STATE OF WISCONSIN CIRCUIT COURT IOWA COUNTY

STATE OF WISCONSIN,
Plaintiff,

v.

MICHEAL A. KEISTER,
Defendant.

Case No. 15CF193

MEMORANDUM DECISION ON DEFENDANT'S MOTION TO DISMISS, FOR DECLARATORY JUDGMENT AND FOR PERMANENT STATEWIDE INJUNCTIVE RELIEF

The Defendant is this case, Micheal A. Keister, is represented by Assistant State Public Defender Jeremiah W. Meyer-O'Day. The State is represented by Assistant District Attorney Matthew C. Allen. The Defendant has brought a Motion to Dismiss State's Motion for Expulsion from Drug Court, for Declaratory Judgment, and for Permanent Statewide Injunctive Relief. Briefs have been filed by both parties. For the reasons set out below, the Court grants the Defendant's Motion to Dismiss State's Motion for Expulsion from Drug Court, grants a declaratory judgment finding that §§165.95(1)(a) and (3)(c), Wisconsin Statutes violates the Wisconsin and United States Constitution insofar as it pertains to the Defendant and other persons who are similarly situated and that §§165.95(1)(a) and (3)(c), Wisconsin Statutes violate procedural due process.

FACTS

This factual summary is taken from the record in this case and from the representations of the parties contained in their motions and briefs.

On February 15, 2013, the Defendant was charged in Sauk County Case Number 2013CF64 with Possession of Narcotic Drugs, which is a Class I Felony, and Possession of Drug Paraphernalia, an unclassified misdemeanor. On May 20, 2013, he pled no contest and was sentenced to 30 months probation with conditions. On March 19, 2014, he was charged in Sauk County Case Number 2014CF95 with Burglary as a Repeater, an enhanced Class F Felony, and three misdemeanors as Repeaters. On March 25, 2014, he was revoked in the 2013CF64 case. On May 12, 2014, he was sentenced in both cases and sent to prison.

It is alleged that on November 3, 2015, the Defendant overdosed on heroin and was revived by Emergency Medical Services. That same month, he applied for admission to the Iowa County Drug Treatment Court. On December 11, 2015, he was charged in the present case, 2015CF193, with Possession of Narcotic Drugs, a Class I Felony, and Possession of Drug Paraphernalia, an unclassified misdemeanor.

On August 9, 2016, the Defendant was charged in Sauk County Case Number 2016CF302 with Substantial Battery, a Class I Felony; Strangulation and Suffocation, a Class H Felony; and Bail Jumping, also a Class H Felony. A person who is charged with the crimes of Substantial Battery and Strangulation becomes a "violent offender," as that term is defined in §165.95(1)(a), Wisconsin Statutes. A "violent offender" is not eligible to participate in drug treatment courts. This is because the funding from the Wisconsin Department of Justice is conditioned upon the programs not accepting "violent offenders." The statute reads as follows:

> **165.95 Alternatives to incarceration; grant program.**
> **(1)** In this section, "violent offender" means 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.
> ...
> **(3)** A county shall be eligible for a grant under sub. (2) if all of the following apply:
> **(c)** The 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.

This Court is aware that the Department of Justice suggests that this term includes offenses contained in §165.84(7)(ab) and §941.291(1)(b), Wisconsin Statutes. An examination of those statutes reveals that both Substantial Battery and Strangulation are listed as "violent felonies."

In September, 2016, a motion was made in the Iowa County Drug Court to expel the Defendant from entry into the program based upon the fact that he had been charged with the allegedly violent crimes in Sauk County case 2016CF302.

On January 17, 2017, the parties appeared in court in the present case, 2015CF193, and recited a plea agreement. This agreement had two alternatives: if the Defendant was accepted into the Iowa County Drug Treatment Court, he would receive two years of probation with conditions that he successfully complete the program. If he was not accepted in to drug treatment court, he would serve four months in the County jail. The sentencing date was set off in the future.

The motions now under consideration were filed on February 17, 2017, challenging the Defendant's expulsion from and inadmissibility into the drug treatment court.

DISCUSSION

I. Due Process Analysis

In his motion, the Defendant asserts that §165.95(1)(a) and §165.95(3)(c), Wisconsin Statutes violate his constitutional rights to substantive and procedural due process. (Defendant's Brief in Support of Motion to Dismiss at 1). The United States Supreme Court has defined these rights as follows:

> The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," ***Rochin v. California,*** 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," ***Palko v. Connecticut***, 302 U.S. 319, 325-326 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. ***Mathews* v. *Eldridge***, 424 U.S. 319, 335 (1976). This requirement has traditionally been referred to as "procedural" due process.

United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

The Defendant is asserting both that the statute is unconstitutional on its face and as applied to his situation. An explanation of the legal hurdles facing the Defendant was set out in the case of ***Dane County Dep't of Human Servs. v. P.P. (In re Diana P.)***, 2005 WI 32, 279 Wis. 2d 169, 694 N.W.2d 344 (2005). That case concerns a father contesting the termination of his parental rights on due process grounds. The process of review was set out as follows:

[P15] P.P. raises a substantive due process challenge to Wis. Stat. § 48.424(4) because that statute provides that a finding under Wis. Stat. § 48.415(4) is sufficient to prove that a parent is unfit. Such a challenge may be raised based on the assertion that the statute is unconstitutional as applied, *see* ***Monroe County Department of Human Services v. Kelli B.***, 2004 WI 48, P1, 271 Wis. 2d 51, 678 N.W.2d 831, or that the statute is facially unconstitutional, *see* ***State v. Rachel***, 2002 WI 81, P1, 254 Wis. 2d 215, 647 N.W.2d 762. Here, P.P. makes a facial challenge, but not an as-applied challenge. He contends that the statute is an invalid rule because it is so sweeping that it may be used to terminate parental rights without a finding of parental unfitness, as is required by ***Stanley v. Illinois***, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972).

[P16] Generally, a challenged statute is presumed to be constitutional. ***Cole***, 2003 WI 112, 264 Wis. 2d 520, P11, 665 N.W.2d 328; ***Lounge Mgmt., Ltd. v. Town of Trenton***, 219 Wis. 2d 13, 20, 580 N.W.2d 156 (1998); ***State v. Konrath***, 218 Wis. 2d 290, 302, 577 N.W.2d 601 (1998). This presumption is based on our respect for a co-equal branch of government and is meant to promote due deference to legislative acts. ***Cole***, 2003 WI 112, 264 Wis. 2d 520, P18, 665 N.W.2d 328. "Every presumption must be indulged to sustain the law." ***Jackson v. Benson***, 218 Wis. 2d 835, 853, 578 N.W.2d 602 (1998); *accord* ***Cole***, 2003 WI 112, 264 Wis. 2d 520, P11, 665 N.W.2d 328.

[P17] The court must resolve any doubt about the constitutionality of a statute in favor of upholding its constitutionality. ***Kelli B.***, 2004 WI 48, 271 Wis. 2d 51, P16, 678 N.W.2d 831; ***Cole***, 2003 WI 112, 264 Wis. 2d 520, P11, 665 N.W.2d 328. Further, "'[g]iven a choice of reasonable interpretations of a statute, this court must select the construction which results in constitutionality.'" ***American Family Mut. Ins. Co. v. Wisconsin Dep't of Revenue***, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998) (quoting ***State ex rel. Strykowski v. Wilkie***, 81 Wis. 2d 491, 526, 261 N.W.2d 434 (1978)).

[P18] A party challenging a statute's constitutionality bears a heavy burden to overcome the presumption of constitutionality. ***Dowhower v. West Bend Mut. Ins. Co.***, 2000 WI 73, P10, 236 Wis. 2d 113, 613 N.W.2d 557. Therefore, it is insufficient for the party challenging the statute to establish either that the statute's constitutionality is doubtful or that the statute is probably unconstitutional. ***Cole***, 2003 WI 112, 264 Wis. 2d 520, P11, 665 N.W.2d 328; ***Jackson***, 218 Wis. 2d at 853. Instead, a party challenging a statute's constitutionality must demonstrate that the statute is unconstitutional beyond a reasonable doubt. ***Cole***, 2003 WI 112, 264 Wis. 2d 520, P11, 665 N.W.2d 328; ***Jackson***, 218 Wis. 2d at 853; ***Konrath***, 218 Wis. 2d at 302. While this language implies the evidentiary burden of proof most commonly used for factual determinations in a criminal case, in this context, the phrase, "beyond a reasonable doubt," establishes the force or conviction with which a court must conclude, as a matter of law, that a statute is unconstitutional before the statute or its application can be set aside. *See* ***Guzman v. St. Francis Hosp., Inc.***, 2001 WI App 21, P4 n.3, 240 Wis. 2d 559, 623 N.W.2d 776.

II. Whether the Defendant Shows a Deprivation of a Liberty or Property Interest Protected by the Constitution

The first step in the analysis of this question is to determine what constitutionally-protected interest is at stake:

> In evaluating a substantive due process claim, the threshold inquiry is whether the plaintiff shows a deprivation of a liberty or property interest protected by the Constitution.

Penterman v. Wisconsin Elec. Power Co., 211 Wis. 2d 458, 480, 565 N.W.2d 521 (1997).

On its face, it would appear that the Defendant has a very real liberty interest at stake in this case. If he is not allowed into the Iowa County Drug Treatment Program, he will go to jail for four months. In the United States Supreme Court case of ***Wolff v. McDonnell***, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 935 (1974), a prisoner in Nebraska challenged the lack of a hearing prior to having his "good time" revoked on due process grounds. The Supreme Court held as follows:

> We also reject the assertion of the State that whatever may be true of the Due Process Clause in general or of other rights protected by that Clause against state infringement, the interest of prisoners in disciplinary procedures is not included in that "liberty" protected by the Fourteenth Amendment. It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing "in every conceivable case of government impairment of private interest." ***Cafeteria Workers v. McElroy***, 367 U.S. 886, 894 (1961). But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

Id. at 556-57. The State of Wisconsin has created treatment courts. 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. The Defendant's situation is a prime example of this arrangement. Having created that program, the State has also created a liberty interest for those who are potentially eligible if their participation reduces their jail time.

In addressing the procedural due process question, the State asserts that the Defendant has no liberty interest at stake here. First, the State argues that the defendant has "no constitutional or inherent right" to be admitted into a drug treatment court. (State's Brief in Opposition at 4). The refutation of that argument is contained in the above excerpt from the ***Wolff v. McDonnell*** case. While 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."

The State's second argument is that the Defendant has already served his time in cases in which he was already convicted and so faces no additional time if he is not accepted into the treatment court. This totally and inexplicably ignores the fact that it is in this pending case that he has brought his motion. If he cannot enter drug treatment court, he will serve four months in the county jail instead of being placed on probation.

The State's third argument is that the Defendant would "enjoy greater freedom if expelled" from drug treatment court, as he would no longer be required to go to the many meetings and be drug tested. (State's Brief in Opposition at 4). This is totally without merit. 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. To argue that jail permits greater freedom than being in a drug treatment court is not only absurd but is counter to the whole concept behind the treatment courts. It also is counter to the Supreme Court's decision in the case of ***Morrissey v. Brewer***, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). In that case, Chief Justice Burger wrote:

> We turn to an examination of the nature of the interest of the parolee in his continued liberty. The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a 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. We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a

> "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.

Id. at 481-82.

The State's final argument is that the Defendant has not been deprived of any rights because he has not yet been expelled. This argument also fails. The motion to expel him was made in September, 2016, and is before the Court. The outcome awaits this decision. This is a real controversy. ***Miller Brands-Milwaukee v. Case***, 162 Wis. 2d 684, 470 N.W.2d 290 (1991); ***Milwaukee District Council 48 v. Milwaukee County***, 2001 WI 65, 244 Wis. 2d 333, 353, 627 N.W.2d 866.

It should be noted that the State cites no cases to support its contention that the statute does not affect the Defendant's liberty. The Defendant cites ***Morrissey v. Brewer***, *supra*, and ***Gagnon v. Scarpelli***, 411 W.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). These cases clearly hold that parole revocation resulting in incarceration affects a liberty interest. Based on this reasoning, this Court holds that the Defendant faces a potential deprivation of his liberty as a result of §§165.95(1)(a) and (3)(c), Wisconsin Statutes.

III. Level of Scrutiny Upon Review

The next issue is the appropriate level of scrutiny upon which the statutes in question are properly reviewed.

> We begin our analysis, as we must, by determining the appropriate level of scrutiny to apply to Wis. Stat. § 51.20(1)(ar), the inmate commitment statute. "If the challenged legislation neither implicates a fundamental right nor discriminates against a suspect class, we apply rational basis review rather than strict scrutiny to the legislation." ***In re Commitment of Alger***, 2015 WI 3, P39, 360 Wis. 2d 193, 858 N.W.2d 346. A law subject to rational basis review will be upheld "unless it is patently arbitrary and bears no rational relationship to a legitimate government interest." ***Id.*** (internal quotation marks omitted) (quoting [***State v.***] ***Smith***, 2010 WI 16, 323 Wis. 2d 377, P12, 780 N.W.2d 90). Moreover, "[a] legislative classification satisfies rational basis review if 'any conceivable state of facts . . . could provide a rational basis for the classification.'" ***Alger***, 2015 WI 3, 360 Wis. 2d 193, P50, 858 N.W.2d 346 (alteration in original) (emphasis added) (quoting ***State v. Mary F.-R.***, 2013 WI 92, P52, 351 Wis. 2d 273, 839 N.W.2d 581). In contrast, "[a] law subject to strict scrutiny will be upheld 'only if narrowly

tailored to serve a compelling state interest.'" ***Id.*** (quoting ***Mary F.-R.***, 2013 WI 92, 351 Wis. 2d 273, P35, 839 N.W.2d 581).

Winnebago Cnty. v. Christopher S. (In re Christopher S.), 2016 WI 1, 366 Wis. 2d 1, P36, 878 N.W.2d 109.

The Defendant argues that expulsion from drug treatment court would result in the loss of his conditional liberty. (Defendant's Brief in Support of Motion to Dismiss at 4). Strict scrutiny would therefore apply. The State, without any elaboration, appears to argue that the "rational basis" test applies. (State's Brief in Opposition at 2). Because the Court has found that a liberty interest is at stake, the statute in question is subject to strict scrutiny. At this level of scrutiny, the law will only be upheld if it is "narrowly tailored to serve a compelling state interest." ***Id.***

IV. Substantive Due Process Claim

As noted above, the Defendant challenges §§ 165.95(1)(a) and 165.95(3)(s), Wisconsin Statutes, as being unconstitutional on both substantive and procedural grounds. The Defendant challenges the law both facially and as applied. (Defendant's Brief in Support of Motion to Dismiss at 1). The next step is to examine the compelling interests the State advances in support of the statutes.

In its brief, the State has set out four interests it has in upholding this law. First, that there is "a legitimate State interest in protecting the safety of the individuals who serve the court in treatment and testing roles by not exposing them to violent offenders." (State's Brief in Opposition at 2). This is hardly compelling. Treatment court teams are typically composed of a judge, district attorney, defense attorney, law enforcement officer, probation and parole officer, victim/witness coordinator and treatment court coordinator. With the possible exception of the treatment court coordinator, all of these people took their jobs knowing they would work with violent offenders and do so every day.

Second, the State asserts that violent offenders may have "additional needs" that "fall outside the scope of services routinely provided" which could "add significantly to both the cost of a treatment court program and to the length of time required to successfully complete such a program." (State's Brief in Opposition at 2). This is speculative at best. In addition, it is typical that each participant sign a contract to enter the treatment court program and is given a

handbook detailing what services are offered. There is no obligation to provide any additional services.

Third, the State argues that the inclusion of violent offenders and the longer time it might take for them to complete the program could result in nonviolent offenders being excluded from the program. (State's Brief in Opposition at 2-3). Again, this is speculative. The State also raises the issue of who is more "worthy" to receive services: violent or nonviolent offenders. That raises a host of policy issues, including a consideration of which type of offender is a greater risk to society. An argument could be made that providing treatment to violent offenders, who might be less violent if they were sober, would be a greater boon to community safety.

All 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. This consideration arises when deciding if the law is "narrowly tailored" and when considering procedural due process. If they are not actually guilty of the violent offense charged, the justifications do not apply. The Court will discuss this issue when considering procedural due process below.

The State argues that its concerns regarding violent offenders applies equally as well to those only charged with a violent offense because of the length of time it takes to complete treatment court. (State's Brief in Opposition at 3). This argument is not developed and its logic is not immediately apparent. There is no rule as to how long a criminal case will last, whether it be a felony or misdemeanor. As noted by the State, treatment court itself is designed to take fourteen months to complete. (State's Brief in Opposition at 3).

The Court has reviewed cases where a compelling state interest has been found. In the well-known case of ***Roe v. Wade,*** 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), these included "interests in safeguarding health, in maintaining medical standards, and in protecting potential life." ***Id.*** at 153. In the case of ***Vernonia Sch. Dist. 47J v. Acton***, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995), "[d]eterring drug use by our Nation's schoolchildren" was found to be a compelling state interest. ***Id.*** at 661. In ***Williams-Yulee v. Fla. Bar***, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015), the compelling state interest was "preserving public confidence in their judiciaries." ***Id.*** at 1661. By contrast, another case that considered a compelling state interest was ***Carey v. Population Servs. Int'l***, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977). That case concerned a statute that only permitted licensed pharmacists to sell

contraceptives. The "compelling interests" suggested by the state were concerns that young people not sell contraceptives; that pharmacists would be able to provide more information concerning the contraceptives; that it would prevent tampering; and it would facilitate the enforcement of other parts of the statute. ***Id.*** at 690. These interests were not found to be compelling.

Wisconsin cases that have considered this issue include ***State v. Oakley***, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200 (2001), wherein the compelling state interest was "requiring parents to support their children as well as rehabilitating those convicted of crimes." ***Id.*** P24. ***Monroe County Dep't of Human Servs. v. Kelli B. (In re Zachary B.)***, 2004 WI 48, 271 Wis. 2d 51, 678 N.W.2d 831, found that "to protect children from unfit parents" was a compelling state interest. ***Id.*** P25. In ***State v. Post***, 197 Wis. 2d 279, 541 N.W.2d 115 (1995), the compelling state interest was to "protect the community from the dangerously mentally disordered and to provide care and treatment to those with mental disorders that predispose them to sexual violence." ***Id.*** at 302.

Guided by these cases, this Court holds that the compelling state interests advanced in support of the statutes are insufficient to overcome the defendant's liberty interest. The statues are therefore unconstitutional beyond a reasonable doubt. This unconstitutionality is clearly found as it is applied in the Defendant's situation. It would also be unconstitutional as to others in his situation; i.e., persons who face incarceration because they cannot enter a treatment program due to being charged with a violent offense. The Court cannot find that the statutes are unconstitutional on their face on substantive grounds because the Court cannot 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. Given the Court's knowledge of how these courts work, most persons affected by this provision probably will face jail. However, there is no evidence to that effect in the record. Additionally, there is no need to make such a finding, given the Court's ruling regarding procedural due process below.

V. Procedural Due Process Claim

The finding that the statutes violate substantive due process as applied could end the Court's consideration of this matter. However, the State and the Defendant have also briefed the

procedural due process aspect of this case and the Court will consider those arguments as well, knowing that this decision is subject to appellate review. The Court believes that the Defendant's arguments concerning a deprivation of procedural due process are even stronger than the substantive due process claims. This is because no due process is afforded by the statute in question.

The obvious first stop on this path is the case of ***Morrissey v. Brewer***, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). There, in considering the deprivation of a defendant's parole, the Supreme Court held as follows:

> This discretionary aspect of the revocation decision need not be reached unless there is first an appropriate determination that the individual has in fact breached the conditions of 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, given the breach of parole conditions. See ***People ex rel. Menechino* v. *Warden***, 27 N. Y. 2d 376, 379, and n. 2, 267 N. E. 2d 238, 239, and n. 2 (1971) (parole board had less than full picture of facts). And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.
>
> Given these factors, most States have recognized that there is no interest on the part of the State in revoking parole without any procedural guarantees at all. What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior.

Id. at 483-84. The decision then goes on to describe the amount of process that is due. The Supreme Court suggested that a preliminary hearing to determine if there is "probable cause or reasonable grounds to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." ***Id.*** at 485.

As a liberty interest is at stake in this case as well, it would seem that similar due process would be mandated. The Defendant cites the case of ***Mathews v. Eldridge***, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). There, the Supreme Court set out the considerations for what process is due in a given situation. They held:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private

> interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35. This Court has already found that the private interest at stake is a constitutionally protected liberty interest.

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. There is no requirement that the alleged wrongdoer be given an opportunity to be heard and the accused almost never has any input into the decision to charge. In this way, the situation is much like that described in the ***Morrissey*** case, where the decision to revoke probation or parole is made unilaterally "on the basis of a written report by his parole officer." ***Id.*** at 473.

The Defendant argues that, although Defendants charged with felonies are entitled to a Chapter 970 preliminary hearing, this is not an effective safeguard. The Defendant notes that hearsay may form the exclusive basis of the proof and such hearings are not meaningful. (Defendant's Brief in Support of Motion to Dismiss at 5). However, the Court does not read §165.95(1)(a), Wisconsin Statutes to only apply to felonies. The statute says that if a person is "charged with...an offense in a pending case and, during the course of the offense, the person...used force against another person," they qualify as a "violent offender" and are denied admission into treatment court. This would certainly include crimes such as misdemeanor battery for which no preliminary hearings are held.

Thus, the risk of an erroneous deprivation of liberty appears substantial. This Court cannot say exactly what the conviction rate is for those charged with violent crimes, as statistics are so prone to manipulation. Online statistics given from one study by the U.S. Department of Justice Office of Justice Programs suggest that 68% of felony defendants were convicted and 72% of those convicted were convicted of the crime for which they were originally charged. U.S. Department of Justice, Bureau of Justice Statistics, *State Court Processing Statistics, 2006, Felony Defendants in Large Urban Counties, 2006*, https://www.bjs.gov/content/pub/pdf/fdluc06.pdf (last revised July 15, 2010). Regardless of the

exact statistics, this Court certainly can take judicial notice that the rate of criminal convictions is not 100%.

The Court has already cited to the ***Post*** case, *supra* at 197 Wis. 2d 279, 541 N.W.2d 115 (1995). The ***Post*** case bears examination as it considered issues of "dangerousness" in terms of substantive due process. In ***Post***, Chapter 980 defendants challenged their commitments on several grounds, including substantive Due Process. The defendants' civil commitments were found to invoke their liberty interest. ***Id.*** at 302. The statute was therefore subject to strict scrutiny. ***Id.***

The first challenge discussed was whether the terms "mental illness" and "mental disorder" were sufficiently narrowly tailored to survive strict scrutiny. ***Id.*** at 303. On this issue, the Supreme Court held that "[a] statute must be narrowly enough drawn that its terms can be given a reasonably precise content and those persons it encompasses can be identified with reasonable accuracy." ***Id.*** Because the diagnosis of mental illness was an area "fraught with medical and scientific uncertainties", this definition was held sufficient. ***Id.*** at 304 (quoting ***Jones v. United States,*** 463 U.S. 354, 370, 77 L. Ed. 2d 694, 103 S. Ct. 3043 (1983) (quoting ***Marshall v. United States,*** 414 U.S. 417, 427, 38 L. Ed. 2d 618, 94 S. Ct. 700 (1974)).

The Due Process issue regarding dangerousness was framed as whether "chapter 980's statutory definition of dangerousness sets an impermissibly low standard of 'substantial risk' and is therefore unconstitutional." ***Id.*** at 312. This issue was considered summarily. Because of the "uncertainty endemic to the field of psychiatry," "particular deference must be shown to legislative decisions in that arena." "Here, the Wisconsin Legislature has devised a statutory method for assessing the future danger posed by persons predisposed to sexual violence and we find it constitutionally sound." ***Id.*** at 312-13. This statutory method was to list the statute number of certain sex offenses and to include other crimes if they were found to be "sexually motivated." §980.01(6), Wisconsin Statutes.

As it more directly applies to the case *sub judice*, the Supreme Court noted that there is a probable cause hearing within 72 hours of filing a Chapter 980 petition where a court would determine whether probable cause existed to believe the alleged person was eligible for commitment. ***Id.*** at 298-99. It should also be noted that only persons who had been actually convicted of such an offense could be committed. Ultimately, a person was entitled to a full adversarial trial concerning the allegations. ***Id.***

A Wisconsin Supreme Court case which highlights the concern raised by the fact that persons merely charged with a violent offense are excluded is ***Monroe County Dep't of Human Servs. v. Kelli B. (In re Zachary B.)***, *supra* at 2004 WI 48, 271 Wis. 2d 51, 678 N.W.2d 831. The issue in that case was whether a statute that terminated the parental rights of people whose children were the result of incest was "narrowly tailored." The Supreme Court concluded as follows:

> **[P25]** Under that standard, we next consider whether the statute, as applied to [the mother] Kelli, is narrowly tailored to advance a compelling state interest. "Incestuous parenthood" is one of 11 grounds set forth by Wis. Stat. § 48.415. The compelling interest underlying the statute is to protect children from unfit parents. *See* Wis. Stat. § 48.01.
>
> **[P26]** As applied to Kelli, we conclude that the incestuous parenthood ground as set forth in Wis. Stat. § 48.415(7) is not narrowly tailored to advance the compelling state interest underlying the statute. The reason it is not narrowly tailored is that it renders people like Kelli per se unfit solely by virtue of their status as victims. While we recognize a correlation between perpetrators of incest and unfit parents, we fail to see how being victimized by one's parent or relative necessarily warrants the same conclusion. The fact of incestuous parenthood does not, in itself, demonstrate that victims like Kelli are unfit parents.

Likewise, in the present case, the fact that one has been charged with a crime has never meant that one is presumed guilty.

The final consideration under ***Mathews*** is the "burdens that the additional or substitute procedural requirement would entail." ***Id.*** at 335. In this situation, it is not a question of "additional" procedures. There are none to begin with. This cannot comport with procedural due process when a liberty interest is at stake.

The Court's consideration of this issue led it to the "irrebuttable presumption" doctrine. This line of cases concerns situations where legislation creates a presumption that affects a person's rights and they have no opportunity to rebut it. A prime example is set out in ***Stanley v. Illinois***, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). In that case, Peter and Joan Stanley had three children over the course of eighteen years. When she died, the children were taken from him and made wards of the State of Illinois. ***Id.*** at 646-47. Illinois law did not define an unwed father as a "parent" and presumed he was unfit.

> Under Illinois law, therefore, while the children of all parents can be taken from them in neglect proceedings, that is only after notice, hearing, and proof of such unfitness as a parent as amounts to neglect, an unwed father is uniquely subject to the more simplistic dependency proceeding. By use of this proceeding, the State, on showing that the father was not married to the mother, need not prove unfitness in fact, because it is presumed at law. Thus, the unwed father's claim of parental qualification is avoided as "irrelevant."

Id. at 650. The United States Supreme Court did not see the sense of this arrangement:

> For its part, the State has made its interest quite plain: Illinois has declared that the aim of the Juvenile Court Act is to protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" and to "strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal . . . ." Ill. Rev. Stat., c. 37, § 701-2. These are legitimate interests, well within the power of the State to implement. We do not question the assertion that neglectful parents may be separated from their children.
>
> But we are here not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible. What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family.

Id. at 652-53.

The Court went on to cite similar cases, including ***Bell v. Burson***, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). In that case, a clergyman driver had his license suspended after he was in an accident and had no insurance. He established that he was free from fault for the accident. The Georgia Court of Appeals ruled that liability was irrelevant. ***Id.*** at 537-39. The Supreme Court found that the clergyman had a due process interest in his driver's license. ***Id.*** at 539. He had a right to a meaningful hearing. ***Id.*** at 541. And he had a right to the hearing prior to being suspended:

> While "many controversies have raged about . . . the Due Process Clause," *ibid.*, it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" before the termination becomes effective.

Id. at 542 (citing and quoting ***Mullane v. Cent. Hanover Bank & Trust Co.***, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

Another case relied upon in ***Stanley*** was ***Carrington v. Rash***, 380 U.S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965). There, the State of Texas refused to allow any servicemen who moved to Texas to vote in Texas elections while they remained in the military. ***Id.*** at 89. The stated reason was to prevent large voting blocks of servicemen from "taking over" elections when stationed near small communities. ***Id.*** at 93. The Supreme Court found this law unconstitutional and asserted that servicemen must be given a chance to overcome the presumption of non-residence:

> "The presumption here created is . . . definitely conclusive -- incapable of being overcome by proof of the most positive character." ***Heiner v. Donnan***, 285 U.S. 312, 324 [285 U.S. 312, 52 S. Ct. 358, 76 L. Ed. 772 (1932)]. All servicemen not residents of Texas before induction come within the provision's sweep. Not one of them can ever vote in Texas, no matter how long Texas may have been his true home.

Id. at 96-97.

A Wisconsin case that recognized the irrebuttable presumption doctrine and discussed it in detail was ***Blake v. Jossart***, 2016 WI 57, 370 Wis. 2d 1, 884 N.W.2d 484. That case concerned a child daycare provider whose childcare certification was revoked due to a new law that imposed a lifetime prohibition on licensure or certification for anyone who had ever been convicted of certain crimes. Because the provider had a conviction for public assistance fraud from twenty-four years previously, her certification was permanently revoked. ***Id.*** PP 7-18. After describing the doctrine, the Court held that it was not applicable because the interest at stake was government benefits rather than constitutional interests. ***Id.*** P60.

This Court has already determined in the case *sub judice* that a liberty interest is at stake, not a social welfare benefit. Therefore the irrebuttable presumption doctrine applies in this situation. The Defendant has been placed in the category of a "violent offender" and is afforded no way to disprove this designation. Based upon the above line of cases, that is unconstitutional.

For that reason, and also because the statute in question deprives defendants of their liberty without any procedural due process of law, as required by ***Mathews v. Eldridge*** and ***Morrissey v. Brewer,*** *supra,* this Court finds that §§165.95(1)(a) and (3)(c), Wisconsin Statutes, are unconstitutional beyond a reasonable doubt.

VI. Permanent Statewide Injunctive Relief

The final issue is the Defendant's request that the Court grant permanent Statewide injunctive relief. Both sides agree that the Court has the power to grant such relief under §806.04 and §813.025, Wisconsin Statutes. The defendant asserts that a finding that a statute is unconstitutional "should have the practical effect of a permanent statewide injunction prohibiting the State from enforcing the statute against anyone, under any circumstances." (Defendant's Brief In Support of His Request for Permanent Statewide Injunctive Relief at 4). The State concurs. (State's Brief In Opposition to Defendant's Request for Statewide Injunctive Relief at 1).

This would seemingly settle the matter except for the Defendant's concern stemming from the case of ***Madison Teachers, Inc. v. Walker***, 2013 WI 91, P20, 351 Wis. 2d 237, 839 N.W.2d 388. In that case, certain Madison teachers petitioned a circuit court to find certain portions of 2011 Wisconsin Acts 10 and 32 unconstitutional and to issue declaratory and injunctive relief. The circuit court granted declaratory but not injunctive relief. That matter was appealed. ***Id***. PP 3-4. While the matter was pending in the appellate courts, the circuit issued an injunction against certain parties who were alleged to be ignoring the circuit court's earlier order. ***Id***. PP 9-10. In a *per curiam* decision, the Supreme Court vacated the circuit court's contempt order on the theory that "the circuit court should not have taken any action that significantly altered its judgment." ***Id***. P21. Unhappy with this result, Justices Abrahamson and Bradley wrote a twenty-page dissent.

Thus, the Defendant in the present case is concerned that, if this matter is appealed, this Court will lose its power to enforce its judgment should its ruling be ignored. (Defendant's Brief In Support of His Request for Permanent Statewide Injunctive Relief at 6). While this Court understands that concern, it does not share it. The officials who will decide whether to respect this Court's finding of unconstitutionality will be other treatment courts. This Court has confidence in their integrity. This Court also notes that it is likely that the ruling here will be less controversial than the situation presented in ***Madison Teachers, Inc. v. Walker.***

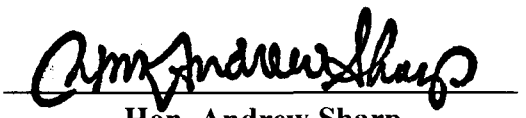
CONCLUSION

For the reasons stated above, the Court grants the Defendant's Motion to Dismiss State's Motion for Expulsion from Drug Court; grants a declaratory judgment finding that §§165.95(1)(a) and (3)(c), Wisconsin Statutes violates the Wisconsin and United States Constitution insofar as it pertains to the Defendant and other persons who are similarly situated; and that §§165.95(1)(a) and (3)(c), Wisconsin Statutes violate procedural due process.

This is a final order as defined by Wis. Stat. § 808.03(1) for purposes of appeal.

Dated this 7th day of July, 2017, in the City of Richland Center, Wisconsin.

BY THE COURT:



Hon. Andrew Sharp
Iowa County Circuit Court