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

REPLY BRIEF OF THE PLAINTIFF-APPELLANT-PETITIONER

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ARGUMENT

I. This Court should not address issues that were not included in the petition for review.

The State petitioned this Court for review of two discrete issues related to a declaratory judgement finding Wis. Stat. § 165.95 unconstitutional as applied to Michael Keister and others similarly situated. Those issues are:

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]?

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

Keister did not cross-petition nor raise additional arguments in response to the State's petition for review. He agrees that the Court should resolve both of the presented issues in the negative. (Keister's Br. 1–2.) However, he asks this Court to use this case as a vehicle to exercise its superintending authority and issue an advisory opinion that a treatment court participant has the same conditional liberty interest as someone on probation, extended supervision, or parole, and that the process for expelling a participant must be commensurate to process for revoking probation, extended supervision, or parole. (*See generally,* Keister's Br.)

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

Respectfully, those issues are not before this Court. *See Jankee v. Clark Cty.*, 2000 WI 64, ¶ 7, 235 Wis. 2d 700, 612 N.W.2d 297 ("If an issue is not raised in the petition for review or in a cross petition, 'the issue is not before us.'"). And "the parties cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court." Wis. Stat. § (Rule) 809.62(6). Thus, this Court should decline Keister's request to use this case as a vehicle to exercise its superintending authority and issue an advisory opinion that a treatment court participant has the same conditional liberty interest as someone on probation, extended supervision, or parole, and that the process for expelling a participant must be commensurate to process for revoking probation, extended supervision, or parole.

II. This Court should not exercise its superintending authority to declare advisory procedures for expelling a participant from a treatment court.

Article VII, section 3(1) of the Wisconsin Constitution confers upon this court "superintending . . . authority" over all Wisconsin courts. Such superintending authority "is unlimited in extent" and "indefinite in character." *State v. Jerrell C.J.*, 2005 WI 105, ¶ 40, 283 Wis. 2d 145, 699 N.W.2d 110. This Court recognizes its superintending authority as its "duty . . . to promote the efficient and effective operation of the state's court system." *Id.* ¶ 41. However, the Court does not lightly invoke that authority, and its decision to do so is a "matter of 'judicial policy rather than one relating to the power of this [C]ourt.'" *Id.*

"This [C]ourt will not exercise its superintending power where there is another adequate remedy, by appeal or otherwise, for the conduct of the trial court, or where the conduct of the trial court does not threaten seriously to impose a significant hardship upon a citizen." *State ex rel.*

Hass v. Court of Appeals, 2001 WI 128, ¶ 11, 248 Wis. 2d 634, 636 N.W.2d 707.

There is no compelling policy reason for this Court to exercise its superintending authority to declare that drug court participants are entitled to specific termination procedures. Doing so would require the Court to engage in a completely hypothetical inquiry and depart from the well-established principle that the level of procedural due process due is flexible in scope.

It is undisputed that this case is moot. While the State has advanced—and the Court has agreed to hear—the issues presented in the petition despite their mootness, Keister pushes farther by advancing an issue that is both moot and unripe. "A case is ripe when the facts are 'sufficiently developed to admit of a conclusive adjudication.'" *State ex rel. Chiarkas v. Skow*, 160 Wis. 2d 123, 133, 465 N.W.2d 625 (1991) (citation omitted). Here, Keister was not expelled. There is no expulsion decision under review. It is not possible for this Court to determine whether adequate due process was afforded because Keister's alleged conditional liberty interest was never denied.

It would be inappropriate for this Court to conclude that Iowa County's program would necessarily violate procedural due process protections absent a factual record of the process it actually provides. 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.").

"Courts act only to determine actual controversies—not to announce principles of law or to render purely advisory opinions." *State v. Robertson*, 2003 WI App 84, ¶ 32, 263 Wis. 2d 349, 661 N.W.2d 105. An advisory opinion would be especially inappropriate here because procedural due process is flexible in scope. "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." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." *Id.* Thus, this Court should decline Keister's invitation to expand the scope of this case and limit its decision to the issues presented in the petition for review.

To briefly address the merits of Keister's argument, the State disagrees with his contention that Wis. Stat. § 165.95 creates a conditional liberty interest. (Keister's Br. 11–13.) The 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. 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. And contrary to Keister's assertion, the statute's title does not "[make] it even clearer that a liberty interest is at stake." (Keister's Br. 15.) The statute's *complete* title is not "Alternatives to incarceration." Rather, the title is "Alternatives to incarceration; grant program." Wis. Stat. § 165.95. Thus, the statute's title makes

it even clearer that it pertains only to grant funding and it does not confer rights to treatment court participants.

Because the statute does not create treatment courts, it would be inappropriate to assume, as Keister does, that the statute creates a conditional liberty interest in continued participation in a treatment court program. *See, e.g., Dunson v. Commonwealth*, 57 S.W.3d 847 (Ky. App. 2001) (While a treatment court has the "court" label, it is not a court in the jurisprudence sense. When such programs are created and administered by the court system, termination from the program is similar to termination from a private program and not subject to due process protections.). It is not the termination from the program that implicates Keister's liberty interest, it is the enforcement of his plea. *See*, *e.g.*, *Harris v. Commonwealth*, 689 S.E.2d 713, 716 (Va. 2010) ("The drug treatment court program termination decision itself, however, did not constitute a revocation of the liberty interest created pursuant to acceptance of the plea agreement.").

Thus, the State disagrees with Keister's assertion that participation in treatment courts is like probation, extended supervision, or parole. In those circumstances, there are State regulations that confer individual rights. *See*, *e.g.*, Wis. Stat. §§ 302.107, 302.113, 973.09, 973.11. The same is not true here, and it is inappropriate to equate the two.

The issue properly before this Court is not whether Keister was afforded due process, but whether Wis. Stat. § 165.95 is unconstitutional as applied to Keister and others similarly situated. That is a very different inquiry. To that end, *State v. Shambley*, 795 N.W.2d 884 (Neb. 2011), and *State v. Rogers*, 170 P.3d 881 (Idaho 2007), are inapposite. (Keister' Br. 14.) Those cases concern only whether the process provided before expulsion was adequate. Keister was

not expelled. No advance advisory opinion from this Court is needed to review a process that never occurred.

CONCLUSION

The parties agree that an individual does not have a fundamental liberty interest in participating in a treatment court, and that Wis. Stat. § 165.95 does not need to define procedural due process protections. This Court should reverse the declaratory judgment of the circuit court.

Dated this 3rd day of December, 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 1,537 words.

Dated this 3rd day of December, 2018.

_____
TIFFANY M. WINTER
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 3rd day of December, 2018.

_____
TIFFANY M. WINTER
Assistant Attorney General