STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP001618-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 OF DEFENDANT-RESPONDENT

JEREMY C. PERRI
Assistant State Public Defender
State Bar No. 1041820

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
perrij@opd.wi.gov

Attorney for Defendant-Respondent

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ISSUES PRESENTED

1. Does a fundamental liberty interest exist in continued participation in a statutorily-created government-funded treatment court?

   The circuit court answered yes.

   The court of appeals dismissed the State's appeal as moot upon learning that the pending charges against Mr. Keister, upon which his alleged status as a violent offender had been based, were dismissed.

   This Court should hold that the liberty interest created by the treatment court statute, while not fundamental such that it implicates substantive due process and strict scrutiny review, nonetheless requires the participant be provided procedural due process on par with what occurs at a probation revocation hearing.

2. Must defined expulsion procedures for treatment courts be specified within Wis. Stat. § 165.95, the statute defining the Wisconsin Department of Justice's grant funding program, in order for the statute to survive a procedural due process challenge?

   The circuit court implicitly answered yes, as this case was decided without Mr. Keister having gone through the expulsion process, and the decision

below did not analyze the process that would have been provided.

This Court should answer that although a statute need not define procedures to survive a procedural due process challenge, the procedure Iowa County provides is inadequate as to an individual facing expulsion from treatment court due merely to a crime having been charged. This Court should exercise its superintending authority and rule that the same process due at a probation revocation hearing must be applied to expulsion hearings before the circuit court.

INTRODUCTION

The circuit court correctly held that participants have a liberty interest in remaining in drug treatment court, and the government curtailment of that liberty interest based solely on an allegation of violent conduct would violate due process. However, its decision that Wis. Stat. § 165.95's definition of a violent offender implicated a fundamental liberty interest, violated substantive due process, and provided no procedural due process, was flawed. Significantly, the circuit court's decision rested on a definition of "violent offender" that the parties now agree was mistaken.

Mr. Keister agrees that Wis. Stat. § 165.95 does not create a *fundamental* liberty right that subjects the statute to strict scrutiny. Furthermore, a statute does not need to define specific procedures in order

for that statute to survive a due process challenge. The circuit court also erred by not considering the process that actually would have been provided to Mr. Keister in the expulsion process, before deciding that the statute violated procedural due process.

However, Mr. Keister asserts that the treatment court statute does create a liberty interest entitled to procedural due process protection, and the process outlined in the Iowa County treatment court handbook is deficient. This Court should clarify the minimum process to which a drug treatment court participant is entitled before expulsion can occur.

The issue is moot as to Mr. Keister[1]; but a decision by this Court can (1) clarify, as the parties agree, that allegations alone are insufficient to constitute a "violent offender" under the statute, and (2) provide guidance to the circuit courts as to the minimum amount of due process necessary before a drug treatment court participant can be expelled.

[1] The charges against Mr. Keister, which formed the basis for the expulsion motion, were dismissed.

POSITION ON ORAL ARGUMENT AND PUBLICATION

As suggested by this Court's decision to grant review, oral argument and publication are appropriate.

STATEMENT OF THE CASE AND FACTS

Mr. Keister had been released from a confinement term to extended supervision in Sauk County Case Nos. 13-CF-64 and 14-CF-95 when he overdosed on heroin. (37:1; 44:2; Pet-App. 130). That led to charges in Iowa County Case No. 15-CF-193 of possession of heroin, and possession of drug paraphernalia. (3). Mr. Keister subsequently enrolled in Iowa County's Drug Treatment Program. (44:2; Pet-App. 130).

Mr. Keister entered into a plea deal in his pending Iowa County case, which consisted of his no contest plea to felony possession of heroin, and the State's dismissal of the drug paraphernalia charge. (68:2). The parties agreed that if Mr. Keister were not expelled from drug treatment court, they would jointly recommend two years' probation with the condition of participation and completion of drug treatment court, and if expelled, the joint recommendation would be that he serve four months in jail. (68:8-9).

At the time he entered his plea, Mr. Keister was facing expulsion from drug court based on new charges in Sauk County of substantial battery, strangulation/suffocation, and felony bail jumping (16-CF-302). (92:1). Due to his alleged conduct and pending Sauk County case, the State moved to expel Mr. Keister from drug treatment court. (92). The State's expulsion motion relied on Wis. Stat. §§ 165.95(1)(a) and (3)(c), asserting that, "Based on the new charges in Sauk County Case No. 16-CF-302 and the underlying factual allegations, Mr. Keister meets the statutory definition of 'violent offender' and is therefore ineligible for participation in the Iowa County Drug Treatment Court program." (92:2).

In response, Mr. Keister challenged the constitutionality of the Wis. Stat. §§ 165.95(1)(a) and (3)(c), which requires expulsion of a "violent offender" from drug treatment court. (28). His challenge rested on an understanding that the statute requires that "those who have merely been charged with but not yet convicted of an offense involving the use of force against another, be expelled from participation in drug treatment court. There is *no* requirement that the allegations be proven, and there is *no* opportunity for the defendant to be meaningfully heard regarding the truth of the allegations prior to expulsion from drug treatment court." (29:6, emphasis in original). The defense asserted that the statute worked to deprive a liberty interest, and violated the defendant's rights to procedural and substantive due process. (29:6).

Before the circuit court, the State did not offer a different understanding of the statute, and asserted, "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, the Honorable William Andrew Sharp, held that Mr. Keister faced a potential deprivation of his liberty as a result of Wis. Stat. §§ 165.95(1)(a) and (3)(c). (44:7; Pet. App. 135). In support, the court reasoned that because of the plea deal, Mr. Keister would have to serve four months in jail if he was expelled, and that "if a prisoner is accepted into the program, imposed jail time is stayed so that it can be used as a sanction during the program." (44:5-6; Pet. App. 133-134). Further, the circuit court explained "the whole theory behind drug treatment court is that the participants are motivated to work on their sobriety in order to avoid going to jail." (44:6; Pet-App. 134). Having found that a liberty interest was at stake, the circuit court held that the statute was subject to strict scrutiny. (44:8; Pet-App. 136). As applied to Mr. Keister, the court did not find a compelling state interest to overcome Mr. Keister's liberty interest. (44:8-10; Pet-App. 136-138).

As to whether procedural due process was satisfied, the circuit court found that "the only process the present law requires is the filing of a complaint. The Court is also aware that the amount

of due process involved in the filing of a criminal complaint is *de minimus*. Complaints are often routinely filed and are sworn to by persons who have no actual knowledge of the facts." (44:12; Pet-App. 140). The circuit court determined that there was no process provided, and the statute "deprives defendants of their liberty without any procedural due process of law…" (44: 14, 16; Pet-App. 142, 144).

While the constitutional challenge to Mr. Keister's expulsion from drug treatment court was pending, Mr. Keister's extended supervision was revoked, although defense counsel explained that at Mr. Keister's revocation hearing, "he won…on the allegations of violence. He lost on other allegations and was revoked anyway. And given that fact, it would appear that at least one fact finder didn't find the allegation substantiated of violence." (72:13).

Subsequent to the court's ruling on the constitutionality of the statute, the substantial battery, strangulation/suffocation, and felony bail jumping charges in Sauk County Case No. 16-CF-302 were dismissed. (Pet-App. 153). In Mr. Keister's Iowa County possession of heroin case (15-CF-193), the court placed him on three years' probation, with the condition that he successfully complete drug treatment court. (Pet-App. 101).

ARGUMENT

I. Mere allegations of violent conduct are insufficient to constitute a "violent offender" for purposes of expulsion from drug treatment court under Wis. Stat. § 165.95.

Wisconsin Statute § 165.95 provides grant funding to counties in order to establish and operate drug treatment courts. One of the conditions a program must meet in order to be eligible for a grant is that "a violent offender is not eligible to participate…" Wis. Stat. § 165.95(3)(c).

A "violent offender" is defined as "a person to whom one of the following applies:

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

The statute is clear that under sub. (a), there are two elements required to constitute a "violent offender" subject to expulsion from drug treatment

court: (1) the participant must be charged with or convicted of an offense in a pending case; and (2) during the course of that offense, he or she carried, possessed, or used a dangerous weapon, he or she used force against another person, or a person died or suffered serious bodily harm.

"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." (State's brief at 26, emphasis in original). The statute does not say, "and *it is alleged that*, during the course of the offense, the person carried, possessed, or used a dangerous weapon, the person used force against another person, or a person died or suffered serious bodily harm." As explained by the State before the court of appeals, "§ 165.95(1)(a) does not define violent offender by the offense charged. It defines a violent offender by conduct committed *during the course of the offense*." (State's reply brief to the court of appeals at 6, emphasis in original).

Before the circuit court, however, Mr. Keister erroneously believed that allegations alone sufficed to make him a violent offender subject to expulsion. The State agreed, arguing that "the only proof necessary to support expulsion… should be presentation of the record to date…" (37:4). The parties' mistaken understanding of the statute was the basis on which the circuit court issued its decision. (44:12; Pet-App. 140).

As the parties now agree, an allegation of violent conduct alone cannot result in a determination that a drug treatment court participant is a "violent offender" subject to expulsion. Rather, under Wis. Stat. § 165.95(3)(a), there must be a determination that certain conduct was committed during the course of the charged offense.

The State asserts that there is a rational basis for excluding violent offenders from drug treatment court: (1) it is consistent with an underlying policy of removing violent individuals from the community to protect the community; (2) treatment court staff should not be exposed to violent offenders; and (3) violent offenders are likely to have treatment and supervision needs that exceed those of nonviolent offenders. (State's brief at 19-22). Each proposed rational basis could only reasonably apply after a determination that a person actually carried, possessed, or used a dangerous weapon, the person used force against another person, or a person died or suffered serious bodily harm. The State's proposed rational bases would not justify the statute if allegations alone were sufficient, because then the definition of "violent offender" would include people who are not, in fact, violent offenders.[2]

[2] The charges against Mr. Keister, which were formed the basis of the motion to expel him, were ultimately dismissed.

II. A treatment court participant has a liberty interest entitled to procedural due process before expulsion from drug treatment court.

A. Standard of review and legal standards related to due process.

The State shall not deprive "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, Wisconsin Const. art. I, § 1.

The constitutionality of a statute is a question of law that is reviewed *de novo*. *State v. Wood*, 2010 WI 17 at ¶15, 323 Wis. 2d 321, 78 N.W. 2d 63.

Mr. Keister agrees that there is not a *fundamental* liberty interest for a participant to remain in drug treatment court. Statutes may create liberty interests entitled to procedural due process protections, but do not create a fundamental liberty interest protected by substantive due process. *See Black v. City of Milwaukee*, 2016 WI 47, ¶50, 369 Wis. 2d 272, 882 N.W. 2d 333.

Courts utilize a two-step analysis in determining whether a violation of procedural due process rights has occurred. First, the court examines whether a constitutionally-protected property or liberty interest is at stake. Second, if a liberty or property interest is implicated, the court applies a balancing test to determine what process is due. *See Matthews v. Eldridge*, 424 U.S. 319, 333-335 (1976); *Aicher ex rel. LaBarge v. Wisconsin Patients*

Compensation Fund, 2000 WI 98, ¶80, 237 Wis. 2d 99, 613 N.W.2d 849.

B. Participants have a liberty interest in remaining in drug treatment court.

In the present case, the State, for the sake of argument, assumed that Mr. Keister had a "limited protectable property interest in not being expelled from the drug treatment court after he was admitted because the program provided Keister with certain benefits, like treatment for his drug addiction." (State's brief at 23).

It is true that expulsion from drug treatment court would end treatment being provided. However, in addition, and more significantly, a treatment court participant's *liberty* is affected by an expulsion decision.

The circuit court held that Wis. Stat. §§ 165.95(1)(a) and (3)(c) created a liberty interest. In support, the court pointed to Mr. Keister's plea deal in the case, which called for probation if he completed drug treatment court, but four months jail if expelled. (44:5; Pet-App. 133). The court noted that when "a prisoner is accepted into the program, imposed jail time is stayed so that it can be used as a sanction during the program," and reasoned that "the whole theory behind drug treatment courts is that the participants are motivated to work on their sobriety in order to avoid going to jail." (44:5-6; Pet-App. 133-134). The court analogized expulsion from drug treatment courts to revocation of probation and

parole, and held that a liberty interest was at stake. (44:7; Pet-App. 135).

The circuit court's analogy to revocation of probation or parole was sound. In *Morrissey v. Brewer*, the United States Supreme Court held that a liberty interest was at stake in parole revocations. 408 U.S. 471, 482 (1972):

> Though the State properly subjects him [a parolee] to many restrictions not applicable to other citizens, his condition is very different from that of confinement in prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked.

Id. at 482.

Noting that termination of parole supervision inflicts a "grievous loss" on the parolee and often on others, the Court recognized that, regardless of whether parole is considered a "right" or a "privilege," "the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment," and that its "termination calls for some orderly process, however informal." *Id.*

Although Wisconsin has not addressed what due process rights attach in the context of termination from drug court programs, several other

jurisdictions have determined that a liberty interest is at stake. *See State v. Shambley*, 281 Neb. 317, 328-329, 795 N.W.2d 884 (2011) (termination of post-plea diversion program); *State v. Rogers*, 144 Idaho 738, 741 ("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"); *Brookman v. State*, 232 Md. App. 489, 507-509 (2017) (non-adversarial hearing to determine intermediate sanctions of incarceration violated due process right).

Following suit, the State of Michigan mandates that adult drug courts comply with procedural due process protections prior to termination of participants, similar to due process requirements in termination from probation. *See* Adult Drug Court Standards, Best Practices, and Promising Practices at 3 and 31, at https://courts.michigan.gov/Administration/SCAO/Resources/Documents/bestpractice/ADC-BPManual.pdf (last viewed 11/12/18).

In doing so, 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*, 408 U.S. 471; *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). *See also Shambley*, 281 Neb. at 328-329.

Successful completion or expulsion from a drug treatment court created under Wis. Stat § 165.95 very directly affects a person's liberty. Iowa County's eligibility standards require participants to be in either post-adjudication or in alternative to revocation status. (Pet-App. 109). As the circuit court noted, jail time is an available sanction for participants. (Pet-App. 109, 120-121). Additional sanctions include electronic monitoring, home detention, and increased supervision. (Pet-App. 120). "Successful completion of the program may result in reduction of fines, reduction/dismissal of charges, or reduced jail time." (Pet-App 118)

Making it even clearer that a liberty interest is at stake in successfully completing the program, Wis. Stat. § 165.95 is titled in part "Alternatives to incarceration." The statute further specifies that a drug treatment court must be designed to reduce prison and jail populations. Wis. Stat. § 165.95(3)(b).

The Iowa County Drug Treatment Court allows referrals from the following sources: the arresting agency, the District Attorney's office, the defense attorney, and the Department of Corrections "in the case of requests to modify conditions of probation or provide an alternative to revocation (ATR)." If approved into the treatment court, "formal admission will coincide with sentencing, if the Court deems it appropriate to make Treatment Court a part of the sentence. In the case of Alternatives to Revocation from probation or extended supervision, formal

admission will coincide with the signing of the ATR paperwork." (Pet-App. 112).

In the present case, Mr. Keister had a conditional liberty interest in not being expelled from drug treatment court. Although the record is not clear as to whether his enrollment in Drug Treatment Court was at the direction of his extended supervision agent, his enrollment was in connection with his Sauk County extended supervision: Mr. Keister did not face revocation proceedings of his Sauk County extended supervision as a result of the new Iowa County felony possession of heroin charge, and the State's eventual motion to expel him from treatment court was filed under the Sauk County case numbers for which he was on extended supervision. (92). Further, enrollment in connection with his extended supervision would be consistent with Iowa County's intake procedures. (Pet-App. 112). In addition, the parties in his pending Iowa County case hinged their recommendations regarding Mr. Keister's liberty on whether he completed drug treatment court: probation if successful, or four months jail if expelled. (68:8-9). Indeed, Mr. Keister was eventually placed on probation, and a condition of it is to complete drug treatment court. (Pet-App. 101).

Iowa County's handbook explains that if expelled from the program, "the Treatment Court Participant will be removed from the program and be returned to Circuit Court for resentencing or for the

stay to be lifted on any imposed and stayed sentence." (Pet-App. 122-123).

Pursuant to Wis. Const. Art. VII, § 3, this Court has superintending authority "that is indefinite in character, unsupplied with means and instrumentalities, and limited only by the necessities of justice." *Arneson v. Jezwinski*, 206 Wis. 2d 217, 225, 556 N.W.2d 721 (1996). This authority is as broad and as flexible as necessary to insure the due administration of justice. *Id*. at 225-226.

This Court should hold that a defendant participating in a drug treatment court has a conditional liberty interest similar to a person on probation, extended supervision, or parole. Termination from the drug treatment court program, like termination of probation or parole, inflicts a "grievous loss" on the person.

C. The State cannot expel a drug court participant without due process of law.

"Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey,* 408 U.S. at 481. Generally, in determining the appropriate process due, three distinct factors are considered: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards; and (3) the government's interest, "including the function involved and the fiscal and administrative burdens

that the additional or substitute procedural requirements would entail." *Eldridge*, 424 U.S. at 335.

1. The interests of the individual and of the State.

In *Morrissey*, after determining that a liberty interest was at stake, the Court balanced the individual's interests with the State's to determine what process was due before that liberty could be revoked. The Court considered the interests of the parolee in his continued liberty: subject to conditions, he can be employed, be with family and friends, and can rely on a belief that parole will be revoked only if he fails to live up to the parole conditions. *Morrissey*, 408 U.S. at 482. Considering that a parolee would have previously been convicted, the Court noted the State's interest in being able to return the individual to imprisonment without having to go through a new adversary criminal trial. *Id*. at 483.

In *Shambley*, the Nebraska Supreme Court found that on balance, the interests of the State and the drug court participant were essentially the same as the interests with an individual on probation or parole. *Shambley*, 281 Neb. at 329-330. Drug court participants are not imprisoned, may generally live at home, maintain employment, and be with family and friends, so long as those relationships are not detrimental to treatment. *Id*. at 329. Expulsion from drug court "inflicts a 'grievous loss' similar to the loss of parole or probation." *Id.* at 329. The State's

interests, as in parole or probation revocation, include avoiding the burden of a full criminal trial, restoring drug court participants to a normal and useful life, and seeing that expulsion does not occur because of erroneous information. *Id.*

The Court in *Morrissey* also discussed society's interest in a parolee's success on parole:

> The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole…"

Morrissey, 408 U.S. at 484.

As in *Morrissey,* society's interests must not be discounted when considering expulsion of a participant from drug treatment court. Any program established under Wis. Stat. § 165.95 must be "designed 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)(b). Iowa County's Drug Treatment Court's Mission Statement asserts that it "will enhance public safety, preserve families, and improve the quality of life for all residents." (Pet-App. 107). As communities everywhere wrestle with the opioid epidemic, society

has an intense interest in a drug treatment offender's successful completion of drug treatment, a presumable reduction of recidivism and more productive life within the law. Society thus has a significant interest in a drug treatment court participant not being expelled erroneously.

2. The risk of an erroneous deprivation of a drug treatment court participant's liberty interest through the procedures used and the probable value of additional procedural safeguards.

The Iowa County Drug Treatment Court includes a procedure for expulsion in its participant handbook. (Pet-App. 122-123). Under Iowa County's Drug Treatment Court rules, any member of the treatment court team may make a motion for expulsion of a participant. Any such motion must be seconded before the team may consider it. Once the motion is seconded, the treatment court judge provides notice to the participant at the participant's next treatment court session. The treatment court judge explains the participant's right to counsel and schedules an "expulsion conference." The judge does not participate in the conference. *Id*.

The treatment court team and the participant, with the attorney, meets to discuss the expulsion motion. The participant and the attorney are provided the opportunity to speak; the team may ask questions. The team then votes to either recommend

expulsion or not; that vote is shared with the judge and the participant. If the team recommends expulsion, the matter is set for a hearing before the treatment court judge. The expulsion proceeding is on the record and in open court and the rules of evidence and procedure applicable at a sentencing hearing are followed. *Id*.

If the treatment court judge agrees that there is a basis to grant the motion for expulsion, findings and conclusions are made on the record and the participant is removed from the program and returned to court for resentencing or for the stay to be lifted on any imposed and stayed sentence. *Id*.

Thus, in Iowa County, the treatment court participant has a right to be present and a right to counsel, as would occur at a sentencing proceeding. Beyond that there is little guidance and little protection against an erroneous expulsion decision. There is no formal standard or burden of proof at a sentencing hearing, and fact-finding is essentially folded into the court's exercise of discretion. *See e.g.*, *State v. Hubert*, 181 Wis.2d 333, 510 N.W.2d 799 (Ct. App. 1993). That is inadequate for determining whether a person in drug court has committed conduct that will result in expulsion.

The "violent offender" classification requires some finding that the treatment court participant carried, possessed, or used a dangerous weapon, used force against another person, or a person died or suffered serious bodily harm during the course of an

offense. Yet, the burden of proof to make that showing is unstated, and the procedure applicable at sentencing hearing does not typically include a right to confront witnesses. *See United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005).

Because of the comparable conditional liberty interest at stake, and the significant interest in avoiding an erroneous expulsion decision, this Court should hold that the minimal due process in an expulsion hearing be the same as in a probation or parole revocation hearing.

Those minimal requirements in a revocation proceeding include: (a) written notice of the claimed violation; (b) disclosure of the evidence against the person; (c) an opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine witnesses; (e) a neutral and detached hearing body; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. *Morrissey*, 408 U.S. at 489.

The adversarial process set forth by the Court in *Morrissey* was seen as the minimum necessary to guard against erroneous revocation decisions, while balancing the needs of the State. Those same standards are minimally appropriate to guard against erroneous expulsion decisions.

3. The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Providing the same process protections as in a revocation proceeding would not impose a significant burden on the State. *See Morrissey*, 408 U.S. at 490. In Iowa County, the only additional processes to be provided would be to require disclosure of the evidence, and the right to confront and cross-examine witnesses. The hearing on expulsion is already before a judge in a court proceeding; these are standards that will be easy to apply.

Some other Wisconsin drug courts already provide these protections, which is further evidence that these procedures will not be a significant burden on the State. Participants in the Sauk County treatment court have the following rights at termination hearings: to retain counsel, to be present and testify at the hearing, to confront and cross-examine witnesses, and to present witnesses. In addition, participants are entitled to written notice of the grounds for termination, disclosure of evidence against the participant, and a statement from the judge regarding the findings and basis for granting or denying the motion to terminate. Sauk County Adult Treatment Court Policy and Procedure Manual at 12. (https://www.co.sauk.wi.us/sites/default/files/fileattachments/criminal_justice_coordinating_council/page/2

041/treatment_court_policy_manual_february_2018.pdf) (last viewed 11/15/18).

Similarly, Dane County's OWI treatment court provides written notice of the grounds for termination and requires disclosure to the participant of any evidence being used. The participant may be present and may confront and cross-examine adverse witnesses. In some treatment courts, including those in Sauk and Dane, the evidence supporting termination must be proven by a preponderance of the evidence. Dane County OWI Treatment Court Program Policies and Procedures Manual at 13 (https://courts.countyofdane.com/documents/pdf/owi%20court%20policy%20and%20procedures%203-16-16.final.pdf) (last viewed 11/15/18).

Considering the significant interest in avoiding an erroneous expulsion decision, and the liberty interest often at stake, the additional process will advance those interests.

CONCLUSION

For the reasons stated above, Mr. Keister asks this Court to: (1) clarify that allegations alone are insufficient to establish that a person is a "violent offender" under Wis. Stat. § 165.95, and (2) hold that the minimal process due in an expulsion hearing be the same as in a probation revocation hearing.

Dated this 16th day of November, 2018.

Respectfully submitted,

JEREMY C. PERRI
Assistant State Public Defender
State Bar No. 1041820

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
perrij@opd.wi.gov

Attorney for Defendant-Respondent

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,470 words.

RULE 809.19(12) CERTIFICATION

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 16th day of November, 2018.

Signed:

_____

JEREMY C. PERRI
Assistant State Public Defender