41 (E.D.N.Y., 1994); see also: Alvarado v. Westchester County, 22 F.Supp.3d 208, 217 (S.D.N.Y. 2014) ("[S]ome courts have concluded that the failure to provide methadone to an inmate exhibiting symptoms of withdrawal may constitute deliberate indifference to a serious medical need.").

27. That in the case at bar, the Court has ordered Mr. [REDACTED] to discontinue a medically prescribed and agreed upon medical treatment. Seemingly has done so without any analysis, reason or consideration of Mr. [REDACTED]'s medical needs. The Order contravenes the view held by

Mr. [REDACTED]s doctor, and a substantial body of medical literature that documents the risks of relapse following a sudden cessation of treatment. The Court's Order thus deprives Mr. [REDACTED] of his fundamental liberty interest to direct his own medical care, and it does so in a manner that potentially threatens his future health and safety.

28. That it is important to note that the New York State Constitution's due process clause is interpreted more expansively than that of the United States' Constitution. Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152 (1978).

29. That the medical care is an important, if not fundamental, right. Those that have been convicted of crimes, are a disfavored class. But not for Mr. [REDACTED]s conviction he would be able to continue Suboxone therapy without restriction. Therefore, barring Mr. [REDACTED] from participating in a medically prescribed and necessary course of treatment violates his right to equal protection.

Dated: February 27, 2017



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