

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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PROPOSED ADOPTION OF A NEW RULE)	NOTICE OF SPECIAL
IN RE: DEFINING KEY COMPONENTS FOR)	RULES HEARING
DRUG COURTS IN SOUTH DAKOTA;)	
PROPOSED ADOPTION OF A NEW RULE)	NO. 127
IN RE: GOVERNING EVIDENCE-BASED)	
PROBATION SUPERVISION PRACTICES;)	
IN THE MATTER OF THE ADOPTION OF A)	
NEW RULE IN RE: ESTABLISHING AN)	
EARNED DISCHARGE POLICY FOR CERTAIN)	
PROBATIONERS;)	
IN THE MATTER OF THE ADOPTION OF A)	
NEW RULE IN RE: ESTABLISHING A)	
GRADUATED RESPONSE GRID;)	
IN THE MATTER OF THE PROPOSED)	
AMENDMENT OF SDCL 23A-35-4.2)	

Petition for the amendment of existing section of the South Dakota Codified Laws and the adoption of new rules having been filed with the Court, and the Court having determined that the proposed amendment and adoption of new rules should be noticed for hearing, now therefore,

NOTICE IS HEREBY GIVEN THAT ON November 5, 2013, at 9:00 A.M., C.S.T., at the Courtroom of the Supreme Court in the Capitol Building, Pierre, South Dakota, the Court will consider the following:

1. Proposed Adoption of a new rule in Re: Defining the key components for drug courts in the State of South Dakota.

Section 1. As used in this rule drug courts include any court supervised alternative to incarceration and includes drug, driving under the influence, and other specialty court dockets aimed at increasing public safety, offender accountability and decreasing recidivism.

Section 2. South Dakota drug courts shall adhere to the following ten key components in order to maintain the fidelity and preserve the structural integrity of such programs:

Key Component 1: Drug courts integrate alcohol and other drug treatment services with justice system case processing.

Key Component 2: Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

Key Component 3: Eligible participants are identified early and promptly placed in the drug court program.

Key Component 4: Drug courts provide access to a continuum of alcohol and other drug related treatment and rehabilitation services.

Key Component 5: Abstinence is monitored by frequent alcohol and other drug testing.

Key Component 6: A coordinated strategy governs drug court responses to participants' compliance.

Key Component 7: Ongoing judicial interaction with each drug court participant is essential.

Key Component 8: Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.

Key component 9: Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.

Key Component 10: Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court effectiveness.

Section 3. The State Court Administrator's Office, in consultation with the Statewide Drug Court Advisory Board, shall implement statewide standards and guidelines in accordance with these ten key components to ensure the effectiveness and maintain the fidelity of the drug courts.

Section 4. The State Court Administrator's Office, in consultation with the Statewide Drug Court Advisory Board, shall implement statewide standards in accordance with "Adult

Drug Court Best Practice Standards," published by the National Association of Drug Court Professionals.

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2. Proposed Adoption of a New Rule In Re: Governing evidence-based probation supervision practices.

Section 1. Adult probation supervision shall use evidence-based practices and shall target the probationer's criminal risk and need factors with appropriate supervision and intervention, focusing resources on moderate-risk and high-risk offenders.

Section 2. Adult probation supervision shall include:

- (1) Use of a normed and validated risk and needs assessments measuring criminal risk factors, specific individual needs and driving variable supervision levels;
- (2) Use of assessment results to guide targeted supervision responses consistent with evidence-based practices as to the level of supervision and the practices used to reduce recidivism;
- (3) Collateral and personal contacts, including unscheduled contacts, with the offender and community and with a frequency consistent with the probationer's supervision level and risk of re-offense, staying informed of the probationer's conduct, compliance with conditions, and progress in community based intervention;
- (4) Use of adult probation change plans for each probationer assessed as medium-risk, high-risk or intensive risk to reoffend;
- (5) Use of an automated call-in system for each probationer assessed as administrative or low risk to reoffend unless otherwise approved by the chief court services officer for the judicial circuit; and
- (6) Use of practical and suitable supervision methods that are consistent with evidence-based practices to aid and encourage the probationer to improve his or her conduct and circumstances and to reduce the risk of recidivism through the use of incentives and rewards for positive behavior and swift and certain sanctions for noncompliance.

Section 3. "Adult probation change plan" means an individualized, documented accountability and behavior change strategy that:

- a. Matches the type and intensity of supervision to the assessed risk of reoffending;
 - b. Targets and prioritizes the specific criminal risk factors of the individual, with attention to addressing barriers to learning and participation;
 - c. Engages the probationer in the development of the plan; and
 - d. Establishes a timetable for achieving specific behavioral goals, including a schedule for payments of restitution, child support, and other financial obligations.
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3. **Proposed Adoption of a new rule in Re: Establishing an earned discharge policy for certain probationers.**

Section 1. Pursuant to the South Dakota Public Safety Improvement Act the Supreme Court establishes the following criteria and procedure for awarding earned credits for discharge from probation.

Section 2. Definitions:

- A. **Absconded.** The term absconded means to be absent from the offender's approved place of residence or employment with the intent of avoiding supervision. When there is reason to believe that an offender has absconded, verification of absence is obtained by conducting a field contact at the last known approved place of residence, contacting the last known approved place of employment, if applicable, and contacting known family members and collateral contacts.
- B. **Probationer.** A probationer is defined as any person convicted of a felony or receiving a suspended imposition under SDCL 23A-27-13 on a felony charge and sentenced by a South Dakota court to a term of supervised probation exceeding six months. A probationer for the purpose of these rules does not include a person sentenced to drug court, a minor on juvenile court probation, or a person serving probation only on a misdemeanor offense under the laws of the State of South Dakota.

C. Probation Violation. A probation violation is defined as any written report submitted to the states attorney by a supervising court service's officer, or any petition to modify or revoke probation filed with the court by a state's attorney, the attorney general or court services officer alleging that a probationer has violated the terms of supervised probation.

D. Supervised Probation. Supervised probation under these rules shall mean a period of probation, exceeding six months, imposed upon a probationer who has entered into a written agreement for probation with a court services officer that has been approved and filed with the court. Supervised probation does not include supervision through case-service monitoring or through the financial accountability collections system.

Section 3. Any probationer serving a term of supervised probation as the result of a sex offense under §22-24B-1, a violation of the sex offender registry requirements, or a violation of community safety zone requirements is not eligible for earned discharge credits under this rule.

Section 4. Except as set forth in Section 3, a probationer who has a term of supervised probation of six months or more as of the effective date of this rule shall be eligible for earned discharge credit as set forth in Section 5 regardless of the date of conviction.

Section 5. A probationer shall be awarded earned discharge credits while on supervised probation as follows:

(1) For each full calendar month of compliance with the terms of supervised probation an earned discharge credit of 30 days shall be awarded to a probationer. Each earned discharge credit shall reduce the term of supervised probation by 30 days. No earned discharge credit may be awarded for a partial month or the last full month of supervised probation. No earned discharge credit may be awarded for any month, or portion of a month, during which the probationer is incarcerated as part of a sentence or sanction.

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(2) A probationer shall not receive an earned discharge credit for any month(s) during which a probation violation is pending before the court. If the court does not sustain the probation violation, the court may enter a written order awarding earned discharge credits to the probationer for the months the probation violation was pending before the court. Absent such an order the probationer shall not be entitled to any earned discharge credit for such period of time.

(3) Earned discharge credits shall not be awarded to a probationer for any month(s) in which a probationer is absconded. Additionally, a probationer shall not be awarded earned discharge credit for any month in which the probationer was sanctioned for conduct that disqualifies the probationer from receiving earned discharge credit as provided by the graduated response grid.

(4) A South Dakota probationer placed on supervised probation who is supervised in another state under the Interstate Compact for Adult Offender Supervision is eligible for earned discharge credits pursuant to this rule.

(5) Earned discharge credits shall be applied to the probation term within fifteen days after the end of the month in which any credit was earned. A probationer who is eligible for earned discharge credits shall be notified of their probation discharge date on a semi-annual basis.

Section 6. Within ten days following the end of the month, a supervising court services officer shall report to the chief court services officer for the judicial circuit the name of any probationer eligible for an award of earned discharge credit and whether an earned discharge credit was awarded for the previous month.

Section 7. A probationer who objects to a supervising court services officer's determination that the probationer is ineligible for the award of earned discharge credit may seek review of that decision with the chief court services officer for the judicial circuit. Review of the denial of earned discharge credit may be made by filing a notice of review with the chief court services officer within 10 days from receiving notice of the denial. In the event the supervising court services officer is the chief court services officer, the probationer may request review of such

determination by a chief court services officer from another judicial circuit which will be assigned by the director of trial court services. The decision made by the chief court services officer concerning the award of earned discharge credits is final.

Section 8. Earned discharge credits are not revocable once awarded. However, nothing in this rule limits the sentencing court's authority to modify the terms and conditions of probation.

Section 9. The effective date of this Rule shall be January 1, 2014.

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4. Proposed Adoption of a new rule in Re: Establishing a graduated response grid.

Section 1. Pursuant to SDCL 16-22-13, the Supreme Court hereby adopts the following graduated response grid and rules to guide court services officers in determining the appropriate response to a violation of conditions of probation. It is the policy of the Unified Judicial System that violations of probation be addressed in a timely, consistent and reasonable manner by use of a graduated response grid. The use of graduated sanctions and incentives is intended to achieve public safety by holding offenders accountable for their behavior and reinforcing positive behavior.

Section 2. The response grid attached to this rule as Appendix A is hereby adopted for statewide use by court services officers. The response grid shall be utilized statewide for all adult cases supervised through court services. This rule does not apply to probationers supervised as part of a drug court as defined by SDCL 16-22-3.

Section 3. Court services officers are encouraged to provide incentives for compliance with the conditions of probation and acknowledge achievements to reinforce positive behavior.

Section 4. Except as stated in Section 2 the response grid shall be made a standard condition of probation and a probationer shall be informed that they may seek review of any moderate or serious sanction imposed by requesting review by the chief court services officer for the judicial circuit. In the event the

supervising court services officer is the chief court services officer, the probationer may request review of such determination by a chief court services officer from another judicial circuit which shall be assigned by the director of trial court services. The decision made by the chief court services officer concerning the imposition of a sanction is final.

Section 5. The response grid applies to conduct that is a violation of the terms and conditions of probation including an arrest for a misdemeanor offense. If a probationer is arrested for a felony the court services officer shall submit a probation violation report to the state's attorney. The court services officer may file a petition to modify or revoke probation with the court. If a probationer's conduct demonstrates a significant risk to public safety the court services officer shall immediately submit a probation violation report.

Section 6. A court services officer shall respond to a violation through the application of the grid by utilizing the appropriate cells based on the probationer's risk level and the type of violation. The imposition of sanctions within a grid cell is vested to the discretion of the supervising court services officer. A court services officer may deviate up or down from the cell with supervisor approval. Not all responses in each grid may be appropriate for all violations or for all probationers. Graduated responses may be used individually or in combination and include formal and informal responses to probation violations. The imposition of any sanction or incentive shall be documented by the court services officer.

Section 7. Court services officers shall consider the risk the probationer poses to the community, the severity of any violation, prior history on probation, previous violations or sanctions, and the deterrent effect when imposing a sanction. The court services officer shall also employ positive reinforcement for a probationer's compliance with the conditions of supervision and completion of benchmarks during the term of supervision.

Section 8. In response to a violation of the conditions of probation the court services officer may:

- a. Modify the conditions of community supervision for the limited purpose of imposing graduated sanctions.

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- b. Place a probationer who violates the terms of supervision in a local correctional or detention facility for a period of time up to forty-eight hours with review and prior approval of the chief court services officer for the judicial circuit.
- c. Impose any sanction with consideration to the probationers' employment schedule while still preserving public safety and maintaining the purpose and integrity of the sanctioning process.

Section 9. A sanction cannot extend the term of probation.

Section 10. There is hereby established a response grid oversight committee to consider recommendations to the graduated response grid and make such changes as the committee determines appropriate by majority vote. The committee shall be appointed by the Chief Justice of the South Dakota Supreme Court. The committee shall consist of nine members and be composed of two judges, two chief court services officers, one deputy chief court services officer, two court services officers that are not chief or deputy chief court services officers, one state's attorney and one defense attorney. The director of trial court services shall also serve as a non-voting member of the committee. The committee shall meet within 180 days from appointment and at least annually thereafter.

Section 11. Nothing in this rule shall be construed to limit the sentencing court's ability to respond to a probation violation or modify the terms and conditions of probation.

Section 12. This rule shall become effective January 1, 2014.

South Dakota's Application of Supervisory Responses (ASR): Responding to the Public Safety Improvement Act

Violation Severity	Administrative/Financial Obligations Only/Case Service Monitoring	Low Risk active probationer (LSI-R)	Moderate Risk active probationer (LSI-R)	High Risk active probationer (LSI-R)
Minor Failure to file paperwork/form on time Failure to complete an assignment/directive Missing programming appointment (1 st time) Missing meeting with officer (1 st time) Late to meeting w/ officer (1 st time) Failure to meet financial obligation (1 st time) Dishonesty (1 st time) Failure to maintain satisfactory performance at educational/employment endeavor (1 st time) Minor 24/7 violation Violation of social decorum	<ul style="list-style-type: none"> Verbal consequence Letter to client Volunteer opportunity (service; 1 time) Written assignment for client (brief) Discretion of CSO; appropriate per violation 	<ul style="list-style-type: none"> Verbal consequence Letter to client Volunteer opportunity (service; 1 time) Written assignment for client (brief) Discretion of CSO; appropriate per violation 	<ul style="list-style-type: none"> Verbal consequence Letter to client Volunteer opportunity (service; 1 time) Written assignment for client (brief) Discretion of CSO; appropriate per violation 	<ul style="list-style-type: none"> Verbal consequence Letter to client Volunteer opportunity (service; 1 time) Written assignment for client (brief) Discretion of CSO; appropriate per violation Extra (scheduled) meeting with officer for problem solving
Moderate Continuing failure to file paperwork/form Continuing failure to complete assign/direct. Continuing missed programming appt. Continuing lateness to meeting w/ officer Continuing failure to meet finance. ob. Continuing dishonesty Failure to report change in status (employ; residence; other) New arrest/change – Misdemeanor Class 2 Continuing missed meeting w/ officer New arrest/change – Misdemeanor Class 1 Prohibited space by statute or court order Unsatisfactory termination from treatment program Continuing failure to maintain satisfactory performance at educational/employment endeavor Contact with prohibited associates Violation of protection order Serious 24/7 violation Positive (or continuing positive) UA Positive (or continuing positive) PBT AWOL	<ul style="list-style-type: none"> Verbal consequence Letter to client Volunteer opportunity (service) Written assignment Discretion of CSO; appropriate per violation 	<ul style="list-style-type: none"> Verbal consequence Letter to client Volunteer opportunity (service) Written assignment Discretion of CSO; appropriate per violation Treatment referral Short-term jail stay – up to 48 hours 	<ul style="list-style-type: none"> Verbal consequence Letter to client Volunteer opportunity (service) Written assignment Discretion of CSO; appropriate per violation Treatment referral Increase meeting requirement Develop planner/scheduler/workbook Court observations Increase UA and similar Residential/out-of-home placement House arrest/Electronic monitoring Short-term jail stay – up to 48 hours 	<ul style="list-style-type: none"> Verbal consequence Letter to client Volunteer opportunity (service) Written assignment Discretion of CSO; appropriate per violation Treatment referral Increase meeting requirement Develop planner/scheduler/workbook Court observations Increase UA and similar Residential/out-of-home placement House arrest/Electronic monitoring Short-term jail stay – up to 48 hours
Serious Continuing or ongoing contact w/prohibited associates Continuing or ongoing prohibited space by statute or court order Continuing failure to report change in status (employ; residence; other) Continuing or ongoing serious 24/7 violation Ongoing failure to file paperwork/form Ongoing missed programming appt. Ongoing missed meeting w/ officer Ongoing lateness to meeting w/ officer Ongoing failure to meet finance ob. Ongoing dishonesty Ongoing failure to maintain satisfactory performance at educational/employment endeavor Ongoing positive UA and similar Ongoing positive PBT Unsatisfactory termination from any treatment program A significant event related to original/instant offense *New arrest/change – Felony *Absconding *Continuing or ongoing AWOL *Continuing violation of protection order	<ul style="list-style-type: none"> Verbal consequence Letter to client Volunteer opportunity (service) Written assignment (thinking report) Increase/institute meeting requirement Increase in supervision level/risk level Discretion of CSO; appropriate per violation Formal violation order to show cause issued 	<ul style="list-style-type: none"> Verbal consequence Letter to client Volunteer opportunity (service) Written assignment (thinking report) Increase meeting requirement Treatment referral Increase UA and similar Increase in supervision level/risk level House arrest/Electronic monitoring Discretion of CSO; appropriate per violation Short-term jail stay – up to 48 hours 	<ul style="list-style-type: none"> Verbal consequence Letter to client Volunteer opportunity (service) Written assignment (thinking report) Increase meeting requirement Treatment referral Increase UA and similar House arrest/Electronic monitoring Develop planner/scheduler/workbook Residential/out-of-home placement (incl. tx) Discretion of CSO; appropriate per violation Short-term jail stay – up to 48 hours 	<ul style="list-style-type: none"> Verbal consequence Letter to client Volunteer opportunity (service) Written assignment (thinking report) Increase meeting requirement Treatment referral Increase UA and similar House arrest/Electronic monitoring Develop planner/scheduler/workbook Residential/out-of-home placement (incl. tx) Discretion of CSO; appropriate per violation Short-term jail stay – up to 48 hours

Yellow highlight = discharge credit is not earned, if applicable to the case. Once discharge credit has not been granted to the offender for a month, it may not be earned back.

Violations that are not highlighted assume earned discharge credit can still be earned by the offender, if applicable to the case.

* Indicates this officer is required to submit a violation of probation report. In all other cells of the grid, the officer has the discretion to submit a probation violation report as appropriate in response to behavior.

5. Proposed Amendment of SDCL 23A-35-4.2: Faesimile Electronic transmission of affidavit in support of search warrant--
Issue of search warrant--Proof of magistrate's signature.

A committing magistrate may, by means of faesimile electronic transmission, receive an affidavit in support of the issuance of a search warrant and may issue a search warrant by the same method. All applicable procedural and statutory requirements for the issuance of a warrant shall be met. For all procedural and statutory purposes, the faesimile electronic document shall have the same force and effect as the original. The Any original electronic documents transmitted pursuant to this section shall be filed with the court within five business days.

The officer executing the warrant shall receive proof that the committing magistrate has signed the warrant before the warrant is executed. Proof that the committing magistrate has signed the warrant may consist of receipt of the faesimile electronic copy of the warrant.

Any person interested may appear at the hearing and be heard, provided that all objections or proposed amendments shall be reduced to writing and the original and ten copies thereof filed with the clerk of the Supreme Court no later than October 22, 2013.

Subsequent to the hearing, the Court may reject or adopt the proposed rule or any rule germane to the subject thereof.

Notice of this hearing shall be made to the members of the State Bar by publication of this notice in the October 2013, State Bar Newsletter.

DATED at Pierre, South Dakota this 27th day of September, 2013.

**SUPREME COURT
STATE OF SOUTH DAKOTA
FILED**

SEP 27 2013

BY THE COURT:

Shirley A. Johnson
Clerk

David Gilbertson
David Gilbertson, Chief Justice

ATTEST:

Shirley A. Johnson
Clerk of the Supreme Court
(SEAL)