STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP1618-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL A. KEISTER,

Defendant-Respondent.

ON APPEAL FROM A DECLARATORY JUDGMENT THAT WIS. STAT. § 165.95 IS UNCONSTITUTIONAL, ENTERED IN THE IOWA COUNTY CIRCUIT COURT, THE HONORABLE ANDREW SHARP, PRESIDING

BRIEF AND APPENDIX OF THE PLAINTIFF-APPELLANT

BRAD D. SCHIMEL
Wisconsin Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Constitutional Provisions

Statutes

Other Authorities

STATEMENT OF THE ISSUES

1. Does Michael A. Keister have a fundamental right to participate in a drug treatment court even though he has committed a violent crime?

The circuit court concluded yes.

This Court should conclude no.

2. Does the statute defining the Department of Justice's grant funding program have to define expulsion procedures for treatment courts in order satisfy procedural due process?

The circuit court implicitly concluded yes.

This Court should conclude no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument may be beneficial to the Court. Publication will be appropriate because the interpretation of Wis. Stat. § 165.95 will have statewide application to treatment courts and it will also directly impact the administration of the Department of Justice's Alternatives to Incarceration grant program.

INTRODUCTION

Wisconsin Stat. § 165.95 applies to the administration of the Department of Justice's Alternatives to Incarceration grant program. At the broadest level, it defines the process by which counties can apply for funding of a treatment court program or a suspended or deferred prosecution program. Wisconsin Stat. § 165.95 does not define the counties' programs; however, to be eligible for grant funding, counties must exclude "violent offenders" from their programs. An Iowa County court declared that the exclusion of violent offenders, yet to be convicted, was unconstitutional as

applied to Michael A. Keister. The circuit court's due process analysis was flawed and this Court should reverse that declaration.

STATEMENT OF THE CASE AND FACTS

The Department of Justice administers a grant program, as defined in Wis. Stat. § 165.95, that requires the department to "make grants to counties to enable them to establish and operate programs, including suspended and deferred prosecution programs and programs based on principles of restorative justice, that provide alternatives to prosecution and incarceration for criminal offenders who abuse alcohol or other drugs." Wis. Stat. § 165.95(2). Wisconsin Stat. § 165.95 defines the eligibility requirements for such grants, certain requirements of the county if a grant is awarded, reporting requirements of the Department of Justice, and other miscellaneous provisions. At issue here is the operation of Wis. Sat. § 165.95(1)(a), which defines "violent offender" in part and Wis. Stat. § 165.95(3)(c) which defines a county's eligibility in part.

Wisconsin Stat. § 165.95(1) defines "violent offender" as "a person to whom one of the following applies:"

> (a) The person has been charged with or convicted of an offense in a pending case and, during the course of the offense, the person carried, possessed, or used a dangerous weapon, the person used force against another person, or a person died or suffered serious bodily harm.
>
> (b) The person has one or more prior convictions for a felony involving the use or attempted use of force against another person with the intent to cause death or serious bodily harm.

Wisconsin Stat. § 165.95(3)(c) establishes that "[a] county shall be eligible for a grant" if, among other things, the county's alternative to incarceration program

"establishes eligibility criteria for a person's participation. The criteria shall specify that a violent offender is not eligible to participate in the program."

The Iowa County Treatment Court program is funded in part by a grant from the Department of Justice.[1] Iowa County has a handbook which defines its program. *See* Iowa County Treatment Court, Drug Court Program, Participant Handbook (hereinafter "Handbook"). (A-App. 119–43.) The mission of the program is to "enhance public safety, preserve families, and improve the quality of life of all residents." *Id.* at 4. (A-App. 122.) The program seeks to accomplish that mission "[b]y providing cost effective, individualized and comprehensive treatment and rehabilitative services, delivered in a dignified environment . . . to break the cycle of addiction." *Id.* at 4. (A-App. 122.)

Admission into Iowa County's program is at the discretion of the treatment court team. *Id.* at 9. (A-App. 127.) Once admitted, the individual can be expelled due to subsequent conduct, like arrest for a violent crime. *Id.* at 18. (A-App. 136.) The expulsion process begins with a motion by any member of the treatment court team. *Id.* at 19. (A-App. 137.) If the motion is supported, the participant is informed of the motion and that an expulsion conference will be scheduled. *Id.* (A-App. 137.) The participant has the right to counsel at the conference, and both are permitted to advocate to the treatment court team why the person should not be expelled. *Id.* (A-App. 137.) Following the conference,

[1] Wisconsin Stat. § 165.95 also apples to suspended and deferred prosecution programs. *See* Wis. Stat. § 165.95(2). Thus, the Court's decision in this case will have an impact beyond treatment courts.

the team will make a recommendation to the court. *Id.* (A-App. 137.) If the team recommends expulsion, a hearing is set. *Id.* (A-App. 137.) The hearing takes place on the record and in open court, and culminates in the treatment court's discretionary expulsion decision. *Id.* at 19–20. (A-App. 137–38.)

Keister was a participant in the Iowa County Treatment Court, but not as an alternative to revocation, and, indeed, not relating to any charge in Iowa County. He submitted a voluntary application to the Treatment Court after he overdosed on heroin in early November 2015. (R. 37:1; 44:2, A-App. 102.) At that time, he was an Iowa County resident, but was not facing any charges in Iowa County. (R. 44:2; A-App. 102.) He based his eligibility for the program on a 2014 conviction in Sauk County on which he was on extended supervision. (R. 37:1; 44:1, A-App. 101.) His application was based on the prior Sauk County offense, but he did not participate in the Iowa County Treatment Court as an alternative to revocation. (R. 44:2, A-App. 102; 65:2.)

In December 2015, Keister was charged in Iowa County with possession of narcotic drugs and possession of drug paraphernalia. (R. 3.) Those charges stemmed from his November heroin overdose. (R. 3.) He was *not* in treatment court as a post-adjudication agreement on these charges. (R. 44:2, A-App. 102; 63:2.) A plea hearing was scheduled for July 2016, then delayed until August 2016, and ultimately delayed again until January 2017. (R. 63; 64; 68.)

In August 2016, Keister picked up new charges in Sauk County. (R. 44:2, A-App. 102.) Those charges included substantial battery, strangulation and suffocation, and felony bail jumping. (R. 44:2, A-App. 102.)

In September 2016, the Iowa County Treatment Court team, by Assistant District Attorney Matt Allen, moved to

expel Keister from treatment court based on the new Sauk County charges. (R. 37:1; 44:2, A-App. 102.) This motion came *after* an expulsion conference. The expulsion conference was held off the record, and treatment court records are confidential and separate for the criminal case file (but again, there is no criminal case file that corresponds to Keister's involvement in this treatment program). *See* Handbook at 10. (A-App. 128.) The motion specified that the treatment team was relying on Wis. Stat. § 165.95(3)(c) and the rules of the program that establish that a "violent offender" is not eligible to participate in the program. Due to the new Sauk County charges, Keister met that definition, and thus, the treatment team asked for an expulsion hearing.[2] (R. 37:1.)

Keister, through counsel, advised that he would challenge the motion to expel on constitutional grounds. As a result, the expulsion hearing was put on hold. (R. 28; 37:1.)

In December 2016, Keister was sent back to prison, presumably on a revocation of his extended supervision in the 2014 Sauk County case. (R. 65:2.)

In early January 2017, with the expulsion motion still pending, Keister entered into a conditional plea agreement in his Iowa County case. (R. 37:1; 68:2.) Keister pled no contest to the charge of possession of narcotic drugs. (R. 68:3–4.) A charge of possession of drug paraphernalia was dismissed. (R. 68:2.) If Keister was allowed to continue with and complete the Iowa County Treatment Court program, the State would recommend two years of

[2] Both the treatment court judge and Allen expressed concern that the program would lose funding if Keister was not expelled. (R. 69:3–4.)

probation. (R. 68:8–9.) If he did not complete the program, the State would recommend four months in county jail. (R. 68:8–9.) Because the plea agreement was conditioned on future events, the sentencing date was set off. (R. 68:13.)

A month later, Keister filed his motion to dismiss the State's motion to expel him from treatment court and asked for a declaration that Wis. Stat. §§ 165.95(1)(a) and (3)(c) are facially unconstitutional and unconstitutional as applied. (R. 28; 29.) He also asked for an order enjoining any further enforcement of that statute "against the defendant or any other participant in the drug treatment courts in Wisconsin." (R. 28:1.) Keister argued that he had a substantive due process right not to be expelled from the program as a "violent offender" based solely upon a charge (as opposed to a conviction), and no amount of procedural due process afforded in the expulsion process could justify a violation of that substantive right. (R. 29:3–6.) He used his plea agreement in the Iowa County Case to assert that expulsion from treatment court would result in a deprivation of liberty, i.e., jail time as opposed to probation. (R. 29:4–5.)

The circuit court ultimately entered a declaratory judgment that the operation of Wis. Stat. §§ 165.95(1)(a) and 165.95(3)(c) was unconstitutional as applied to Keister and others similarly situated. (R. 44, A-App. 101–18.) The court concluded that Wisconsin, by enacting Wis. Stat. § 165.95, created a liberty interest in participating in treatment courts. (R. 44:5, A-App. 105.) Relying on *Wolff v. McDonnell*, 418 U.S. 539 (1974), the court concluded that "[w]hile there is no constitutional right to be admitted into a drug treatment court, the State having created that opportunity, it falls within the Fourteenth Amendment's guarantee of 'liberty.'" (R. 44:6, A-App. 106.) The circuit court did not find the statute unconstitutional on its face because the court could not "say that all persons who are prevented from

entering treatment court due to its provisions will be incarcerated and thus have a liberty interest at stake." (R. 44:10; A-App. 110.) The circuit court declined Keister's request for a statewide injunction, having "confidence in [the] integrity" of other treatment courts to respect the court's conclusion that the statute is unconstitutional as applied. (R. 44:17, A-App. 117.)

Because the court found that a liberty interest was implicated, it concluded that the statute was viewed under the strict scrutiny standard. (R. 44:8, A-App. 108.) The court dismissed the proffered four interests in expelling "violent offenders" from a treatment court: 1) it protects the safety of the individuals who serve the court in treatment and testing roles by not exposing them to violent offenders; 2) it prevents the expansion of costs and time to deal with the needs of violent offenders, which may be different from nonviolent offenders; 3) it mitigates against the need to decline to accept nonviolent offenders due to lack of resources used by violent offenders; and 4) it mitigates against wasting resources on a lengthy treatment program that a violent offender will be unlikely to complete before he is convicted of new charges. (R. 44:8–10; A-App. 108–10.) The circuit court concluded that "[a]ll of this is actually irrelevant because it begs that basic question of whether the 'violent offenders' are in fact violent offenders. The law at issue here concerns the exclusion of persons merely charged with a violent offense." (R. 44:9, A-App. 109 (formatting in original).)

The court then addressed procedural due process and concluded that the statute—the Department of Justice's *grant program* for alternatives to incarceration—affords no due process to an *individual* participating in a treatment court. (R. 44:11, A-App. 111.) The court found that the only due process involved is the filing of a complaint, which is de minimis due process and insufficient to protect against the

apparent substantial risk of an erroneous deprivation of liberty. (R. 44:12, A-App. 112.) The court did not consider the actual rules of the program, which require notice and a hearing before expulsion. *See* Handbook at 19–20. (A-App. 137–38.)

Based on its review of Wis. Stat. § 165.95, the circuit court concluded that Keister was placed in the category of a "violent offender" with no opportunity to disprove the designation, and that was unconstitutional. (R. 44:16, A-App. 116.)

The State appeals.

STANDARD OF REVIEW

"When a circuit court's ruling on motions for declaratory judgment depends on a question of law, we review the ruling de novo." *Black v. City of Milwaukee*, 2016 WI 47, ¶ 20, 369 Wis. 2d 272, 882 N.W.2d 333, *cert. denied sub nom. Milwaukee Police Ass'n v. City of Milwaukee, Wis.*, 137 S. Ct. 538 (2016) (quoting *Gister v. Am. Family Mut. Ins. Co.*, 2012 WI 86, ¶ 8, 342 Wis. 2d 496, 818 N.W.2d 880). The constitutionality of a statute is a question of law that this Court reviews de novo. *State v. Heidke*, 2016 WI App 55, ¶ 5, 370 Wis. 2d 771, 883 N.W.2d 162 *review denied*, 2016 WI 98, 372 Wis. 2d 278, 891 N.W.2d 410 (citation omitted).

ARGUMENT

"A statute enjoys a presumption of constitutionality." *Heidke*, 370 Wis. 2d 771, ¶ 5 (citation omitted). "To overcome that presumption, a party challenging a statute's constitutionality bears a heavy burden . . . [to] 'prove that the statute is unconstitutional beyond a reasonable doubt.'" *Id.* (quoting *State v. Cole*, 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328). Keister did not meet that burden and the circuit court's declaratory judgment should be reversed.

I. Keister does not have a fundamental liberty interest in participating in a state and county funded treatment court when he has committed a violent crime.

A. The principles of substantive due process.

The substantive due process guarantees of the United States and Wisconsin Constitutions forbid governments "'from exercising "power without any reasonable justification in the service of a legitimate governmental objective."'" *State v. Quintana*, 2008 WI 33, ¶ 80, 308 Wis. 2d 615, 748 N.W.2d 447 (citation omitted).[3] "The right to substantive due process addresses 'the content of what government may do to people under the guise of the law.'" *State v. Wood*, 2010 WI 17, ¶ 17, 323 Wis. 2d 321, 780 N.W.2d 63 (citation omitted). "An individual's substantive due process rights protect against a state action that is arbitrary, wrong, or oppressive, without regard for whether the state implemented fair procedures when applying the action." *Id. See also, In re the Commitment of Schulpius*, 2006 WI 1, ¶ 33, 287 Wis. 2d 44, 707 N.W.2d 495.

"The Supreme Court of the United States 'has always been reluctant to expand the concept of substantive due process because guideposts for reasonable decision making in this unchartered area are scarce and open-ended.'" *Black*, 369 Wis. 2d 272, ¶ 47 (quoting *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 126 (1992)). This is so because

---

[3] The Fourteenth Amendment to the United States Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Wisconsin Constitution provides equivalent guarantees in Art. I, § 1 and Art. I, § 8. *See State v. Radke*, 2003 WI 7, ¶¶ 5 n.5, 6, 259 Wis. 2d 13, 657 N.W.2d 66.

"extending constitutional protection to an asserted right or liberty interest . . . place[s] the matter outside the arena of public debate and legislative action.'" *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). Thus, courts exercise "judicial self-restraint" when determining what is a "fundamental" liberty interest as "the Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Glucksberg*, 521 U.S. at 721 (citation omitted).

The Supreme Court's "established method" to evaluate a substantive due process claim is two-fold. *See Glucksberg*, 521 U.S. at 720. First, the court carefully describes the asserted fundamental liberty interest. *Id.* at 721–23 (citation omitted).[4] Second the Court determines if the carefully described interest is a fundamental right or liberty "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* at 720–21 (citations omitted).

"The mere novelty of . . . a claim is reason enough to doubt that 'substantive due process' sustains it." *Id.* at 723 (citation omitted). "[T]he outlines of the 'liberty' specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete

[4] While the Court labels "careful description" as its second "primary feature" of a "substantive-due-process analysis," it is actually the first step in the analysis. *See Glucksberg*, 521 U.S. at 721–23.

examples involving fundamental rights found to be deeply rooted in our legal tradition." *Id.* at 722.

If a fundamental liberty interest is implicated, "the challenged legislation must survive strict scrutiny." *State v. Smith*, 2010 WI 16, ¶ 12, 323 Wis. 2d 377, 780 N.W.2d 90. If not, the challenged legislation must survive rational basis review, which evaluates whether the legislation is "patently arbitrary and bears no rational relationship to a legitimate government interest." *Id.* (citation omitted). "To have a rational basis, substantive due process requires only that 'the means chosen by the legislature bear a reasonable and rational relationship' to a legitimate government interest." *Id.* ¶ 14. It does not depend on actual legislative intent or require that a statute be the most efficient or best way to achieve an end. *State v. Radke*, 2003 WI 7, ¶ 11, 259 Wis. 2d 13, 657 N.W.2d 66. Courts must uphold legislation as constitutional if they "can conceive of facts on which the legislation could be reasonably be based." *Radke*, 259 Wis. 2d 13, ¶ 11.

B. The circuit court's substantive due process analysis was flawed.

1. Keister has no fundamental right to participate in a treatment court.

Here, the circuit court's substantive due process analysis was flawed. First, it was unclear exactly what substantive due process right Keister alleged to have or what right the court found. Following the Supreme Court's guidance to carefully define the asserted interest, the question is: does an individual have a fundamental liberty interest in participating in a state and county funded treatment court when the person has committed a violent crime? The answer to the question is no.

Drug treatment courts are a relatively new development in the criminal justice system. While community-based treatment programs began to emerge in the 1960s, the first official drug treatment court was established in Florida in 1989. *No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives*, 23, Ctr. For Health & Just. At TASC (Dec. 2013). (A-App. 144–48.) Thus, participation in a treatment court cannot be said to be "deeply rooted in our legal tradition." And if there is no right to participate in a treatment court then, logically, there can be no fundamental liberty interest implicated by an eligibility requirement.

Second, the circuit court's reliance on *Wolff* for the proposition that a statute can created a substantive due process right is flawed. The Court in *Wolff* was concerned with whether *procedural* due process applies when a liberty interest, there good-time credits, was statutorily created. *Wolff*, 418 U.S. at 556–58. That inquiry "is whether the regulation created a protect[a]ble liberty interest, thus entitling the holder of the interest to the minimum procedures that are appropriate under the circumstances and necessary to insure the interest is not arbitrarily abrogated." *State v. Steffes*, 2003 WI App 55, ¶ 22, 260 Wis. 2d 841, 659 N.W.2d 445 (explaining the holding of *Wolff*) (citation omitted).

"[W]hile liberty interests entitled to procedural due process protection may be created by state law as well as the Constitution itself, those entitled to substantive due process protection (whatever the procedures afforded) are 'created only by the Constitution.'" *Hawkins v. Freeman*, 195 F.3d 732, 748 (4th Cir. 1999) (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring)). Neither the United States' nor Wisconsin's constitution

recognizes a constitutional liberty interest in the participation in treatment courts.

Furthermore, unlike the statute addressed by the Supreme Court in *Wolff*, the statute at issue here is a *grant program*. It does not create a treatment court, nor a right to participate in one. It simply defines the Department of Justice's grant program for alternatives to incarceration.

Finally, the specific terms of Keister's plea agreement do not change the analysis. The plea agreement reached by the State and Keister had alternative sentencing recommendations based on whether Keister was expelled from drug court. (R. 68:8–9.) That agreement was reached after the expulsion process had begun. (R. 68:2.) Thus, Keister was fully aware that he might be expelled from the program at the time the agreement was brokered. But more importantly, the agreement and his expulsion did not actually effect Keister's sentencing exposure. Keister was not in the drug court program in connection with the crime for which he pled; rather, he was admitted on a voluntary application before charges were filed in Iowa County. And, of course, the sentencing court was not bound by the State's sentencing recommendation. *State v. Williams*, 2002 WI 1, ¶ 24, 249 Wis. 2d 492, 637 N.W.2d 733. The circuit court's conclusion that expulsion necessarily resulted in a change in Keister's sentence (R. 44:5, A-App. 105) is plainly wrong: Keister has yet to be sentenced (R. 68:13).

The circuit court's decision that the statute created the treatment court, and thus a statutory right to participant in treatment court subject to substantive due process protections is incorrect.

2. If there is any liberty interest in the participation in a treatment court, infringement on that interest is evaluated under the rational basis test, not strict scrutiny.

Even if it could be said that Wis. Stat. § 165.95 does more than define a grant program, there is a rational basis for excluding violent offenders, yet to be convicted, from the program. Again when, as in this case, a statute does not implicate a fundamental liberty interest, the rational basis test for evaluating constitutionality applies. *In re Jeremy P.*, 2005 WI App 13, ¶ 18, 278 Wis. 2d 366, 692 N.W.2d 311.

Wisconsin Stat. § 165.95 specifically identifies that alternatives to incarceration are meant "to meet the needs of a person who abuses alcohol or other drugs" and "to promote public safety, reduce prison and jail populations, reduce prosecution and incarceration costs, reduce recidivism, and improve the welfare of participants' families by meeting the comprehensive needs of participants." Wis. Stat. §§ 165.95(3)(a) and (b).

In working towards those governmental interests, the State has a reasonable and rational basis for treating violent offenders differently from nonviolent offenders when it comes to eligibility for drug treatment court.

Alternatives to incarceration have historically been premised on the idea that prison space and resources should be reserved for violent offenders. *See, e.g.,* Hon. Sheila M. Murphy*, Drug Courts: An Effective, Efficient Weapon in the War on Drugs*, 85 Ill. B.J. 474, 475 (1997) ("Conviction for drug offenses is the largest and fastest-growing category in the federal prison population . . . . The resulting situation means violent offenders are being released earlier to accommodate the incoming drug offender population."). This reflects the underlying policy that violent individuals should

be removed from the community to protect the community, but nonviolent offenders should be rehabilitated within the community itself. *See Reducing Correctional Costs in An Era of Tightening Budgets And Shifting Public Opinion*, 14 Fed.Sent.R. 332, 332–33 (Vera Inst. Just. 2002) (noting the overwhelming public support of treatment in lieu of prison for cost savings).

"To address both substance abuse recidivism and overcrowding, many counties in Wisconsin and other states have developed treatment courts (also called specialty courts or problem-solving courts) with a view toward directing specific resources at specific problems." Thomas J. Walsh*, In the Crosshairs: Heroin's Impact on Wisconsin's Criminal Justice System*, 89-Jan Wis. Law. 32, 33 (2016). Because a treatment court is focused on rehabilitation, these formalized alternatives to incarceration programs are resource intensive. *Id.* at 37. There are limited resources and thus limited space for participants.

Participation in treatment court involves frequent drug testing, treatment or counseling sessions, and meetings with treatment court staff. *See* Handbook at 11–14. (A-App. 129-32.) These individuals may have chosen to serve the court in treatment and testing roles with the understanding that they will not be exposed to violent offenders. The State has an interest in protecting their safety, but also in ensuring that it can retain the human resources needed for these programs.

Additionally, violent offenders are likely to have treatment and supervision needs that exceed those of nonviolent offenders. The additional needs of violent offenders may fall outside the scope of services routinely provided and could add significantly to both the cost of the program and to the length of time required to successfully

complete such a program. As a result of limited resources, nonviolent offenders who, as a matter of public policy, are viewed as more deserving of community-based treatment, could be denied admission for the lack of resources.

For example, in Iowa County, the optimal progression through the five phases of the Iowa County Drug Treatment Court requires a minimum of 14 months to complete, but progress through the five phases invariably takes longer, as participants are prone to setbacks, slips, and relapse. (R. 37:3.) The Iowa County Treatment Court celebrated its first graduate on March 9, 2017, more than 19 months after that individual was initially accepted into the program. (R. 37:3 n.1.) In light of how long a treatment court program can take to complete, it runs counter to common sense to require treatment courts to expend their limited resources on individuals facing the possibility of incarceration that would almost certainly prevent program completion.

There is a significant rational basis for treating violent offenders differently from nonviolent offenders when considering their eligibility for treatment courts. Having a rational basis to exclude "violent offenders," Wis. Stat. § 165.95 is not unconstitutional as applied to Keister.

II. Procedural due process need not be defined by statute, and Keister has been and will be afforded the full protections of procedural due process before he is expelled from treatment court.

"The procedural component of the due process clause does not prohibit states, or municipalities, from depriving a person of life, liberty, or property; it prohibits this only if done without due process of law." *Thorp v. Town of Lebanon*, 225 Wis. 2d 672, 687, 593 N.W.2d 878 (Ct. App. 1999), *aff'd*, 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59 (citation omitted) "A claim that a person has been deprived of life,

liberty or property without the procedural protections required by due process arises only if and when the state fails to provide the requisite procedures." *Id.* (citation omitted). To prove a procedural due process violation there must be a "recognized right" and the deprivation of that right was done without "process commensurate with the deprivation." *Milewski v. Town of Dover*, 2017 WI 79, ¶ 20, 377 Wis. 2d 38, 899 N.W.2d 38 (citation omitted).

"The focus of such claims is not on whether the State may infringe the right in question, but whether it has engaged the proper procedure in doing so." *Id.* "Procedural due process rules are meant to protect persons . . . from the mistaken or unjustified deprivation of life, liberty, or property." *Id.* (quoting *Carey v. Piphus*, 435 U.S. 247, 259 (1978)). "The elements of procedural due process are notice and an opportunity to be heard, or to defend or respond, in an orderly proceeding, adapted to the nature of the case in accord with established rules." *Id.* ¶ 23 (citation omitted). "The review must be 'adequate, effective, and meaningful.'" *Id.* (citation omitted).

Here, the circuit court only looked to Wis. Stat. § 165.95, and not to the rules of the treatment court, to conclude that no procedural due process was afforded to Keister. If there is any right to not be expelled from a treatment court program without due process, the court should have nevertheless determined that the Iowa County Treatment Court afforded Keister due process.

The circuit court's analysis is flawed because it concluded that the *grant funding* statute had to define expulsion procedures, the statute did not, and thus, there was no due process. As far as the State is aware, there is nothing that would establish that a procedural due process violation occurs if a procedure is not defined by statute.

The Iowa County Treatment Court does have an expulsion process. *See* Handbook at 19–20. (A-App. 137–38.) It includes an expulsion conference by the treatment team, notice to the participant, and a hearing in front of the treatment court judge. *Id.* That hearing is not just a formality.

A "violent offender" is defined not by an offense, but by the person's actions during the offense. To be a "violent offender" in charged conduct, it must be that "during the course of the offense, the person carried, possessed, or used a dangerous weapon, the person used force against another person, or a person died or suffered serious bodily harm." Wis. Stat. § 165.95(1)(a). Thus, contrary to the circuit court's belief, Keister cannot be expelled simply because a criminal complaint was filed. It is the details of the crime that matter, not the crime itself.

For example, two individuals could both be charged with theft as a party to a crime. If Defendant A carried a gun, he would meet the definition of Wis. Stat. § 165.95(1)(a). If Defendant B did not, and did not otherwise use force, then Defendant B would not meet the definition. Similarly, two people could be charged with first-degree homicide as a party to a crime and only one be a "violent offender." A person is violent based on his individual conduct, not based on the charged crime.

Moreover, participation in a treatment court is discretionary and participants must agree to abide by the rules. *See* Handbook at 6. (A-App. 124.) If a rule is broken, the proponent of expulsion must convince the majority of the members of the treatment team and the treatment court that expulsion is appropriate. *See* Handbook at 19. (A-App. 137.) Keister's expulsion hearing has been on hold, but the fact remains that a hearing would occur before he could be

expelled. The circuit court erred when it concluded that the due process afforded to Keister was de minimis. Expulsion does not flow directly from the filing of the criminal complaint.

CONCLUSION

For the foregoing reason, this Court should reverse the judgment of the circuit court.

Dated this 7th day of December, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,028 words.

_____
TIFFANY M. WINTER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 7th day of December, 2017.

_____
TIFFANY M. WINTER
Assistant Attorney General

Appendix
State of Wisconsin v. Michael A. Keister
Case No. 2017AP1618-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 7th day of December, 2017.

_____

TIFFANY M. WINTER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 7th day of December, 2017.

_____
TIFFANY M. WINTER
Assistant Attorney General