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victim. The district court did not abuse its discretion in the sentence imposed. The Court of Appeals did not err when it rejected this assignment of error.

CONCLUSION

In this case on further review, raising various sentencing issues, we conclude that the record is insufficient to rule on Sidzyik's claim of ineffective assistance of counsel. The record shows that the sentencing court did not commit plain error when it proceeded to sentence Sidzyik after the State failed to remain silent at the sentencing hearing, in breach of the plea agreement, and that the sentence imposed was not an abuse of discretion. The Court of Appeals did not err when it affirmed Sidzyik's conviction and sentence.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
SAMANTHA A. SHAMBLEY, APPELLANT.
795 N.W.2d 884

Filed April 8, 2011. No. S-10-556.

1. **Due Process.** The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law.
2. ____. Applying the Due Process Clause to the facts of any given case is an uncertain enterprise which must discover what fundamental fairness consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.
3. ____. Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.
4. **Constitutional Law: Probation and Parole.** The conditional liberty of a parolee or probationer includes many of the core values of unqualified liberty and is, therefore, an interest within the contemplation of the liberty or property language of the 14th Amendment.
5. **Probation and Parole: Due Process.** At a hearing to determine revocation of parole or probation, the following minimum due process protections apply: (1) written notice of the time and place of the hearing; (2) disclosure of evidence;

(3) a neutral factfinding body or person, who should not be the officer directly involved in making recommendations; (4) opportunity to be heard in person and to present witnesses and documentary evidence; (5) the right to cross-examine adverse witnesses, unless the hearing officer determines that an informant would be subjected to risk of harm if his or her identity were disclosed or unless the officer otherwise specifically finds good cause for not allowing confrontation; and (6) a written statement by the fact finder as to the evidence relied on and the reasons for revoking the conditional liberty.

6. **Probation and Parole: Due Process: Evidence.** A parole or probation revocation hearing is not a criminal prosecution, and the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.
7. **Courts: Probation and Parole: Due Process.** Drug court program participants are entitled to the same due process protections as persons facing termination of parole or probation.
8. **Courts: Probation and Parole: Evidence: Witnesses.** Despite the flexible standard for drug court program termination and parole or probation revocation hearings which allows the consideration of hearsay evidence inadmissible under the rules of evidence, absent a showing of good cause, the drug court participant, parolee, or probationer has the right to confront adverse witnesses with personal knowledge of the evidence upon which the termination or revocation is based.
9. **Courts: Proof.** In drug court termination proceedings, the State bears the burden of proving, by a preponderance of the evidence, the alleged grounds for termination.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Vacated in part, and in part reversed and remanded with directions.

Melissa A. Wentling, Madison County Public Defender, and Christopher Bellmore for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN, Judge.

MCCORMACK, J.

NATURE OF CASE

This case presents an appeal from a participant's discharge from the drug court program.[1] The participant argues she was

[1] See, Neb. Rev. Stat. §§ 24-1301 and 24-1302 (Reissue 2008); Neb. Ct. R. §§ 6-1201 to 6-1209.

denied her rights to due process and confrontation when no adverse witnesses were available for cross-examination and the only evidence considered in support of the alleged violations of her drug court contract was a letter, written to the judge by the drug court coordinator, and its attachments. This is the first time we consider what process is due in drug court termination proceedings.

BACKGROUND

On December 23, 2008, Samantha A. Shambley pled guilty to possession of a controlled substance, a Class IV felony, in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 2008). The district court accepted the plea and adjudged her guilty of the offense. In lieu of sentencing at that time, the court transferred the case to the drug court program.

The drug court program is a postplea or postadjudicatory intensive supervision drug and alcohol treatment program for eligible offenders.[2] The purpose of the program is to reduce offender recidivism by fostering a comprehensive and coordinated court response composed of early intervention, appropriate treatment, intensive supervision, and consistent judicial oversight.[3] A drug court program participant pleads guilty and agrees to the terms and conditions of the program in exchange for the possibility of avoiding sentencing and, oftentimes, being allowed to withdraw the plea upon successful completion of the program. If the participant is terminated from the program or withdraws before successful completion, then the conviction stands and the case is transferred back to the district court for sentencing. Throughout this opinion, we have, for convenience, used the term "drug court." In this case, when the term is used, it refers to the district court. There is not a separate drug court under the Nebraska Constitution, and when the term "drug court" is used, it simply refers to a program of the district court, county court, or juvenile court, rather than to a separate court.[4]

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[2] § 6-1206.

[3] *Id.*

[4] See § 24-1302.

The parties agree that Shambley signed a drug court contract which, among other things, required that she stay drug free. On August 28, 2009, Shambley appeared before a judge of the drug court after reports that she had used marijuana. Shambley admitted that she had used. Shambley promised to try harder to comply with the terms and conditions of the program. She was not represented by counsel, and no evidence was adduced or specific findings made. In a written order, the judge revoked Shambley's bond for 72 hours, during which time she was ordered incarcerated "for violations of [her] Drug Court program."

Similar proceedings occurred on November 13 and December 4, 2009. At the November 13 proceeding, the judge told Shambley that she could not smoke marijuana and referred to the fact that she had missed drug tests. Shambley neither specifically admitted nor denied having done so. Shambley again told the judge that she wanted to stay in the program. The judge revoked her bond for 72 hours and sent Shambley to jail "for violations of [her] Drug Court program." Shambley was told that thereafter, she was to report to the drug court weekly. These meetings are not in the record.

During her appearance on December 4, 2009, Shambley admitted to having had another "setback." She was sent to spend the weekend in jail "for violations of [her] Drug Court program." She was ordered to report back on December 18, but there is no record of any meeting on that date.

On February 5, 2010, Shambley appeared to discuss yet another report of drug usage, which she neither admitted nor denied. The judge warned Shambley that she was at risk for termination from the drug court program.

On March 12, 2010, the judge again told Shambley that she had tested positive for drugs. Shambley, however, denied that she had used on the occasion in question. The judge informed Shambley that this time, the drug court team had recommended that she be terminated from the program. The judge scheduled an informal hearing to determine the issue of the recommended termination.

The hearing on termination was held on March 25, 2010. For the first time, Shambley appeared with counsel. The court

explained that it was Shambley's burden to go forward with showing why she should not be terminated from the program, stating:

> We have a termination hearing from the drug court. And this is a non — I guess the term is informal hearing to address that under our policy. And under the policy I believe that [Shambley] has the responsibility of going forward with that. Any evidence to remain as the recommendation of the drug court team has been to terminate her from the drug court, and I've received a report. Have you folks seen that . . . ?

The State did not argue any position as to the termination and did not present any evidence or call witnesses. The judge noted that he had received the letter from the drug court coordinator recommending Shambley's termination. The letter and its attachments were the only evidence in support of termination.

In the letter, the drug court coordinator alleged three instances of drug usage for the court to consider at the termination hearing: (1) February 5, 2010, (2) March 11, 2010, and (3) March 19, 2010. The coordinator made a brief synopsis of Shambley's recent difficulties in following the drug court contract and included five attachments as proof of those difficulties.

The first attachment was a discharge summary report from the rehabilitation center where Shambley stayed from December 2009 to January 2010. The report summarized that Shambley had relapsed three times while at a previous center and that that was the reason for her transfer. The report stated that Shambley made good progress at the center. She was discharged, with a favorable prognosis, to a halfway house.

According to the drug court coordinator's letter, the placement at the halfway house was unsuccessful. The second attachment was a letter written by a therapist of a therapeutic community where Shambley was admitted on February 9, 2010, apparently after her discharge from the halfway house. The therapist stated that Shambley was admitted "due to her continued substance use." The therapist also stated that while at the community, Shambley violated the conditions of a pass when she skipped an appointment to go shopping and she tested positive for marijuana on March 8, 2010.

The third and fourth attachments were printouts from a toxicology laboratory. Under the "result" column, one printout showed "25.5 mg/dL" of creatinine from a sample collected from Shambley on February 24, 2010. The other printout showed "209.6 mg/dL" of creatinine and an indication in the "positives" column adjacent to a result of "404 ng/mL" of "THC" from a sample collected on March 8.

The final attachment, a printout of an e-mail from an unidentified author to an unidentified recipient, discussed the fact that a February 24, 2010, drug test of Shambley was negative with a weak concentration, but should nevertheless be considered a positive result.

Shambley's counsel objected to the court's consideration of the letter and its attachments on the grounds of hearsay and lack of foundation. Counsel also argued that the manner in which the report was received and in which the proceedings were being conducted violated Shambley's rights to due process and confrontation. Counsel argued that he was neither able to adequately question the veracity of the unsworn hearsay allegations contained in the letter and its attachments nor able to effectively examine the meaning and reliability of the unauthenticated laboratory printouts.

The court overruled all objections. Shambley testified at the hearing that she did not use illegal drugs on March 11, 2010. She was not asked and did not discuss whether she had used drugs on the other two occasions alleged by the drug court coordinator as grounds for termination from the program.

The judge concluded that he agreed with the letter and its attachments outlining Shambley's "difficulties." Apparently in reference to prior meetings with Shambley and ex parte meetings with the drug court team, the judge said he was "certainly . . . familiar with" these difficulties. He also observed that the letter now "indicate[d] a positive test, which [he had] no reason to dispute."

Based on this evidence, the judge agreed with the drug court team's recommendation to discharge Shambley from the program. The judge found that keeping Shambley in the drug court would not be in her best interests and would erode the integrity of the drug court program. In light of Shambley's discharge

from the drug court program, the court scheduled a hearing in the district court to determine Shambley's sentence on the possession of a controlled substance conviction.

At the sentencing hearing, the same judge, now acting as a judge of the district court, sentenced Shambley to 90 days' incarceration with credit for 9 days served while awaiting sentence. Shambley appeals her termination from the drug court program.

ASSIGNMENTS OF ERROR

Shambley assigns that the lower court erred in (1) terminating Shambley from the drug court program without affording her due process of law, in violation of the 14th Amendment to the U.S. Constitution and corresponding sections of Nebraska law; (2) placing the burden of proof on Shambley to go forward and show why she should not be terminated from the drug court program, thereby violating her rights to due process as guaranteed to her under the 14th Amendment to the U.S. Constitution and corresponding sections of Nebraska law; (3) receiving into evidence the probation report over Shambley's objections, thereby denying her the right to confront and cross-examine witnesses against her; and (4) finding sufficient evidence to terminate Shambley from the drug court program, insofar as the inadmissible report was the only evidence against her.

STANDARD OF REVIEW

[1] The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law.[5]

ANALYSIS

[2,3] In considering claims under the Due Process Clause of the 14th Amendment, we first consider whether the nature of the interest is one within the contemplation of the liberty or

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[5] *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991); *State v. Clark*, 8 Neb. App. 525, 598 N.W.2d 765 (1999).

property language of the 14th Amendment.[6] If it is, we must then determine what procedural protections the particular situation demands, for "not all situations calling for procedural safeguards call for the same kind of procedure."[7] Applying the Due Process Clause to the facts of any given case is an "uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake."[8] Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.[9]

Conditional Liberty Interest

The U.S. Supreme Court has not had occasion to address due process in the context of termination from problem-solving diversion programs such as the drug court program. The Court has, however, examined what procedures due process requires in the revocation of parole or probation.[10] In *Morrissey v. Brewer*[11] and *Gagnon v. Scarpelli*,[12] the Court explained that revocations of parole or probation deprive an individual of the

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[6] See, *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972); *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

[7] *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

[8] *Lassiter v. Department of Social Services, supra* note 6, 452 U.S. at 24-25.

[9] *Id.*; *Cafeteria Workers v. McElroy*, 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).

[10] *Black v. Romano*, 471 U.S. 606, 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985); *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

[11] *Morrissey v. Brewer, supra* note 7.

[12] *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

"conditional liberty properly dependent on observance of special . . . restrictions."[13]

[4] The Court said that such liberty, although indeterminate and perhaps a "'privilege,'" includes many of the core values of unqualified liberty and is, therefore, an interest within the contemplation of the liberty or property language of the 14th Amendment.[14] It is a condition very different from confinement in a prison; the parolee or probationer is still able to do "a wide range of things."[15] For instance, subject to conditions, the parolee or probationer may be "gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life."[16] Termination of this conditional liberty inflicts a "'grievous loss'"[17] and "calls for some orderly process."[18]

To determine exactly what process is due, the Court balanced the individual's interest in his or her conditional liberty with the interests of the State. Because the termination of parole or probation does not deprive an individual of the absolute liberty to which every citizen is entitled, that having already been taken away upon conviction, the Court held that the process a parolee or probationer is due does not include "the full panoply of rights due a defendant in [a criminal prosecution]."[19] The Court described that the State has "an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole."[20] A full-blown adversary process, moreover, may be "less attuned to the rehabilitative needs of the individual probationer or parolee."[21]

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[13] *Morrissey v. Brewer, supra* note 7, 408 U.S. at 480.

[14] See *id.*, 408 U.S. at 482.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*, 408 U.S. at 480.

[20] *Id.*, 408 U.S. at 483.

[21] *Gagnon v. Scarpelli, supra* note 12, 411 U.S. at 787-88.

On the other hand, the Court concluded that there is no necessity for summary treatment of the parolee or probationer and that revocation is not such a discretionary matter that some form of hearing would be "administratively intolerable."[22] Furthermore, "[s]ociety has a stake in whatever may be the chance of restoring [the parolee or probationer] to normal and useful life within the law."[23] To this extent, the State shares the parolee's or probationer's "interest in not having parole [or probation] revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole [or probation], given the breach of . . . conditions."[24]

Having considered the weight of the relative interests at stake, the Court concluded that before a parolee or probationer is deprived of his or her conditional liberty, there must be "an informal hearing structured to assure that the finding of a . . . violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge" of the parolee's or probationer's behavior.[25] At such a hearing, the parolee or probationer is entitled to an opportunity to show that he or she did not violate the conditions and, where discretion exists, that there was a justifiable excuse for any violation or that revocation is not the appropriate disposition.[26]

[5] More specifically, the Court held that due process requires, at a minimum, both a preliminary hearing at or near the time of arrest, to determine whether there is probable cause or reasonable ground to believe that the parolee or probationer has committed acts that would constitute a violation of his or her conditions, and another opportunity for a hearing before the final finding of a violation and decision of revocation.[27] In both hearings, the following minimum due process

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[22] *Morrissey v. Brewer, supra* note 7, 408 U.S. at 483.

[23] *Id.*, 408 U.S. at 484.

[24] *Id.*

[25] *Id.*

[26] See *Black v. Romano, supra* note 10.

[27] *Morrissey v. Brewer, supra* note 7.

protections apply: (1) written notice of the time and place of the hearing; (2) disclosure of evidence; (3) a neutral factfinding body or person, who should not be the officer directly involved in making recommendations; (4) opportunity to be heard in person and to present witnesses and documentary evidence; (5) the right to cross-examine adverse witnesses, unless the hearing officer determines that an informant would be subjected to risk of harm if his or her identity were disclosed[28] or unless the officer otherwise "'specifically finds good cause for not allowing confrontation'"[29]; and (6) a written statement by the fact finder as to the evidence relied on and the reasons for revoking the conditional liberty.[30] In addition, the parolee or probationer has a right to the assistance of counsel in some circumstances where the parolee's or probationer's version of a disputed issue can fairly be represented only by a trained advocate.[31]

[6] Beyond this, the Court described the required procedure as "flexible" and subject to further refinement by the states.[32] The Court reiterated that a parole or probation revocation hearing is not "a criminal prosecution" and that the process should be "flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."[33] In *Morrissey*, the Court also noted that if it turned out that the parolee had admitted parole violations to the parole board, and if those violations were found to be reasonable grounds for revoking parole under

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[28] *Id.*

[29] *Gagnon v. Scarpelli, supra* note 12, 411 U.S. at 786.

[30] *Id.* See, also, *Black v. Romano, supra* note 10; *United States v. Smith*, 767 F.2d 521 (8th Cir. 1985); *United States v. Rilliet*, 595 F.2d 1138 (9th Cir. 1979); *State v. Moreno*, 21 Ariz. App. 462, 520 P.2d 1139 (1974); *State v. Fortier*, 20 Or. App. 613, 533 P.2d 187 (1975); *State v. Myers*, 86 Wash. 2d 419, 545 P.2d 538 (1976).

[31] See *Gagnon v. Scarpelli, supra* note 12.

[32] *Morrissey v. Brewer, supra* note 7, 408 U.S. at 489.

[33] *Id.*

state standards, then that "would end the matter."[34] In *Young v. Harper*,[35] the U.S. Supreme Court held that preparole, early release programs were sufficiently similar to parole and probation to require the same due process protections.

Application of *Morrissey* and *Gagnon* to Drug Courts

Shambley argues that a participant in the drug court program has a conditional liberty interest in continuing in the program similar to the conditional liberty interests of participants in preparole, early release programs; parolees; and probationers. She asserts that she should thus be afforded the same due process protections and that those protections were not afforded in this case.

We have never directly addressed this question. In *In re Interest of Tyler T.*,[36] we were asked to consider whether the State complied with due process in revoking the probation of a juvenile adjudicated delinquent and sent to a drug treatment court program as a condition of his probation. The revocation was based on an alleged positive drug test. We vacated the detention order because of the absence of either a verbatim record of the hearing or a written order. We held that due process requires a written record when a judge of a problem-solving court conducts a hearing and enters an order affecting the terms of the juvenile's probation. "[W]here a liberty interest is implicated in problem-solving-court proceedings, an individual's due process rights must be respected."[37]

[7] The majority of other courts considering the issue have determined that participants facing termination from post-plea diversion programs, such as the drug court program, are entitled to the same due process protections as persons

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[34] *Id.*, 408 U.S. at 490.

[35] *Young v. Harper*, 520 U.S. 143, 117 S. Ct. 1148, 137 L. Ed. 2d 270 (1997).

[36] *In re Interest of Tyler T.*, 279 Neb. 806, 781 N.W.2d 922 (2010).

[37] *Id.* at 811, 781 N.W.2d at 925.

facing termination of parole or probation.[38] We agree. While restrictions upon the liberty of drug court participants may depend on their individual program plans, participants are not imprisoned, and, like parolees or probationers, they may still do a wide range of things.[39] Participants are generally allowed to live at home and maintain gainful employment. They are allowed to be with family and friends and form the other enduring attachments of normal life, so long as these relationships are not a detriment to their rehabilitation.[40] The termination of the conditional liberty granted drug court participants inflicts a "'grievous loss'"[41] similar to the loss of parole or probation.

The State's interests, as in parole or probation, include an interest in being able to terminate participation in the program without the burden of a full adversary criminal trial.[42] But perhaps even more so than in parole or probation, the State has little necessity for summary treatment.[43] Drug court participants must generally plead guilty in order to qualify for the program, and the State thereby avoids the burden of a full adversary trial in the first instance. Furthermore, in order to qualify for the program, the crime cannot be a crime of violence and the offender must not have a significant criminal history of crimes of violence. Thus, the risk inherent to any delay caused by conducting a termination hearing is minimal.

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[38] *State v. Rogers*, 144 Idaho 738, 170 P.3d 881 (2007); *Gosha v. State*, 931 N.E.2d 432 (Ind. App. 2010); *Hagar v. State*, 990 P.2d 894 (Okla. Crim. App. 1999); *State v. Varnell*, 137 Wash. App. 925, 155 P.3d 971 (2007). See, also, *Torres v. Berbary*, 340 F.3d 63 (2d Cir. 2003); *People v. Bishop*, 7 P.3d 184 (Colo. App. 1999); *People v. Anderson*, 358 Ill. App. 3d 1108, 833 N.E.2d 390, 295 Ill. Dec. 557 (2005); *State v. Devatt*, 173 N.J. Super. 188, 413 A.2d 973 (1980); *Harris v. Com.*, 279 Va. 541, 689 S.E.2d 713 (2010); *State v. Cassill-Skilton*, 122 Wash. App. 652, 94 P.3d 407 (2004).

[39] *Morrissey v. Brewer, supra* note 7.

[40] *Id.*

[41] *Id.*, 408 U.S. at 482.

[42] *Id.*

[43] *Id.*

As with parole and probation, it is in the State's interests that drug court participants are restored to a normal and useful life. This is, after all, the point of the program. Accordingly, the State, like the participant, has an interest in seeing that there is a termination process which ensures participants are not terminated from the program because of erroneous information or because of an erroneous evaluation of the need to terminate.[44]

Considering the relative interests in the drug court program together with those of parole or probation, their balance is essentially the same. Therefore, the minimal due process to which a parolee or probationer is entitled under *Morrissey* and *Gagnon* also applies to participants in the drug court program. Case law decided in Nebraska setting forth minimum due process for parolees and probationers is equally applicable to our drug courts. We expect drug court termination proceedings to be conducted similarly to hearings terminating parole or probation.

Termination Hearing Violated Due Process

Applying these standards, we conclude that Shambley's termination hearing did not comport with the minimal due process to which a drug court participant is entitled. The drug court coordinator's letter and its attachments, considered without establishing foundation or reliability and containing statements made without personal knowledge, were insufficient to sustain the State's burden of proof. In addition, the failure to proffer any witness for Shambley to cross-examine as to the veracity of those statements, and the soundness of the recommendation to terminate, violated Shambley's right to cross-examination as set forth in *Morrissey* and *Gagnon*.[45]

In *State v. Mosley*[46] and *State v. Clark*,[47] our courts addressed the *Morrissey*/*Gagnon* right to cross-examine. In *Mosley*, we

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[44] *Id.*

[45] See, *Gagnon v. Scarpelli, supra* note 12; *Morrissey v. Brewer, supra* note 7.

[46] *State v. Mosley*, 194 Neb. 740, 235 N.W.2d 402 (1975), *overruled on other grounds, State v. Kramer*, 231 Neb. 437, 436 N.W.2d 524 (1989).

[47] *State v. Clark, supra* note 5.

reversed an order revoking probation, because the probationer was denied his right to confront and cross-examine the informant regarding his alleged probation violation. The probationer was alleged to have robbed a store. The evidence of the robbery consisted of the testimony of the investigating officer at the hearing, who related the hearsay statements of a store clerk describing the robbers and suggesting that one of them might have left a fingerprint on a freezer door. The State also presented a technician's testimony that a fingerprint in the store matched the probationer's fingerprints. We observed that there was no finding, as required by *Morrissey*, of good cause for denying the probationer his right to confront the store clerk. Therefore, the court could not deny the defendant his right to cross-examination:

> The Morrissey requirement [of the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation] reserves to the defendant the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation. In State v. Kartman, [192 Neb. 803, 224 N.W.2d 753 (1975)], this court stated: "Persons who have given adverse information should be available for questioning unless the hearing officer determines that they would be subjected to risk of harm if their identity were disclosed."[48]

The probationer's objection at the hearing claiming hearsay and the right to confrontation was sufficient to preserve these rights.[49]

Subsequently, in *Clark*,[50] the Nebraska Court of Appeals reversed an order revoking probation, when the State failed to present the laboratory technician to establish foundation for the urine screening test upon which the revocation was based. At the hearing, the probation officer testified that he had conducted

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[48] *State v. Mosley, supra* note 46, 194 Neb. at 744, 235 N.W.2d at 404.

[49] *Id.*

[50] *State v. Clark, supra* note 5.

the test on the probationer and sent the specimen to a laboratory for analysis, and the State offered a copy of the laboratory test result showing positive for marijuana. The district court overruled the probationer's objection that there was no evidence as to the specific procedures followed or the specific tests done and no opportunity to cross-examine the person who conducted the test. The Court of Appeals held that by denying the probationer his right to confront the technician who conducted the test, the district court denied the probationer's rights to due process as stated in *Gagnon*. While the court acknowledged that the Nebraska Evidence Rules do not apply to proceedings for revocation of probation,[51] minimum due process, the court explained, includes the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation.

[8] Despite the flexible standard which allows the consideration of hearsay evidence inadmissible under the rules of evidence, absent a showing of good cause, the drug court participant, parolee, or probationer has the right to confront adverse witnesses with personal knowledge of the evidence upon which the termination or revocation is based.[52] Not a single adverse witness was available for Shambley to cross-examine, despite her protests that she was thus unable to adequately challenge the evidence against her. The drug court denied Shambley her right to cross-examination without making any findings that there was good cause to disallow it. In this manner, she was deprived of her right to procedural due process.

[9] In addition, we agree with Shambley that the State failed to sustain its burden of proof when the sole evidence against her was the drug court coordinator's letter and its accompanying attachments, consisting of hearsay and hearsay within hearsay and considered without specific findings of reliability. While the burden of proof is not a point specifically discussed in *Morrissey* or *Gagnon*, it is understood that the State carried

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[51] See Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 2008).

[52] See, *State v. Mingua*, 42 Ohio App. 2d 35, 327 N.E.2d 791 (1974); *Jones v. Com. Pennsylvania Bd. of Probation and Parole*, 47 Pa. Commw. 438, 408 A.2d 156 (1979); *State v. Styles*, 166 Vt. 615, 693 A.2d 734 (1997).

a greater burden of proof at the final revocation hearing than at the preliminary "probable cause" hearing. Other jurisdictions specifically hold that minimal due process demands that the State bear the burden of showing the grounds for revocation of parole or probation by a preponderance of the evidence.[53] While the Nebraska Legislature, through Neb. Rev. Stat. § 29-2267 (Reissue 2008), has set forth a higher standard of proof in the case of violations of probation, we agree that the minimal standard under the Due Process Clause is a preponderance of the evidence. Having found no significant variance between the respective interests in parole and probation and those involved in postplea diversion, we conclude that the minimal preponderance of the evidence standard should also apply to demonstrating the alleged grounds for terminating a participant from the drug court program. The State and Shambley agree that this is the proper standard.

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[53] *Rich v. State*, 640 P.2d 159 (Alaska App. 1982); *State v. Gerlaugh*, 134 Ariz. 164, 654 P.2d 800 (1982), *modified on other grounds* 135 Ariz. 89, 659 P.2d 642 (1983); *Baldridge v. State*, 31 Ark. App. 114, 789 S.W.2d 735 (1990); *People v. Rodriguez*, 51 Cal. 3d 437, 795 P.2d 783, 272 Cal. Rptr. 613 (1990); *State v. Davis*, 229 Conn. 285, 641 A.2d 370 (1994); *Harris v. U.S.*, 612 A.2d 198 (D.C. 1992); *Rita v. State*, 470 So. 2d 80 (Fla. App. 1985); *People v. Wadelton*, 82 Ill. App. 3d 684, 402 N.E.2d 932, 37 Ill. Dec. 930 (1980); *Jaynes v. State*, 437 N.E.2d 137 (Ind. App. 1982); *Calvert v. State*, 310 N.W.2d 185 (Iowa 1981); *State v. Carter*, 5 Kan. App. 2d 201, 614 P.2d 1007 (1980); *Rasdon v. Com.*, 701 S.W.2d 716 (Ky. App. 1986); *State v. La Casce*, 512 A.2d 312 (Me. 1986); *Wink v. State*, 317 Md. 330, 563 A.2d 414 (1989); *Commonwealth v. Holmgren*, 421 Mass. 224, 656 N.E.2d 577 (1995); *People v Ison*, 132 Mich. App. 61, 346 N.W.2d 894 (1984); *Stapleford v. Perrin*, 122 N.H. 1083, 453 A.2d 1304 (1982); *State v. Reyes*, 207 N.J. Super. 126, 504 A.2d 43 (1986) (superseded by statute on other grounds as stated in *State in Interest of S.T.*, 273 N.J. Super. 436, 642 A.2d 422 (1994)); *People v. Hemphill*, 120 A.D.2d 767, 501 N.Y.S.2d 503 (1986); *State v. Saavedra*, 406 N.W.2d 667 (N.D. 1987); *McCaskey v. State*, 781 P.2d 836 (Okla. Crim. App. 1989); *State v. Donovan*, 305 Or. 332, 751 P.2d 1109 (1988); *Com. v. Brown*, 503 Pa. 514, 469 A.2d 1371 (1983); *Lloyd v. State*, 574 S.W.2d 159 (Tex. Crim. App. 1978); *State v. Hodges*, 798 P.2d 270 (Utah App. 1990); *State v. Begins*, 147 Vt. 295, 514 A.2d 719 (1986); *State ex rel. Thompson v. Riveland*, 109 Wis. 2d 580, 326 N.W.2d 768 (1982); *Krow v. State*, 840 P.2d 261 (Wyo. 1992).

The U.S. Supreme Court has said that the required procedure is flexible enough to allow consideration of evidence, including letters, affidavits, and other material that would not be admissible in an adversary criminal trial. Nevertheless, the *sole* reliance on hearsay evidence in parole and probation hearings, especially when no findings of substantial reliability are made, is generally considered a failure of proof.[54] No lesser standard should be applied to drug court termination proceedings. As one court said, "Although evidentiary rules may be relaxed somewhat at a revocation hearing, . . . they cannot be relaxed to the point where a parole violation may be proved entirely by unsubstantiated hearsay testimony."[55]

Few instances can be found, such as the one with which we are now presented, where the only evidence against the participant is letters and printouts with not even a single witness testifying in support of these documents. Needless to say, courts confronted with such a record find the evidence insufficient.[56] The State here, in fact, did not present a case. It did not proffer evidence, call any witnesses, or make any argument as to its position at the discharge hearing. Yet the drug court imposed upon Shambley the burden to show that the statements against her were untrue and that she had not violated the conditions of her liberty.

We disagree with the State's argument that it made a prima facie case and that the drug court was merely shifting the burden to Shambley to rebut it. A prima facie case is made by an amount of evidence sufficient to counterbalance the general presumptions of innocence if not overthrown by evidence

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[54] See, *State v. Portis*, 187 Ariz. 336, 929 P.2d 687 (Ariz. App. 1996); *Collins v. State*, 897 A.2d 159 (Del. 2006); *Glenn v. State*, 558 So. 2d 513 (Fla. App. 1990); *Goodson v. State*, 213 Ga. App. 283, 444 S.E.2d 603 (1994); *State v. Rochelle*, 877 So. 2d 250 (La. App. 2004); *Com. v. Foster*, 77 Mass. App. 444, 932 N.E.2d 287 (2010); *Com. v. Ortiz*, 58 Mass. App. 904, 788 N.E.2d 599 (2003); *State ex rel. Henschel v. H&SS Department*, 91 Wis. 2d 268, 282 N.W.2d 618 (Wis. App. 1979).

[55] *State ex rel. Henschel v. H&SS Department, supra* note 54, 91 Wis. 2d at 271, 282 N.W.2d at 619 (citation omitted).

[56] *Torres v. Berbary, supra* note 38; *Ex parte Belcher*, 556 So. 2d 366 (Ala. 1989); *State v. Mingua, supra* note 52.

contradicting it.[57] There was very little in the way of "evidence" at Shambley's hearing—certainly not enough to make a prima facie case. While we understand that the judge was familiar with Shambley's history, this does not diminish Shambley's right to have a hearing "structured to assure that the finding of a . . . violation will be . . . informed by an accurate knowledge" of her behavior.[58] In this case, the court conducted something more akin to a summary procedure than a hearing commensurate with the interests at stake in depriving a person of conditional liberty.

While we acknowledge, as the State points out, that on some prior occasions before the drug court, Shambley appeared to admit certain acts of drug usage, we note that she was less clear on other occasions. Most importantly, she adamantly denied having used drugs on the occasion for which the drug court team finally recommended her termination. Therefore, Shambley did not waive her due process right to have the State prove by a preponderance of the evidence the alleged drug court contract violations for which her participation was to be terminated, at a hearing conducted in accordance with the principles set forth in *Morrissey* and *Gagnon.* The drug court failed to conduct such a hearing, and we must reverse.

CONCLUSION

We reverse the order of termination and vacate Shambley's sentence, which was imposed after her termination from the program. We remand the cause for a new hearing before the drug court, conducted in accordance with the principles set forth above, to determine the extent to which Shambley violated the terms of the drug court contract and the appropriate action to be taken.

VACATED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., and WRIGHT, J., not participating.

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[57] See *Mantell v. Jones*, 150 Neb. 785, 36 N.W.2d 115 (1949).

[58] See *Morrissey v. Brewer, supra* note 7, 408 U.S. at 484.