STATE OF IDAHO)
County of KOOTENAI) ss

FILED_____

AT_____ O'Clock_____M
CLERK OF THE DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

PETER CHARLES LILLEMO,

Defendant.

Case No. **CRF 01 17504**

MEMORANDUM DECISION AND ORDER ON APPEAL

I. BACKGROUND.

On September 18, 2001, defendant Peter C. Lillemo pled not guilty to a misdemeanor charge of domestic battery. On November 19, 2001 at 9:20 AM the defendant changed his plea to guilty and voluntarily entered into the Kootenai County Domestic Violence Diversion Program, but was not then sentenced. According to the Diversion Agreement, successful completion of this voluntary program causes the charges against the defendant to be fully dismissed. The Agreement also warns that the defendant may "be terminated from the program for non-compliance"; the magistrate judge may then impose a sentence up to the maximum sentence allowed for the offense to which the defendant pled guilty.

Mr. Lillemo met with his Diversion supervisor, Amy K. Henson, on October 24, 2002, where she informed the defendant that his involvement in the program would be done as of November 19, 2002 if he had completed all of the requirements of the program. Clause three (3) of the Diversion

Waiver reads, "the length of time of participation is ordinarily 12 months," as it was in Mr. Lillemo's case. Ms. Henson requested to meet with the defendant on the last day of the program. On November 19, 2002, Mr. Lillemo came into the probation office to pay his last fees and later meet with Ms. Henson. At this meeting, defendant submitted to a breath test and UA test that revealed both a blood alcohol level of .081 and cocaine use. Both alcohol consumption and cocaine use violated the Diversion Agreement. Ms. Henson wrote a letter dated November 19, 2002 to the Prosecutor's office and the defendant terminating Mr. Lillemo from the Diversion Program. At oral argument, counsel for the State indicated this decision was more than just a unilateral decision by Henson, and that the decision was made by a "team" consisting of someone from the prosecuting attorney's office, the defendant's diversion supervisor (Amy Henson) and sometimes the court.

After termination, a sentencing hearing was set for December 4, 2002. The defendant filed a Motion to Dismiss on December 2, 2002 claiming that the Diversion Program had ended at 9:19 the morning of November 19, 2002 and that the defendant had not violated the Agreement by that point, and thus could not be sentenced. At sentencing, the court denied the Motion to Dismiss, stating that the defendant's interpretation was too technical a reading of "12 months." The Magistrate then sentenced Mr. Lillemo. Defendant appeals both the denial of the Motion to Dismiss and the imposition of judgment (sentence). Notice of Appeal, p. 2.

II. ISSUES

1. Was the lack of a hearing before defendant's termination from the Diversion Program a violation of the defendant's Constitutional procedural due process rights?
2. Did the Magistrate err in denying defendant's Motion to Dismiss?

III. DISCUSSION

A. Background

In 1972, the U.S. Supreme Court handed down a decision holding that a parolee has a significant liberty interest protected by the Due Process Clause of the Fourteenth Amendment regardless of whether parole was a privilege or a right. *Morrissey v. Brewer*, 408 U.S. 471 (1972). This opinion set out a two-prong test to determine whether a criminal defendant is entitled to due process. *Id.* at 481. First, the defendant must have a liberty interest within the meaning of the Fourteenth Amendment. *Id.* Once this is established, the question turns to what procedure satisfies the due process requirement. *Id.*

After finding that parolees were entitled to due process for revocation of their parole because they have a conditional liberty interest if they violate their parole, the Court addressed the second prong—what procedure effectively guaranteed the parolee's constitutional rights. *Id.* at 482-483. It rejected the argument that an evidentiary hearing would be "administratively intolerable" and held that the parolee is entitled to a preliminary hearing and a final revocation hearing if requested. *Id.* 483-488. The Court quickly made it clear that due process does not necessarily require formal judicial proceedings; an informal proceeding in front of an independent party would suffice. *Id.* at 486. The opinion laid out the "minimum requirements of due process":

> They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (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.

Id. at 489. The Court reiterated that these proceedings were intended to be "flexible." *Id.* at 490.

One year after *Morrissey*, the Supreme Court extended the entitlement to a minimum of procedural due process to probationers, stating that it did not perceive any difference between the conditional liberty interest of a parolee and that of a probationer. *Gagnon v. Scarpelli*, 411 U.S. 778,

782 (1973). The Court reasoned that both a parolee and probationer would be deprived of liberty if he or she violated the terms of release. *Id.* The looming question became whether a participant in a diversion program has this same "liberty interest" triggering the minimum requirements of due process set out in *Morrissey*.

B. Divertee's Due Process Rights

This issue has not been addressed by either the Idaho Court of Appeals or the Idaho Supreme Court, and offers only limited discussion in other states or in the federal courts. Courts that have addressed the issue have generally found that *Morrissey*'s minimal due process requirements apply to revocation of participation in the program if the participant in a diversion program has a liberty interest at stake, or after the defendant has entered the criminal process. *See State v. Lebbing*, 158 N.J. Super. 209 (N. J. 1978). The few courts that have held that due process does not apply have addressed programs where diversion was offered *pre-prosecution*—before any charge had been filed or before the entry of a plea—and the defendant did not have a liberty interest at stake upon termination from the program.

New Jersey offers a "Pretrial Intervention Program" (PTI) that seems similar (from the extremely limited facts) to the Kootenai County Domestic Diversion Program. *Id.* at 212. PTI is a supervised alcohol treatment program offered after the defendant is charged with a crime; the court even referred to the defendant's involvement as a "diversionary status." *Id.* The decision included an extended discussion of the due process rights of a divertee. The court directly analogized PTI to probation based on two factors. First, like probation, "loss of PTI status will also entail the loss of the conditional liberty attendant upon participation in the program." *Id.* at 215. The court continued, "This interest alone was deemed sufficient to impose due process protections in *Morrissey* and in *Gagnon*." *Id.* Second, the court considered a policy rationale, finding that PTI had the same rehabilitative purpose as parole or probation and noted that society also had an interest in rehabilitating the defendant and keeping him or her in the program. *Id.* at 216. In light of these

considerations, the court found that the PTI program was so closely analogous to probation or parole that the due process rights set out in *Morrissey* and *Gagnon* applied to New Jersey's diversion program. *Id.*

Other states have also analogized the conditional liberty interest held by a divertee to a parolee or probationer, but with somewhat less discussion of why. *See Hopper v. State*, N.E. 2d 106 (Ind. App. 1989). The *Hopper* court reasoned that the defendant had a liberty interest in continuing and completing the program because criminal proceedings against him would be entirely discharged upon completion of the diversion program. *Id.* at 108. Therefore, the defendant "must be accorded procedural due process" before termination. *Id.* at 109. An Ohio District Court also recently stated, though with no further discussion, that "the [divertee's] rights are analogous to those afforded a defendant in a probation revocation" and concluded under *Gagnon* that the defendant was entitled to due process for revocation of his participation in a diversion program. *State v. Stafford*, No. 2000 AP 12 0095 (Ohio App. Aug. 16, 2001).

Two cases have held that due process does not apply to termination from diversion programs. *Deurloo v. State*, 690 N.E.2d 1210 (Ind. App. 1998); *Wood v. U.S.*, 622 A.2d 67 (D.C. Cir. 1993). However, the diversion programs in both of these cases differ from probation, parole and the Kootenai County Domestic Diversion Program in a key aspect: criminal charges had not been brought or were not pending at the time of termination from the program. *Deurloo* readily acknowledges this distinction,

> The defendants in *Hopper*, *Gagnon*, and *Morrissey*, however, had already been subjected to the full criminal process, ***had entered an admission of guilt pursuant to a plea agreement*** or had been found guilty following a trial and had been sentenced by the court…[Deurloo] had not yet come before the court to answer the charge against her prior to her entry into the pretrial diversion program.

690 N.E.2d at 1212 (emphasis added). The court held that the defendant in that case did not have a liberty interest entitling her to due process before termination because "[t]he consequence of her termination from the program was not that a…sentence would be imposed on her by the court,

depriving her of her liberty." *Id.* The defendant under that type of pre-trial diversion program would only be required to "re-enter the formal criminal process." *Id.* at 1213.

Wood notes the distinction between the federal diversion program—a program extremely similar to the one in *Deurloo* that defers any *prosecution* of a crime—and probation or parole. 622 A.2d at 72. Because the divertee in *Wood*, as in *Deurloo*, would only have been required to re-enter the criminal process and would not have been sentenced upon termination of the diversion program, the court held that the divertee did not "suffer a loss of liberty that rises to a constitutional level requiring procedural due process." *Id.* at 72. Thus, if a person voluntarily enters a diversion program *before* entry of a plea, they would not have a liberty interest that would entitle him or her to due process for termination of the program. Under this same rationale, specifically addressed in *Deurloo*, if a defendant enters a guilty plea pursuant to a plea agreement or is sentenced by the court, he or she ***does have*** a liberty interest entitling the defendant to due process to terminate participation in the diversion program.

In the present case, Mr. Lillemo changed his plea on November 19, 2001 to guilty under a plea agreement allowing his participation in the Kootenai County Domestic Violence Diversion Program. Thus, upon his termination from the program, Mr. Lillemo is *sentenced*; he does not simply re-enter the criminal system to be charged and tried. Our program is very similar to the programs offered in *Lebbing, Hopper*, and *Stafford*, where the defendant enters a plea or is sentenced and *then* offered entry to a diversion program. The court in each of those cases directly analogized the diversion program to probation or parole, and held that the defendant was entitled to due process to terminate participation in a diversion program. Also, under the holding in *Deurloo*, a defendant who has already been subjected to the criminal process has a liberty interest entitling him or her to due process. Therefore, under all of these cases, Mr. Lillemo has a liberty interest under the 14th Amendment's protection of "liberty and property" entitling him to due process *before* terminating him from the Domestic Violence Diversion Program.

C. Procedure Satisfying Due Process.

If the defendant is entitled to due process, the termination procedure must meet the *Morrissey* minimum requirements standard outlined above. *Morrisey*, 408 U.S. at 489. This does not, however, require a full judicial hearing and is meant to be flexible. *Id.* at 486, 489. The *Hopper* court further explained, "The purpose of due process is to protect the individual from the arbitrary action of government." *Hopper*, 546 N.E.2d at 108. In *Hopper*, the defendant was entered in a program under the supervision of the department of mental health. *Id.* at 107. The decision to terminate was also placed "exclusively within the discretion of the department of mental health." *Id.* at 108. The court held that because "that discretion may be subject arbitrary exercise or abuse" and the defendant had a protected liberty interest, "the placing of [the] determination [to terminate] within the discretion of the department of mental health require[d] certain minimal due process protection," referring to the minimum procedural requirements under *Morrissey*. *Id.* at 108-109. The court continued, "The purpose of these procedures is to ensure that the determination by the department of mental health [to terminate] is not arbitrary but rests upon some reasonable basis." *Id.* at 109.

Again, it is unclear from the record who made the determination to terminate Mr. Lillemo's involvement in the Kootenai County Diversion Program. Was it only Amy Henson who wrote the letter, or as the State's counsel mentioned at oral argument, was the decision made by a "team" of someone from the Prosecutor's office, the defendant's diversion supervisor (Amy Henson) and sometimes the court? It does not matter. Even if the decision was made by the "team", what is clear from the record is neither the defendant nor his attorney had any input into the decision. Defendants must be given the opportunity to respond to allegations of non-compliance. *State v. Valentine*, 100 Wash.App. 1058, 2000 WL 628996 (Wash.App.Div.1 2000) (where in an unpublished opinion, the State of Washington conceded error when such due process was not provided). Similar to the decision made in *Hopper*, the determination to terminate in the present case is placed entirely within

the discretion of the supervising body, and is susceptible to arbitrary exercise. Since Mr. Lillemo is entitled to due process regarding his termination, the procedure must meet the minimum requirements expressed in *Morrissey* to prevent arbitrariness.

Again, on remand, Mr. Lillemo is "not entitled to a full judicial hearing," and the procedures that are to be used may be "flexible". *Morissey* 408 U.S. at 486, 489. Violations of the terms of the diversion program need only be shown by a preponderance of the evidence. *Hagar v. State*, 990 P.2d 894, 898 (Okla.Cr. 1999) (interpreting drug court termination and due process rights). Hearsay may be allowed where appropriate. *Id.* p. 899. Written notice to Mr. Lillemo of the program's intent to terminate him from the program is required, and that written notice must set forth the reasons for termination with such clarity that the defense is able to determine what reason is being submitted as grounds for revocation/termination, enabling him to prepare a defense to the allegation. *Id.* pp. 898-99, *citing Lennox v.State*, 674 P.2d 1146, 1148-49 (Okl.Cr.1984). In order to meet the requirements of due process, the judge shall state on the record the reasons for the revocation/termination, which must include the conditions violated and the reasons why disciplinary action short of revocation/termination are insufficient or inappropriate (although this concept of progressive discipline is required by statute in Oklahoma's drug courts, and it is unclear from the record whether there is any such requirement in the termination proceeding in the instant case). *Id.* p. 899.

The State primarily argues that because Mr. Lillemo did not object to the lack of sworn testimony and did not present any witnesses himself at the argument for the Motion to Dismiss, any objection to the proceedings is now waived. Respondent's Brief pp. 2-3. The State urges that the "fundamental error" exception to preserving an objection for appeal does not apply. Respondent's Brief p. 2. While the State's brief does not address Mr. Lillemo's due process claim, its secondary position at oral argument seemed to be that the defendant was afforded due process by the opportunity to argue his "Motion to Dismiss."

Appellant Mr. Lillemo argues first that the "fundamental error" exception does apply because the contested right is "constitutionally grounded"; because of its fundamental nature, the due process issue was not waived by failure to object at the hearing on the Motion to Dismiss. Appellant's Reply Brief p. 5. He further argues the hearing on the Motion to Dismiss Sentencing did not satisfy the minimum requirements of due process under *Morrissey*. The defendant notes that "the Motion was not to contest [Mr. Lillemo's] failure [of the Diversion Program], but rather to dismiss the case." Appellant's Reply Brief p. 2. The December 4, 2002 hearing did occur *after* the defendant was terminated from the Diversion Program; the hearing was not set to determine *whether* Mr. Lillemo should be terminated. Therefore, the defendant claims that that hearing did not satisfy Mr. Lillemo's due process rights.

D. <u>Duration of the Diversion Program.</u>

Defendant argues the duration of the program for "12 months" means the program ended at 9:19 a.m. on November 19, 2002, or **<u>exactly</u>** one year after defendant's admittance into the diversion program at 9:20 a.m. on November 19, 2001, and when he was tested at 4:30 p.m. on November 19, 2002, the program had already expired. This Court agrees with the Magistrate that such argument is "too technical a reading." Tr. p. 10. First of all, there is nothing about the paperwork involved in the acceptance into the program that states the program ends at a certain date let alone a certain time. Second, the program can be extended beyond one year. In fact, clause three (3) of the Diversion Waiver reads, "the length of time of participation is ***ordinarily*** 12 months." (emphasis added). Third, and most important, the obvious purpose of the program is rehabilitation. A defendant is given a substantial incentive to rehabilitate himself or herself by complying with the terms and conditions of the diversion program. Since it is a diversion program aimed at rehabilitation, it only makes sense that the person who enters that program realize that he or she is subject to the terms and conditions of the program, **until he or she is told otherwise.** It only makes sense that the diversionee would **expect** a meeting with his supervisor at the end of the program, and that until

such meeting occurs, the program is not at an end. Fourth, nothing about Amy Henson's October 24, 2002 representation to Mr. Lillemo that defendant's involvement in the program would be done as of November 19, 2002 if he completed all of the requirements of the program, changes the Court's analysis. That is not some sort of oral modification of a contract. Up to and including that last meeting, Amy Henson obviously felt the issue of whether Mr. Lillemo had satisfied all his requirements was still an open issue. Again, Mr. Lillemo had to **expect** a final meeting where his compliance or non-compliance would be discussed, and nothing about the communication on October 24, 2002 gave Mr. Lillemo the right to reasonably expect something different. Accordingly, the magistrate's denial of defendant's Motion to Dismiss is affirmed.

IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED that the magistrate's denial of defendant's Motion to Dismiss is AFFIRMED.

Mr. Lillemo is entitled to due process for termination of his participation in the Kootenai County Domestic Violence Diversion Program because the program was offered after entry of a guilty plea. Mr. Lillemo therefore has a liberty interest in his termination that is protected by the 14th Amendment. Without further information, even the "team" procedure for termination described by the State at oral argument does not satisfy the minimum requirements of *Morrissey*, because it at least violates the requirements of an evidentiary hearing where defendant has: "(c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (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." The first two *Gagnon* requirements appear to have been met: "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee (diversionee) of evidence against him."

The defendant did contest his termination in his Motion to Dismiss, however, this Court finds that such hearing did not amount to an evidentiary hearing determining termination before a neutral and detached body with the opportunity to present evidence and cross examine witnesses. On his termination from the Domestic Violence Diversion Program, Mr. Lillemo must have an opportunity for an evidentiary hearing before a neutral and detached body, an opportunity to present evidence and cross-examine witnesses and a written decision which gives the reason(s) for termination and the evidence relied upon. It appears logical that neutral and detached body would be the magistrate, but that does not appear to be required, as long as the person(s) making the decision are neutral and detached. As long as there is no bias, the sentencing judge may be a member of the team that makes the determination to revoke or terminate. *Alexander v. State*, 48 P.3d 110, 112 (Okla.Cr. 2002). What is clear is the defendant and his counsel must be allowed to participate in the process should they choose to do so. Defendant must be given those due process rights set forth in *Gagnon*, 411 U.S. at 786 (which were set forth *supra* at page 3 of this decision). The Magistrate and the parties must keep in mind that the due process requirements of *Morrisey* and *Gagnon* are "minimal". The procedures need not "require a full judicial hearing and [are] meant to be flexible" (*Morissey*, 408 U.S. at 486 and 489), and as shown in *Hagar*, hearsay may be allowed and the state need only prove the reason for termination by a preponderance of the evidence.

IT IS FURTHER ORDERED that the sentence imposed is VACATED and the matter REMANDED to the Magistrate for such a hearing, and for determination of the procedures to be used in such a hearing.

DATED this 1st day of July, 2018

_____
John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of July, 2018copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Greg D. Horne
Prosecuting Attorney – CDA
City Attorney, Wes Summerton

Judge Charles B. Hosack
Judge John P. Luster
Judge Fred Gibler
Judge Stephen Verby
Judge Barry E. Watson
Judge Eugene A. Marano
Judge Scott Wayman
Judge Benjamin R. Simpson

Judge Robert B. Burton
Judge Patrick R. McFadden
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CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy