

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,

vs. Plaintiff-Appellee,

Case No. 360521
Circuit Court No. 20-275332-FH

MARVIN TERRELL KENNEDY,

Defendant-Appellant.

Syeda F. Davidson (P72801)
Philip Mayor (P81691)
Daniel S. Korobkin (P72842)
American Civil Liberties Union Fund
of Michigan
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814
sdavidson@aclumich.org
pmayor@aclumich.org
dkorobkin@aclumich.org

Brandon Barlog (P81851)
Assistant Oakland County Prosecutor
1200 N. Telegraph, Building #14E
Pontiac, MI 48341
(248) 452-0656
barlogb@oakgov.com
appellatedivision@oakgov.com

Attorneys for Plaintiff-Appellee

Will S. Nahikian (P81520)
Cooperating Attorney, American Civil
Liberties Union Fund of Michigan
WILL DEFEND YOU, PLLC
500 Griswold St., Ste. 2450
Detroit, MI 48226
(248) 227-1978
will.nahikianwdy@gmail.com

Attorneys for Defendant-Appellant

APPLICATION FOR LEAVE TO APPEAL

RECEIVED by MCOA 3/14/2022 4:41:05 PM

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

QUESTIONS PRESENTED..... v

STATEMENT OF THE BASIS OF JURISDICTION 1

INTRODUCTION 1

STATEMENT OF FACTS 3

PROCEDURAL HISTORY..... 5

STANDARD OF REVIEW 5

ARGUMENT 6

 I. A panel of this Court has already held that Oakland County’s ZTP is a form of probation because it is a “community corrections program” as defined by the Community Corrections Act, so Appellant was statutorily entitled to a hearing before he was removed from the program and reincarcerated..... 6

 A. The rules of statutory construction require that the sentencing court retain jurisdiction over ZTP participants as probationers. 6

 B. Because participants in community corrections programs are statutorily entitled to the same process as other probationers, Appellant was entitled to a hearing, counsel, and a discretionary judicial determination of whether he should be re-incarcerated..... 10

 II. Re-incarcerating Mr. Kennedy without a hearing also violated his constitutional right to procedural due process. 13

CONCLUSION AND RELIEF REQUESTED 15

TABLE OF AUTHORITIES

Cases

Affeld v City of Detroit, 112 Mich 560; 71 NW 151 (1897)..... 12

Gagnon v Scarpelli, 411 US 778; 93 S Ct 1756; 36 L Ed 2d 656 (1973) 14

Greenholtz v Inmates of the Nebraska Penal & Correctional Complex, 442 US 1; 99 S Ct 2100; 60 L Ed 2d 668 (1979)..... 13

In re Parole of Hill, 298 Mich App 404; 827 NW2d 407 (2012)..... 13

Morrissey v Brewer, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972)..... 13, 14

People v Ambrose, 317 Mich App 556; 895 NW2d 198 (2016)..... 6

People v Breeding, 284 Mich App 471; 772 NW2d 810 (2009) 14

People v Brown, 72 Mich App 7; 248 NW2d 695 (1977) 15

People v Cannon, 206 Mich App 653; 522 NW2d 716 (1994) 12

People v City of Detroit, 90 Mich App 285; 297 NW2d 839 (1980)..... 12

People v Collins, 25 Mich App 609; 181 NW 2d 601 (1970) 7

People v Comer, 500 Mich 278; 901 NW2d 553 (2017)..... 6

People v Jackson, 168 Mich App 280; 424 NW2d 38 (1988)..... 13

People v Laurent, 171 Mich App 503; 431 NW 2d 202 (1988) 14

People v Lively, 470 Mich 248; 680 NW2d 878 (2004)..... 6

People v Rowser, 2020 WL 5267969, unpublished per curiam opinion of the Court of Appeals, issued September 3, 2020 (Docket No. 347307) passim

People v Warren, 462 Mich 415; 615 NW2d 691 (2000)..... 7

Rowland v Washtenaw Co Rd Comm, 477 Mich 197; 731 NW2d 41 (2007)..... 7

United States v Brown, 899 F2d 189 (CA 2, 1990) 14

Vitek v Jones, 445 US 480; 100 S Ct 1254; 63 L Ed 2d 552 (1980)..... 13

Young v Harper, 520 US 143; 117 S Ct 1148; 137 L Ed 2d 270 (1997)..... 13

Statutes

MCL 771.1 11

MCL 771.3 11

MCL 771.4..... 11

MCL 791.401 6, 14

MCL 791.402..... 2, 7, 8
MCL 791.403..... 7
MCL 791.404..... 7
MCL 791.408..... 7, 14
MCL 791.409..... 2, 6, 7, 11

Rules

MCR 6.445..... 2, 11
MCR 7.203..... 1
MCR 7.205..... 1

Other Authorities

Oakland County Community Corrections Advisory Board, *Bench Guide 2018*..... 3, 9

QUESTIONS PRESENTED

- I. Oakland County's Zero Tolerance Program is a program listed on its Community Corrections website that provides an alternative to incarceration. The Community Corrections Act provides that all participants in any community corrections programs must be treated as probationers who are subject to the jurisdiction of the sentencing court. The Oakland County Sheriff has determined that he has the authority to make unilateral decisions about whether or not to detain participants in the Zero Tolerance Program, and therefore unilaterally revoked Defendant-Appellant Marvin Kennedy's participation incarcerated him without a hearing. Is the program a Community Corrections program and, if so, did the Sheriff violate Mr. Kennedy's rights under the Community Corrections Act by unilaterally sending him to jail for nearly a year without any judicial involvement?

Appellant answers: Yes.

- II. Constitutional principles of procedural due process guarantee that probationers receive, at the least, a hearing before having their probation revoked. Here, the sentencing court refused to exercise jurisdiction to determine whether there was a probation violation and what an appropriate sanction would be if there was. Did the court's refusal to exercise jurisdiction violate Mr. Kennedy's constitutionally protected liberty interest as a probationer?

Appellant answers: Yes.

STATEMENT OF THE BASIS OF JURISDICTION

This is an application for leave to appeal from the circuit court's January 6, 2022 Order and Opinion denying Mr. Kennedy's Emergency Motion to Modify Terms of Probation/Prevent Violation of Due Process. (Opinion and Order, Jan 6, 2022, attached as Exhibit A). Mr. Kennedy filed a motion for reconsideration on January 19, 2022. (Mot. for Recon., Jan 19, 2022, attached as Exhibit B). The motion was denied on February 11, 2022. (Opinion and Order, Feb 11, 2022, attached as Exhibit C). An application for leave to appeal from a circuit court order that is not appealable of right must be filed within 21 days after the entry of an order denying a motion for reconsideration if the motion was filed within the initial 21-day period. MCR 7.203(B)(1); 7.205(A)(1)(b). Mr. Kennedy's motion for reconsideration was filed within the initial 21-day period, and this request falls within the 21 days following the denial of that motion. Mr. Kennedy's request is timely.

INTRODUCTION

Defendant-appellant Marvin Terrell Kennedy seeks leave to appeal because his participation in a probation program was terminated, and he was remanded to jail, without a hearing. The circuit court, in denying his request for relief, misconstrued the Community Corrections Act, which is the statute that governs diversionary programs such as Mr. Kennedy's, and the lower court therefore violated Mr. Kennedy's statutory rights and his constitutional right to due process. Mr. Kennedy requests that this Court grant leave to appeal and set this case for full briefing and argument.¹

¹ Because Mr. Kennedy is currently incarcerated on a one-year jail sentence, contemporaneously with this application he is filing a motion for immediate consideration.

Michigan’s Community Corrections Act provides that a “community corrections program” is a diversionary program that is operated by or contracted for by a city, county, or group of counties, or is operated by a nonprofit service agency, and is an alternative to incarceration in state correctional facility or jail. MCL 791.402(c). By statute, a court that places a person in a community corrections program must retain jurisdiction over the person as a probationer under Chapter XI of the code of criminal procedure. MCL 791.409.

Mr. Kennedy was sentenced to 365 days in the Oakland County Jail, suspended for his participation in the Oakland County Zero Tolerance Program (“ZTP”), which allows a person who has been sentenced for certain offenses to remain in the community in lieu of incarceration, subject to drug screening and other conditions. This Court has already held that the ZTP is a community corrections program as defined by the Community Corrections Act, and that a sentencing court who places a person in the ZTP must therefore retain jurisdiction over that person as a probationer. *People v Rowser*, 2020 WL 5267969, unpublished per curiam opinion of the Court of Appeals, issued September 3, 2020 (Docket No. 347307) (attached as Exhibit D). By statute, this means that a person who is accused of violating the terms of the ZTP is a probationer who is entitled to a hearing (with counsel present) before the sentencing court prior to being removed from the program, just as a person who is accused of violating probation is entitled to a hearing before probation is revoked. MCR 6.445(A). It also means that the sentencing court must determine a proper sanction if the court finds that the participant violated the program’s terms. MCR 6.445(G).

When Mr. Kennedy was arrested for allegedly committing a criminal offense during his participation in the ZTP, the Oakland County Sheriff unilaterally revoked his participation in the ZTP and reinstated his entire suspended 365-day sentence, with no hearing, no court oversight, and no legal counsel. Mr. Kennedy’s ZTP revocation was immediate upon his arrest; no court

determined that termination and a year of incarceration were appropriate sanctions for Mr. Kennedy's alleged violations of the ZTP program. Leaving such unchecked power in the hands of the Oakland County Sheriff is a violation of both the Community Corrections Act itself and a probationer's right to due process of law. Accordingly, the circuit court erred as a matter of law in denying Mr. Kennedy's motion for relief. Mr. Kennedy was entitled to a hearing held by the sentencing court (with counsel present) to determine whether he violated the terms of the ZTP and, if he did, whether removal from the ZTP was an appropriate sanction for any violation. Mr. Kennedy therefore requests that this Court grant his application for leave to appeal and set this case for full briefing and argument.

STATEMENT OF FACTS

On December 1, 2020, Marvin Kennedy ("Mr. Kennedy") pleaded no contest to four charges.² On February 17, 2021, he was sentenced to 365 days in the Oakland County Jail, with the entire sentence suspended so that Mr. Kennedy could participate in the Oakland County Zero Tolerance Program ("ZTP"). (Judgment of Sentence, Ex. 1 to Ex. B.)

The ZTP is a program endorsed and promoted by Oakland County's Community Corrections Division, which receives funding under Michigan's Community Corrections Act.³ It allows for a person to avoid incarceration after being sentenced for certain offenses, contingent upon continuing to test negative for drugs or alcohol during their participation in the program. (ZTP Rules, Ex. 2 to Ex. B.)

² The charges are as follows: 1) Felon in possession of a firearm; 2) Carrying a concealed weapon; 3) Resisting and obstructing a police officer; and 4) Driving while license suspended (second offense).

³ Oakland County Community Corrections Advisory Board, *Bench Guide 2018*, pp 6; 27, available at <<https://www.oakgov.com/comccorr/Documents/BenchGuide.pdf>> (accessed Feb 16, 2022).

According to a rules sheet that the Sheriff requires program participants to sign, but which Mr. Kennedy did not receive until after he pleaded guilty and received his suspended sentence, a person can be removed from the ZTP after a third positive drug or alcohol screen, as well as for any new arrest, charge, or change in legal status. (*Id.*) The rules sheet states that removal is immediate and does not require that the person be adjudicated on any new arrest or charge. (*Id.*) Thus, the Oakland County Sheriff's Department ("the Sheriff") has concluded that when a ZTP participant is arrested, the Sheriff can simply incarcerate the individual and impose their entire suspended sentence with no judicial intervention whatsoever. (ZTP Rules and Wheeler email, Exs. 2 & 4 to Ex. B.) The sentencing court is not advised of any rearrest or incarceration resulting from ZTP removal, because of the Sheriff's position that the court has surrendered jurisdiction over a person who has been ordered to participate in the ZTP. (*Id.*) The result is that ZTP participants like Mr. Kennedy face incarceration simply for being arrested, even if they did not in fact do anything wrong. They are incarcerated by non-judicial actors with no hearing of any sort, with no court oversight, and with no legal representation. Furthermore, even if a participant in the ZTP does violate the terms of the program, it is the Sheriff—not a court—who is determining and imposing the appropriate sanction, again without a hearing.

On September 9, 2021, Mr. Kennedy was arrested and charged with new crimes in the 45th District Court.⁴ (Emergency Mot. to Modify Terms of Probation, attached as Exhibit E.) After his arrest, the Sheriff immediately and unilaterally removed him from the ZTP and reinstated his entire 365-day jail sentence with no credit for the seven months Mr. Kennedy spent in the ZTP. (*Id.*) No hearing was held before Mr. Kennedy was incarcerated and removed from the ZTP, and his

⁴ The additional charges were as follows: 1) 2 domestic violence charges; 2) Driving while license suspended; 3) No insurance; and 4) Tinted windows.

criminal defense attorneys were not notified of his removal. (ZTP Rules and Wheeler email, Exs. 2 & 4 to Ex. B.) He remains incarcerated at the Oakland County Jail serving his one-year sentence. *Id.*

Following the Sheriff's unilateral decision to incarcerate him, Mr. Kennedy appeared in the 45th District Court on the additional charges on October 13, 2021. At that hearing, Mr. Kennedy pleaded guilty to misdemeanor charges.⁵

PROCEDURAL HISTORY

One of the undersigned counsel represented Mr. Kennedy on the new criminal charges that arose following Mr. Kennedy's September 9 arrest. Upon learning that the Sheriff had unilaterally decided to incarcerate Mr. Kennedy until July 2022 for violation of the ZTP without judicial intervention, counsel filed an Emergency Motion to Modify Terms of Probation/Prevent Violation of Due Process on December 21, 2021. The motion argued that the ZTP is a form of probation under Michigan law and thus, that Mr. Kennedy was entitled to a hearing before his sentencing judge, who would adjudicate whether he violated the terms of his probation and determine an appropriate sanction. On January 6, 2022, the sentencing court denied the motion, refusing to take jurisdiction of the matter and concluding that "placement into the ZTP and . . . adherence to the rules of the ZTP is entirely within the purview of the Oakland County Sheriff's Office." Ex. A, p. 3. On January 19, 2022, Appellant filed a motion for reconsideration, requesting only that the matter be set for a probation violation hearing. Ex. B. The motion was denied on February 11, 2022. Ex. C. This appeal follows.

STANDARD OF REVIEW

⁵ Mr. Kennedy was sentenced to 93 days in jail with credit for 83 days. The only reason that he remains in jail today is because the Sheriff unilaterally reinstated his 365-day jail sentence after determining, with no judicial intervention, that Mr. Kennedy violated the terms of the ZTP.

The proper interpretation and application of statutes and court rules is a question of law to be reviewed de novo. *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017).

ARGUMENT

I. A panel of this Court has already held that Oakland County’s ZTP is a form of probation because it is a “community corrections program” as defined by the Community Corrections Act, so Appellant was statutorily entitled to a hearing before he was removed from the program and reincarcerated.

The Community Corrections Act, MCL 791.401 *et seq.*, states that any community corrections program is a form of probation. MCL 791.409. This Court has previously (and correctly) held that the ZTP is a community correction program and, thus, a form of probation. *People v Rowser*, 2020 WL 5267969, unpublished per curiam opinion of the Court of Appeals, issued September 3, 2020 (Docket No. 347307) (Ex. D). As a participant in a probationary program, Mr. Kennedy was entitled to all of the statutory protections available to probationers, including, as relevant here, that (1) his *sentencing court*, not the Sheriff, determine whether he violated the terms of his probation, (2) his *sentencing court*, not the Sheriff, determine whether to revoke his probation, and (3) he be provided counsel. In declining to treat Mr. Kennedy as a probationer, the trial court erred as a matter of law.

A. The rules of statutory construction require that the sentencing court retain jurisdiction over ZTP participants as probationers.

The ZTP is a community corrections program, as defined by the Community Corrections Act. The fundamental task of statutory construction is to give effect to the intent of the Legislature. *People v Ambrose*, 317 Mich App 556, 560; 895 NW2d 198 (2016). The first step in determining legislative intent is to examine the specific language of the statute. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). When the language of the statute is unambiguous, judicial construction is not permitted and courts apply the statute as written. *Ambrose* at 560. The

Legislature is presumed to have intended the meaning that it plainly expressed. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007). Judicial construction is only appropriate if reasonable minds could differ concerning the statute’s meaning. *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000).

Michigan’s Community Corrections Act created a state community corrections advisory board in the office of community corrections. MCL 791.403(2). The state advisory board adopts minimum program standards, policies, and rules for community corrections programs. MCL 791.404. Counties may request funding for their community corrections programs by submitting a comprehensive corrections plan to the state advisory board. MCL 791.408(1). A community corrections program is defined by statute as any “program that is operated by or contracted for by a city, county, or group of counties . . . and that offers programs, services, or both, *instead of incarceration in prison*, and that are locally operated and provide a continuum of programming options from pretrial through post-adjudication.” MCL 791.402(c) (emphasis added). A community corrections program must also satisfy a number of other standards. See MCL 791.408. The goal of community corrections programs is to reduce the occurrence of repeat criminal offenses that result in a term of incarceration or detention in jail or prison. MCL 791.408(4)(b).

A sentencing court that places a person in a community corrections program “shall retain jurisdiction over the person as a probationer under Chapter XI of the code of criminal procedure.” MCL 791.409. A “sentencing court” means the court in which the defendant was sentenced. *People v Collins*, 25 Mich App 609, 612; 181 NW 2d 601 (1970).

A panel of this Court has already held that the ZTP is a community corrections program. See *Rowser*. In *Rowser* this Court specifically rejected an argument that the trial court can relinquish jurisdiction over a defendant to the sheriff when it orders the defendant to participate in

the ZTP. The trial court in *Rowser* sentenced the defendant to 150 days in jail, and suspended his sentence for his participation in the ZTP. Ex. D, p 1. The defendant in *Rowser* subsequently re-offended and filed a motion to reduce his sentence. *Id.* The sentencing court granted that motion and the prosecutor appealed. The prosecutor’s lead argument was that by sentencing the defendant to the ZTP, the sentencing court relinquished jurisdiction over the defendant to the sheriff. *Id.* at 2.

This Court disagreed. *Id.* It cited the statutory definition of a community corrections program, which, again, is a “program that is operated by or contracted for by a city, county, or group of counties . . . and that offers programs, services, or both, instead of incarceration in prison, and that are locally operated and provide a continuum of programming options from pretrial through post-adjudication.” *Id.*, quoting MCL 791.402(c). This Court reasoned that the “ZTP substance abuse program is the type of program provided for under the Community Corrections Act.” *Id.* at 2. Thus, the Community Corrections Act required the sentencing court to retain jurisdiction over the defendant as a probationer. *Id.* In so holding, *Rowser* recognized that the Oakland Community Corrections Department does not operate the ZTP directly, but held that this was not dispositive as to whether the ZTP was a community corrections program. The Court also noted that the ZTP is listed on Oakland County’s Community Corrections website as an “analogous program.” *Id.*

Rowser’s conclusion is correct and compelled by the plain language of the Community Corrections Act. Nothing in the statute states that a community corrections program must be directly operated by a community corrections department. Rather, a diversionary sentencing program can be a community corrections program if it is “operated by or contracted for by a city, county, or group of counties.” MCL 791.402(c). And in any event, as *Rowser* observed, the

Oakland County Community Corrections Advisory Board (“OCCCAB”) supports and promotes the ZTP Program as well. In turn, the OCCCAB submitted a plan to the state advisory board, and has been receiving funding under the Community Corrections Act since 1994.⁶

In denying Mr. Kennedy’s motions, the trial court purported to acknowledge *Rowser*’s holding in one sentence, but then went on to contradict that holding in the very next sentence: “*Rowser*’s holding merely stated that ‘the trial court had the discretion to elect whether to impose sanctions for defendant’s violations of the rules for ZTP participation...’ *Rowser*’s holding did not create a right to a hearing for a defendant who violates the rules of the ZTP.” Ex. A, p 2. The trial court failed to explain how it could simultaneously be true that the court has the discretion to determine whether to sanction a defendant for violating the ZTP, but that the defendant is not entitled to a hearing on that very question.

In any event, the quote from *Rowser* that the trial court relied upon is taken out of context, and illustrates that the trial court conflated two separate issues in *Rowser*. The prosecutor’s lead argument in *Rowser* was that the sentencing court lacked jurisdiction over the defendant. But then the prosecutor argued, in the alternative, that *if* the court had jurisdiction over the defendant as a probationer it was improper for the court to grant the defendant’s motion to reduce his sentence. The *Rowser* Court agreed that sentencing courts cannot commute or modify sentences except in specific enumerated circumstances. *Rowser* then held that if resentencing was what the sentencing court had done, it erred. *Rowser*, Ex. D, p 3. In that context, *Rowser* explained, “[w]hile the trial court had the discretion to elect whether to impose sanctions for defendant’s violation of the rules of ZTP participation, it did not have the authority to modify defendant’s valid sentence for defendant’s underlying crime of possession with intent to deliver.” *Rowser* at 2.

⁶ *Bench Guide 2018*, p 6.

The *Rowser* Court went on to recognize that although the sentencing court was not permitted to *resentence* the defendant, the sentencing court might have instead decided simply not to revoke the defendant's probation and thus allow him to remain unincarcerated. *Id.*, p 5 n 5. *Rowser* then remanded the matter to the trial court for further clarification as to what the trial court had intended to do. Thus, *Rowser* contemplated that it would have been proper for the sentencing court to have decided to allow the defendant to remain free by declining to revoke his participation in the ZTP. *Id.* And that conclusion, in turn, can only be correct if the sentencing court had jurisdiction over the defendant as a probationer participating in a community corrections program.

The sentencing court in this case also attempted to distinguish *Rowser* by stating that “[t]he Court reminds Defendant that it did not sentence him to probation; it sentenced him to 365 days jail, credit for 2 days.” Ex. A, p 2. However, the defendant in *Rowser* was also sentenced to jail time, suspended for his participation in the ZTP. Appendix 4, p 1. Furthermore, the judgment of sentence expressly contemplated Mr. Kennedy's participation in the program, stating that the “balance of jail sentence [is] suspended immediately upon entry into the ZTP program.” (Judgment of Sentence, Ex. 1 to Ex. B.) *Rowser*'s holding that the sentencing court should have retained jurisdiction over a participant in the ZTP program is not distinguishable here. The portion of *Rowser* applicable to this case is its holding that the ZTP is a community corrections program, and that the Community Corrections Act thus requires the sentencing court to retain jurisdiction over ZTP participants as probationers.

B. Because participants in community corrections programs are statutorily entitled to the same process as other probationers, Appellant was entitled to a hearing, counsel, and a discretionary judicial determination of whether he should be reincarcerated.

In providing that the sentencing court must retain jurisdiction over a participant in a community corrections program “as a probationer,” the Community Corrections Act incorporates

the procedures of Chapter XI of the code of criminal procedure. MCL 791.409. In turn, Chapter XI states that “if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer.” MCL 771.1. The code also articulates what must be included in a probation sentence and specifies that the conditions must be individually tailored to the probationer. MCL 771.3. Revocation of probation and subsequent incarceration “should be imposed only for repeated technical violations, new criminal behavior, as allowed in section 4b of this chapter, or upon request of the probationer.” MCL 771.4(2). If a probationer is accused of violating the terms of probation, “the probationer is entitled to a written copy of the charges constituting the claim that he or she violated probation *and to a probation revocation hearing.*” MCL 771.4(4) (emphasis added).

The Michigan Court Rules guarantee additional protections to probationers. They provide that the probationer must be promptly brought before the court for arraignment on any alleged violation. MCR 6.445(A). The court must ensure that the probationer receives written notice of the alleged violation and advise the probationer that he has a right to contest the charge. MCR 6.445(B). Evidence must be disclosed at the hearing, where the probationer has the right to be present and represented by counsel and the state has the burden of proving a violation by a preponderance of the evidence. MCR 6.445(E). If *the court* finds that the probationer has violated probation, *the court* has discretion to continue probation, modify probation, extend probation, or impose a sentence of incarceration. MCR 6.445(G) (emphasis added).

It is uncontested that none of these procedures were followed here. Mr. Kennedy was not advised of his right to a hearing. Instead, his participation in the program was unilaterally terminated by the Oakland County Sheriff's Office on September 7, the day he was arrested, without any adjudication that he had violated probation at all. It is well established that probation may not be revoked solely on the basis that the probationer was arrested. *People v Pillar*, 233 Mich App 267, 269-271; 590 NW 2d 622 (1998). There must be verified facts in the record from which the court can find by a preponderance of the evidence that a violation was committed. *Id.* Thus, Mr. Kennedy's arrest itself was not enough to warrant a revocation of his probation. The sentencing court was required to hold a hearing to determine whether he violated probation, and then use its discretion to determine if revocation was an appropriate sanction.

The *Rowser* court reached the same conclusion, noting in its decision that "the trial court had discretion to elect whether to impose sanctions for defendant's violation of the rules for ZTP participation." *Rowser* at 2. Here, the court held no such hearing and exercised no such discretion.⁷ Accordingly, the Sheriff's determination that Mr. Kennedy should be re-incarcerated violated the Community Corrections Act, and the lower court erred as a matter of law in refusing to hold a

⁷ The fact that the terms sheet for the ZTP states that a participant can be unilaterally terminated from the program simply for being arrested is legally irrelevant. For the reasons stated above, the ZTP is a community corrections program as a matter of state law, thus entitling participants to the statutory rights that probationers have. Neither the Sheriff nor the lower court can circumvent state law by implementing a community corrections program that defies these legal requirements. See, e.g., *Affeld v City of Detroit*, 112 Mich 560, 561; 71 NW 151 (1897) (holding that governmental bodies cannot enter into contracts with citizens that would "enable the [government] to evade the organic law and accomplish by indirection what it cannot do directly"); *People v City of Detroit*, 90 Mich App 285, 302; 297 NW2d 839 (1980) ("Contracts which violate a statute are contrary to public policy and cannot be enforced by the courts . . ."); *People v Cannon*, 206 Mich App 653, 656; 522 NW2d 716 (1994) (recognizing that it is unlawful to "circumvent or nullify" sentencing statutes).

hearing and exercise *its own* discretion to determine whether Mr. Kennedy should be re-incarcerated.

II. Re-incarcerating Mr. Kennedy without a hearing also violated his constitutional right to procedural due process.

The due process clauses of the United States and Michigan Constitutions apply when government action deprives a person of a liberty or property interest. *Greenholtz v Inmates of the Nebraska Penal & Correctional Complex*, 442 US 1, 7; 99 S Ct 2100; 60 L Ed 2d 668 (1979). Procedural due process requires the government to institute appropriate safeguards in proceedings that affect those rights protected by due process, such as life, liberty, or property. *In re Parole of Hill*, 298 Mich App 404, 413; 827 NW2d 407 (2012). A statutory scheme that “includes many of the core values of unqualified liberty” creates a “valuable” interest that “must be seen as within the protection of the Fourteenth Amendment.” *Morrissey v Brewer*, 408 US 471, 482, 92 S Ct 2593; 33 L Ed 2d 484 (1972). A liberty interest that triggers due process protections is created when a person who has been sentenced is permitted to participate in a program that allows him to “live a life generally free of the incidents of imprisonment.” *Young v Harper*, 520 US 143, 147-148; 117 S Ct 1148; 137 L Ed 2d 270 (1997). This is because termination of such an interest inflicts a “grievous loss” on the participant. *Morrissey*, 408 US at 482.

It is well established that probation implicates these liberty interests such that due process protections attach to decisions where probation might be revoked. *People v Jackson*, 168 Mich App 280, 283; 424 NW2d 38 (1988). Although there is no right to be placed on probation in the first place, once a State grants a person conditional liberty such as probation, due process protections attach. *Vitek v Jones*, 445 US 480, 488; 100 S Ct 1254; 63 L Ed 2d 552 (1980). Even though the revocation of probation is not a stage of the criminal prosecution, the potential loss of liberty brings the probationer within the protection of the 14th Amendment. *People v Breeding*,

284 Mich App 471, 483; 772 NW2d 810 (2009). Thus, “a probationer is entitled to a preliminary and final revocation hearing” to protect his liberty interest. *Gagnon v Scarpelli*, 411 US 778, 782; 93 S Ct 1756; 36 L Ed 2d 656 (1973).

Here, the very purpose of Mr. Kennedy’s participation in the ZTP program was his ability to live among the public, gain employment, and maintain relationships with family and friends. Indeed, one express statutory goal of diversionary community corrections programs under the Community Corrections Act is “to reduc[e] the occurrence of repeat criminal offenses that result in a term of incarceration or detention in jail or prison.” MCL 791.408(4)(b). The ZTP and community corrections programs under MCL 791.401 *et seq.* “include[] many of the core values of unqualified liberty” like those considered by the *Morrissey* Court when it held that the termination of such an interest requires due process. See *Morrissey*, 408 US 471, 482. Mr. Kennedy was therefore entitled to due process protections before being removed from the ZTP and incarcerated.

Due process requires that a probationer is “entitled to an opportunity to demonstrate that there was a justifiable excuse for any violation that occurred or that societal interests, like community safety, do not require revocation.” *United States v Brown*, 899 F2d 189, 194 (CA 2, 1990). Specifically, a probationer has the right to a procedure at which a factual determination is made as to whether the probationer did in fact violate probation and a discretionary legal determination is made as to whether the violation warrants revocation. *People v Laurent*, 171 Mich App 503, 505; 431 NW 2d 202 (1988). A hearing to revoke probation includes the following minimum features:

- a) Written notice of the claimed violations of probation;
- b) Disclosure to the probationer of evidence against him;

- c) The opportunity to be heard in person and to present witnesses and documentary evidence;
- d) The right to confront and cross-examine adverse witnesses;
- e) A neutral and detached hearing body such as a traditional parole board; and
- f) A written statement by the factfinders as to the evidence relied on and reasons for revoking probation.

People v Brown, 72 Mich App 7, 10-11; 248 NW2d 695 (1977).

It is undisputed that Mr. Kennedy was not afforded any of these protections, because the Sheriff and the lower court erroneously determined that these rights were eliminated because of his participation in the ZTP.

To be sure, Mr. Kennedy is not arguing that the sentencing court cannot revoke his probation and order him to serve his entire suspended sentence. But such a deprivation of his liberty cannot occur without due process of law. The sentencing court was required to exercise jurisdiction over Mr. Kennedy as a probationer and evaluate for itself whether he violated the terms of his probation. If the record showed that he did, the sentencing court was required to exercise its own discretion whether to terminate Mr. Kennedy's ZTP participation and remand him to jail. Because no such procedures carried out here, Mr. Kennedy's incarceration violates his right to due process of law.

CONCLUSION AND RELIEF REQUESTED

The Community Corrections Act does not authorize the Sheriff to act as judge, jury, and executioner. Nor do core principles of due process. But that is precisely what the lower court's understanding of the ZTP program would allow. This Court should therefore grant leave to appeal, and set this case for full briefing and argument.

Respectfully submitted,

/s/ Syeda Davidson

Syeda F. Davidson (P72801)

Philip Mayor (P81691)

Daniel S. Korobkin (P72842)

American Civil Liberties Union Fund
of Michigan

2966 Woodward Avenue

Detroit, Michigan 48201

(313) 578-6814

sdavidson@aclumich.org

pmayor@aclumich.org

dkorobkin@aclumich.org

Will S. Nahikian (P81520)

Cooperating Attorney, American Civil
Liberties Union Fund of Michigan

WILL DEFEND YOU, PLLC

500 Griswold St., Ste. 2450

Detroit, MI 48226

(248) 227-1978

will.nahikianwdy@gmail.com

Attorneys for Defendant-Appellant