

ALBUQUERQUE CRIMINAL LAWYER BLOG

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Sliding Scales of Due Process in New Mexico Probation Violation Hearings

The New Mexico Supreme Court case of *State v. Guthrie* addresses the rights of defendants in probation violation hearings to due process and confrontation of the State's witnesses. The court determined that the rights of probationers in probation violation hearings were measured on a "sliding scale with extremes at either end and much balancing and weighing of competing interests in between."

The facts of the Guthrie case are pretty straightforward. The defendant failed to complete a residential treatment program required under the terms of his probation. The probation officer that filed the probation violation report had been relocated and was unable to attend the hearing. In her place, her supervisor testified to the contents for her report and the contents of the probation file. The supervisor had no direct knowledge of the probation violation and had never met or spoken with the defendant or the residential treatment facility.

The defendant did not dispute that he had not completed treatment and it was taken as an undisputed fact. The defendant's objections at the probation hearing were strictly related to the violation of his right to confront and cross examine his probation officer. The district court found the evidence of violation sufficient for the revocation of defendant's probation. The defendant filed an appeal arguing a violation of due process and his right to confrontation of witnesses.

The Court cited the U.S. Supreme Court *Morrissey v. Brewer* for the proposition that probation revocation hearings are rather informal depriving a defendant not of an absolute liberty but only a conditional liberty under the terms of probation. Because revocation of probation addresses on conditional liberties, the Court reasoned that the full spectrum of criminal trial rights do not apply.

Under *Morrissey*, live testimony of probation officers is not always required. Instead, the court may rely on a variety of hearsay evidence such as affidavits, depositions, and documentary evidence. The Court stated further that it had no intention of preventing

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the State "from developing other creative solutions" suggesting ever greater latitude for courts and prosecutors in probation violation settings.

In short, the Court in Guthrie found that the live testimony of the defendant's probation officer was not necessary. The Court also emphasized that whether or not defendant completed treatment was a simple factual determination not susceptible to subjective interpretation. The failure of the defendant to offer any rebuttal evidence to suggest otherwise weighed heavily on the Court's ruling. The Court suggested that due process and the right to confrontation might require live testimony where the violation of probation was in dispute and/or relied on more subjective criteria.

The specific findings of the case are not so troubling as the broad parameters the Court set forth for probation violations. As it stands, the due process and confrontation rights of probationers are tenuous at best. After all, a sliding scale of justice with creative prosecution is not where a defendant would like to be.

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