STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2017AP001618-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 Iowa County, the Honorable Andrew Sharp, Presiding.

RESPONSE BRIEF OF DEFENDANT-RESPONDENT

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ISSUE PRESENTED

What due process protections are required before a participant may be expelled from a drug treatment court program?

At issue in this case are the "violent offender" provisions of Treatment Alternatives and Diversion Program statute, Wis. Stat. §§ 165.95(1)(a) and (3)(c). Specifically, Mr. Keister challenged the statute's mandate that he constitutes a "violent offender" because he had been "charged with…a[] [violent] offense in a pending case" and thus, according to the statute, "is not eligible to participate" in drug treatment court. Wis. Stat. §§ 165.95(1)(a) and (3)(c).

The circuit court found that Mr. Keister could not be expelled from the Iowa County Drug Treatment Court based solely on the filing of a complaint that alleged he committed a violent crime—it held that such a deprivation of his liberty interest denied his rights to substantive and procedural due process.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Keister welcomes oral argument if it would be helpful to the court. Publication is appropriate because no Wisconsin case has addressed what due process protections are required before a participant may be terminated from drug treatment court.

STATEMENT OF FACTS

As Respondent, Mr. Keister chooses to supplement the factual background provided, as necessary, within his argument.

ARGUMENT

This Court Must Declare What Due Process Protections a Participant in Drug Court is Entitled to Prior to Expulsion.

A. Overview of Argument.

All parties agree that Mr. Keister is enrolled in Iowa County Drug Treatment Court related to his extended supervision in Sauk County Case Nos. 13-CF-64 and 14-CF-95. (37:4; 28:2). All parties agree that his ability to continue with treatment court in this case, Iowa County Case No. 15-CF-193, is contingent on whether he is expelled from Drug Treatment Court in Sauk County Case Nos. 13-CF-64 and 14-CF-95. (37:1; 68:8-9). In this case, Mr. Keister pled pursuant to a plea agreement that provides a joint sentencing recommendation for drug treatment court, instead of four months jail, if he is not expelled from drug treatment court in his Sauk County cases. (68:8-9).

While this case, Iowa County Case No. 15-CF-193, was pending, Mr. Keister was charged with violent offenses in Sauk County Case No. 16-CF-302. (37:1; 44:2). These new charges led to an expulsion motion by the state. The state, relying on Wis. Stat. § 165.95, argued expulsion was automatic based on the charging of the violent offense in Sauk County Case No. 16-CF-302. (37:1).

Mr. Keister brought a declaratory judgment action, seeking to dismiss the expulsion motion and arguing that expulsion based solely on a charge violates substantive and procedural due process. (28; 29).

The state, relying on its interpretation of Treatment Alternatives and Diversion Program ("TAD") statute, argued that proof of the violent charge alone is enough to trigger expulsion: "As a matter of procedure, the only proof necessary to support expulsion on the basis of Mr. Keister's new charges should be presentation of the record to date in Sauk County Case No. 16-CF-302." (37:4).

The circuit court granted Mr. Keister's motion to dismiss the expulsion motion, and declared Wis. Stat. §§ 165.95(1)(a) and (3)(c) unconstitutional. (44:1-18; App. 101-118). The purpose of declaratory judgment is to allow courts to anticipate and resolve controversies of a justiciable nature prior to the time that a wrong has been threatened or committed. ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶28, 309 Wis. 2d 365, 749 N.W.2d 211. Here, the circuit court found that Mr. Keister could not be expelled from Iowa County Drug Treatment Court based on the filing of a complaint that alleged he committed a violent crime—it held that such a deprivation of his liberty interest denied his rights to substantive and procedural due process. (44:1-18; App. 101-118).

On August 17, 2017, the state appealed the circuit court's ruling. (45).

On October 17, 2017, the charges in Sauk County Case No. 16-CF-302—the charges that formed the basis for the state's expulsion motion—were dismissed on the

prosecutor's motion.[1] As such, by law, those charges were not proven, have no legal effect, and Mr. Keister is presumed innocent.

At the appellate level, the state's argument has changed. It no longer argues that evidence of filing of the criminal complaint is enough to support expulsion from drug treatment court. (App. Br. 18). The state also includes the Iowa County Drug Treatment Court handbook as part of its Appendix. (App. 119-143). This handbook was not part of the circuit court record, was not argued during any hearing or in any motion, and was not considered by the circuit court in its decision. It is unclear what legal authority this handbook has. It purports to be "a road map" to Iowa County's Drug Treatment Court. (App. 122).

Nevertheless, the state argues that this handbook provides adequate procedural due process. It highlights that before expulsion occurs, a participant is afforded an expulsion conference by the treatment team, notice to the participant, and a hearing in front of the treatment court judge. (App. Br. 18; App. 137-38). The state contends that "That hearing is not just a formality." (App. Br. 18). Contrary to the position taken by the state at the circuit court, the state now concedes that "Expulsion does not flow directly from the filing of the criminal complaint." (*Id*. at 19).

The state has proposed a reading of the statute that attempts to save its constitutionality. While Mr. Keister believes the Iowa County handbook does not address all the due process protections necessary, he agrees with the state that there is a way to read the statute to preserve its constitutionality. ***Am. Family Mut. Ins. Co. v. Wisconsin***

[1] Court record entries are available for Sauk County Case No. 16-CF-302 via Wisconsin Circuit Court Access.

Dep't of Revenue, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998). (When a reasonable interpretation exists that would render the legislation constitutional, a court should avoid interpreting a statute in such a way that would render it unconstitutional.). As will be addressed below, the circuit court's findings that the statute violated due process guarantees is understandable, considering the state's interpretation of the TAD statute at the circuit court level.

Since the TAD statute is silent regarding what due process protections a drug treatment court participant is due before expulsion can occur, this court must declare what due process protections are to be provided prior to a participant's expulsion. By doing so, this court will engraft the minimum due process protections necessary before a person can be expelled from a drug treatment court funded by TAD, such as the Iowa County Drug Treatment Court in this case.

Further, since all TAD funded drug courts develop their own programs and procedures, a ruling by this court would help ensure that all counties are operating their drug treatment courts in accordance with the minimum due process guarantees of the constitution.

For the reasons argued below, this court:

- must interpret Wis. Stat. § 165.95 because it is the only relevant statutory language that creates the right to, and funding for, an alternative to incarceration program, like Iowa County's Drug Treatment Court;

- should interpret "charged with…a[] [violent] offense in a pending case" in Wis. Stat. § 165.95(1)(a) in a way to avoid unconstitutionality; and

- should hold that a person in drug treatment court has a substantive and procedural due process right to remain in the program and cannot be expelled without a procedure akin to the procedure used to revoke probation, parole, or extended supervision.

Mr. Keister asks this court to address the due process protections of a person already in drug treatment court, rather than eligibility for entry into drug treatment court. This case does not squarely present the issue of entry, as all parties agree that Mr. Keister is already in Iowa County's Drug Treatment Court. (37:4; 28:2).

B. Summary of Treatment Alternatives and Diversion Program ("TAD") established by Wis. Stat. § 165.95.

In Wisconsin, the primary funding for drug treatment courts comes from the Treatment Alternatives and Diversion Program ("TAD"), established by Wis. Stat. § 165.95 and administered by the Wisconsin Department of Justice.[2] The TAD program was started in 2005 to help counties implement problem-solving courts—with the goal to provide treatment and diversion programs for non-violent, adult offenders whose substance abuse problems were a contributing factor in their criminal activity.[3]

As of 2017, TAD programs are now operating in 46 counties and two tribes.[4] Drug Treatment Courts ("DTC") are the most common type of problem-solving courts in

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[2] Criminal Justice Coordinating Council ("CJCC"), "Treatment Alternatives and Diversion Program (TAD)," *available at* https://cjcc.doj.wi.gov/initiative/tad-0

[3] *See* ***Id.***

[4] *See* ***Id.***

Wisconsin, and in 2014, accounted for about half of the total number of problem-solving courts in the state.[5]

The only statutory requirements for the operation of problem-solving courts are codified in Wis. Stat. § 165.95, the statute that creates the TAD program by creating funding for such courts.[6] Wis. Stat. § 165.95. This statute defines the minimum eligibility requirements for a participant, county requirements if a grant is awarded, reporting requirements, and other miscellaneous provisions. *See, generally* Wis. Stat. § 165.95.

At issue in this case are the "violent offender" provisions of TAD, Wis. Stat. §§ 165.95(1)(a) and (3)(c). Specifically, Mr. Keister has challenged the statute's mandate that he constitutes a "violent offender" because he has been "charged with…a[] [violent] offense in a pending case" and thus, according to the statute, "is not eligible to participate" in DTC. Wis. Stat. §§ 165.95(1)(a) and (3)(c).

While the TAD statute provides the minimum requirements of who is eligible to participate in these county funded problem-solving courts—by specifying that a violent offender may not participate and defines what a violent offender is—that is the extent of guidance that TAD provides on how problem-solving courts operate. Rather, each county that receives a grant is responsible for creating the policies

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[5] *See* "Problem-Solving Courts, Alternatives, and Diversions," Staff Brief, June 18, 2014, p. 15, *available at* https://docs.legis.wisconsin.gov/misc/lc/study/2014/1190/010_june_25_2014_meeting_10_00_a_m_411_south/sb_2014_01.

[6] *See* "Wisconsin Statutory Requirements for Operation of Treatment Alternatives and Diversion Programs," *available at* https://cjcc.doj.wi.gov/sites/default/files/initiative/Wisconsin%20Statutory%20Requirements%20for%20the%20Operation%20of%20Treatment%20Alternatives%20and%20Diversion.pdf.

and protocols to be followed and for handling the day-to-day operations of the problem-solving courts.[7] For example, the Iowa County handbook outlines Iowa County's DTC program operation that details the intake process, program phases, graduation, and sanction and expulsion process. (*See* App. 119-143).

The TAD program takes pride in their program flexibility, which they contend allows for "local criminal justice professionals to design a structured approach to meet the unique criminal justice needs of the community."[8]

However, because of this flexibility, it appears that no two DTC programs are the same. As such, the standards for eligibility, program phase goals, and the sanction and expulsion process, are in each county's discretion.[9]

As a preliminary matter, the state argues that because Wis. Stat. § 165.95 is a funding statute, "It does not create a treatment court, nor a right to participate in one." (App. Br. 13). TAD grants the county the authority to provide an alternative to incarceration program, such as DTC, and provides the mechanism for funding such a program. Without the funding, or the statutory right to create such a program, the DTC program would not exist nor would the participant's associated liberty interest, which will be addressed below. As such, the state's purported distinction that the TAD statute is

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[7] *See* Wisconsin Department of Justice, "TAD Information," *available at* https://www.doj.state.wi.us/dci/tad-information.

[8] *See* ***Id.***

[9] *See* ***Id.****(* "While the overarching principles of TAD apply in every project, there is variation among projects on program model used, length and intensity of treatment and monitoring, and program target population.")

merely a funding statute, and therefore cannot create a right to such a program, is a distinction without a difference.

Further, in the circuit court, the state relied on the TAD's statute's definition of "violent offender" to try to expel Mr. Keister from the program. There is no other statute dealing with what DTCs look like or how they function. By virtue of Wis. Stat. § 165.95's requirements, the statute functionally governs—without much detail—DTCs funded by DOJ grants.

If DTCs implicate due process—and for reasons given below, they do—then Wis. Stat. § 165.95's requirements must comport with due process requirements or they are invalid.

C. Legal standards related to due process.

The United States Constitution guarantees that "no State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. Wisconsin's own due process clause is significantly similar. Wis. Const. Art. I, § 8. In both, the "touchstone of due process is protection of the individual against arbitrary action of government." ***Co. of Sacramento v. Lewis***, 523 U.S. 833, 845 (1998) *citing* ***Wolf v. McDonnell***, 418 U.S. 539, 558 (1974).

The Due Process Clause protects more than an individual's right to fair process; it has a "substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." ***Lewis***, 523 U.S. at 840 (internal quotation marks omitted). "Substantive due process forbids a government 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.

Freedom from physical restraint is a fundamental right that "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." ***Foucha v. Louisiana***, 504 U.S. 71, 80 (1992).

Procedural due process addresses the fairness of the manner in which a governmental action is implemented. ***State v. Wood***, 2010 WI 17, ¶17, 323 Wis. 2d 321, 780 N.W.2d 63. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." ***Morrissey v. Brewer***, 408 U.S. 471, 481 (1972); ***Mathews v. Eldridge***, 424 U.S. 319, 333 (1976).

This court employs a two-part test to determine whether a violation of procedural due process has taken place. ***Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund***, 2000 WI 98, ¶80, 237 Wis. 2d 99, 613 N.W.2d 849. "First, we examine whether the person has established that a constitutionally protected property or liberty interest is at issue. Second, we consider whether the procedures attendant with the deprivation of the interest were sufficient." ***Id.*** (internal citations omitted).

The constitutionality of a statute is a question of law that this court reviews de novo. ***Wood***, 2010 WI 17, ¶15. In an "as applied" challenge to the constitutionality of a statute, the party challenging the statute must prove that his or her constitutional rights were actually violated. "If a challenger successfully shows that such a violation occurred, the operation of the law is void as to the party asserting the claim." ***Wood***, 2010 WI 17, ¶13.

D. A participant in drug treatment court has a constitutionally protected liberty interest.

The liberty interest involved in Drug Treatment Court—remaining in the program—is similar to the liberty interest involved in probation, parole, and extended supervision.

Neither Wisconsin nor the United States Supreme Court has addressed what due process rights attach in the context of termination from drug court programs. However, the majority of other jurisdictions considering this issue have determined that an individual facing termination from a drug treatment program is entitled to the same due process protections as a person facing termination of parole or probation. *See*, *e.g.* ***State v. Shambley***, 281 Neb. 317, 329 n. 38 (Neb. 2011)(compiling cases from other jurisdictions that have found due process protections for participants facing termination from diversion programs, like drug treatment court). The majority of these jurisdictions have found that when a defendant pleads guilty in order to enter a diversionary program, he has a liberty interest at stake as he will no longer be able to assert his innocence if expelled from the program. *See*, *eg.* ***State v. Rogers***, 144 Idaho 738, 741, 170 P.3d 881 (2007).

In so deciding, these jurisdictions have mainly examined and applied the U.S. Supreme Court's seminal cases, ***Morrissey*** and ***Gagnon***, which address the process due in parole and probation revocation proceedings. ***Morrissey v. Brewer***, 408 U.S. 471 (1972); ***Gagnon v. Scarpelli***, 411 U.S. 778 (1973).

In ***Morrissey***, the U.S. Supreme Court determined that a person on parole has a constitutionally protected, conditional liberty interest. A parolee's liberty "includes

many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502, 513–15, 563 N.W.2d 883 (1997) *citing* ***Morrissey***, 408 U.S. at 482.

This court should similarly hold that a defendant participating in drug treatment court has a conditional liberty interest similar to a person on probation, extended supervision, or parole. Like supervision through the Department of Corrections, the Iowa County Drug Treatment Court offers participants conditional liberty. As in probation or parole, a participant is in post-adjudication or in possible revocation status. (App. 124). Drug court participants are able to enjoy a wide variety of freedoms, such as living at home and seeking employment. (App. 134-135).

Most importantly, termination from the drug court program, like termination of probation or parole, could result in a grievous loss like "return to circuit court for resentencing or for the stay to be lifted on any imposed and stayed sentence." (App. 137-138). Because drug court can be imposed as part of a condition of extended supervision, termination from drug court could also lead to supervision sanctions or revocation. (App. 124, 137-38); *see also* ***State ex rel. Cutler v. Schmidt***, 73 Wis. 2d 620, 622, 244 N.W.2d 230, 231 (1976) *citing* ***State ex rel. Plotkin v. H&SS Department***, 63 Wis. 2d 535, 544, 217 N.W.2d 641 (1974) (holding that violation of a condition of supervision is a "sufficient ground for revocation.").

In this case, Mr. Keister has a conditional liberty interest in remaining in DTC. He is enrolled in Iowa County Drug Treatment Court related to the extended supervision in Sauk County Case Nos. 13-CF-64 and 14-CF-95. (37:4;

28:2). As such, termination of Mr. Keister's conditional liberty interest by expelling him from drug court could result in a violation of his rules of extended supervision—which in turn could lead to extended supervision sanctions or revocation. (App. 124, 137-38). [10]

E. Because a drug court participant has a liberty interest, the government cannot terminate participation without due process of law

Because a defendant has a protected liberty interest, he must be accorded procedural due process before the court may terminate his participation from treatment court. Drug court termination proceedings must trigger the same due process protections afforded in probation or parole revocation because the state's interests and the participant's conditional liberty interest, on balance, are similar.

In ***Morrissey***, after finding a protected liberty interest, the Court balanced the individual's interests with that of the interests of the state to determine what process was due before this liberty could be revoked. Because the termination of parole or probation does not deprive an individual of absolute liberty—that has 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 to a defendant in a criminal prosecution. ***Morrissey***, 408 U.S. at 480. Likewise, the state has an interest in "being able to return the individual to imprisonment without the burden of a new

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[10] Further, revocation would also affect his liberty in Iowa County Case No. 15-CF-193. All parties agree that his ability to continue treatment court in this case, Iowa County Case No. 15-CF-193, is contingent on whether or not he is expelled from drug treatment court on his Sauk County Case Nos. 13-CF-64 and 14-CF-95. (37:1; 68:8-9).

adversary criminal trial if in fact he has failed to abide by conditions of his parole." ***Id.*** at 483. The Court also noted that society has an interest in restoring the parolee or probationer to normal and useful life; and that to a certain extent, the state shares the parolee's or probationer's interest in not having supervision revoked because of erroneous information or evaluation. ***Id.*** at 483.

After balancing the government's interests with that of the individual, the Court held that before a person is deprived of his conditional liberty, a hearing must take place "to assure that the finding of a parole violation will be based on verified facts." ***Id.*** at 483. As such, the Court held that the minimum requirements of due process included: written notice of the claimed violation(s); disclosure of evidence against him; the opportunity to be heard in person and to present witnesses and documentary evidence; the right to confront and cross-examine adverse witnesses, unless the hearing officer finds good cause for not allowing confrontation; a neutral and detached hearing fact-finder; and a written statement by the fact finder regarding the evidence relied on and the reasons for revocation. ***Endicott***, 210 Wis. 2d 502, 514–15 *citing* ***Morrissey*** 408 U.S. at 489.

In ***Gagnon***, the U.S. Supreme Court mandated that the same due process guarantees were required at probation revocation, and further, that a parolee or probationer has a right to the assistance of counsel during revocation under certain circumstances. ***Gagnon***, 411 U.S. 778, 786-790.

Thanks to ***Morrissey*** and ***Gagnon***, it is now well established that prior to revocation of supervision, a person is entitled to due process of law. In Wisconsin, these rights are codified in Wis. Adm. Code §§ DOC 331.05, 331.06, and Ch. HA 2, and provide detailed specifications of the

notice and procedure required for revocation of probation, extended supervision, and parole.

Other jurisdictions have applied ***Morrissey*** and ***Scarpelli*** to drug court termination procedures. For example, in ***Shambley***, the Nebraska Supreme Court acknowledged that like probation and parole, a drug court termination also involves the loss of conditional liberty. 281 Neb. 317, 329. Drug court participants are able to enjoy a wide variety of freedoms such as living at home and seeking employment. ***Id.*** Further, while in drug court, a participant remains free from incarceration. ***Id.*** Similar to revocation of probation or parole, termination from the drug court program could cause the participant to suffer a grievous loss, including incarceration. ***Id.***

The court found that the state's interests in termination from drug court were similar to its interests in termination of probation or parole. ***Id.*** The point of drug court was to restore participants to a normal and useful life, and the state, like the participant and society as a whole, had an interest in ensuring that participants were not terminated from the program due to erroneous information or based on an erroneous evaluation. ***Id.*** at 330.

In ***Shambley***, the Nebraska Supreme Court found that, on balance, the interests of the state and the participant were essentially the same as the interests of probation or parole so that "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." ***Shambley***, 281 Neb. 317, 330. The court advised that drug court termination proceedings should be conducted similar to hearings terminating probation or parole. ***Id.***

This court should hold similarly. Like supervision through the Department of Corrections, the Iowa County Drug Treatment Court offers participants conditional liberty. As in probation or parole, a participant is in post-adjudication or in possible revocation status. (App. 124). Similarly, because an individual enters post-conviction, the state has a similar interest in the termination without the full rights in a criminal prosecution. ***Morrissey***, 408 U.S. at 480. The point of drug court is to help the participant overcome their addiction and not recidivate, so the state, like the participant and society as a whole, has an interest in ensuring that participants are not wrongfully terminated.

F. Because drug treatment courts implicate due process, Wis. Stat. § 165.95 must comport with due process requirements or it is invalid.

A participant in drug treatment court has a conditional liberty interest in remaining a participant, akin to a liberty interest of a person on probation or parole. At the circuit court, the state argued that the TAD statute mandated expulsion from treatment court solely because the participant is charged with a violent crime in a pending case and without any opportunity for the defendant to challenge the evidentiary basis for his expulsion. (37).

If the state's interpretation of Wis. Stat. §§ 165.95(1)(a) and (3)(c), as argued before the circuit court, were correct—expulsion would violate a participant's substantive and procedural due process rights. ***Quintana***, 308 Wis. 2d 615, ¶ 80 ("'Substantive due process forbids a government from exercising power without any reasonable justification in the service of a legitimate governmental objective.'"); s*ee* ***Morrissey***, 408 U.S. at 484; *see also* ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502, 516, 563

N.W.2d 883, 888 (1997) (stating that "[t]he core of the process due . . . [is] the opportunity for a meaningful hearing on the facts of the alleged violation and the appropriate disposition of the probationer[.]") (brackets and ellipsis added).

1. Substantive due process concerns in Wis. Stats. §§ 165.95(1)(a) and (3)(c).

In reviewing a substantive due process challenge, the threshold question is whether a fundamental right is implicated. ***State v. Smith***, 2010 WI 16, ¶12, 323 Wis. 2d 377, 780 N.W.2d 90. As previously established, a participant in drug treatment court has a conditional liberty interest in remaining a participant, akin to a liberty interest of a person on probation or parole. As such, the fundamental right implicated in this case is a liberty interest. ***Foucha v. Louisiana***, 504 U.S. 71, 80 (1992). (Freedom from physical restraint is a fundamental right that "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.")

Review of legislation that restricts a fundamental liberty requires a court to apply strict scrutiny to its due process analysis. In order to pass strict scrutiny, the challenged statute must further a compelling state interest and be narrowly tailored to serve that interest. ***State v. Post***, 197 Wis. 2d 279, 302, 541 N.W.2d 115, 122 (1995) *citing* ***Roe v. Wade***, 410 U.S. 113, 155 (1973).

According to the state at the circuit court level, the county could revoke participation just by proving that a person has been charged with a violent offense. (37:4). Mandating a participant be expelled from DTC—and thus lose his/her liberty interest—based on the fact that the participant has been charged with a violent offense does not

further any state interest nor is it narrowly tailored. The substantive due process problem presented is the government punishing someone—removing their conditional liberty—without having to prove that that person actually committed an offense.

The state advances several reasons for why the government has a reasonable and rational basis for treating violent offenders differently from nonviolent offenders. (App. Br. 14). The state argues that it has an interest in keeping their treatment court members safe, the additional treatment needs and supervision of violent offenders may exceed those of non-violent offenders, and the limited resources for programs such as DTC should be used on non-violent offenders. (App. Br. 15-16).

While these are all reasonable considerations, they fail to address the problem with the statute: it assumes that a person is a violent offender solely if that person is charged with a violent offense in a pending case. The mere fact that a person has been charged with committing an offense does not establish that that person has committed an offense. As such, the state's purported reasons for deeming a violent offender ineligible for DTC are reasonable, but the state still must establish that the participant actually committed a violent offense *before* concluding that the participant is a violent offender.

Consider the due process concerns implicated if the Department of Corrections could revoke a person's probation, parole, or extended supervision solely based on the criminal complaint establishing that a person was charged with a new crime. The governing rules explicitly require more than an allegation in a criminal complaint in allowing revocation of a probationer's liberty interest. In seeking revocation of

supervision, the department has "the burden of proof to establish, by a preponderance of the evidence, that the [defendant] violated the rules or conditions of supervision." Wis. Admin. Code HA § 2.05(6)(f). The rule further specifies that "A violation is proven by a judgment of conviction arising from conduct underlying an allegation." Wis. Admin. Code HA § 2.05(6)(f).

At a revocation hearing for probation, parole, or supervision, the Department could not just rely on the filing of a criminal complaint to establish that the person violated a condition of supervision by committing a new crime. Rather, the department would need to show, by a preponderance of the evidence, that the defendant actually committed the new offense. It could meet that burden by a new judgment of conviction because that is evidence that a person was either found guilty beyond a reasonable doubt of committing the crime, or entered a plea where he admitted his guilt.

As previously noted, the state no longer appears to read the statute as it did in the circuit court. The state now concedes that the mere charging of a violent offense is not enough and acknowledges that the proponent of expulsion must show that "a person is violent based on his individual conduct, not based on the charged crime."(App. Br. 18).

A participant in DTC has a similar liberty interest as a person on parole, probation, and extended supervision. As such, proof that a person was charged with a violent offense cannot be enough to terminate that interest, as it is not enough to terminate a person under supervision's liberty interest.

2. The plain language of Wis. Stat. § 165.95 provides no procedural due process

Because Mr. Keister established that he has a liberty interest in remaining in the drug treatment program, the court must next examine whether the procedures attendant with the deprivation of the interest were sufficient." ***Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund***, 2000 WI 98, ¶80, 237 Wis. 2d 99, 613 N.W.2d 849. (internal citations omitted). As this action was brought under declaratory judgment, the court declared that the procedures attendant in the statute were insufficient to protect Mr. Keister's procedural due process rights.

This ruling was understandable given the state's argument at the circuit court level.

According to Wis. Stat. §§ 165.95(1)(a) and (3)(c), a person who is "charged with…a[] [violent] offense in a pending case" "is not eligible to participate" in DTC. At the trial level, the state argued that proof of the violent charge alone is enough to trigger expulsion: "As a matter of procedure, the only proof necessary to support expulsion on the basis of Mr. Kesiter's new charges should be presentation of the record to date in Sauk County Case No. 16-CF-302." (37:4).

The plain reading of the statute appears to support the state's trial court argument: that once a participant is charged with a violent offense in a pending case, a participant can no longer participate in the program. As established *supra*, because termination of drug court is akin to termination of probation and parole, Mr. Keister must be afforded the minimum protections laid out in ***Morrissey*** and ***Gagnon***.

Wis. Stat. § 165.95 provides none of these protections. The statute violates Mr. Keister's procedural due process guarantees because it effectively expels Mr. Keister from participating in Drug Treatment Court merely because he was charged with a violent offense in a pending case. The statute does not require notice, a hearing, or an opportunity to rebut these findings before being unable to participate.

3. The Iowa County Drug Treatment Court handbook does not comport with the minimum requirements of procedural due process.

In its brief-in-chief, the state includes the Iowa County Drug Treatment Court Handbook as part of its Appendix. It is unclear what legal authority this handbook has. It purports to be "a road map" to Iowa County's Drug Treatment Court. (App. 122).

Nevertheless, the state argues that this handbook provides adequate procedural due process. It highlights that before expulsion occurs, a participant is afforded an expulsion conference by the treatment team, notice to the participant, and a hearing in front of the treatment court judge. (App. Br. 18; A-App 137-38). The state contends that "That hearing is not just a formality." (App. Br. 18). Contrary to the position taken by the state at the circuit court, the state now concedes that "Expulsion does not flow directly from the filing of the criminal complaint." (*Id.* at 19).

According to the handbook, the procedures a participant is entitled to before expulsion are as follows: a conference by the treatment team, notice to the participant after the expulsion motion is "seconded", the right to an attorney, and a hearing in front of the treatment court judge. (App. Br. 18; App. 137-38). While the handbook is a noble

beginning, it does not provide all the rights necessary to protect a DTC's participant's liberty interest.

The hearing in front of the treatment court judge appears to be just argument by the parties and states that "the rules of evidence and procedure applicable at a sentencing hearing shall be observed at the Expulsion hearing." (App. 137). The handbook does not require advance notice of the alleged violations, disclosure of evidence against the participant, no right to present witnesses and documentary evidence; no right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); and no right to a written statement by the fact finder regarding the evidence relied on and the reasons for revoking participation.

As such, this process provided for in the handbook is not enough when measured against the ***Gagnon*** and ***Morrissey*** standards. Because a drug court participant's liberty interest is akin to a probationer's, due process protections of a participant's liberty interest mandate the same minimum process.

G. In order to save the TAD statute's constitutionality, this court must declare what substantive and procedural due process protections are necessary before expulsion can occur from drug treatment court.

A cardinal rule of statutory interpretation is that the legislature intended to adopt a constitutional statute and that a court should preserve a law and hold it constitutional when possible. ***State ex rel. Hammermill Paper Co. v. La Plante***, 58 Wis.2d 32, 46–47, 205 N.W.2d 784 (1973). When a reasonable interpretation exists that would render the legislation constitutional, a court should avoid interpreting a

statute in such a way that would render it unconstitutional. ***Am. Family Mut. Ins. Co. v. Wisconsin Dep't of Revenue***, 222 Wis. 2d 650, 667, 586 N.W.2d 872, 879 (1998). "Given a choice of reasonable interpretations of a statute, this court must select the construction which results in constitutionality." ***Id.***

Wisconsin Statute § 165.95 is the only relevant statute that governs the establishment of drug treatment courts. Based on the state's interpretation of the plain language reading of the TAD statute, it is understandable that the circuit court found that the statute violated Mr. Keister's substantive and procedural due process rights. However, the state has since changed its position and is arguing that Iowa County provides many of the procedural due process concerns advocated for in this brief. While the statute itself provides no process, the state, in conjunction with the Iowa County Handbook, has provided somewhat of a savings construction of the statute. Further, since the state relies on the handbook in arguing that more process is due, it effectively concedes that the statute can be read to require more process, as the DOJ approved Iowa County's grant application to establish its DTC.

As such, in order to avoid substantive due process concerns, this court must interpret the TAD statute language "charged with…a[] [violent] offense in a pending case" to mean that the proponent for expulsion has demonstrated by a preponderance of the evidence that the person was charged with a violent offense in a pending case and actually committed the violent offense. Wis. Stat. §§ 165.95(1)(a) and (3)(c). Even the state now concedes that the mere charging of a violent offense is not enough. Rather, the state acknowledges that in order to be expelled, the proponent of expulsion must show that "a person is violent based on his

individual conduct, not based on the charged crime." (App. Br. 18).

Before expulsion can occur, in order to comply with due process, the TAD statute must be read so that "charged with…a[] [violent] offense in a pending case" means charged plus evidence that the person actually committed the offense. Wis. Stat. §§ 165.95(1)(a) and (3)(c).

This court must also declare what process is due before expulsion can occur. It is not enough that Iowa County handbook requires some process before expulsion can occur. The Iowa County handbook is not a source of statutory authority. It does not appear that the Iowa County handbook has any binding, legal effect. Further, the Iowa County Assistant District Attorney was apparently unaware of what process was due according to its own county's DTC handbook.

Moreover, Iowa County Drug Treatment Court is one of many drug courts in this state. Because the TAD statute only details eligibility requirements and allows each county to establish its own protocols and procedures, there is no guarantee that other DTCs are operating in accordance with due process. In order to ensure that each county is affording DTC participants minimum due process guarantees before expulsion, this court must declare what due process protections are provided for in the DTC expulsion process. In doing so, it can offer a savings construction of the TAD statute.

As other jurisdictions around our nation have found, this court should declare that expulsion from DTC proceedings meet the procedural due process protections outlined in ***Morrissey*** and ***Gagnon***. That is, before expulsion from DTC, a participant is entitled to: written notice of the

claimed violation(s); disclosure of evidence against him; the opportunity to be heard in person and to present witnesses and documentary evidence; the right to confront and cross-examine adverse witnesses, unless the hearing officer finds good cause for not allowing confrontation; a neutral and detached hearing fact-finder; and a written statement by the fact finder regarding the evidence relied on and the reasons for revocation. *See* ***Endicott***, 210 Wis. 2d 502, 514–15 *citing* ***Morrissey*** 408 U.S. at 489.

This court should hold that on balance, the interests of the state and the participant are essentially the same as the interests of probation or parole so that "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." *See* ***Shambley***, 281 Neb. 317, 330. This court should also find that that drug court expulsion should be conducted similar to hearings terminating probation or parole. ***Id.***

Here, these protections are necessary because the expulsion process must provide some adequate process for the person accused of a violent offense to demonstrate that he has not committed the offense. Even the state now agrees to some extent—acknowledging that the expulsion "hearing is not just a formality," that the "filing of the criminal complaint is not enough" and it is the "details of the crime that matter, not the crime itself." (App. Br. 19).

The point of drug court is to help the participant overcome their addiction and not recidivate, so the state, like the participant and society as a whole, has an interest in ensuring that participants are not terminated from the program due to erroneous information or based on an erroneous evaluation. The minimum procedural due process

guarantees of probation and parole revocation hearings can help to ensure that a participant is not terminated erroneously.

H. Mr. Keister's current eligibility for participation in drug treatment court

As of October 17, 2017, the charges in Sauk County Case No. 16-CF-302 were dismissed on the prosecutor's motion.[11] Therefore, by either the state's standard at the circuit court level or on appeal, Mr. Keister' no longer meets the definition of a "violent offender," as he is no longer "charged with…a[] [violent] offense in a pending case." *See* Wis. Stat. §§ 165.95(1)(a) and (3)(c). Pursuant to §§ 165.95(1)(a) and (3)(c), no basis for expulsion exists if there is no "pending charge," so Mr. Keister cannot be expelled on the basis of the "violent offender" provision of the TAD statute.

As such, resolution of this issue on appeal will no longer affect Mr. Keister's continued eligibility determination for DTC in Iowa County.

[11] Court record entries are available for Sauk County Case No. 16-CF-302 via Wisconsin Circuit Court Access.

CONCLUSION

Mr. Keister, by counsel, respectfully requests that the court declare what due process protections are necessary before a participant in Drug Treatment Court may be expelled.

Dated this 23rd day of January, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,594 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 23rd day of January, 2018.

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