STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP1618-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

MICHAEL A. KEISTER,

Defendant-Respondent.

REVIEW OF A DECISION OF THE IOWA COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM ANDREW SHARP, PRESIDING

BRIEF AND APPENDIX OF THE PLAINTIFF-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. Does an individual have a fundamental liberty interest in participating in a treatment court funded by the state and county when he or she has been charged with an offense involving violent conduct, as defined in Wis. Stat. § 165.95(1)(a) (2015–16)[1]?

The circuit court answered yes.

The court of appeals did not decide this issue, concluding that it became moot as to the defendant-respondent, Michael A. Keister.

This Court should answer no.

2. Must Wis. Stat. § 165.95, the statute defining the Wisconsin Department of Justice's grant funding program, define procedures for treatment courts to follow for the statute to survive a procedural due process challenge?

The circuit court implicitly answered yes.

The court of appeals did not decide this issue, concluding that it became moot as to Keister.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with most cases accepted for review by this Court, oral argument and publication are appropriate.

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[1] All statutory references are to the 2015–16 version of the Wisconsin Statues unless otherwise noted.

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 dictate the general scope and administration of the counties' programs; counties have broad discretion in how they choose to administer these programs. That said, to be eligible for grant funding, section 165.95 requires counties to exclude "violent offenders" from their programs.

Iowa County operates one such treatment court program, from which Keister was the subject of an expulsion motion after he was charged with crimes involving violence. An Iowa County court declared that section 165.95's categorical exclusion from participation of offenders who have been charged with a crime involving violence—but who have not yet been convicted—violated substantive due process as applied to Keister. It also concluded that Wis. Stat. § 165.95's silence on procedural requirements counties must implement for expulsion violated procedural due process.

The circuit court's due process analysis was flawed. There is no liberty interest in participation in treatment court; to the extent that there is, the statute survives rational-basis scrutiny. Moreover, a statute need not set forth procedural due process requirements to pass constitutional muster. And Iowa County's program provides all the procedural process a treatment court participant is due. This Court should reverse the circuit court's declaratory judgment.

STATEMENT OF THE CASE

An overview of the grant program created by Wis. Stat. § 165.95 and the Iowa County Treatment Court Program.

The Wisconsin Department of Justice administers a grant program, as defined in Wis. Stat. § 165.95,[2] that requires it 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 Wis. Stat. § 165.95(3)(c), which conditions a county's grant eligibility on its making violent offenders ineligible to participate in its alternatives to prosecution program: "[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." Wisconsin Stat. § 165.95(1)(a) defines "violent offender," in part, as "[a] person . . . 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

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[2] Wisconsin Stat. § 165.95 also applies 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.

weapon, the person used force against another person, or a person died or suffered serious bodily harm."

The Iowa County Treatment Court receives grant funding for its program from the Department of Justice. Iowa County has a handbook that defines its program. *See* Iowa County Treatment Court, *Drug Court Program*, Participant Handbook (hereinafter "Handbook").[3] (Pet-App. 104–28.) The mission of the program is to "enhance public safety, preserve families, and improve the quality of life for all residents." *Id.* at 4. (Pet-App. 107.) 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. (Pet-App. 107.)

The Iowa County treatment court team decides in its discretion whether to recommend to admit an individual into

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[3] The Handbook is not in the record, but is akin, in many respects, to local court rules. The circuit court acknowledged this, explaining that the Handbook defined Iowa County's program. (R. 44:8–9.) Thus, the Handbook is not a factual or historical element that must be within the record to be considered by this Court. Moreover, even if the Handbook is considered to contain "facts," this Court must take judicial notice of those facts. *See Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶ 11, 313 Wis. 2d 411, 756 N.W.2d 667 (citing Wis. Stat. § 902.01) ("[A] court must take judicial notice when, as material here: (1) the fact for which judicial notice is requested is 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned'; and (2) a party asks the court to take judicial notice and gives the court 'the necessary information.'"). The Handbook and its contents are capable of accurate and ready determination and that accuracy cannot reasonably be questioned, and the State has provided the Court with a copy of the Handbook in the appendix to this brief.

the program. Handbook at 9. (Pet-App. 112.) The treatment court team considers, among other things, whether the potential candidate is a current resident of Iowa County and convicted of a crime related to substance abuse, convicted of a crime related to financing substance abuse, charged with distribution of a controlled substance, or facing probation or extended supervision sanctions or revocation and abusing substances. *Id.* at 6, 9. (Pet-App. 109, 112.) Admission into the program typically coincides with sentencing, meaning that the participant is either in a post-adjudication or alternative to revocation status. *Id.* (Pet-App. 109, 112.)

Once admitted, a participant can be expelled from the program due to subsequent conduct, such as an arrest for a violent crime. Handbook at 18–19. (Pet-App. 121–22.) Any member of the treatment court team can initiate the expulsion process by filing a motion. Handbook at 19. (Pet-App. 122.) If the motion is supported, the treatment court team informs the participant of the motion and schedules an expulsion conference. *Id.* (Pet-App. 122.) The participant has the right to counsel at the conference, and both the participant and counsel may advocate to the treatment court team why the person should not be expelled. *Id.* (Pet-App. 122.) Following the conference, the team makes a recommendation to the court. *Id.* (Pet-App. 122.) If the team recommends expulsion, a hearing is set. *Id.* (Pet-App. 122.) 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. (Pet-App. 122–23.)

Keister's participation in the Iowa County Treatment Court and his request for a declaratory judgment.

Keister was a participant in the Iowa County Treatment Court, but not as a post-adjudication or an alternative to revocation participant. As explained above,

normally a treatment court participant is accepted into the program before sentencing based upon a recommendation by the treatment court team. In this case, however, Keister submitted a voluntary application to the treatment court after he overdosed on heroin in early November 2015, and before charges were filed. (R. 37:1; 44:2, Pet-App. 130; 63:2; 65:2.) He based his eligibility for the program on a 2014 conviction in Sauk County for possession of narcotic drugs and burglary, for which he was on extended supervision. (R. 37:1; 44:1, Pet-App. 129.)[4]

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 2015 heroin overdose. (R. 3.) The court scheduled a plea hearing for July 2016, but it was delayed several times, ultimately until January 2017. (R. 63; 64; 68.)

In the meantime, in August 2016, Keister picked up new criminal charges in Sauk County. (R. 44:2, Pet-App. 130.) Those charges included substantial battery, strangulation and suffocation, and felony bail jumping. (R. 44:2, Pet-App. 130.)

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, Pet-App. 130; 92:1.) Allen

[4] While Keister's acceptance into the program before he faced sentencing is unique, acceptance into the program is left to the discretion of the treatment court team and judge. Thus the State is not arguing that Keister should not have been admitted.

filed that motion after an expulsion conference.[5] 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, in the team's view, Keister met that definition; thus, the treatment team asked for an expulsion hearing.[6] (R. 37:1; 92:1.)

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 due to a revocation of his extended supervision in the 2014 Sauk County case. (R. 65:2.)

During all of that, the December 2015 Iowa County drug possession charges remanded pending. In early January 2017, with the expulsion motion still pending, Keister entered into a conditional plea agreement in that case. (R. 37:1; 68:2.) Keister pled no contest to the charge of possession of narcotic drugs. (R. 68:3–4.) In exchange, the State agreed to dismiss a charge of possession of drug paraphernalia. (R. 68:2.) Moreover, the State agreed to make the following conditional sentencing recommendations: If Keister was allowed to continue with and complete the Iowa

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[5] The expulsion conference is not in the appellate record. The conference was held off the record, and treatment court records are confidential and separate from the criminal case file. There is no criminal case file that corresponds to Keister's involvement in this treatment program. *See* Handbook at 10. (Pet-App. 113.)

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

County Treatment Court program, the State would recommend two years of 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.)

One 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 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 criminal charge (as opposed to a conviction). (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., it would result in jail time. (R. 29:4–5.) Keister also argued that no amount of procedural due process afforded in the expulsion process could justify a violation of that right. (R. 29:3–6.)

The circuit court's declaration that the operation of Wis. Stat. § 165.95(1)(a) and (3)(c) is unconstitutional as applied.

The circuit court ultimately entered a declaratory judgment holding that Wis. Stat. § 165.95(1)(a) and (3)(c) were unconstitutional as applied to Keister and others similarly situated. (R. 44, Pet-App. 129–46.) The court concluded that the Legislature, by enacting Wis. Stat. § 165.95, created a liberty interest in participating in treatment courts. (R. 44:5, Pet-App. 133.) 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, Pet-App. 134.)

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, Pet-App. 138.) 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, Pet-App. 145.)

Because the court found that Wis. Stat. § 165.95 implicated a fundamental liberty interest, it applied strict scrutiny. (R. 44:8, Pet-App. 136.) The court rejected the State's proffered four interests in expelling "violent offenders" from a treatment court, namely: (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 address the needs of violent offenders, which may be different from those of nonviolent offenders; (3) it avoids rejecting nonviolent offenders due to lost 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, Pet-App. 136–38.) The circuit court concluded that "[a]ll of this is actually irrelevant because it begs that basic question of whether these '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, Pet-App. 137.)

The court then addressed procedural due process and concluded that Wis. Stat. § 165.95—providing the parameters of the Department of Justice's grant program for alternatives to incarceration—afforded no due process protections to an individual participating in a treatment court. (R. 44:11, Pet-App. 139.) The court found that a participant could be expelled on the ground that the State filed charges, which in the court's view, provides de minimis due process and is insufficient to protect against the apparent substantial risk of an erroneous deprivation of liberty. (R. 44:12, Pet-App. 140.) The court did not consider the actual rules of the program, which require notice and a hearing before expulsion. *See* Handbook at 19–20. (Pet-App. 122–23.)

Based on its review of Wis. Stat. § 165.95, the circuit court concluded that Keister was placed in the category of "violent offender" with no opportunity to disprove the designation, and that was unconstitutional as applied to him. (R. 44:16, Pet-App. 144.) Again, the circuit court's declaration purported to extend to Keister and others similarly situated. (R. 44:16, Pet-App. 144.)

The State's appeal and subsequent actions in the circuit court.

The State filed a notice of appeal on August 17, 2017. (R. 45.) A Sauk County court dismissed the substantial battery, strangulation and suffocation, and felony bail jumping charges on the prosecutor's motion on October 17, 2017. (Pet-App. 153.) Once those charges were dismissed, Keister no longer met the definition of a violent offender—he was no longer facing charges in a pending case involving violent conduct.

On April 4, 2018, the court of appeals ordered the parties to address whether the appeal is moot and the

practical effect of dismissing the case as moot. (Pet-App. 154.) The State admitted that the issues presented were likely moot because their resolution would no longer have an effect on the underlying controversy, i.e., Keister's expulsion. (Pet-App. 155–58.) The State, however, requested that the court of appeals decide the issues raised because three exceptions to the rule of dismissal for mootness applied. (Pet-App. 155–58.)

On April 26, 2018, the court of appeals dismissed the appeal, solely on mootness grounds. (Pet-App. 159.)

The State petitioned this Court to accept review to address the merits of the issues presented. While the petition for review was pending, the circuit court held a sentencing hearing in Keister's pending Iowa County case, 2015CF193. (Pet-App. 102.)[7] The court withheld sentence and placed Keister on probation. (Pet-App. 101.)

SUMMARY OF THE ARGUMENT

To start, Keiser mounts a due-process challenge to a funding statute that does not purport to create individual rights. Wisconsin Stat. § 165.95 governs the DOJ's grant program to help fund county-created treatment courts. It does not create treatment courts or address or confer individual rights to treatment court participants. Thus, the statute does not implicate due process protections, substantive or otherwise.

Even if the statute was subject to the type of constitutional challenge that Keister raises, the statute

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[7] It appears that the sentencing hearing also included the resolution of charges in Iowa County case numbers 2017CF159 and 2018CF5. (Pet-App. 102.)

survives that challenge. "A statute enjoys a presumption of constitutionality." *State v. Heidke*, 2016 WI App 55, ¶ 5, 370 Wis. 2d 771, 883 N.W.2d 162 (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 because there is a rational basis for excluding individuals charged with violent conduct from county drug court programming, and the statute itself is not required to define procedural due process protections.

The circuit court incorrectly declared that the operation of Wis. Stat. § 165.95(1)(a) and Wis. Stat. § 165.95(3)(c) was unconstitutional. Its reasoning was faulty for two reasons.

First, the circuit court concluded that the participation in a treatment court involved a fundamental liberty interest entitled to substantive due process protections. But only the Constitution creates fundamental liberty interests entitled to substantive due process protection. Alternatives to incarceration, like drug treatment courts, were not constitutionally created. There is no fundamental liberty interest at stake here. Because of that, the statute is subject to only rational basis review. Under that standard, there is a rational basis to the extent that the statute conditions funding on a county's excluding individuals who have been charged with, but not yet convicted of, violent crimes from treatment courts.

Second, the circuit court concluded that Wis. Stat. § 165.95 had to define procedural due process protections in order to survive a constitutional challenge. But there is no authority requiring any statutes—let alone a funding statute—to set forth specific due process protections in order

to pass constitutional muster. Rather, the procedural due process analysis looks at the process actually afforded to an individual. Here, the circuit court should not have addressed whether Keister's procedural due process rights had been violated, because his challenge to the statute came *before* the treatment court implemented or completed the procedures attendant to expulsion.

Moreover, had the court looked to the process available to Keister, as defined by Iowa County's program, the court should have concluded that the program affords Keister notice of the expulsion motion and an opportunity to be heard at an expulsion hearing in open court. Those two elements are the defining elements of procedural due process.

The operation of Wis. Stat. § 165.95(1)(a) and Wis. Stat. § 165.95(3)(c), to the extent that those subsections condition grant availability on county programs excluding violent offenders, is not unconstitutional as applied to others similarly situated to Keister. This Court should reverse the judgment of the circuit court.

STANDARD OF REVIEW

"When a circuit court's ruling on motions for declaratory judgment depends on a question of law, [the Court] review[s] 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. *Heidke*, 370 Wis. 2d 771, ¶ 5 *review denied*, 2016 WI 98, 372 Wis. 2d 278, 891 N.W.2d 410 (citation omitted).

ARGUMENT

I. Keister's substantive due process claim fails because there is no fundamental right to participate in a publicly funded treatment court, and Wis. Stat. § 165.95 survives rational basis review.

A. Strict scrutiny review is limited to statutes that implicate constitutionally created fundamental rights or liberty interests; otherwise, rational basis review applies.

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.[8] "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 State v. 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

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[8] 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 article I, section 1 and article I, section 8. *See State v. Radke*, 2003 WI 7, ¶¶ 5 n.5, 6, 259 Wis. 2d 13, 657 N.W.2d 66.

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 "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" for courts to evaluate a substantive due process claim is two-fold. *See Glucksberg*, 521 U.S. at 720. First, the court carefully describes the asserted interest. *Id.* at 721–23.[9] Second the court determines if the carefully described interest is a fundamental right or liberty. *Id.* at 720–21. Fundamental rights and liberty interests are either created by the Constitution or "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). *See also*, *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring)).

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[9] 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 Washington v. Glucksberg*, 521 U.S. 702, 721–23 (1997).

Thus, "[t]he mere novelty of . . . a claim is reason enough to doubt that 'substantive due process' sustains it." *Glucksberg*, 521 U.S. 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 examples involving fundamental rights found to be deeply rooted in our legal tradition." *Id.* at 722.

If the challenged legislation implicates a fundamental liberty interest, it "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, in which the court 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 reasonably be based." *Radke*, 259 Wis. 2d 13, ¶ 11.

B. Keister has no fundamental right to participate in a treatment court. Treatment courts are neither created by the constitution nor deeply rooted in our legal tradition.

Following the Supreme Court's guidance to carefully define the asserted interest, the question is: did Keister have a protected interest in his continued participation in a

publicly funded treatment court after he committed a violent crime? The answer to the question is no.

There is no constitutionally recognized liberty interest in the participation in alternative to incarceration programs, like a drug treatment court. Moreover, 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). (Pet-App. 148.) Thus, participation in a treatment court cannot be said to be "deeply rooted in our legal tradition." *See Glucksburg*, 521 U.S. at 722.

Because drug treatment courts are not created by the Constitution and not deeply rooted in our legal tradition, there is no fundamental right to participate in one. And if there is no fundamental right to participate in a treatment court then, logically, an individual cannot have a fundamental liberty interest in continued eligibility for such programming despite being charged with a crime involving violence.

The specific terms of Keister's plea agreement—the one in effect at the time of the State's appeal—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.) The parties reached that agreement *after* the Iowa County treatment team initiated the expulsion process. (R. 68:2.) Thus, Keister was fully aware that he might be expelled from the program when the agreement was brokered. But more importantly, the plea agreement and his potential expulsion from drug court did not actually effect Keister's sentencing exposure. The statute for the crime he

pled guilty to—not the conditional recommendation in the plea agreement—defined Keister's potential sentence, because 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 substantive due process analysis was flawed and must be reversed for two reasons. First, the court did not carefully define the asserted interest. Rather, the court reasoned that, pursuant to Keister's plea agreement, expulsion from the program necessarily would result in a change in Keister's sentence. (R. 44:5, Pet-App. 133.) As established in the preceding paragraph, that conclusion is speculative and plainly wrong.

Second, the circuit court wrongly relied on *Wolff* for the proposition that a statute can create a right subject to substantive due process protections. 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).

Furthermore, unlike the statute addressed in *Wolff*, Wis. Stat. § 165.95 merely defines the Department of Justice's grant program, which helps fund—but does not create—alternative to incarceration programs. It does not create a treatment court or a right to participate in one. Even if it did, a statute cannot create a fundamental right or liberty interest. Thus, the circuit court incorrectly

determined that Wis. Stat. § 165.95 created a fundamental right to participate in a drug treatment court.

C. Because Wis. Stat. § 165.95 does not implicate a fundamental right, it is subject to rational basis review, which it satisfies.

There is a rational basis for conditioning the availability of grant money on the exclusion of violent offenders, including those who have been charged with but not yet convicted of a violent offense, from that programming. Again when, as in this case, a statute does not implicate a fundamental right, 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 provides 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*, Wis. Law., January 2016, at 32, 33. 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. (Pet-App. 114–17.) 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 program's

costs and an individual's time in a program. As a result of limited resources, nonviolent offenders who, as a matter of public policy, are viewed as more likely to benefit from 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 its 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 to accommodate individuals facing the possibility of incarceration, which would almost certainly prevent program completion.

The circuit court's conclusion that "[a]ll of this is actually irrelevant" (R. 44:9, Pet-App. 137) is wrong. The circuit court was concerned only with labeling someone a "violent offender" before the person is convicted (R. 44:9, Pet-App. 137), and did not address whether there was good reason to do so. Rationally, the reasons for excluding violent offenders from treatment court addressed in the proceeding paragraphs apply to offenders who have been charged with committing violent acts but who have not yet been convicted.

Moreover, the definition of a "violent offender" is not predicated on any specific crime, making a conviction irrelevant. What it is predicated on is the person's conduct or the severity of the physical injury to the victim. To be a "violent offender" in charged conduct, one must have,

"during the course of the offense, . . . carried, possessed, or used a dangerous weapon, . . . used force against another person, or a person died or suffered serious bodily harm." Wis. Stat. § 165.95(1)(a). Whether the State is able to prove beyond a reasonable doubt all of the elements of any particular crime is not dispositive of whether the defendant carried, possessed, or used a dangerous weapon, used force against another person, or a person died or suffered serious bodily harm. The definition is not a definition for a violent *criminal*—it is the definition for a "violent offender."

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

II. Procedural due process protections need not be defined by statute, and Keister would have been afforded the full protections of procedural due process before expulsion.

"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 deprivation of a "recognized right" or property interest that 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 303 (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." *Milewski,* 377 Wis. 2d 38, ¶ 20. "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).

The question is not whether the process is written somewhere, but whether there was sufficient process before the deprivation. *See State v. Iglesias*, 185 Wis. 2d 117, 144, 517 N.W.2d 175, (1994) ("reject[ing] the idea" that a statute "is procedurally inadequate because it fails to guarantee that notice . . . will be provided); *Cornell University v. Rusk County*, 166 Wis. 2d 811, 824, 481 N.W.2d 485 (Ct. App. 1992) ("[T]he right to a hearing does not necessarily have to come from a statute.").

Here, given the timing of the circuit court's declaratory judgment, the Iowa County treatment court did not have an opportunity to provide Keister with full process. But by all appearances, the treatment court would have provided him all the process he was due assuming that it followed the Handbook procedures.

For the sake of argument, the State will assume that Keister had a limited protectable property interest in not being expelled from the drug treatment court program after he was admitted because the program provided Keister with certain benefits, like treatment for his drug addiction. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576 (1972) ("The Fourteenth Amendment's procedural protection

of property is a safeguard of the security of interests that a person has already acquired in specific benefits."). *See also*, *Schmidt v. State*, 68 Wis. 2d 512, 519–20, 228 N.W.2d 751 (1975) (discussing the distinction between procedural due process protections for continued receipt of benefits versus the entitlement to a benefit in the first instance).

Nonetheless, Wis. Stat. § 165.95 did not implicate Keister's procedural due process rights. The statute is a funding statute and does not define a county's expulsion procedures for a treatment court program. Furthermore, there is nothing within Wis. Stat. § 165.95 that would render expulsion automatic, nor confine a county in a way that would prevent the county from providing procedural due process protections to a participant in a treatment court program. This is evidenced by Iowa County's Drug Court Program Participant Handbook, which provides a description of the detailed procedure afforded to a participant before the participant is expelled from the program. Those defined expulsion procedures required that Keister be provided with notice and an opportunity to be heard in an orderly proceeding.[10]

To initiate the expulsion procedures, the proponent of expulsion must make a motion to expel a participant and a

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[10] The State's reliance on the Handbook in no way suggests that the State believes that the level of process provided by Iowa County is the minimum level of process necessary to satisfy the Due Process Clause. Rather, the State's argument is that the level of process provide is more than adequate given the limited interest in continued participating in a treatment court program. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("It has been said so often by [the Supreme] Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.").

member of the treatment court team must second that motion. Handbook at 19. (Pet-App. 122.) The Treatment Court Judge then provides notice to the participant of the motion, and informs the participant that he or she has the right to counsel during the expulsion proceedings. *Id.* (Pet-App. 122.)

In Keister's case, the expulsion motion provided notice of the grounds for expulsion. It identified the pending case in which Keister was charged and detailed Keister's violent conduct: "the victim reported that Mr. Keister hit her three to four times, causing her a black eye; he burned her on the leg with a lit cigarette; he pushed her onto a bed; and he placed his hands around her neck, choking or strangling her in a manner that cut off her breathing to the point that she felt like she may die." (R. 92:1.)

After that motion was made, Keister challenged the constitutionality of Wis. Stat. § 165.95, which stayed the expulsion procedures. (R. 28.) Had that not occurred, pursuant to the Handbook, an expulsion conference would have been scheduled, at which Keister and his attorney would have the opportunity to be heard. Handbook at 19–20. (Pet-App. 122-23.)[11]

The Treatment Court Team then votes on whether to proceed with expulsion, and makes a recommendation to the Treatment Court Judge. Handbook at 19. (Pet-App. 122.) If the Treatment Court Team recommends expulsion, the Treatment Court Judge sets the matter for a hearing, which is conducted on the record. *Id.* (Pet-App. 122.) The hearing is

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[11] It is not clear from the record whether the expulsion procedures were stayed before or after the expulsion conference. It is clear, however, that the stay occurred before the expulsion hearing.

conducted according to the rules of evidence and procedure applicable at a sentencing hearing, *id.* (Pet-App. 122), which gives both Keister and his counsel an opportunity to be heard and to defend and respond to the expulsion motion.

Keister would have been afforded adequate, effective, and meaningful review. This is so because a "violent offender" is defined not by an offense, but by the person's actions during the offense. Stated another way, the dispositive issue was not that Keister was charged with a crime, but that Keister was charged with the crime *and* committed certain conduct. To illustrate, 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 violent offender under Wis. Stat. § 165.95(1)(a). If Defendant B did not carry a gun, did not otherwise use force during the crime, and a person did not die or suffer serious bodily harm as a result of the crime, then Defendant B would not meet the definition of "violent offender" under paragraph (1)(a).

In Keister's case, it is likely that the court would have concluded that he was a violent offender due to his use of force, but that does not mean that he would not be provided adequate process. Due process guarantees procedural protections like the opportunity to be heard; it does not guarantee favorable results. *See Jones v. Dane Cty.*, 195 Wis. 2d 892, 918, 537 N.W.2d 74 (Ct. App. 1995).

Had the circuit court not issued the declaratory judgment, Keister would have been afforded notice, an opportunity to be heard, and a decision by a neutral decision-maker. His expulsion hearing would not have been a mere formality; it would have provided the procedural mechanism for him to challenge the team's recommendation to expel him.

The circuit court's conclusion that the statute itself denied Keister procedural due process was incorrect. The statute did no such thing. Wisconsin Stat. § 165.95 does not create or define expulsion procedures, nor does it prevent a county from adopting adequate expulsion procedures. Moreover, a statute need not define procedural due process protections. *See Iglesias*, 185 Wis. 2d at 143; *Cornell University*, 166 Wis. 2d at 824. The absence of defined expulsion procedures in Wis. Stat. § 165.95 did not violate Keister's due process rights.

Moreover, contrary to the circuit court's conclusion, Keister's expulsion would not have flowed directly from the filing of a criminal complaint. As explained in the proceeding paragraphs, a "violent offender" is defined not by an offense, but by the person's actions during the offense. The procedural protections afforded to Keister are not de minimis. Rather, the expulsion process gives Keister the opportunity to be heard and to defend against an expulsion motion.

To deem a statute is unconstitutional because it does not define process is an erroneous application of the law. At the time of the State's appeal, Keister had not been deprived of anything, and there was no reason to assume, as the circuit court did, that Keister would not have been afforded a process commensurate with the Iowa County treatment court's defined expulsion process. If there is a right not to be expelled from a treatment court program without due process, the Iowa County Treatment Court would have afforded Keister all the process he was due.

CONCLUSION

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

Dated this 17th day of October, 2018.

Respectfully submitted,

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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 7,394 words.

Dated this 17th day of October, 2018.

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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.

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Dated this 17th day of October, 2018.

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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 first names and last initials instead of full names of persons, 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.

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TIFFANY M. WINTER
Assistant Attorney General

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