

APPELLANT'S BRIEF

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

NO. 27790

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
v.

LEE ANN STENSTROM,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE ROBIN HOUWMAN & THE HONORABLE PATRICIA RIEPEL
Circuit Court Judges

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Notice of Appeal Filed March 10th, 2016.

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PRELIMINARY STATEMENT

The sentence hearing transcript settled record as "SR", followed by the applicable page number. This brief's appendix will be referred to as "A" followed by the page number. The hearing transcripts will be referred to as "T" followed by the page number: 4/27/15 Plea and Sentencing Hearing as T1; 12/28/15 Circuit Court Advising Hearing as T2; 1/21/16 Drug Court Hearing as T3; 1/28/16 Drug Court Termination Hearing as T4; 2/11/16 Circuit Revocation Hearing as T5. The Drug Court refers to the Honorable Pat Riepel. The Circuit Court refers to the Honorable Robin Houwman.

JURISDICTIONAL STATEMENT

The trial court entered an order revoking the Appellant's probation on February 11, 2016, following her termination from Drug Court on January 28, 2016. A Notice of Appeal was timely filed on March 10, 2016. SR104. This

Court possesses jurisdiction to review this appeal pursuant to, inter alia, SDCL 15-26A-3.

LEGAL ISSUES ON APPEAL

I. WHETHER AN INCARCERATED DRUG COURT PARTICIPANT IS ENTITLED TO HAVE LEGAL COUNSEL ATTEND AND REPRESENT HER AT DRUG COURT TEAM MEETINGS

The trial court ruled that she is not.

SDCL 23A-40-6

State v. Christian, 199 S.D. 4, 588 N.W.2d 881.

SDCL 16-22-5.3

II. WHETHER THE DRUG COURT ERRED BY TERMINATING THE APPELLANT FROM DRUG COURT AND THE CIRCUIT COURT ERRED BY REVOKING THE APPELLANT'S SUSPENDED SENTENCE

The trial court terminated the Appellant from Drug Court revoked her suspended sentence.

SDCL 23A-27-13

SDCL 23A-27-21

State v. Olson, 305 N.W.2d 852 (S.D. 1981)

STATEMENT OF THE CASE AND FACTS

The Minnehaha County Grand Jury indicted the Appellant with charges of Possession of a Controlled Substance, Possession of Drug Paraphernalia, Possession of Prescriptions Drugs/Non Prescription Drugs in Minnehaha County Cr.# 14-4050, on July 17, 2016. SR9. She was accepted into Drug Court and entered a plea of guilty to Possession of a Controlled Substance on April 27, 2015, for which she received a 4 year suspended sentence. SR53. Other pending charges were dismissed.

The Drug Court issued a warrant for non-compliance issues on May 7, 2015. SR52. The Appellant returned to

custody upon service of the warrant on July 15, 2015. A termination report was filed on July 24, 2015. SR56. The Appellant was allowed to continue in the program following that report.

The Drug Court filed a subsequent Termination Report on October 26, 2015, following a meeting of the Drug Court Team on October 22, 2015. SR68. It alleged events occurring since May, 2015. First, it alleged the Appellant absconded from her court services officer on May 8, 2015. She allegedly registered a 0.029 blood alcohol content [BAC] reading on August 29, 2015, and she admitted to drinking alcohol. She allegedly registered a 0.04 BAC on September 29, 2015. It stated her drug patch from September 11, 2015, registered positive for methamphetamine. On October 16, 2015, the report alleged she had left placement at Changes and Choices Recovery Center without permission.

A warrant was issued following the pronouncement of these allegations. SR68. After service, the Appellant appeared in circuit court before Judge Hoffman on December 28, 2015. T2:3. She was temporarily represented by a representative of the Minnehaha County Public Defender's office. T2:3. The Public Advocate's Office was appointed by Judge Hoffman. T2:3. The Appellant was held in custody

following that hearing up through the eventual imposition of her penitentiary sentence. T2:5. On December 31, 2015, the Drug Court conducted a Drug Team Meeting and issued a Termination Report. SR73. The State subsequently elected to forgo proceeding with regards to the December 31, 2015, Termination Report.

Jacob Vanderzee testified on behalf of the State on January 21, 2016 at the Drug Court Termination hearing. He testified consistently with the allegations stated in the October 22, 2015, Termination Report. Vanderzee also discussed events at the Changes and Choices Recovery Center circa October 16, 2015. Vanderzee indicated that the Appellant was frustrated residing there. T3:32 The Appellant's nephew, Daniel Stenstrom, had been killed through the actions of David Valandra. T3:32. The Appellant noticed that Valandra's girlfriend not only resided at Changes and Choices but was her roommate. T3:33. This increased the Appellant's stress levels while she resided there. T3:35. When the Appellant informed Vanderzee of the conflict at that facility, he did not move her elsewhere. T3:36. The Appellant left the facility without Vanderzee's permission on October 16, 2015. T3:33.

The parties reconvened for the Termination hearing on January 28, 2016. The Appellant addressed the Drug Court and apologized to the Drug Court Team. T4:6. She relayed how stressful the situation was at Changes and Choices regarding her roommate. T4:6 She said she should have focused on her recovery rather than try to flee from her problems. T4:7. The Drug Court Team then adjourned to meet one final time prior to the Drug Court stating its decision in open court. T4:14. The court reporter accompanied the Team. T4:14

The Drug Court terminated the Appellant from the Drug Court Program. T4:15. The Appellant later appeared in circuit court wherein she expressed similar thoughts concerning the events at Changes and Choices as well as her future desires: "I don't believe I am a hardened criminal, who needs to spend more time behind bars than I already have, but an addict who has a disease that requires treatment and counseling." T5:13.

Prior to the Appellant's termination from Drug Court, Appellant's counsel filed a motion to allow the Appellant's legal counsel to attend Drug Court Team Meetings for her case. SR75; SR91. Defense counsel representing the probationer were not allowed to attend team meetings.

T3:17; T3:11. Appellant's counsel also contacted the State to confirm whether the Appellant's case would be discussed at upcoming Team Meetings preceding Drug Court after January 6, 2016. T3:16. He was informed by Deputy States Attorney Matthew Abel that the Appellant would not be discussed at these Team Meetings.^a Appellant's counsel argued that he should be allowed to attend because the Appellant possessed due process rights and rights to counsel pursuant to the Due Process Clauses of the Constitutions of the United States and South Dakota. SR75; T3:11. In addition, South Dakota statutes allowed his attendance. SR75; T3:11.

In furtherance of this motion, the Appellant called attorney Michael Miller, of the Public Defender's Office to testify. Miller testified he is "the defense team member" of the Drug Court Team. T3:4. He did not represent the Appellant on a general every day basis, nor did he represent her at the termination hearing. T3:4.

The Drug Court Team investigates whether termination is appropriate during its Team Meetings. T3:5. At times, Miller has supported termination of participants from the

^aThe Drug Court later found that every participant in Drug Court "is discussed every week" at weekly pre-court team meetings. T3:22.

program. T3:5. Miller represented participants regarding non-termination violations, but does not represent them where termination is a possibility. T3:4. His role as a defense attorney for drug court is different from Appellant's counsel representing someone who is facing termination. T3:5. He gives a general defense perspective but does not represent the individual participant. T3:6. He acknowledged that adopting a termination position creates different interests from a participant who wants to remain in the program. T3:6.

The State was represented by Deputy States Attorney Ryan Sage during the proceeding. T3:7 The Minnehaha County State's Attorney's office was "doing the hearing" regarding the termination report. T3:7 The same prosecutor also attends the Drug Court Team Meetings. T3:8.

The Appellant also called Attorney Kristi Jones to testify. Jones indicated that she has represented clients in alternative sentencing proceedings. T4:9 In a DUI Court matter, the DUI Court Team left the court room to discuss the case after her client entered an admission. T4:10. Jones and her client were then allowed to meet with the team in their meeting. T:11-12. The Drug Court indicated

"That's not unusual. That's not an unusual procedure."

T4:12.

The Drug Court denied the Appellant's request. T4:12. The matter was transferred to circuit court where it found the Appellant to be in violation of her probation. After noting the Appellant had preserved her due process concerns for appellate review, the circuit court imposed the remainder of the Appellant's four year suspended sentence. T5:2; T5:18.

ARGUMENT

I. DUE PROCESS AND STATE STATUTES ENTITLE AN INCARCERATED DRUG COURT PARTICIPANT TO HAVE LEGAL COUNSEL ATTEND AND REPRESENT HER AT DRUG COURT TEAM MEETINGS

The Appellant requested the Drug Court to allow her legal counsel to attend Drug Court Team Meetings regarding her case. The Drug Court denied the request and later terminated her from the program. T4:15 The historical fact that termination occurred provided the grounds used to revoke her suspended sentence in circuit court. T5:2. She was then sentenced to the penitentiary. T5:18.

The Drug Court's decision to terminate the Defendant provided the causal link leading ultimately to the revocation of her suspended sentence. The failure to allow counsel into drug court team meetings that both lead up to

the final hearing on January 28, 2016, and occurred during the final hearing, preceded the decision to terminate the Appellant. Accordingly, the Drug Court committed reversible error which tainted later proceedings in this case. The Appellant was denied the right to representation in a Drug Court Team Meeting in violation of due process and right to counsel accorded to the Appellant by the Constitutions of the United States and South Dakota as well as applicable state statutes.

The Appellant maintains that South Dakota's statutes pertaining to its Drug Courts arising from SDCL 16-22 et seq. are constitutional. However, otherwise constitutional statutes may be applied against a party in an unconstitutional manner. See In re A.L., 2010 S.D. 13, ¶19, 781 N.W.2d 482. The manner in which *this* particular Drug Court declined the Appellant's request in *this* particular case constituted an unconstitutional deprivation of her right to representation and due process.

A. Right to Legal Representation in Drug Court Cases Under South Dakota State Law

South Dakota statutes require that the Appellant's Counsel be allowed to appear in Drug Court Team Meetings addressing the Appellant's case. The Appellant requested

the Drug Court to allow her attorney to attend the Drug Court Team Meetings via a written motion and oral argument. The Drug Court denied the Appellant's request, thereby committing error.

South Dakota law provides the right to legal representation for indigents at criminal court proceedings. SDCL 23A-40-6 provides:

"In *any criminal investigation or in any criminal action or action for revocation of suspended sentence or probation in the circuit or magistrate court or in a final proceeding to revoke a parole*, if it is satisfactorily shown that the defendant or detained person does not have sufficient money, credit or property to employ counsel and pay for the necessary expenses of his representation, the judge of the circuit court or magistrate *shall*, upon the request of defendant, assign, at any time following arrest or commencement of detention without formal charges, counsel for his representation, who shall *appear for* and defend the accused upon the charge against him, or take other proper legal action to protect the rights of the person detained without formal charge." (emphasis added).

State v. Christian, 199 S.D. 4, ¶17, 588 N.W.2d 881, 884.

The right to representation per South Dakota law arguably exceeds those rights emanating from the United States Constitution. Id. SDCL 23A-40-6 does not require a pre-appointment examination on the complexity of the issue involved in the case versus a probationer's intelligence or skill. Id. Indigent probationers may receive legal services

in Drug Court proceedings upon an application to the court, as occurred in this case on December 28, 2016. SR71

The scope of SDCL 23A-40-6 is described in its first clause. It applies to "any criminal investigation . . . or action for revocation of suspended sentence or probation". Use of the term "any" suggests the scope of the statute is broad, encompassing "every" action pertaining to a suspended sentence or probation. See Heyler v. City of Watertown, 91 N.W.334 (S.D. 1902).

Drug Court Team Meetings pertain to suspended sentences or probation. As Judge Hoffman stated, "So, Drug Court's basically like a probation Program." T1:4. Pre-Court Staff meetings are attended by members of the Drug Court Team to "determine appropriate actions" regarding the participant. Adult Drug Court Best Practice Standards II, p. 38. Discussion of these actions may include "making decisions that affect participant's liberty interests." Standards II, p. 38-39. In that actions which effect liberty interests are potentially at risk, an Appellant is entitled to legal counsel to "*appear for* and defend the accused upon the charge against him, or take other proper legal action *to protect the rights of the person detained without formal charge.*" SDCL 23A-40-6 (emphasis added).

The Appellant's personal counsel "may step in if the participant faces a potential jail sanction or discharge from the program." Standards II, p.40.

Legal counsel are appointed after a probationer is arrested pending further Drug Court proceedings. T2:4. The probationer's liberty interests have already been adversely affected by the time counsel is appointed. Drug Court Teams during team meetings "investigate" allegations of misconduct arising during a participant's program. T3:5. Investigations, of which a person may be aware of, or concerned about, are covered by SDCL 23A-40-6 as well. The right to counsel, and counsel's obligation to appear for a participant, should allow counsel to appear at Drug Court Team Meetings per South Dakota law, since actions to be taken regarding the participant are discussed.

Practice or professional standards generally do not impose "binding force as a judicial decision or legislative act, but as indicating the general view of members" of a given profession or practice. Hosford v Eno, 168 N.W.764, 765 (SD 1918). Courts will look to such standards for guidance. Id. However, guidelines are not necessarily dispositive of a particular case in that the guidelines do not constitute, inter alia, a "legislative act." Id.;

Discipline of Claggett, 1996 S.D. 21, ¶16, 544 N.W.2d 878, 881, n.7.

The practices and procedures of Drug Courts are outlined in the Adult Drug Court Best Practice Standards. The South Dakota legislature enacted its provisions. SDCL 16-22-5.3.^b Having been incorporated by the legislature, these standards possess the binding force of a legislative act. Hosford, 168 N.W. at 765. Drug Courts should act in accordance with these Practice Standards when administering the Drug Court Program.

Drug Teams are composed of individuals, "including but not limited to judge or judicial officer, program coordinator, prosecutor, defense counsel representative, treatment, community supervision officer, and law enforcement officer." Standards II, p. 38. The phrase "including but not limited to" implies a list of inclusion rather than exclusion of possible team members, or team meeting attenders.

^bSDCL 16-22-5.3 provides that "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."

The Drug Court Team attends pre-court staff meetings. These are presumptively closed to the public and the participant. Standards, II, p. 38. However, the Appellant's legal counsel is not the "participant", but is the legal representative of the participant. He is not a member of the public in a general sense. He is licensed by the State and appointed to "appear for" the Appellant to address matters associated with his appointment per SDCL 23A-40-6.

As such, the Standards do not explicitly preclude the presence of the Appellant's personal or assigned counsel. To the contrary, the Standards support inclusion. They analogize pre-court staff meetings to "to pre-court conferences in which attorneys commonly meet with the judge in chambers to clarify what legal," and factual issues remain disputed and to discuss other pertinent matters to "achieve a fair and efficient resolution of the case." Id. at p.41 (*emphasis added*). The Standard's use of the term "attorneys" as plural suggests more than one attorney, or more than one side to case, would be conferring with a judge at a pretrial conference or "team meeting".

The Standards discuss the role of the "Defense Attorney" at Team Meetings. It first mentions a private or public defense attorney who "ensures participants

constitutional rights are protected and advocates for participants' stated legal interests." Id. at p40. The plural designation "participants'" suggest this "defense attorney" represents all participants from a defense perspective in a general sense on the Drug Court Team.

The Standards, however, also discuss a "defense attorney" in terms of legal counsel representing the interests of a single participant. Once a probationer enters the program, "the participant may retain their previous defense counsel," Id. at p.40. After informed consent, the participants may elect to "be represented by a defense representative serving on the Drug Court Team,". Id.. Alternatively, the probationer might also consent to be *represented jointly* by their private counsel and the defense representative." Id. (emphasis added).

The Standards that the Defense Representative for the Drug Court and the Defense Attorney for the participant are two different people. The Drug Court Defense Representative could handle day to day issues regarding program participation while the Appellant's Defense attorney or "private counsel may step in if the participant faces a *potential* jail sanction or discharge from the program." Id. at p.40 (emphasis added). The Bifurcation of

tasks assigned to each suggest their respective functions differ, as do the interests each are trying to protect.

The Standards list a defense counsel representative as part of the Team. Id. at p.39. Latter descriptions of "Defense Attorney" include references to the Drug Court Teams Defense representative as well as the Appellant's individual attorney within the Standards' descriptions of its terms. Id. p.40. Both types of Defense attorneys, one with a general duty to the Drug Court and its participants, and yet also one with a particularized duty to the interests of a particular client, can and should serve on a Drug Court Team upon the request of an incarcerated participant pursuant to the Standards.

The mere potential for jail warrants presence of counsel. In the present case, this potential advanced to actual incarceration. T1:4. In so doing, "participants may be more likely to perceive Drug Court procedures as fair when a dedicated defense attorney represents their interests *in team meetings*". Id. (emphasis added). The Standards and supporting comments explicitly anticipate that legal counsel, focused on the participant's interests, would attend "team meetings". Accordingly, South Dakota law requires attorney attendance upon request.

The problem occurring in *this* Drug Court in the Second Judicial Circuit arises when the Drug Team Defense Representative elects to seek termination. They cease being a "dedicated defense attorney" representing the participant's interests once he or she decides termination is the appropriate plan of action. The Defense Representative on this case indicates he provides legal representation in a general sense. T3:6. He is not representing the interests of the Appellant once a termination decision was made by him. T3:6. This impairs the Appellant's right to assistance of counsel. See State v. Goode, 171 N.W.2d 733, 734 (S.D. 1969) citing Glasser v. United States, 315 U.S. 60, 70 (1942).^c

Once the Drug Court Defense Representative concludes termination is the correct action, a vacuum of representation for the Appellant is created within the Team Meeting.^d The vacuum is exacerbated by the continued

^c Glasser states "Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." Id.

^d The Appellant does not maintain this Drug Court Defense Representative acted with some nefarious intent. He has served on the Drug Court with dedication since its

presence of a Deputy States Attorney advocating a position adverse to the probationer's interest. The Defense Representative is not, or is no longer, taking a position consistent with the participant's desires. The Deputy State's Attorney, however, still remains present at the meeting, maintaining an adverse position against the participant.

These issues are compounded when the Deputy States Attorney in the Team Meeting is the same official prosecuting and advancing the Termination Report in open court. See generally *infra* Morrissey v. Brewer, 408 U.S. 471, 486 (1972).^e In the present case, the Deputy States Attorney that is proceeding on a Termination Report, also participates in decisions at present and future Team Meetings on how the case will be disposed. Due process concerns arise from the individual initiating the proceedings remaining objective when evaluating subsequent recommendations. *Id.* at 486.

inception, but nevertheless is subject to some of its potential limitations as outlined in this brief.

^eMorrissey indicates, "It will be sufficient, therefore, in the parole revocation context, if an evaluation of whether reasonable cause exists to believe that conditions of parole have been violated is made by someone such as a parole officer *other than the one who has made the report of parole violations or has recommended revocation*") (emphasis added). *Id.*

Merely allowing the presence of counsel at Team Meetings would alleviate these concerns regarding adequate legal representation and the avoidance of conflicts. The actions taken by the Drug Court excluding the Appellant's own legal counsel from Drug Court Team Meetings caused a representation vacuum - a vacuum which would not otherwise exist if counsel were simply allowed to attend. The Drug Court accordingly erred prohibiting legal counsel's presence at Drug Court Team Meetings in conflict with, inter alia, SDCL 23A-40-6 and SDCL 16-22-5.3. The text and comments of the Standards promote the inclusion and not exclusion of defense counsel from Team Meetings.

B. Rights to Legal Representation and Due Process Under Federal Constitutional Law.

Due Process requires that the Appellant's Counsel be allowed to attend Drug Court Team Meetings addressing the Appellant's case. The Appellant requested the Drug Court to allow her attorney to attend the Drug Court Team Meetings via a written motion and oral argument. The Drug Court denied the request thereby committing error.

The United States Supreme Court has ruled procedural due process rights and the right to counsel apply to post sentencing revocation hearings for criminal defendants in

State courts. U.S.Const.Amend. V, VI, XIV; Morrissey v Brewer, 408 U.S. 471, 486 (1972). The Court extended Morrissey's holding from parole to probation revocation proceedings in Gagnon v. Scarpelli, 411 U.S. 778, 783 (1973). Similarly, the right to counsel was extended to deferred sentence proceedings. Mempa v. Rhay, 389 U.S. 128, 137 (1967).

The amount of process due in these various post conviction proceedings was examined in Morrissey v. Brewer, 408 U.S. 471 (1972); In Morrissey, a number of inmates sought habeas corpus relief following revocations of their parole without being accorded a hearing. Morrissey, 408 U.S. at 472-73. The Supreme Court noted that a parolee is not entitled to the same level of process as is accorded to a defendant in the underlying charge prior to their convictions. *Id.* at 480. However, an individual's status on parole still allows engagement in activities of other citizens with no convictions. The Court did therefore acknowledge that parolees still retain a protected liberty interest protected by the Due Process Clause of the 14th Amendment. *Id.* at 482. The State, conversely, possessed an interest in avoiding the need for process associated with a new criminal proceeding for an individual who had

already been convicted, and to return him to the penitentiary if he failed to adhere to his parole conditions. Id. at 483. However, the State did not have an interest in revoking parole status without any hearing. Id. The State had an interest in administering a parole system that provides basic fairness to inmates and to "enhance the chance of rehabilitation by avoiding reactions to arbitrariness." Id. at 484.

Due process required that a post arrest determination must be made regarding whether reasonable grounds existed for parole revocation "by someone not directly involved in the case," at a "preliminary hearing" Id. at 485. The parolee was entitled to have adverse witnesses made available for the hearing. Id. at 487. The parolee would then be entitled to a full revocation hearing prior to a final decision on parole revocation.

In Morrissey, the Court then announced what process was due at the parole revocation hearing. The requirements imposed six obligations: "(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 such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." Id at 489.

The Supreme Court in Gagnon determined that probation revocations like parole revocations could result in a loss of liberty. Gagnon, 411 U.S. at 783. Gagnon, however, addressed an issue that Morrissey did not - whether an indigent probationer possessed a due process right to appointment of counsel at probation revocation hearings. The Court determined to adopt a case by case basis approach. Id. The need for counsel at a probation revocation hearing "derives, not from the invariable attributes of these hearing, but rather from the peculiarities of particular cases.". Id. at.

The application of this case by case approach was illustrated by this Court in State v. Christian. In Christian, the probationer did not receive a written violation report per the requirements of Gagnon and Morrissey. Christian, 199 S.D. at ¶20, 588 N.W.2d at 884.

Although noting state law presented a greater right to legal representation via SDCL 23A-40-6, this Court noted that the probationer lacked the knowledge and skills on his own "to effectively challenged this denial of due process" without legal assistance using of Gagnon's holding. Id. The Appellant's case presents issues that are arguably more complex than whether an incarcerated probationer was served with a violation report. Gagnon and Christian would allow the presence of counsel under these circumstances in light of the complexity of the issues.

The Appellant possessed a liberty interest during Drug Court proceedings including Drug Court Team meetings. Adult Drug Court Best Practice Standards I, p.41. The Defendant was incarcerated because of warrants pertaining to her participation or the lack thereof in the Drug Court program. T1:4. She had been held for these allegations over several weeks, where every drug court case is discussed each week at Drug Court Team Meetings. T3:22. Decisions discussed and made at these team meetings affect the Appellant's incarceration status. The Appellant, accordingly suffered a loss of liberty per Gagnon and Christian by her incarceration.

The State possesses an interest to allow the presence of defense counsel at Drug Court Team Meetings. The State has an interest to ensure execution and compliance with SDCL 23A-40-6. The State must ensure that counsel is provided upon request for any investigation or action for revocation of probation. This obligation supports and augments the stated interest in the Adult Drug Court Best Practice Standards to encourage participants to be "more likely to perceive Drug Court procedure as fair when a dedicated defense attorney represents their interests in team meetings and status hearings." Standards II, p.40; Compare Morrissey, 408 U.S. at 484 (State possesses an interest in administering a parole system that provides basic fairness to inmates to "enhance the chance of rehabilitation by avoiding reactions to arbitrariness."). This can be accomplished when "private counsel may step in if the participant faces a *potential* jail sanction or discharge from the program." Id. at p. 40 (*emphasis added*). Similarly, Appellant's counsel may then can meet the requirement that he "appear for" his client per SDCL 23A-40-6 at "team meetings". Id.

Any burden on the State to allow the presence of counsel in Drug Court Team Meetings is minimal. South

Dakota law provides for the appointment of counsel in Drug Court termination cases, as shown by Appellant counsel's appointment in this case. SR71. The statutorily adopted Practice Standards actually recognize joint representation of the Drug Court Team's Defense Counsel with the Appellant's personal counsel. Standards II. P. 40. Similarly, the Appellant had been facing actual jail time as well as potential jail time triggering the need for her own attorney.

The transcripts illustrate the minimal effect on State and County resources. On January 28, 2016, Appellant's counsel was present in the court room for the same amount of time which the Drug Court Team deliberated with the Deputy State's Attorney and the Drug Court Defense Representative. T4:14-15. The transcript reveals the brevity of the meeting as shown by the lack of topics discussed. T4:14-15. No additional time or county expense would be incurred generally, or were present in this case, specifically. Appellant's counsel was present in the court room regardless, while the Drug Court Team deliberated in its final meeting. Similarly, the skills of the Deputy States Attorney and the Drug Court were also employed for the same amount of time, albeit in a different location. In

addition, the notion that these types of appearances by counsel are "not unusual" in comparable alternative sentencing proceedings diminish the notion that the government's interest would be hindered. T4:12

This Court addressed whether an administrative appeals process met procedural due process standards in Daily v. City of Sioux Falls, 2011 S.D. 48, 802 N.W.2d 905. In Daily, a property owner sought to appeal citations issued against him for alleged violations of concrete extension restrictions. During a hearing on the citations, the City Attorney informed Dailey's attorney that the rules of evidence did not apply at the hearing. Nevertheless, the City made evidentiary objections which were sustained by the hearing examiner. In contrast, evidentiary objections made by Daily's attorney were overruled.

This Court noted that "fair trial in a fair tribunal is a basic requirement of due process." Daily, 2011 S.D. at ¶29, 802 N.W.2d at 917. The act of sustaining evidentiary objections for the benefit of one party only while the City proclaimed the rules of evidence did not apply, defied fairness concerns. This Court concluded that the one sided "application of the City's administrative appeals ordinance

violated Daily's procedural due process rights." Daily, 2011 S.D. at ¶30, 802 N.W.2d at 917.

The present application of legal counsel representation in Drug Court during Team Meetings is similarly one sided. A Deputy States Attorney presents the case to Drug Court for termination. This same individual participates in Team Meetings which determine the actions to be taken. This presents concerns that this prosecutor can remain sufficiently objective in subsequent team meetings. See Morrissey, 408 U.S. at 486 (1972).

In Daily, the property owner's attorney continued to represent the owner's interest throughout the hearings. In the present case, the Drug Court Defense Representative definitively voted with the prosecutor for termination at the meeting occurring during the hearing on January 28, 2016. At this point, the Defendant was unrepresented while the decision making process was still under way. However, the State, nevertheless, maintained its presence during the decision making process despite lack of equivalent representation for the Appellant.^f

^fThe Drug Court Team had voted on Terminating the Appellant on prior occasions. SR56, 68, 73. However, these meetings were not recorded. The Drug Court Defense Representative's positions at these meetings are not shown in the record.

The record presents clearly wrong factual findings regarding whether the Appellant's case came up at Team Meetings occurring before hearings on Thursdays of each week. The Drug Court and State inquired of the Appellant to show evidence her case was discussed at any of those meetings. T4:12. Appellant's counsel had been informed by Deputy States Attorney that the Appellant was not being discussed on certain days. T4:16. However, the Drug Court later conceded that each participant's case was discussed during each meeting each week. T3:22. The Appellant would maintain that the Drug Court's admission confirms and constitutes such proof. The act of forbidding counsel's entry to the team meetings, arising from concerns of "the confidentiality of drug court and the privacy of the team meeting", effectively prevented Appellant's Counsel from finding and offering more evidence. T3:5.⁹

Due Process required that the Appellant be allowed to have her counsel attend Drug Court Team Meetings upon her request. The Appellant's termination from the program without allowing her attorney to attend Drug Court Team

⁹Transcripts were available of the final team meeting on January 28, 2016, as the court reporter was told to attend the meeting. T4:14. Notwithstanding alleged privacy concerns, transcripts were produced without any State objection or protective order of the Drug Court. T4:14.

Meetings, particularly the last one on January 28, 2016, denied her due process. It also contravened state statutes and best practice standards. The Drug Court committed error denying the Appellant's request. The error continued into circuit as the Drug Court's termination decision formed the basis of State's motion to revoke preceding the imposition of the Appellant's penitentiary sentence.

C. The Drug Court's Ruling Creates Structural Error

Appellant possessed a right to legal representation at Drug Court Team Meetings. The Appellant announced her desire to exercise that right through her legal representative. The Drug Court's failure to grant that request created structural error in this case, where it might not otherwise exist in the Drug Court system.

Structural error constitutes a defect in a case where they "so affect the framework within which the trial proceeds that automatic reversal is required." Guthmiller v. Weber, 2011 S.D. 62, P16, 804 N.W.2d 400, 407, The United States Supreme Court listed six instances that constitute where structural defects are present: "(1) a deprivation of the right to counsel; (2) a biased judge; (3) an unlawful exclusion of grand jurors of the defendant's race; (4) a deprivation of the right of self-

representation at trial; (5) a deprivation of the right to a public trial; and (6) an erroneous reasonable doubt standard." Id. citing Neder v. U.S., 527 U.S. 1, 8 (1999).

The first enumerated factor - deprivation of right to counsel - is implicated in this case. Counsel was not permitted to attend pre-hearing Drug Court Team meetings. He was not notified that the Defendant would be discussed at a particular team meeting on a given Thursday after he had been appointed. He was not allowed to attend Team Meetings after he filed his motion but before the final termination hearing, even though every participant's case is discussed in every meeting. T3:22. He was not allowed to attend the Drug Team Meetings that occurred just prior to the conclusion of the termination hearing. T4:14-15.

Although prejudicial error is not required to be shown where structural error exists, there are some observations worth noting, particularly regarding the last Drug Team Meeting prior to the end of the termination hearing. The transcript reveals that a mere vote was taken without any discussion, and one vote was not considered although it was stated by the team member. T4:14-15.

The brevity of the discussion of events would have allowed Appellant's counsel to state how certain tenants of

the Drug Court best practice standards were not being followed during this particular Team Meeting, had he been allowed to attend the meeting. Team members may be assembled for a meeting, or a vote, but the Standards preclude the mere presence of members who vote but say nothing:

"The best practice standards indicate that Team members have an obligation to contribute relevant observations and insights and to offer suitable recommendations based on their professional, knowledge, experience and training. *A team member who remains silent in staffings or defers habitually to group consensus is violating his or her professional obligations to participants and to the administration of justice* The Judge may overrule a team member's assertions, but this fact does not absolve the team member from articulating and justifying an informed opinion." Standards II, p 45.(emphasis added).

The final Drug Team meeting occurred after Drug Court heard the arguments of both counsel and the Appellant's allocution. Presumably, these arguments and statements were allowed to be stated during the Drug Court's open hearing for the purpose of providing additional information for the Drug Court and Drug Court Team to consider. In the present case, however, each and every member of the Drug Court Team, including the Team's Defense Attorney Representative, stated nothing. Each team member deferred to a group consensus absolving themselves of their respective

obligations to articulate and justify an informed opinion. No one said anything other than their vote.

The aforementioned standard requiring team members to voice an opinion appeared to have been initially squelched by the Drug Court by statements made prior to the request for a vote. The Drug Court stated "I'm going to go around the room. Each one of you, yay or nay." T4:14. Team member opinions regarding their yay or nay vote were not solicited prior to the call for votes. Not surprisingly, none were stated.

The Drug Court made further statements that would tend to induce a chilling effect on team members stating their opinions. The Drug Court indicated "For the record, there has been a finding by myself, Judge Riepel, that she's in violation of the probation." T P.14. This statement was made, however, prior to the vote on whether termination should occur. The Team then possessed advanced knowledge that the Drug Court, who makes the ultimate decision, had already made a finding that a probation violation occurred. One is left to question what need would there be for any

Team members to voice any opinion, when everyone knows what the lower court's ultimate decision has been, and will be.^h

One Drug Court team member, Joy Parker, voted to terminate the Appellant from the program. The Drug Court then immediately stated "I'm not going to have you because you haven't heard the cases." T4:14. This exchange presents two troubling issues. One is that a current team member with no knowledge of the case apparently had no reservations about voting on a case where she did not hear the facts. In addition, someone who had not heard the case to enable her to vote was admitted to the meeting. However, Appellant's appointed counsel, who arguably might know *something* about the case, was not admitted.

The Parker issue related above presents additional due process concerns demonstrating arbitrary and capricious decisions by this Drug Court in this case on who would be allowed to attend team meetings and who might not. See

^h The Drug Court stated the Appellant was found in violation of her "probation". T4:14. A probation revocation proceeding typical occurs in circuit court following a post-drug court termination hearing. The circuit court revocation hearing had yet to occur. T5:18. The Standards provide that closed team meetings "may not result in a binding order or factual conclusion related to a contested matter". Standards II, p. 41. Finding a violation of probation occurred arguably constitutes such a factual conclusion.

Coyote Flats L.L.C. v Sanborn Co., 1999 S.D. 87, 596 N.W.2d 347 (Arbitrary and capricious act is exhibited by a lack of relevant and competent evidence to support the action taken). When allowed to be present, defense counsel can provide assistance to the court to point out potential errors and seek corrections prior to an appeal, See Christian, 1999 S.D. 4, P22, 588 N.W.2d at 885.ⁱ Appellant's counsel was not able to do so at the Team Meetings in this case as he was not present.

Appellant's counsel alerted the court with concerns about not knowing what might be said at the Team Meeting, in advance of the Team Meeting. T4:13-14. Had Appellant Counsel been present, he could have called attention to the lack of opinions stated by the Team contrary to the Best Standards requiring active comment. He would have been in a position to alert the Drug Court about the presence of Parker who voted but had not heard any evidence. He could have commented on the possible effect on the Drug Court Team's obligations to state opinions after the Drug Court indicated its conclusion first before taking a vote.

ⁱChristian indicates "Counsel could have objected to the proceedings and alerted the trial court to the procedural problem. In fact, many of the issues raised by Christian on appeal may have been avoided if competent counsel had been appointed,". Id.

The Drug Court's decision barring Appellant's Council from Drug Court Team Meetings during the case and its conclusion before the Drug Court created structural error where it did not previously exist. Allowing counsel inside the meeting would have cured the error. The Drug Court committed reversible error, which was spread to the circuit court, where the Appellant's suspended sentence was ultimately imposed.

II. THE DRUG COURT AND CIRCUIT COURT ERRED IN TERMINATING THE APPELLANT FROM DRUG COURT AND REVOKING HER SUSPENDED SENTENCE.

Following the Appellant's termination from the Drug Court Program, the matter was then disposed of in circuit court. A circuit court may find that a probationer has violated the terms of her probation after the State presents sufficient evidence such that the circuit court would be reasonably satisfied that a violation occurred. See State v. Olson, 305 N.W.2d 852 (S.D. 1981). In this case, the State alleged the Appellant was terminated from the Drug Court program. From a factual stand point, the presentation of a historical fact that the Appellant was terminated from Drug Court requires little effort. The mere

announcement of the termination is self-executing to present reasonable satisfaction.

In terms of its eventual disposition of the case, however, the circuit court must still determine whether "the purposes and objects of such suspension or probation are not being served." SDCL 23A-27-21. The record demonstrates the circuit court erred and abused its discretion sentencing the Appellant to the penitentiary. Similarly, the Drug Court erred in terminating the Appellant from Drug Court based on substantive facts.

In the present case, the Appellant had initially received a four years suspended sentence. SR53. The circuit court later revoked her sentence in its four year entirety. Imposition of a sentence on its full entirety conflicts with Best Practice Standards concerns about augmenting sentences: "Under such circumstances, it may become necessary to discharge the participant; however, the participant should not be punished or receive an augmented sentence for trying, but failing, to respond to treatment". Standards I, p. 45. Imposing the total possible sentence can have a chilling effect on future participation: "To do otherwise is likely to dissuade addicted offenders and their defense attorneys from choosing the Drug Court

option. Defense attorneys are understandably reluctant to advise their clients to enter Drug Court when there is a serious risk their client could receive an enhanced sentence despite his or her best efforts in treatment". Standards I, p. 33.

The facts demonstrated the Appellant continued to use illicit substances while in the program. Continued use, while regrettable, is not necessarily surprising in drug court for which a graduated system of sanctions may be applied over time. Standards I, p.41. In the present case, the Appellant acknowledged the depth of her addiction. T5:11-13. She also was placed into a situation increasing the amount of stress she experienced. Placement in a residential program with someone associated with individuals who killed a close relative enhanced the possibility that "triggers" would be pulled and treatment progress would be compromised at that juncture. Her court services officer recognized this effect was probable. T3:35. Under these circumstances, termination from drug court was an excessive sanction, and imposition of the suspended sentence in its entirety constituted an abuse of discretion, in that imposition of the maximum possible

sentence contravened the principles of the Best Practice Standards.

CONCLUSION

South Dakota's Drug Courts oversee a wonderful program that helps so many people change their lives for the better, and reduces the use of limited incarceration resources. Unfortunately, some participants fail at aspects of the program. Fortunately, the law provides for attorneys to further assist them. In so doing, attorneys occasionally find some cracks in a benevolently intended process that need repair. In this case, the repairs are quite simple - allow a participant to send their attorney into the Drug Court Team Meeting upon their request. It presents more balance into the Team's discussions on a consistent basis, and is consistent with Due Process and Best Practice Standards.

The Drug Court erred by not allowing Appellant's counsel to attend Drug Court Team Meetings concerning the Appellant. The Appellant possessed a due process right to have legal representation at such proceedings pursuant to the United States Constitution, the South Dakota Constitution, and SDCL 23A-40-6 and SDCL 16-22-5.3

(incorporating Drug Court Standards). The trial court also erred by revoking the Appellant's suspended sentence based on the facts of this case. The circumstances warrant that this Court should remand this case to the circuit court with instructions to the Drug Court to reinstate her into the Drug Court Program and to allow her counsel to attend Drug Court Team Meetings as they occur.

This Brief complies with the length requirements of SDCL 15-26A-66.

REQUEST FOR ORAL ARGUMENT

The Appellant requests 20 minutes for oral argument.

Dated this 15th day of September, 2016.



MARK KADI
Attorney for Appellant
Minnehaha County Public Advocate

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of September, 2016, a true and correct copy of the foregoing Appellant's Brief was served by mail and electronically on:

Marty Jackley
Attorney General
1302 E. Hwy, Suite 1

Pierre, SD 57501
ATGservice@state.sd.us

Aaron McGowan

Minnehaha County States Attorney
415 N. Dakota Ave
Sioux Falls, SD 57104
amcgowan@minnehahacounty.org

A handwritten signature in black ink, appearing to read 'Mark Kadi', written over a horizontal line.

Mark Kadi
Attorney for Appellant
Minnehaha County Public Advocate

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STATE OF SOUTH DAKOTA)
) SS
COUNTY OF MINNEHAHA)

MAR 02 2016

116-96-5A3
116-96-5A3
Sicko pr
IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

SFPD 201444724

STATE OF SOUTH DAKOTA,
Plaintiff,

+

49CRI14004050

vs.

+

ORDER REVOKING
SUSPENDED SENTENCE

LEE ANN STENSTROM,
Defendant.

+

The defendant in this matter LEE ANN STENSTROM, pled guilty to Possession of Controlled Drug or Substance on April 27, 2015. The offense was committed on or about July 1, 2014. The defendant was sentenced on April 27, 2015 to four (4) years in the South Dakota State Penitentiary, with the sentence suspended on a number of conditions.

Pursuant to information received in the Minnehaha County State's Attorneys Office, a Motion to Revoke Suspended Sentence was filed with this Court setting forth the terms of the probation which the State has claimed were violated, as more fully appears in the exhibits and documents filed prior to and during such hearing. On February 11, 2016 before the Honorable Judge Robin J. Houwman, the defendant appeared with Mark Kadi, Counsel and the State appeared by Matt Abel, Deputy State's Attorney. The defendant was advised and allowed an opportunity to appear and contest the allegations and the defendant admitted to the violation of the terms of the suspended sentence in the violation report filed with the Court and the Court having found the defendant in violation, and now, based upon such finding, it is hereby

ORDERED that the suspended sentence imposed on April 27, 2015, is revoked and the defendant, LEE ANN STENSTROM, shall be imprisoned in the South Dakota State Women's Prison, located in Pierre, County of Hughes and State of South Dakota, for four (4) years with credit for two hundred six (206) days served. It is ordered that remaining costs and fees of \$604.00 shall be collected by the Board of Pardons and Paroles.

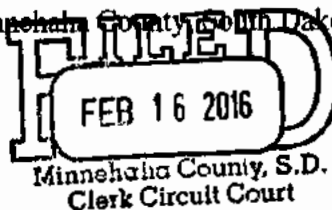
The defendant shall be returned to the Minnehaha County Jail following court on the date hereof, to then be transported to the Prison; there to be kept, fed and clothed according to the rules and discipline governing the South Dakota State Women's Prison.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 16th day of February, 2016.

ATTEST:
ANGELIA M. GRIES, Clerk
By: _____



Deputy



BY THE COURT

JUDGE ROBIN J. HOUWMAN
Circuit Court Judge

STATE OF SOUTH DAKOTA } ss.
MINNEHAHA COUNTY }
I hereby certify that the foregoing
instrument is a true and correct copy
of the original as the same appears
on record in my office.

MAR 01 2016

Clerk of Courts, Minnehaha County

By: _____ Deputy

STATE OF SOUTH DAKOTA

COUNTY OF MINNEHAHA

)
)
)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA

VS

Lee Ann Stenstrom

)
)
)
)
)

DRUG COURT TERMINATION REPORT

DOCKET NO:
49CRI14-004050

NAME: Lee Ann Stenstrom

DOB: 9/26/1983

ADDRESS: Unknown

On October 22, 2015, the Drug Court Team met and a proposal was made that the defendant be terminated from the Minnehaha County Drug Court.

The proposal for termination was based on but not limited to the following events:

1. On 5/8/15, Lee absconded from this officer. She did not report to this officer until she was arrested on 7/14/15.
2. On 8/29/15, Lee' PBT registered .029 BAC and she admitted to drinking alcohol.
3. On 9/20/15, Lee's PBT registered .04 BAC and she admitted to accidentally drinking alcohol.
4. Lee's drug patch from 9/11/15 through 9/28/15 returned positive for methamphetamine. She denied use.
5. On 10/16/15, Lee left Changes and Choices without permission. As of this report, she has not returned and this officer is unaware of her whereabouts.

Based on the aforementioned violations, a proposal was made to terminate the defendant from the Minnehaha Drug Court and the defendant will address the Court regarding the violations.

Dated this 26th day of October, 2015.

Respectfully Submitted,

Jake Vander Zee
Court Services Officer

Subscribed and sworn to before me this 26 day of Oct., 2015

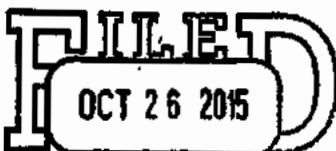
My Commission Expires: My Commission Expires
April 28, 2018

Notary Public: G. Mensch
(Seal)



ATTEST:
Angelia Gries, Clerk

By: [Signature] Deputy
(Seal)



Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA } ss.
MINNEHAHA COUNTY }
I hereby certify that the foregoing
instrument is a true and correct copy
of the original as the same appears
on record in my office.

OCT 26 2015

Clerk of Courts, Minnehaha County

By: [Signature] Deputy

1C-050

STATE OF SOUTH DAKOTA

COUNTY OF Minnehaha

)
)
)

IN CIRCUIT COURT

2nd JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA

vs

Lee Ann Stenstrom

)
)
)

DRUG COURT TERMINATION REPORT

DOCKET NO:
14-4050

NAME: Lee Ann Stenstrom

DOB: 09/26/1983

ADDRESS: Minnehaha County Jail
Sioux Falls, SD 57104

On December 31, 2015, the Drug Court Team met and a proposal was made that the defendant be terminated from the Minnehaha County Drug Court.


The proposal for termination was based on but not limited to the following events:

1. On 12/28/15 Lee Ann Stenstrom was arrested and charged with Aggravated Eluding Law Enforcement Officer as Felony and Driving with Suspended License.

Based on the aforementioned violations, a proposal was made to terminate the defendant from the Minnehaha Drug Court and the defendant will address the Court regarding the violations.

Dated this 31st day of December, 2015.

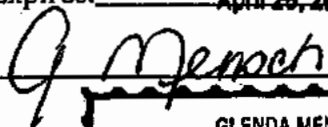
Respectfully Submitted,


Mina Bonhorst
Court Services Officer

Subscribed and sworn to before me this 31 day of December, 2015

My Commission Expires: My Commission Expires April 26, 2016

Notary Public:





(Seal)

ATTEST:
Angelia Gries, Clerk

By: _____
(Seal)



FILED
DEC 31 2015
Minnehaha County, S.D.
Clerk Circuit Court

1 would be not in a position to respond to them, not having
2 been brought up here.

3 THE COURT: All right. That motion is denied.

4 MR. KADI: Thank you.

5 THE COURT: Team, we need to recess into the back room.
6 Jena, do you want to come back with us.

7 (The following was held outside the courtroom)

8 THE COURT: All right. Back on the record.

9 We're outside the presence of the hearing with regards
10 to Lee Ann Stenstrom and her drug court termination. We have
11 had testimony on for -- yet -- last week and this week. For
12 the record, there has been a finding by myself, Judge Riepel,
13 that she's in violation of the probation. The issue before
14 this team today is, we have indicated that she is facing
15 termination and the issue is whether or not she is going to
16 be terminated. I'm going to go around the room. Each one of
17 you, yay or nay.

18 Mina.

19 MS. BONHORST: Mina Bonhorst. Terminate.

20 MR. MILLER: Mike Miller. Terminate.

21 JUDGE DAMGAARD: Natalie Damgaard. Terminate.

22 MS. PARKER: Joy Parker. Terminate.

23 THE COURT: I'm not going to have you because you
24 haven't heard the cases.

25 CAPTAIN VANDENKAMP: Greg Vandenkamp. Terminate.

1 MR. LILLESTOL: Jason Lillestol. Terminate.

2 MS. JACOBSMA: Kristy Jacobsma. Terminate.

3 MS. ALBERS: Katherine Albers. Terminate.

4 MR. VANDEGRIEND: Ross VandeGriend. Terminate.

5 MR. SAGE: Ryan Sage. Terminate.

6 MS. BOYD: Michelle Boyd. Terminate.

7 THE COURT: Are these statements -- issues of
8 termination -- statements of termination based upon the
9 testimony and the exhibits that have been entered into court?
10 If that is not your understanding or the reason that you
11 voted that way, please say something now.

12 All right. Record reflect people being silent. I'll
13 take that as an affirmative that the decision to terminate is
14 based upon the testimony in court and the exhibits as have
15 been presented.

16 Anything further for the record? We're in recess.

17 (The following was back in the courtroom)

18 THE COURT: Thank you. Please be seated.

19 Lee Ann, it was the unanimous decision of the team to
20 terminate you. The team based their termination response
21 based upon the testimony that you and your attorney offered
22 last week and today based upon the violations that were found
23 by me and the evidence that was presented.

24 We wish you luck. And all I can say is that I hope that
25 you do something at the penitentiary that allows you to move

STATE OF SOUTH DAKOTA)
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
)SS
SECOND JUDICIAL CIRCUIT

* * * * *

STATE OF SOUTH DAKOTA,
Plaintiff,

*

CR. 14-4050

v.

*

MOTION TO ALLOW

LEE ANN STENSTROM,

*

ATTENDANCE OF
ATTORNEY AT DRUG
COURT TEAM MEETINGS
AND OTHER
PROCEEDINGS

Defendant,

*

* * * * *

Defendant, Lee Ann Stenstrom, by and through her attorney(s), Mark Kadi of the Minnehaha County Public Advocate's Office, respectfully moves this Court to permit Defendant's counsel to attend Drug Court Team meetings and other Drug Court related proceedings based, inter alia, on the following ground:

- 1) The Defendant applied for court appointed counsel regarding the above entitled matter and counsel was appointed on December 28, 2015;
- 2) The Defendant possesses due process rights, inter alia, to legal counsel at probation revocation proceedings pursuant to state and federal law. State v. Christian, 1999 SD 4, 588 N.W.2d 881; State v. LaPlaca, 27 A.3d 719 (NH 2011);

Gross v. Maine, Superior Court (Penobscott) Criminal Action Docket #CR - 11-4805).

- 3) SDCL 23A-40-6 provides that an indigent defendant is entitled to counsel in any action for revocation of suspended sentence or probation.
- 4) SDCL 16-22-5.3 provides that Drug Court should follow the "Adult Court Best Practice Standards" applicable to Drug Courts.
- 5) The Adult Court Best Practice Standards provide that, with regards to right to counsel at Drug Team and Drug Court

Proceedings:

"Defense Attorney— Typically an assistant public defender or private defense attorney specializing in Drug Court cases serves on the team. Among other duties, the defense attorney ensures participants' constitutional rights are protected and advocates for participants' stated legal interests. Defendants are usually represented by a public defender or private defense attorney in proceedings leading up to their entry into Drug Court. After entry, participants may retain their previous defense counsel, provide informed consent to be represented by a defense representative serving on the Drug Court team, or consent to be represented jointly by private defense counsel and the defense representative. In cases of joint representation, the defense representative typically handles most day-to-day issues relating to Drug Court participation, but private counsel may step in if the participant faces a potential jail sanction or discharge from the program (Freeman-Wilson et al., 2003; Tobin, 2012).

In post conviction Drug Courts, participation in the program is a condition of probation or part of a criminal sentence. Ordinarily, participants are not entitled to defense representation at the post conviction stage unless they face a *potential* jail sanction or revocation of probation. Meyer, 2011a). Nevertheless, post conviction Drug Courts should include a defense representative on their team because studies indicate defense involvement improves outcomes significantly

(Carey et al., 2012; Cissner et al., 2013; National Association of Drug Court Professionals [NADCP], 2009). Evidence suggests participants may be more likely to perceive Drug Court procedures as fair when a dedicated defense attorney represents their interests *in team meetings and status hearings* (Frazer, 2006), and greater perceptions of fairness are consistently associated with better outcomes in Drug Courts and other problem-solving courts (Berman & Gold, 2012; Burke, 2010; Gottfredson et al., 2007; Rossman et al., 2011).

Some Drug Courts require participants to waive defense representation as a condition of entry. Although no case has addressed this issue squarely in the context of Drug Court, the weight of legal authority suggests defendants and probationers are entitled to withdraw such waivers and reassert their right to counsel at critical stages in the proceedings such as when they face a *potential* jail sanction or probation revocation (McKaskle v. Wiggins, 1984; Menefield v. Borg, 1989; Robinson v. Ignacio, 2004; State v. Pitts, 2014). *Regardless of the legality of such waivers, defense representation should be encouraged rather than discouraged in Drug Courts because doing so is associated with significantly better outcomes and ensures participants' due process rights are protected*" (emphasis added).

WHEREFORE, the Defendants asks that the relief requested be granted.

Respectfully submitted this 6th day of January, 2016.

A handwritten signature in black ink, appearing to read 'Mark Kadi', written in a cursive style.

Mark Kadi
Office of the Public Advocate
415 N. Dakota Ave.
Sioux Falls, SD 57104

VIII. MULTIDISCIPLINARY TEAM

A dedicated multidisciplinary team of professionals manages the day-to-day operations of the Drug Court, including reviewing participant progress during pre-court staff meetings and status hearings, contributing observations and recommendations within team members' respective areas of expertise, and delivering or overseeing the delivery of legal, treatment and supervision services.

A. Team Composition

B. Pre-Court Staff Meetings

C. Sharing Information

D. Team Communication and Decision Making

E. Status Hearings

F. Team Training

A. Team Composition

The Drug Court team comprises representatives from all partner agencies involved in the creation of the program, including but not limited to a judge or judicial officer, program coordinator, prosecutor, defense counsel representative, treatment representative, community supervision officer, and law enforcement officer.

B. Pre-Court Staff Meetings

Team members consistently attend pre-court staff meetings to review participant progress, determine appropriate actions to improve outcomes, and prepare for status hearings in court. Pre-court staff meetings are presumptively closed to participants and the public unless the court has a good reason for a participant to attend discussions related to that participant's case.

C. Sharing Information

Team members share information as necessary to appraise participants' progress in treatment and compliance with the conditions of the Drug Court. Partner agencies execute memoranda of understanding (MOUs) specifying what information will be shared among team members. Participants provide voluntary and informed consent permitting team members to share specified data elements relating to participants' progress in treatment and compliance with program requirements. Defense attorneys make it clear to participants and other team members whether they will share communications from participants with the Drug Court team.

D. Team Communication and Decision Making

Team members contribute relevant insights, observations, and recommendations based on their professional knowledge, training, and experience. The judge considers the perspectives of all team members before making decisions that affect participants'

welfare or liberty interests and explains the rationale for such decisions to team members and participants [see Standard III, Roles and Responsibilities of the Judge].

E. Status Hearings

Team members attend status hearings on a consistent basis. During the status hearings, team members contribute relevant information or recommendations when requested by the judge or as necessary to improve outcomes or protect participants' legal interests.

F. Team Training

Before starting a Drug Court, team members attend a formal preimplementation training to learn from expert faculty about best practices in Drug Courts and develop fair and effective policies and procedures for the program. Subsequently, team members attend continuing education workshops on at least an annual basis to gain up-to-date knowledge about best practices on topics including substance abuse and mental health treatment, complementary treatment and social services, behavior modification, community supervision, drug and alcohol testing, team decision making, and constitutional and legal issues in Drug Courts. New staff hires receive a formal orientation training on the Drug Court model and best practices in Drug Courts as soon as practicable after assuming their position and attend annual continuing education workshops thereafter.

COMMENTARY

The Drug Court team is a multidisciplinary group of professionals responsible for administering the day-to-day operations of a Drug Court, including reviewing participant progress during pre-court staff meetings and status hearings, contributing observations and recommendations within team members' respective areas of expertise, and delivering or overseeing the delivery of legal, treatment, and supervision services (Hardin & Fox, 2011). Some Drug Courts may have additional governing bodies such as Steering Committees that are not involved in the daily operations of the program, but provide oversight on policies and procedures, negotiate MOUs between partner agencies, garner political and community support for the Drug Court, or engage in fundraising. Researchers have examined the influence of the multidisciplinary Drug Court team on participant outcomes but have not addressed the influence of other governing bodies.

A. Team Composition

Studies reveal the composition of the Drug Court team has a substantial influence on outcomes. Drug Courts produce significantly greater reductions in criminal recidivism and are significantly more cost-effective when the following professionals are dedicated members of the Drug Court team and participate regularly in pre-court staff meetings and status hearings (Carey et al., 2008, 2012; Cissner et al., 2013; Rossman et al., 2011; Shaffer, 2010):

- *Judge*—Typically a trial court judge leads the Drug Court team; however, in some jurisdictions a nonjudicial officer such as a magistrate or commissioner may preside over the Drug Court. Nonjudicial officers usually report directly to a judge and require judicial authorization for actions that affect participants' liberty interests such as jail sanctions or discharge from the program. No study has compared outcomes between judges and nonjudicial officers.
- *Program Coordinator*—Typically a court administrator or clerk serves as the coordinator for the Drug Court program; however, some Drug Courts may employ a senior probation officer, case manager, or clinician as the coordinator. Among many other duties, the coordinator is responsible for maintaining

MULTIDISCIPLINARY TEAM

accurate and timely records and documentation for the program, overseeing fiscal and contractual obligations, facilitating communication between team members and partner agencies, ensuring policies and procedures are followed, overseeing collection of performance and outcome data, scheduling court sessions and staff meetings, and orienting new hires.

- *Prosecutor*—Typically an assistant district attorney serves on the team. Among other duties, the prosecutor advocates on behalf of public safety, victim interests, and holding participants accountable for meeting their obligations in the program. The prosecutor may also help to resolve other pending legal cases that impact participants' legal status or eligibility for Drug Court.
- *Defense Attorney*—Typically an assistant public defender or private defense attorney specializing in Drug Court cases serves on the team. Among other duties, the defense attorney ensures participants' constitutional rights are protected and advocates for participants' stated legal interests. Defendants are usually represented by a public defender or private defense attorney in proceedings leading up to their entry into Drug Court. After entry, participants may retain their previous defense counsel, provide informed consent to be represented by a defense representative serving on the Drug Court team, or consent to be represented jointly by private defense counsel and the defense representative. In cases of joint representation, the defense representative typically handles most day-to-day issues relating to Drug Court participation, but private counsel may step in if the participant faces a potential jail sanction or discharge from the program (Freeman-Wilson et al., 2003; Tobin, 2012).

In postconviction Drug Courts, participation in the program is a condition of probation or part of a criminal sentence. Ordinarily, participants are not entitled to defense representation at the postconviction stage unless they face a potential jail sanction or revocation of probation (Meyer, 2011a). Nevertheless, postconviction Drug Courts should include a defense representative on their team because studies indicate defense involvement improves outcomes significantly (Carey et al., 2012; Cissner et al., 2013; National Association of Drug Court Professionals [NADCP], 2009). Evidence suggests participants may be more likely to perceive Drug Court procedures as fair when a dedicated defense attorney represents their interests in team meetings and status hearings (Frazer, 2006), and greater perceptions of fairness are consistently associated with better outcomes in Drug Courts and other problem-solving courts (Berman & Gold, 2012; Burke, 2010; Gottfredson et al., 2007; Rossman et al., 2011).

Some Drug Courts require participants to waive defense representation as a condition of entry. Although no case has addressed this issue squarely in the context of Drug Court, the weight of legal authority suggests defendants and probationers are entitled to withdraw such waivers and reassert their right to counsel at critical stages in the proceedings such as when they face a potential jail sanction or probation revocation (*McKaskle v. Wiggins*, 1984; *Menefield v. Borg*, 1989; *Robinson v. Ignacio*, 2004; *State v. Pitts*, 2014). Regardless of the legality of such waivers, defense representation should be encouraged rather than discouraged in Drug Courts because doing so is associated with significantly better outcomes and ensures participants' due process rights are protected (Hora & Stalcup, 2008; NADCP, 2009).

- *Community Supervision Officer*—Typically a probation officer or pretrial services officer serves on the team; however, some Drug Courts may rely on law enforcement or specially trained case managers or social service professionals to provide community supervision. Duties of the community supervision officer may include performing drug and alcohol testing, conducting home or employment visits, enforcing curfews and travel restrictions, and delivering cognitive-behavioral interventions designed to improve participants' problem-solving skills and alter dysfunctional criminal-thinking patterns (Harberts, 2011).
- *Treatment Representative*—Typically an addiction counselor, social worker, psychologist, or clinical case manager serves on the team. In many Drug Courts, participants can be referred to multiple treatment agencies or providers for substance abuse treatment and other complementary services such as mental health counseling or vocational rehabilitation. Because it is unwieldy to have multiple providers attend pre-court staff meetings and status hearings, many Drug Courts will designate one or two treatment professionals to serve as treatment representatives on the Drug Court team (Carey et al., 2012). The treatment representatives receive clinical information from programs treating Drug Court

ADULT DRUG COURT BEST PRACTICE STANDARDS, VOL. II

participants, report that information to the Drug Court team, and contribute clinical knowledge and expertise during team deliberations.

- **Law Enforcement Officer**—Typically a police officer, deputy sheriff, highway patrol officer, or jail official serves on the team. Law enforcement is often the eyes and ears of Drug Court on the street, observing participant behavior and interacting with participants in the community. Law enforcement may also assist with home and employment visits, and serves as a liaison between the Drug Court and the police department, sheriff's office, jail, and correctional system.

Drug Courts may include other community representatives on their team as well, such as peer mentors, vocational advisors, or sponsors from the self-help recovery community. Studies have not examined the impact of including such persons on the Drug Court team; however, anecdotal reports suggest this practice can enhance team decision making and effectiveness (Taylor, 2014). As a condition of federal grant funding and funding from many states, Drug Courts may also be required to include an evaluator on their team beginning in the planning stages for the program and continuing during implementation. This practice helps to ensure Drug Courts collect reliable performance data to report to grant-making authorities and is generally advisable for all Drug Courts to ensure good-quality program monitoring and evaluation [see Standard X, Monitoring and Evaluation]. Finally, Drug Courts may be advised to include a nurse or physician on their team if they treat substantial numbers of participants requiring medication-assisted treatment or suffering from co-occurring medical or mental health disorders.

B. Pre-Court Staff Meetings

The Drug Court model requires Drug Courts to hold pre-court staff meetings—commonly referred to as *staffings* or *case reviews*—to review participant progress, develop a plan to improve outcomes, and prepare for status hearings in court (Hardin & Fox, 2011; NADCP, 1997; Roper & Lessenger, 2007). Not every participant is discussed in every meeting; however, staffings are held frequently enough (typically weekly or at the same frequency as status hearings) to ensure the team has an opportunity to consider the needs of each case.

Consistent attendance by all team members at staffings is associated with significantly better outcomes (Carey et al., 2012; Cissner et al., 2013; Rossman et al., 2011; Shaffer, 2010). A multisite study of approximately seventy Drug Courts found that programs were 50% more effective at reducing recidivism when all team members—the judge, prosecutor, defense representative, program coordinator, treatment representative, law-enforcement representative, and community supervision officer—attended staffings on a consistent basis (Carey et al., 2008, 2012). Drug Courts were nearly twice as cost-effective when defense counsel attended staffings consistently, and were more than twice as effective at reducing recidivism when the program coordinator, treatment representative, and law enforcement representative attended staffings consistently (Carey et al., 2012).

In most Drug Courts, staffings are presumptively closed. Discussions are not transcribed or recorded and the meeting is not open to the public or to participants unless the court has a good reason to allow a participant to attend discussions related to his or her case. Few appellate opinions have addressed the constitutionality or legality of closing staffings. In a recent opinion, the Washington State Supreme Court—which traditionally holds a very dim view of off-the-record proceedings—ruled that staffings may be presumptively closed at the discretion of the Drug Court judge. (*State of Washington v. Sykes*, 2014). The Court analogized staffings to *pre-court conferences* in which attorneys commonly meet with the judge in chambers to clarify what legal issues are under contention, determine which facts are in dispute, and address other practical or collateral matters necessary to achieve a fair and efficient resolution of the case, such as scheduling witnesses or issuing discovery orders. In line with this reasoning, staffings may be closed so long as no final decisions are reached concerning disputed facts or legal issues in the case, and the judge recites in open court what decisions, if any, were made during the staffing. A closed staffing may not result in a binding order or factual conclusion related to a contested matter (Meyer, 2011a). Contested matters must be addressed and resolved in open court during status hearings or related due process hearings such as termination hearings or probation violation hearings.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27790

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

LEE ANN STENSTROM,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE ROBIN J. HOUWMAN
THE HONORABLE PATRICIA C. RIEPEL
Circuit Court Judges

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Notice of Appeal filed March 10, 2016

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27790

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

LEE ANN STENSTROM,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Lee Ann Stenstrom, will be referred to as “Defendant.” Plaintiff and Appellee, State of South Dakota, will be referred to as “State.” All other individuals will be referred to by name. The settled record in the underlying criminal case, *State of South Dakota v. Lee Ann Stenstrom*, Minnehaha County Criminal File No. 14-4050, will be referred to as “SR.” Any reference to Defendant’s brief will be designated as “DB.” All such references will be followed by the appropriate page designation.

JURISDICTIONAL STATEMENT

This matter stems from Defendant’s conviction for Possession of a Controlled Substance, a Class 5 felony, in violation of SDCL 22-42-5. On February 16, 2016, an Order Revoking Suspended Sentence was entered by the Honorable Robin J. Houwman, Second Judicial Circuit

Judge. SR 102. Defendant filed a Notice of Appeal on March 10, 2016.

SR 104. This Court has jurisdiction as provided in SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

DID THE DRUG COURT VIOLATE DEFENDANT'S RIGHT TO DUE PROCESS OR RIGHT TO COUNSEL WHEN IT DENIED HER ATTORNEY ACCESS TO THE DRUG COURT PROGRAM TEAM MEETING?

The drug court denied defendant's counsel access to the drug court program team meeting.

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

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)

State v. Gollither-Weyer, 2016 S.D. 10, 875 N.W.2d 28

II

DID THE DRUG COURT ERR WHEN IT TERMINATED DEFENDANT FROM THE DRUG COURT PROGRAM?

The trial court terminated Defendant from the drug court program.

State v. Chipps, 2016 S.D. 8, 874 N.W.2d 475

III

DID THE CIRCUIT COURT ABUSE ITS DISCRETION WHEN IT SENTENCED DEFENDANT TO PRISON?

The circuit court sentenced Defendant to prison.

State v. Chipps, 2016 S.D. 8, 874 N.W.2d 475

State v. Rice, 2016 S.D. 18, 877 N.W.2d 75

STATEMENT OF THE CASE AND FACTS

On July 1, 2014, law enforcement was dispatched to investigate a possible drug deal occurring in the Power Keeno Casino parking lot located in Sioux Falls, Minnehaha County. SR 143. Upon arrival, law enforcement had contact with Defendant. SR 143. Defendant initially gave law enforcement a false name. SR 143. Defendant was subsequently arrested. SR 143.

When law enforcement placed Defendant in the patrol car, the officer saw Defendant attempt to hide a hypodermic needle under the seat. SR 143. Upon arrival at the jail, Defendant was instructed to change into an inmate uniform. SR 143. Jail personnel discovered a plastic snort tube containing methamphetamine in Defendant's pocket. SR 143.

On July 17, 2014, a Minnehaha County Grand Jury indicted Defendant for Possession of a Controlled Substance (methamphetamine) (SDCL 22-42-5), a Class 5 felony; Possession of Drug Paraphernalia (SDCL 22-42A-3), a Class 2 misdemeanor; Possession of Unauthorized Article in Jail (SDCL 24-11-47), a Class 4 felony; and False Impersonation to Deceive Law Enforcement (SDCL 22-40-1), a Class 1 misdemeanor. SR 9-10.

On July 21, 2014, Defendant was released from jail on a personal recognizance bond. SR 11-15. She failed to appear for a pretrial

conference on November 6, 2014.¹ SR 18. A bench warrant was issued for her arrest. SR 18.

Defendant was arrested on the bench warrant on November 12, 2014. SR 18. Defendant was released on a personal recognizance bond on November 20, 2014. SR 36-40. Once again, she failed to appear for a pretrial conference on January 21, 2015. SR 41. A bench warrant was issued for her. SR 41. Defendant was arrested on the bench warrant on February 14, 2015.² SR 41.

The Honorable Patricia C. Riepel, Circuit Court Judge, arraigned Defendant on the Indictment on April 27, 2015. SR 135-52. Defendant's attorney advised the circuit court that Defendant would plead guilty to possession of a controlled substance, a Class 5 felony, with the understanding that Defendant would be accepted into the drug court program. SR 136. The other charges contained in the Indictment, as well as two other files, would be dismissed. SR 136. The circuit court advised Defendant of her constitutional and statutory rights. SR 139-41. Defendant was also advised of the maximum possible penalty for possession of controlled substance. SR 138.

¹ As a result Defendant was charged with Failure to Appear (SDCL 23A-43-31(1) in Minnehaha County file CR14-7171. It was dismissed as part of the plea agreement in this case. SR 136.

² Defendant was also arrested on several new felony drug charges on February 14, 2015. See Minnehaha County file CR15-1002. Those charges were dismissed as part of the plea agreement in this file. SR 136.

Pursuant to the plea agreement, Defendant entered her guilty plea. SR 142.

Defendant waived her right to have sentencing delayed. SR 144. The circuit court sentenced Defendant to serve four (4) years in the South Dakota Women's prison. SR 150. The circuit court suspended execution of Defendant's prison sentence upon the condition that she complete the drug court program and three years of supervised probation. SR 53-54, 150.

Defendant was released from custody on May 1, 2015, and was directed to reside at the 2020 house.³ SR 56, 220. On May 5, 2015, Defendant left the 2020 house and did not return. SR 56, 221. Defendant was scheduled to attend a drug court hearing and meet with her court services officer on May 7, 2015. SR 56. She failed to appear for either the hearing or her appointment. SR 56. The drug court issued a warrant for her arrest. SR 55.

On July 14, 2015, Defendant was arrested on the drug court warrant and a new charge of possession of a controlled substance. SR 56, 221. On July 15, 2015, she admitted to her court services officer that she had used methamphetamine and marijuana during the time she had absconded from supervision. SR 56. Defendant's admission was confirmed with a urinalysis test. SR 56.

³ The 2020 house is a sober living house for drug court participants. SR 220.

On July 23, 2015, the drug court team met and a proposal was made to terminate Defendant from the drug court program. SR 56. Defendant's court services officer filed a drug court termination report on July 24, 2015. SR 56-57. The report alleged that Defendant had violated her drug court conditions by leaving the 2020 house, failing to appear for drug court, failing to meet with her court services officer using methamphetamine and marijuana, and by committing a new drug offense. SR 56-57. Despite these violations, Defendant was allowed to remain in the drug court program. She was released from custody on August 28, 2015. SR 59.

Defendant met with her court services officer the following day, August 29, 2015. SR 222. The court services officer noticed alcohol in Defendant's residence. *Id.* Defendant admitted she had been drinking alcohol. *Id.* Her PBT registered .029. *Id.*

On September 8, 2015, Defendant was placed on the 24/7 Sobriety Program. SR 62-64. She was required to refrain from alcohol use and PBT twice a day, in the morning and in the evening. SR 62-64. On September 20, 2015, Defendant's morning PBT registered .040. SR 65, 80-81. She claimed that she had cough syrup. SR 65, 80-81. She later told her court services officer that she drank some pop containing alcohol, although she claimed she did not know there was alcohol in it when she drank it. SR 222-23.

On September 11, 2015, Defendant was placed on a drug patch to monitor possible drug use. SR 224. Defendant was required to refrain from drug use as a condition of drug court and probation. She wore the drug patch until September 28, 2015. SR 224. The patch was tested for drug use and the results showed that Defendant used methamphetamine. SR 85-90, 224. Defendant denied using methamphetamine during the time frame that she wore the drug patch. SR 224.

Defendant was placed at the Changes and Choices halfway house on October 2, 2015. SR 225. On October 16, 2015, she met with her court services officer. SR 225. Defendant was frustrated by the rules at the halfway house. SR 225. She also did not like that her roommate had been romantically involved with the person who killed her nephew in 2003. SR 184, 225-26. The court services officer told Defendant to discuss her concerns with the halfway house staff. SR 226. He also told Defendant that he would address her concerns with the staff. SR 226. Defendant did not discuss her concerns with the staff. Instead, a few hours later Defendant left the halfway house. Her court services officer never had an opportunity to speak with the staff. SR 226. Defendant did not return to the halfway house. Instead, she contacted her court services officer via text. The court services officer instructed Defendant to turn herself in. SR 227. Defendant did not follow her court service officer's instructions.

Defendant was scheduled for a drug court appearance on October 22, 2015. SR 67. She failed to appear. SR 67. The drug court team met and proposed that Defendant be terminated from the drug court program. A warrant was issued for Defendant's arrest. SR 70.

Court services filed a drug court termination report on October 26, 2015. SR 68-69. The report alleged that Defendant had violated the conditions of the drug court program by absconding from supervision, using alcohol and methamphetamine, and by leaving the halfway house without permission. SR 68-69.

On December 28, 2015, Defendant was arrested for aggravated eluding and driving with a suspended license. SR 73. Defendant applied for and was appointed an attorney to represent her. SR 71-72.

The drug court team met on December 31, 2015, and a proposal was made to terminate Defendant from drug court. SR 73. On that same date, Defendant's court services officer filed another drug court termination report. SR 73-74. This report alleged that Defendant had violated the conditions of drug court by committing aggravated eluding and driving with a suspended license. SR 73-74.

On January 6, 2016, Defendant's attorney filed a motion to allow the attorney to attend the drug court program team meetings. SR 75-77. A hearing on the motion was held in drug court on January 21 and 28, 2016. SR 194-217, 237-50. Defendant was represented by her

attorney at the hearing. After the presentation of testimony and argument, the drug court judge denied Defendant's motion. SR 250.

An evidentiary hearing was also held on January 21 and 28, 2016, regarding whether Defendant had violated the terms and conditions of drug court. SR 217-30, 239-41. Defendant was present with her attorney at the drug court hearings. Defendant, through her attorney, cross-examined the State's witness about the allegations contained in the drug court termination report. At the conclusion of the evidence, the drug court judge found, by a preponderance of the evidence, that Defendant had violated the terms and conditions of the drug court program.⁴ SR 241.

Defendant and her attorney were then allowed the opportunity to address the drug court team in open court. SR 241-43. Defendant asked the drug court team to allow her to remain in the program. SR 243. The drug court team left the courtroom and met privately to determine whether Defendant should be terminated from the drug court program. SR 250.

At the beginning of the team meeting the drug court judge reminded the team that it found Defendant had violated the terms and conditions of the drug court program. SR 250. In light of that finding, each member of the team was asked to vote on whether Defendant should be terminated from the program. SR 250. Every member of the

⁴ Defendant does not dispute that she violated the terms and conditions of drug court in her appeal.

team voted to terminate Defendant from the program. SR 250-51. The drug court judge confirmed with the team members that their decision to terminate Defendant from the drug court program was based upon the testimony and evidence that was presented during the court hearing. SR 251.

The drug court team returned to the courtroom. SR 251. The drug court judge advised Defendant that the team had unanimously voted to terminate her from the program.⁵ SR 251.

On February 4, 2016, the State filed a Motion to Revoke Defendant's Suspended Sentence. Attached to the motion was the court services violation report dated January 29, 2016, and the October 26, 2015, drug court termination report. SR 94-98.

On February 11, 2016, Defendant appeared with her attorney before the circuit court, the Honorable Robin J. Houwman, on the motion to revoke her suspended sentence.⁶ SR 175-92. The circuit court advised Defendant of her rights with regard to the motion to revoke. SR 177-78. Defendant admitted that she had violated the terms and conditions of her suspended sentence. SR 178, 180. The circuit court found the Defendant's admission to be knowing, voluntary,

⁵ Although the judge did not actually vote during the team meeting, the judge did announce that the team, which includes the judge, had voted unanimously to terminate Defendant from drug court. SR 250-51.

⁶ Although the issue was not before the court, the circuit court judge mentioned at the beginning of the hearing that it agreed with the drug court judge's ruling that Defendant was not entitled to have her counsel present during drug court team meetings. SR 177.

and intelligent. SR 182. Based upon Defendant's admission, the circuit court found that Defendant had violated the terms and conditions of her suspended prison sentence. SR 182.

Defendant waived her right to delay sentencing. SR 183. The circuit court sentenced Defendant to serve the previously suspended four (4) years in the South Dakota Women's Prison. SR 192.

ARGUMENTS

I

THE DRUG COURT DID NOT VIOLATE DEFENDANT'S RIGHT TO DUE PROCESS OR RIGHT TO COUNSEL WHEN IT DENIED HER ATTORNEY ACCESS TO THE DRUG COURT TEAM MEETINGS.

Defendant claims she was denied her right to due process and her right to counsel when the drug court judge denied her attorney access to the drug court team meetings. Defendant's rights were not violated because she has no right to attend the team meetings. She waived her presence at the team meetings when she agreed to the terms of the program. She was informed that she would have the opportunity to have an attorney represent her if there was a termination hearing. She was subsequently provided that attorney when a drug court termination report was filed. The drug court judge did not violate Defendant's rights.

A. *History, Purpose and Procedures of Drug Courts in South Dakota.*

In 2007, South Dakota implemented its first drug court program in the Northern Hills. The Honorable Jerome Eckrich & Roland Loundenburg, *Answering the Call: Drug Courts in South Dakota*, 57 S.D. L. Rev. 171 (2012). A drug court is a court supervised alternative to incarceration aimed at increasing offender accountability and decreasing recidivism. SDCL 16-22-3. A drug court is a type of problem solving court. The Honorable Jerome Eckrich & Roland Loundenburg, *Answering the Call: Drug Courts in South Dakota*, 57 S.D. L. Rev. 171. Over the next few years other problem solving courts, including DUI courts, were implemented across the state. *Id.* at 171-72. This includes the Second Circuit Drug Court, which began in 2010. *Id.* at 172.

In 2013, the South Dakota Legislature passed several statutes regarding drug court programs. *See generally* SDCL ch. 16-22. In addition, this Court adopted IP Rule 2013-02, which set forth the policy regarding termination of drug court program participants. Exhibit A.

In 2014, the Legislature passed SDCL 16-22-5.3, which required the State Court Administrator's Office to implement statewide standards in accordance with the National Association of Drug Court Professionals (NADCP), Adult Drug Court Best Practices Standards (hereinafter "NADCP Standards"). The NADCP Standards were adopted by Supreme Court IP Rule 2016-02. Appendix B. Rule IP 2016-02 incorporated the "black letter" substance of each NADCP Standard. The Rule, however,

did not specifically incorporate the commentary for each Standard.

IP Rule 2016-02. The Rule provides that the drug court may consult the commentary for further guidance or clarity when implementing the Standards. IP Rule 2016-02.

Relevant to this appeal are the following sections of the NADCP Standards:

Multidisciplinary teams: The drug court team manages the day-to day operations of the drug court including reviewing progress during pre-court staff meetings. *Pre-court staff meetings are presumptively closed to participants and the public.* The drug court judge considers the perspective of all team members before making decisions that affect participants, including a decision to terminate a participant from the program. NADCP Standards II, p. 38-39.

Roles and responsibilities of the judge: The judge regularly attends pre-court staff meetings during which each participant's progress is reviewed and potential consequences, including termination, are discussed by the team court team. The judge rules on factual controversies and the final decision on imposition of sanctions, including termination. The judge makes that decision after taking into consideration the input of the other drug court team members and discussing the matter in *court* with the participant or the participant's legal representative. NADCP Standards I, p. 20-21.

Incentives, Sanctions, and therapeutic adjustments: Participants are given an opportunity to explain their perspectives concerning factual controversies and the imposition of sanctions, including termination. *The judge may permit the participant's attorney to assist in providing such explanation.* NADCP Standards I, p. 26-27.

(Emphasis added).

A brief synopsis of the workings of South Dakota drug courts is necessary to understand the issues in this appeal. Entry into a drug court program is contingent upon the defendant accepting responsibility for a drug-related crime and entering a guilty plea. The Honorable Jerome Eckrich & Roland Loundenburg, *Answering the Call: Drug Courts in South Dakota*, 57 S.D. L. Rev. at 174. The defendant receives a suspended prison sentence conditioned on the defendant successfully completing the drug court program. *Id.*

The obligations of each participant are set forth before entering into the program. As a condition of entry into the drug court program, each participant is required to enter into a “drug court treatment program basic understanding, waivers and agreement.”⁷ Exhibit C, Appendix D. The five-page document sets forth details of what is required of and agreed to by each participant. Included is the following language:

I understand that I will not have an attorney to represent me while in the Drug Court Program. I also understand that Drug Court is a non-adversarial forum and, therefore, treatment and accountability is the primary concern. *I also understand that the attorney who represented me in the criminal case does not represent me in Drug Court, and the defense attorney who participates in the Drug Court is not acting as my attorney* (even if the same attorney who represented me in the criminal case is the same attorney who participates in the Drug Court). If the attorney who represents me in the criminal case is the same attorney who participates in the Drug Court, I waive any claim of conflict

⁷ Defendant’s signed drug court treatment program basic understanding, waivers and agreement is not contained within the settled record.

that might otherwise arise if that attorney is required to later represent me in court proceedings (for example, if I am terminated from the Drug Court Program).

I understand and acknowledge that the members of the Drug Court Team, including the Defense Attorney and the Prosecuting Attorney, will be talking to the Drug Court Judge about me, my progress in the program, and any problems that I might be having. The team may also discuss with the Judge, at various times, sanctions or rewards, which I may receive because of my participation in the Program. *I also understand and acknowledge that I will not be present for these discussions with the Judge.* It has been explained to me these discussions with the Judge without me being present is necessary in order for me to receive the maximum benefit from the Program. I understand this and waive my presence at these meeting and discussions with the Drug Court Judge. ⁸

Exhibit C, Appendix D-3 (emphasis added).

Drug court participants must complete four phases. Exhibit C, pp. 4-5. In the initial phase a participant attends weekly drug court sessions. Exhibit C, p. 3. The drug court team meets prior to the court session. *Id.* The drug court team consists of the judge, program coordinator, prosecutor, defense counsel representative, treatment representative, community supervision officer, and a law enforcement officer. NADCP Standards II, p. 38. The team meetings are closed to the public and the participant. *Id.* During the team meeting the members of the team contribute relevant information about the participants and make recommendations to the judge. *Id.* at p. 39.

⁸ Defendant's signed "drug court treatment program basic understanding waivers and agreements" is not contained within the settled record.

Following the team meeting, there is a court session with the drug court judge and the participants. During the court session, each participant speaks to the judge, answering questions and responding to issues or concerns raised by the team. The Honorable Jerome Eckrich & Roland Loundenburg, *Answering the Call: Drug Courts in South Dakota*, 57 S.D. L. Rev. at 173. The judge may impose a sanction or a reward for each participant. *Id.*

The Second Circuit Drug Court has developed a participant handbook. Exhibit C. Each participant must sign a receipt and acknowledgement that the participant has read and agrees to comply with the handbook policies.⁹ Exhibit C, Appendix E. The handbook outlines the drug court termination process as follows:

1. Any member of the drug court team makes a motion for termination.
2. Court Services Officer will provide you with a written notification of the motion.
3. You will be given the opportunity to choose whether or not you would like to have a lawyer represent you *at the termination hearing*.
4. You will address the drug court team concerning the possibility of termination at the next regularly scheduled court *session*.
5. After the court session, the drug court team will vote on termination.
6. If there is a majority vote for termination, you will be terminated from the program.
7. If you are terminated, the court shall advise you of your rights concerning potential probation revocation and appoint you an attorney.

⁹ Defendant's signed drug court participant manual receipt and acknowledgement is not contained within the settled record.

8. You are required to participate in a termination interview and may be subject to a probation revocation hearing.

Exhibit C, p. 8 (emphasis added).

B. Defendant was Afforded Her Due Process Rights

Defendant claims her due process rights were violated by the drug court judge when her attorney was not allowed into the drug court team meetings. DB 19-23. The United States Supreme Court has not addressed the due process requirements in a drug court termination proceeding. The Court has, however, addressed the due process requirements in a parole revocation proceeding. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The Court noted that due process is “flexible and calls for such procedural protections as the particular situation demands.” *Morrissey*, 408 U.S. at 481, 92 S.Ct. at 2600.

In considering parole revocation proceedings, the Court found the minimum requirements of due process are (1) written notice of the claimed violations of parole; (2) disclosure to the parolee of evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a ‘neutral and detached’ hearing body such as a traditional parole board, member of which need not be judicial officers or lawyers; and (6) a written

statement by the factfinders as to the evidence relied on and reasons for revoking parole. *Morrissey*, 408 U.S. at 489, 92 S.Ct. at 2604. The Court extended these due process requirements to probation revocation proceedings in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

While not yet addressed in South Dakota, other state courts have determined a participant in a drug court program is entitled to due process when drug court termination is contemplated. *People v. Anderson*, 833 N.E.2d 390 (Ill. App. Ct. 2005) (drug court participant must be informed of the nature of the alleged violation, the nature of the evidence against him, and the right to appear and be heard before he was dismissed from the program); *State v. Shambley*, 795 N.W.2d 884 (Neb. 2011) (drug court participant has the right to confront and cross-examine adverse witnesses); *State v. Rogers*, 170 P.3d 881 (Idaho 2007) (drug court participant was entitled to the restricted due process protections as articulated in *Morrissey*); *Hagar v. State*, 990 P.2d 894 (Okla. Crim. App. 1999) (drug court participant entitled to written notice setting forth the reasons for termination).

In this case, the drug court provided Defendant with due process before she was terminated from the drug court program. Defendant was provided with written notice of the reported drug court violations. SR 68-69. She was provided with an attorney to represent her in the drug court session. She had a hearing and was afforded the

opportunity to be heard in person and to present witnesses and documentary evidence. SR 194-230, 237-41. Counsel for Defendant cross-examined the witnesses against her. SR 194-230. At the conclusion of the evidence, the drug court judge found by a preponderance of the evidence, that Defendant had violated the terms and conditions of the drug court program. SR 241.

Defendant does not dispute that she fully exercised her due process rights during the drug court hearing. She also does not dispute there was sufficient evidence to find that she violated the terms and conditions of the drug court program. Consequently, Defendant's due process rights were not violated during the drug court termination proceedings.

C. There is No Right to Counsel During a Drug Court Team Meeting

The Sixth Amendment guarantees the right of counsel to the accused in all criminal prosecutions. U.S. Const. Amend. VI. This right to counsel encompasses all federal and state criminal prosecutions that result in imprisonment. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). This right is applicable to the states by virtue of the Fourteenth Amendment. *Gideon v. Wainwright*. The right attaches at the initiation of adversary judicial proceedings, and extends to every critical stage of the proceedings. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

The drug court team meetings are not a “critical stage” of the proceedings. They are meetings for the drug court team to discuss the progress, or lack of progress, by a participant. Even when the team votes to terminate a participant, it is only a recommendation. The ultimate decision remains up to the drug court judge. Here, evidence was taken during the evidentiary hearing that preceded the team meeting. Defendant, with her attorney, was allowed to present evidence, cross-examine witnesses, and explain to the team why she believed she should be allowed to remain in the program.

Defendant does not claim she has a right to be present during the drug court meetings. Indeed, she specifically waived her presence at the meetings. Exhibit C, Appendix D-3. She only claims she has a right to be “represented” at the meeting. DB 14. Defendant agreed to the terms of the program when she asked to be admitted to the program. She was informed that she would not have an attorney represent her while she was in the program. Exhibit C, Appendix D-3.

Defendant asserts that SDCL 23A-40-6 supports her claim that she has a right to have her attorney attend drug court team meetings. DB 11. SDCL 23A-40-6 provides:

In any criminal investigation or in any criminal action or action for *revocation of suspended sentence or probation in the circuit or magistrate court* or in a final proceeding to revoke a parole, if it is satisfactorily shown that the defendant or detained person does not have sufficient money, credit or property to employ counsel and pay for the necessary expenses of his representation, the judge of the circuit court or magistrate court shall, upon the request of

defendant, assign, at any time following arrest or commencement of detention without formal charges, counsel for his representation, who shall appear for and defend the accused upon the charge against him, or take other proper legal action to protect the rights of the person detained without formal charge.

(emphasis added).

The State complied with SDCL 23A-40-6. Defendant was appointed an attorney to represent her in the probation revocation hearing. In addition, although not required by SDCL 23A-40-6, the drug court appointed an attorney to represent Defendant in the drug court termination hearing. The drug court termination hearing is not the same as an action for revocation of a suspended sentence or probation. Termination from drug court does not always result in revocation of a suspended sentence or probation. If it did, there would be no need for a separate probation revocation hearing.

Defendant next attempts to equate a drug court meeting with a criminal investigation in order to meet the requirement of SDCL 23A-40-6. DB 12. She claims that, like a criminal investigation, the drug court team “investigates” allegations of misconduct. DB 12 (citing SR 198). Defendant misconstrues the role of the drug court team. The drug court program is a non-adversarial forum with an emphasis on treatment and accountability. The only “investigating” done by the team is to determine “whether termination from the program is warranted under the circumstances.” SR 198. Even if the team was somehow conducting a criminal investigation as contemplated under

SDCL 23A-40-6, a defendant has no right to have an attorney involved in a criminal investigation. At most, the subject of a criminal investigation may seek the advice of counsel, but that attorney does not participate in the criminal investigation.

Defendant next asserts that the NADCP Standards required the drug court to allow Defendant's attorney to attend the drug court meetings. DB 11-16. The Standards set forth the members of the drug court team. NADCP Standards II, p. 38. The team includes a defense counsel representative. *Id.* It does not include a participant's individual defense attorney. Defendant, in citing to the commentary to this section of the NADCP Standards, ignores this distinction and notes that "private counsel may step in if the participant faces a potential jail sanction or discharge from the program." DB 16. But the commentary cited by Defendant only refers to the composition of the team, not the team meetings. NADCP Standards II, p. 40. The commentary, which this Court did not specifically adopt in IP Rule 2016-02, does not authorize a participant's private counsel to "step in" to the team meetings. Defendant correctly notes that the "bifurcation of tasks" assigned to the drug court defense representative and a participant's individual defense attorney "suggests their respective functions differ." DB 16. Moreover, Defendant was informed that the attorney who represented her during her criminal case does not represent her in drug court and the defense attorney who participates in drug court is not

acting as Defendant's attorney. A participant's individual defense attorney is not a member of the team. Defendant has presented no binding authority to support her claim that she has a right to have her individual attorney present during drug court team meetings.

Defendant claims her attorney should have been allowed in the team meetings to "provide assistance to the court to point out potential errors and seek corrections prior to an appeal." DB 33. According to Defendant, her attorney may need to respond to topics brought up in the team meeting that her attorney hadn't anticipated and argued in the drug court session. SR 249-50. Both claims are without merit. The team meeting in which team members vote to terminate a defendant from drug court can be compared to jury deliberations. Prior to going into the team meeting, the members of the team heard the evidence and the arguments of Defendant's attorney. A jury does the same.

Attorneys are not allowed to go back to the jury room to make sure the jury instructions are followed properly or to address juror questions that may come up during deliberations. The jury makes its decisions based solely upon the evidence and argument made in the courtroom. The same is true for a drug court team.

Defendant and her attorney was given an opportunity to speak to the team before the team retired to a separate room to decide whether Defendant should be terminated or allowed to remain in the program. SR 242-43. She was not prohibited from saying anything to the team.

Nor was she prohibited from presenting any evidence to the team. SR 249. As set forth in the participant handbook, Defendant was allowed to address the team concerning the possibility of termination at the court session prior to the team voting on termination. Exhibit C, p. 8.

Defendant is critical of the process followed by the drug court during the team meeting. First, she claims that the drug court's announcement that the drug court found Defendant in violation of probation had a "chilling effect" on the team member's ability to state their opinions.¹⁰ DB 32. The team was present in the courtroom to hear the evidence and the drug court judge's finding that Defendant had violated the terms and conditions of the drug court program. The drug court judge did not attempt to influence the members to vote to terminate Defendant from the drug court program when it made that finding. A finding by the drug court judge that a participant violated the drug court conditions does not require termination from drug court. There would be no need to have a team meeting after the evidentiary hearing if termination was an automatic outcome.

Second, Defendant criticizes the drug court for taking a vote on Defendant's termination prior to any discussion among its members.

DB 31-32. Nothing in the NADCP Standards require each team

¹⁰ It appears the drug court's choice of words was incorrect. The drug court had just made a finding in open court that Defendant had violated the terms and conditions of *drug court*, not that Defendant had violated her *probation*. SR 241.

member to voice an opinion before a vote is taken on a motion to terminate a participant from the program. Here, the evidence was so clear and overwhelming that Defendant should be terminated from the program that there was no need for further discussion. The drug court confirmed that the team members made their decision to vote for termination based upon what they heard in the courtroom.

Finally, Defendant complains that a team member voted who had not heard the case.¹¹ DB 33. The record shows otherwise. The drug court judge recognized a potential issue and corrected it by saying “I’m not going to have you [vote] because you haven’t heard the cases”. SR 250. The drug court judge only allowed votes of team members who knew the entire background of the participant and could make an informed decision on termination.

Even if this court finds the drug court erred in denying Defendant’s attorney access to the team meeting, Defendant must still show prejudice. *State v. Gollither-Weyer*, 2016 S.D. 10, ¶ 12, 875 N.W.2d 28, 32. “Prejudice, sufficient to require relief, must ‘in all probability’ have ‘produced some effect upon the final result and affected rights of the party assigning it.’” *Id.* (internal citations omitted). Here, there was no prejudice to Defendant. She does not dispute that she violated the terms and conditions of drug court. She

¹¹ This assumes the drug court judge’s comment of “I’m not going to have you because you haven’t heard the cases” was directed at Ms. Parker, and not another team member in the room who was then not allowed to vote.

admitted that she was essentially absent from the program. SR 242. She did not take advantage of the opportunity that drug court offered to turn her life around. SR 243. She continued to commit new crimes. She became a concern for public safety. She made no progress in the program. Allowing a participant like Defendant to remain in the program when she wasn't benefitting from it is a threat to the integrity of the program. Her spot belongs to someone who is invested in the program.

Finally, Defendant attempts to elevate her claim of drug court error to the level of structural error. DB 29-30. In 1967, the United States Supreme Court recognized that certain constitutional errors may be "structural." *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The Court stated, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* at 23, 87 S.Ct. at 827-28. Since that time, however, the United States Supreme Court has only found errors to be structural when there has been "(1) a deprivation of the right to counsel; (2) a biased judge; (3) an unlawful exclusion of grand jurors of the defendant's race; (4) a deprivation of the right of self-representation at trial; (5) a deprivation of the right to a public trial; and (6) an erroneous reasonable doubt standard." *Guthmiller v. Weber*, 2011 S.D. 62, ¶16, 804 N.W.2d 400, 406 (citing *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999)). Most constitutional errors

can be harmless. *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S.Ct. 1246, 1263, 113 L.Ed.2d 302, 329 (1991). Defendant claims she was deprived of her right to counsel and therefore she is not required to show prejudice. DB 30.

A criminal defendant facing incarceration has a right to counsel at every critical stage of the proceedings against him. *Gideon*, 372 U.S. 335, 83 S.Ct. 792. In *Gideon*, the defendant's request for representation by counsel was denied prior to trial and he was forced to represent himself at all stages of the trial. *Id.* There was a *total* deprivation of the right to counsel. "The deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding." *Satterwhite v. Texas*, 486 U.S. 249, 257, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988). *Gideon* did not have to show prejudice.

Defendant did not face a total deprivation of counsel. She had an attorney appointed to represent her during the drug court hearing and during the probation revocation proceedings. Although her attorney was not allowed to go into the drug court team meetings, she was not deprived of her right to counsel like *Gideon*. Even if this Court were to find the drug court erred in denying her attorney access to the drug court team meetings, it would not rise to the level of structural error. Because Defendant cannot show error and prejudice, her claim should be denied.

II

THE DRUG COURT PROPERLY TERMINATED DEFENDANT
FROM THE DRUG COURT PROGRAM.

The drug court judge found that Defendant violated the terms and conditions of the drug court program. SR 241. Defendant does not dispute that finding in her appeal. Instead, she claims that termination from the program was an “excessive sanction.” DB 37.

This Court has not had the opportunity to opine on the standard of review for appeal from a drug court judge’s decision to terminate a participant from the program. The NADCP Standards give the drug court team a “reasonable degree of discretion” to impose a sanction. NADCP Standards I, p. 26. In addition, a circuit court’s imposition of a sentence is examined under an abuse of discretion standard. *State v. Chipps*, 2016 S.D. 8, ¶ 31, 874 N.W.2d 475, 486. With those standards in mind, the State proposes this Court examine a drug court judge’s decision to terminate a participant from the program under an abuse of discretion standard.

Defendant was given advance notice of what was expected of her in the drug court program. The participant handbook set forth what is required in each phase of the program. Exhibit C, p. 4-5. The handbook also set forth the reasons a participant may be terminated from the program. Exhibit C, p. 7. *See also* Exhibit A. Within days of entering the program, Defendant began violating the rules of drug court. She left the 2020 house and failed to appear for drug court hearings. The only reason she had contact with her court services

officer was because she was arrested for possession of a controlled substance. She was still allowed to remain in the drug court program and released from custody.

Within a day of being released from custody the second time, Defendant consumed alcohol. This is a violation of the program. Her next violation was her use of methamphetamine. She was placed in a halfway house but left without permission from the court. She then missed drug court appearances. Again, the only reason she had contact with her court services officer was because she was arrested for a new charge of aggravated eluding. Over the course of her time in drug court, Defendant became a concern for public safety, was a threat to the integrity of the program, violated the terms of the drug court, committed new crimes, failed to attend drug court hearings, and showed an inability to pass required drug tests. See Exhibit A; Exhibit C, p. 7. Each of these reasons alone is sufficient for termination from the program. Exhibit A, Exhibit C, p. 7. When these reasons are combined, it becomes obvious that Defendant failed to take advantage of the drug court program opportunity and did not benefit from the program. The drug court did not abuse its discretion in terminating Defendant from the program.

III

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED DEFENDANT TO PRISON.

Defendant received a four-year sentence in prison after she violated the terms of her probation. Defendant claims the circuit court should not have revoked her probation and should not have imposed her suspended sentence.

This Court reviews a trial court’s sentencing decision for abuse of discretion. *Chipps*, 2016 S.D. 8, ¶ 31, 874 N.W.2d at 486. “An abuse of discretion ‘is a fundamental error of judgment, a choice outside the range of permissible choices . . .’” *State v. Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d 75, 83 (citations omitted). This Court has stated that “[w]e take an extremely deferential review of sentencing. . . .” *State v. Bruce*, 2011 S.D. 14, ¶ 28, 796 N.W.2d 397, 406. “It is not for us to engage in appellate resentencing, or to micromanage the administration of criminal justice.” *Id.* (internal citations omitted). The test for determining whether the trial court abused its discretion is “not whether we would have made the same ruling, but whether we believe a judicial mind, in view of the law and the circumstances, could have reasonably reached the same conclusion.” *State v. Goodroad*, 1997 S.D. 46, ¶ 9, 563 N.W.2d 126, 129. “[A] sentence within the statutory maximum [generally] will not be disturbed on appeal.” *Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d at 83.

Defendant was given a four-year suspended sentence to prison upon the condition that she successfully complete the drug court program. SR 53-54. She almost immediately violated the conditions of the program. The first drug court termination report was filed against Defendant in July, 2015, but Defendant was allowed to remain in the program. Shortly thereafter, Defendant again violated the conditions of the drug court program. Another drug court termination report was filed. This time, after a hearing, the drug court judge found she had violated the conditions of drug court. The drug court judge then terminated Defendant from the program and she was brought before the circuit court on a motion to revoke her suspended sentence. There Defendant admitted that she had violated the conditions of her suspended sentence.

Defendant was given numerous opportunities on probation. She received all of the resources available to a participant in drug court. Instead of taking advantage of those resources, she continued to break the law and violate the drug court rules. She took for granted the tools available in drug court and wasted her opportunities. SR 186. She was unable to be safely supervised in the community and left the circuit court with no alternative other than to sentence her to prison.

Defendant claims she received an “augmented” sentence for trying, but failing, to respond to treatment. DB 36. However, Defendant did more than fail to respond to treatment. Twice she

absconded from the program. She committed more crimes. She violated multiple program rules. She was sentenced to the exact amount of prison time that had been originally suspended. The circuit court did not abuse its discretion when it imposed the four-year prison sentence.

CONCLUSION

The State respectfully requests that Defendant's sentence be affirmed.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 7,262 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 2nd day of November, 2016.

/s/ Kelly Marnette

Kelly Marnette

Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 2, 2016, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Lee Ann Stenstrom* was served via electronic mail upon Mark Kadi at mkadi@minnehahacounty.org.

/s/ Kelly Marnette

Kelly Marnette

Assistant Attorney General

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Exhibit A. IP Rule 2013-02

Exhibit B. IP Rule 2016-02

Exhibit C. Second Circuit Drug Court Participant Handbook

Exhibit A

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ADOPTION OF)	
A POLICY REGARDING TERMINATION)	IP RULE 2013-02
OF DRUG COURT PARTICIPANTS)	

Although the termination of a Drug Court participant should be evaluated on an individual basis, this rule is intended to provide guidance on a statewide basis to the Drug Court programs. For purposes of this rule, a Drug Court is defined as a court supervised alternative to incarceration and includes drug, driving under influence, and other specialty court dockets aimed at increasing public safety, offender accountability and decreasing recidivism for chemically dependent offenders.

Any termination proceeding should be conducted on the record in regularly scheduled Court sessions. The recommendation to terminate a participant will be made by the Drug Court Team and may be made for any of the following reasons:

- Concern for public safety;
- Threat to the integrity of the program;
- Available treatment options have been exhausted and the participant is no longer working towards recovery;
- Violating rules of the Drug Court;
- Commission of a crime;
- Failure to attend Drug Court hearings;
- Abandonment of treatment program;
- Evidence that participant is involved with drug dealing, or driving while under the influence;
- Evidence that participant is involved in any threatening, abusive, or violent verbal or physical behavior towards anyone;
- Tampering with drug/alcohol screening tests;
- Inability to pass required drug/alcohol screening tests for any reason;
- Failure to make satisfactory progress;
- Any other grounds that the Drug Court Team finds sufficient for termination.

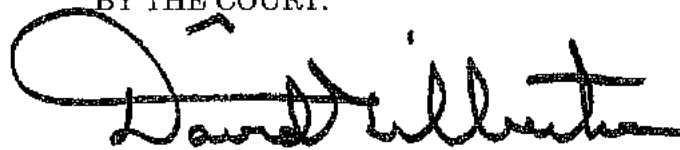
The Drug Court Team may seek the termination of a participant from the program by a consensus vote. In the event of such a vote, the Court Services Officer will provide written notice to the participant of his or her proposed termination from the program. Following such notification, the participant will have an opportunity to address the Drug Court Team concerning the possibility of termination at the next regularly scheduled Court session. After the Court session, the Drug Court Team will vote on the proposed termination. If the Drug Court Judge agrees with the termination then the participant will be terminated from the program.

In the event of termination, the Court shall advise the participant of his or her rights concerning potential probation revocation and shall appoint an attorney to represent the participant in the probation revocation proceeding.

The effective date of this Rule is August 9, 2013. This Rule shall remain in effect until further order of this Court.

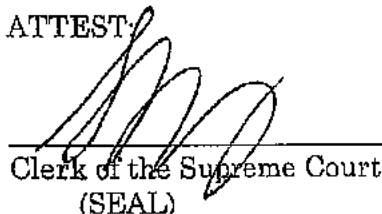
DATED at Pierre, South Dakota this 9th day of August, 2013.

BY THE COURT:



David Gilbertson, Chief Justice

ATTEST:


Clerk of the Supreme Court
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

AUG - 9 2013


Clerk

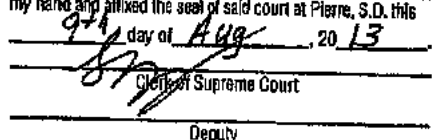
STATE OF SOUTH DAKOTA
In the Supreme Court
I, Shirley A. Jameson-Fargel, Clerk of the Supreme Court of South Dakota, hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears on record in my office. In witness whereof, I have hereunto set my hand and affixed the seal of said court at Pierre, S.D. this
9th day of Aug, 2013

Clerk of Supreme Court
Deputy

Exhibit B

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ADOPTION OF)
A POLICY CONCERNING DRUG COURT)
BEST PRACTICE STANDARDS)

IP RULE 2016-02

A. PURPOSE.

Pursuant to SDCL § 16-22-5.3 the State Court Administrator's Office, in consultation with the Statewide Drug Court Advisory Board, is required to implement statewide standards in accordance with "Adult Drug Court Best Practice Standards," published by the National Association of Drug Court Professionals (NADCP). The nationally recognized "Adult Drug Court Best Practice Standards" are termed as both "best practices" and "standards" while contradictory in meaning the preamble to that document explains:

The NADCP chooses to combine aspirational and obligatory language because best practice standards may be ambitious at present, but they are expected to become obligatory and enforceable within a reasonable period of time. Once best practices have been defined clearly for the field, it is assumed that Drug Courts will comport their operations accordingly. How long this process should take will vary from standard to standard. Drug Courts should be able to comply with some of the standards within a few months, if they are not already doing so; however, other standards might require three to five years to satisfy.

While South Dakota has only relatively recently began the significant undertaking of expanding our Drug Courts, these best practice standards are important to ensure the integrity and fidelity to the model for these programs. Each court is

responsible for demonstrating compliance with these standards or have a plan to achieve compliance as soon as reasonably practicable. Oversight for implementation of these standards resides with the State Court Administrator's Office and the statewide Drug/DUI Court Liaison.

This I.P. Rule is intended to incorporate the "black letter" substance of each best practice standard; however the commentary for each standard should also be consulted for further guidance or clarity when implementing the best practice standards.

B. DRUG COURT DEFINED.

Pursuant to SDCL § 16-22-3 a drug court is defined as a judicially supervised alternative to incarceration and includes drug, driving under influence and other specialty court dockets aimed at increasing public safety, offender accountability and decreasing recidivism for chemically dependent offenders.

C. TARGET POPULATION.

Eligibility and exclusion criteria for the Drug Court are predicated on empirical evidence indicating which types of offenders can be treated safely and effectively in Drug Courts. Candidates are evaluated for admission to the Drug Court using evidence-based assessment tools and procedures.

D. HISTORICALLY DISADVANTAGED GROUPS.

Citizens who have historically experienced sustained discrimination or reduced social opportunities because of their race, ethnicity, gender, sexual orientation, sexual identity, physical or mental disability, religion, or socioeconomic status receive the same opportunities as other citizens to participate and succeed in the Drug Court.

E. ROLES AND RESPONSIBILITIES OF THE JUDGE.

The Drug Court judge stays abreast of current law and research on best practices in Drug Courts, participates regularly in team meetings, interacts frequently and respectfully with participants, and gives due consideration to the input of other team members.

F. INCENTIVES, SANCTIONS, AND THERAPEUTIC ADJUSTMENTS.

Consequences for participants' behavior are predictable, fair, consistent, and administered in accordance with evidence-based principles of effective behavior modification.

G. SUBSTANCE ABUSE TREATMENT.

Participants receive substance abuse treatment based on a standardized assessment of their treatment needs. Substance abuse treatment is not provided to reward desired behaviors, punish infractions, or serve other nonclinically indicated goals. Treatment providers are trained and supervised to deliver a continuum of evidence-based interventions that are documented in treatment manuals.

H. COMPLEMENTARY TREATMENT AND SOCIAL SERVICES.

Participants receive complementary treatment and social services for conditions that co-occur with substance abuse and are likely to interfere with their compliance in Drug Court, increase criminal recidivism, or diminish treatment gains.

I. DRUG AND ALCOHOL TESTING.

Drug and alcohol testing provides an accurate, timely, and comprehensive assessment of unauthorized substance use throughout participants' enrollment in the Drug Court.

J. MULTIDISCIPLINARY TEAM.

A dedicated multidisciplinary team of professionals manages the day-to-day operations of the Drug Court, including reviewing participant progress during pre-court staff meetings and status hearings, contributing observations and recommendations within team members' respective areas of expertise, and delivering or overseeing the delivery of legal, treatment and supervision services.

K. CENSUS AND CASELOADS.

The Drug Court serves as many eligible individuals as practicable while maintaining continuous fidelity to best practice standards.

L. MONITORING AND EVALUATION.

The Drug Court routinely monitors its adherence to best practice standards and employs scientifically valid and reliable procedures to evaluate its effectiveness.

M. EFFECTIVE DATE.

The effective date of this Rule is July 1, 2016. This Rule will remain in effect until further order of this Court.

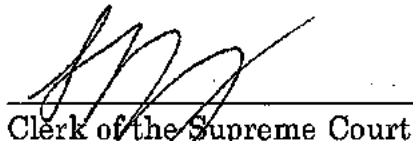
DATED at Pierre, South Dakota this 13th day of June, 2016.

BY THE COURT:

A large, stylized handwritten signature in dark ink, appearing to read "David Gilbertson".

David Gilbertson, Chief Justice

ATTEST:

A handwritten signature in dark ink, appearing to be "Shelley A. Johnson".
Clerk of the Supreme Court
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

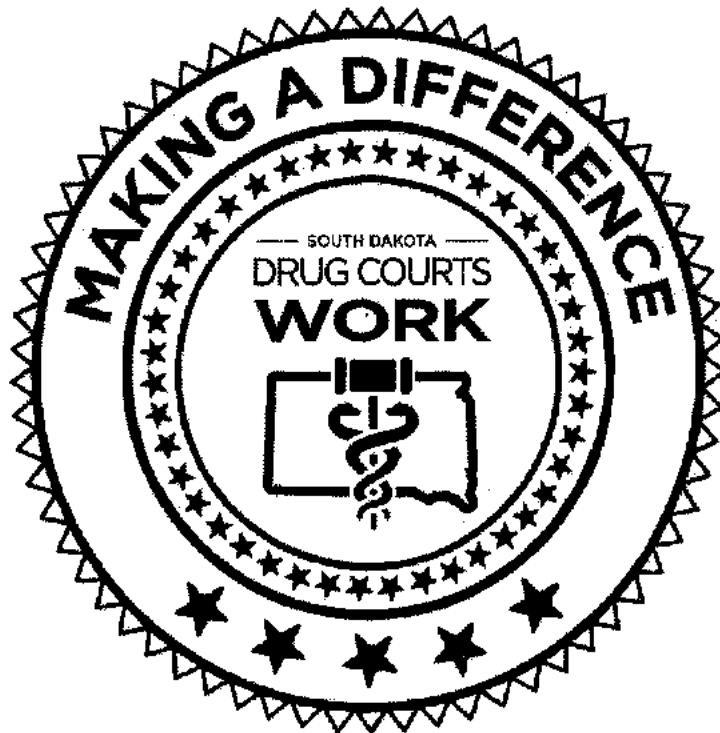
JUN 13 2016

A handwritten signature in dark ink, appearing to be "Shelley A. Johnson".
Clerk

Exhibit C

2015

Second Circuit Drug Court Participant Handbook



Second Circuit Drug Court
425 North Dakota Ave.
Sioux Falls, SD 57104
605-367-5930

Exhibit C

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Mission Statement

The mission of South Dakota's Drug Court Programs is to enhance public safety and improve the quality of life for participants, their families, and communities statewide by holding participants accountable through a judicially-monitored regimen of supervision and treatment to promote long-term recovery.

Program Goals

1. Increase public safety by integrating the criminal justice system with treatment systems and community resources
2. Increase individual length of involvement in treatment and other maintenance systems
3. Increase the number of offenders able to work, parent, and participate in the community as sober, productive citizens
4. Reduce incarceration time for non-violent offenders
5. Reduce recidivism

Introduction

What is Drug Court

Drug Court is defined as a judicially supervised alternative program to incarceration and includes drug, driving under the influence (DUI), and other specialty court dockets aimed at increasing public safety, increasing offender accountability, and decreasing recidivism. Drug Courts are a collaborative community effort.

Program Outline

Drug Court is a voluntary program, which includes regular appearances before the Drug Court judge, frequent and random drug testing, substance abuse counseling in individual and group settings, mental health counseling, educational classes, a system of behavior modification based on incentives and sanctions, and intense community supervision by a Drug Court Team. Drug Court requires participants to participate in community support groups and to be employed. The Program length is determined by each participant but is no less than a year.

Eligibility Standards

1. Over 18 years of age
2. Facing felony level drug- or alcohol-related offense
3. Voluntarily entering into Drug Court and willing to comply to all requirements
4. No current charges of distribution
5. Not required to register as a sex offender
6. No prior conviction of crimes of violence
7. Substantially impacted by your abuse of or dependence on drugs
8. Screened legally eligible for Drug Court
9. Willing to maintain residency as directed to ensure intensive supervision

Referral Process

1. Prosecutor completes legal screen for Drug Court
2. Complete Drug Court application
3. Complete updated drug and alcohol risk assessment and LSI-R needs assessment identifying desire to enter Drug Court
4. Defense attorney provides discovery and evaluation to Drug Court Team
5. Team votes and accepts or denies pending application
6. If accepted, Drug Court becomes sentencing option
7. Sentenced to probation with Drug Court as a condition

*Every reasonable effort will be made by the Drug Court team to ensure that the time between arrest and entry into the Drug Court Program is less than 30 days.

Drug Court Proceedings

The Drug Court is a specialized court operating on a weekly basis dedicated to the assessment and supervision of participants. The Drug Court Team will meet prior to court. Drug Court is open for your family members or other members of your support network to attend. Children may attend court when appropriate.

You are expected to maintain appropriate behavior at all times during court sessions and while in the courthouse. The Judge and Team members shall be addressed with respect. Unless prior approval is given, you will remain for the entire Drug Court proceedings. We do encourage you to show your support and encouragement to fellow participants by applause. Your behavior and demeanor while in the courthouse is a reflection on the entire Program. Maintaining appropriate behavior is a sign of the progress you and your fellow participants are making towards recovery.

Confidentiality

Drug Court is open to the public, but Drug Courts Team meetings are **not**. Special permission to attend Team meetings must have prior approval. It is important to protect the privacy interest of everyone involved in Drug Court. You are required to sign releases from the Drug Court Team and service providers for health, medical, mental health, criminal, employment and educational records. Since this is confidential information, it cannot and will not be shared with anyone outside of the Drug Court team. There is one exception to this rule pertaining to SDCL 26-8A-3 and 4, which requires reporting of any prior or current child neglect/ abuse.

Participant's Rights

You understand that by agreeing to participate in a Drug Court Program, you are waiving your right to usual court proceedings, such as questioning or disputing the legality of a search, seizure, or traffic stop; a preliminary hearing; and a trial by jury or court. Admission into the Drug Court requires acceptance of this responsibility. You also understand that admission, participation, and possible termination from the Drug Court Program are entirely within the discretion of the Drug Court Team.

Drug Testing

A critical component of successful Drug Court participation involves intensive supervision and random drug testing to determine compliance with the rules of the Drug Court Program. The frequency of the tests will be determined by the phase you are in and is subject to change based on violations and the recommendation of the Drug Court Team. Testing is conducted at treatment sessions and at Drug Court sessions by the Court Service Officer. All tests are observed, and any detectable level of alcohol or controlled substance will be considered as a positive test. Upon a positive test, you will ordinarily be taken into custody. This is done to protect public safety. On occasion, treatment providers may conduct tests for the purpose of therapeutic adjustments; results will be shared with the Team. Drug testing includes frequent contact with the South Dakota Prescription Drug Monitoring Program to ensure you are not abusing prescriptions not approved without the Team's knowledge.

Phases of Drug Court

The Second Circuit Drug Court consists of four (4) phases. Each phase is explained in detail below. You are required to submit a written request to the Drug Court Team in order to advance to the next phase or graduate. Program length may vary but is no less than one year. You will be required to complete a Program assessment at **intake, completion of phase 2, and completion of Program**. Before graduating from the Program, you must complete a **Program Exit Survey**.

Phase 1

- Minimum of 90 days (30 days in custody)
- Weekly court attendance
- Report to supervision meetings as instructed
- Attend community support group meetings
- Seek or obtain full-time employment, attend education or complete community service
- Abide by curfew
- Obtain and maintain a weekly/daily planner
- Complete financial review for financial responsibility plan
- Spend a minimum of ten (10) hours a week in treatment plan
- Submit to a minimum of three (3) random UAs a week
- Attend four (4) recovery support meetings per week.
- 90 days of continuous sobriety
- Submit written request to move to next phase

Phase 2

- Minimum of 120 days
- Weekly court attendance
- Report to supervision meetings as instructed
- Attend community support group meetings
- Maintain full-time employment or attend school or community service
- Abide by curfew
- Maintain planner
- Follow financial responsibility plan
- Complete treatment as directed
- Submit to three (3) random UAs a week
- Attend four (4) recovery support meetings per week
- 90 days of continuous sobriety
- Submit written request to move to next phase

Phase 3

- Minimum of 120 days
- Bi-weekly court appearances
- Report to supervision meetings as instructed
- Attend community support group meetings
- Continue full-time employment or education
- Abide by curfew
- Maintain planner
- Continue to follow financial responsibility plan, review plan
- Complete treatment as directed
- Submit to a minimum of two (2) random UAs a week
- Attend four (4) recovery support meetings per week
- 90 days of continuous sobriety
- Submit written request to move to the next phase

Phase 4

- Minimum of 120 days
- Monthly court appearances
- Report to supervision meetings as instructed
- Attend community support group meetings
- Continue full-time employment or education
- Maintain planner
- Financial review
- Spend a minimum of two (2) hours a week in aftercare plan
- Submit to a minimum of two (2) random UAs a week
- Attend two (2) recovery support meetings per week
- 90 days of continuous sobriety
- Submit written request to graduate

Graduation

Graduation Requirements

- Complete Phase 4
- Pay all fees on current file
- 90 days continuous sobriety
- Be employed
- Be living in acceptable housing
- Have been in Program for at least a year

Upon successfully completion of all four (4) phases, upon meeting graduations requirements, and upon recommendation of the Drug Court Team, you will graduate from Drug Court.

Graduation from Drug Court is recognized as a very important event. Your loved ones and friends will be invited to join you at a special ceremony as the Drug Court Team congratulates you for successfully completing all phases of the Drug Court Program and achieving all the goals to establish a chemical-free life.

Incentives

While participating in the Drug Court Program, you may be given incentives to reinforce positive behaviors. An incentive, or reward, is an acknowledgement by the Drug Court Team that you have reached a milestone, accomplished a specific goal, or otherwise exhibited positive behavior or change.

Expected behaviors and incentives can include but are not limited to the following:

Expected behavior	Incentive
✓ Honesty	✓ Applause
✓ Accomplishing goal	✓ Acknowledgement from the court
✓ Positive attitude	✓ Gift card to local restaurant
✓ Adjusting well to Program	✓ Gas card
✓ Securing a sponsor	✓ Movie pass
✓ Avoiding temptation to relapse	✓ Progression in the Program/medal

Violations and Sanctions

While participating in the Drug Court Program, you will be given sanctions for any violations. A violation is a behavior or action that conflicts with the Program rules, policies or recommendations. A sanction is a response to a violation. The seriousness of the violation determines the severity of the sanction imposed. The objective of sanctions is to encourage you to continue to work towards recovery and treatment goals.

Any violations of the Drug Court Program rules, policies, or recommendations will result in the **immediate** imposition of sanctions, as determined by the Drug Court Judge or Drug Court Team. The Drug Court Team will individualize sanctions as deemed appropriate.

Inappropriate behaviors and sanctions can include but are not limited to the following:

Inappropriate Behavior	Possible Sanction
✓ Dishonesty	✓ Verbal reprimand
✓ Failure to maintain journal	✓ Written letter
✓ Failure to attend AA meetings	✓ Incarceration
✓ Breaking curfew requirements	✓ Loss of sober days
✓ Reporting late to PBT or UA	✓ House arrest
✓ Testing positive on PBT or UA	✓ No phase progression

Termination

Termination is evaluated on an individual basis. A decision to terminate participation will be made by the Drug Court Team. The decision to terminate may be made for any of the following reasons:

- Concern for public safety
- Threat to the integrity of the program
- Available treatment options have been exhausted, and the participant is no longer working towards recovery
- Violating rules of the Drug Court
- Commission of a crime
- Failure to attend Drug Court hearings
- Abandonment of treatment program
- Evidence that participant is involved with drug dealing or driving while under the influence
- Evidence that participant is involved in any threatening, abusive, or violent verbal or physical behavior towards anyone
- Tampering with drug/alcohol screening tests
- Inability to pass required drug/alcohol screening tests for any reason
- Failure to make satisfactory progress
- Any other grounds that the Drug Court Team finds sufficient for termination

Process for Termination

1. Any member of the Drug Court Team makes a motion for termination
2. Court Services Officer will provide you with a written notification of the motion
3. You will be given the opportunity to choose whether or not you would like to have a lawyer represent you at the termination hearing.
4. You will address the Drug Court Team concerning the possibility of termination at the next regularly scheduled Court session.
5. After the Court session, the Drug Court Team will vote on termination.
6. If there is a majority vote for termination, you will be terminated from the Program.
7. In you are terminated, the Court shall advise you of your rights concerning potential probation revocation and appoint you an attorney.
8. You are required to participate in a termination interview and may be subject to a probation revocation proceeding.

Voluntary Removal

You may request removal from the Drug Court Program; however, you are advised to meet with your defense attorney before making this request. If you have been deemed an absconder from court services supervision while in the Drug Court Program, you will be considered to have voluntarily removed yourself.

Fees

Court Related Fees

You are required to keep up with your payments for court related fees. Court related fees can include but are not limited to the following:

- Child support
- Restitution
- Crime Victim Fund
- Public Defender fees

You will be responsible to set up a payment plan with the Court Service Officer to present to the Team for approval.

Program Related Fees

You may be required to pay for testing, monitoring, and treatment while in the Program. Failure to make timely payments could result in delayed completion of the Program. The fees can include but are not limited to the following:

- UA's
- 24/7 Program
- SCRAM
- Interlock
- Treatment
- Court fines

Drug Court Application



Application Process

1. Read through the Participant Manual with defense attorney.
 2. Fill out and submit the following application and Consent for Disclosure of Confidential Substance Abuse Treatment Information to the Drug Court Office in the _____ Court House.
 3. Once application is received by the Drug Court, you will be required to keep two scheduled appointments. These appointments must be completed before the Team will further consider your application.
 - ☐ The Court Services Office will call you to schedule a LSI-R (Risk/Needs Assessment)
 - ☐ _____ will call you to schedule a Treatment Needs Assessment
- *Your attorney will receive written notification of acceptance or denial into the program.
4. If you are accepted into the program, you must complete the following forms, which are included in the Participant Handbook.
 - ☐ Drug Court Publicity Consent Form
 - ☐ Drug Court Treatment Program Basic Understanding, Waivers and Agreements
 - ☐ Drug Court Participant Manual Receipt and Acknowledgement
 - ☐ South Dakota Prescription Drug Monitoring Program



Unified Judicial System

Application to Second Circuit Drug Court Program

Second Judicial Circuit

Date of Application		Do you need disability accommodations? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, please state request:		Will an interpreter be needed? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, state language:	
Name			Alias		
Race		Sex		Date of Birth	
Current Address (Street)			Telephone Number		Cell Phone Number
City		State	Zip	Other States Lived in:	
How Long at this Address?		Armed Forces Veteran? <input type="checkbox"/> Yes <input type="checkbox"/> No		Valid Driver's License? <input type="checkbox"/> Yes <input type="checkbox"/> No Driver's License Number	
Reliable Transportation? <input type="checkbox"/> Yes <input type="checkbox"/> No			State ID Number		
Do You Have Children? <input type="checkbox"/> Yes <input type="checkbox"/> No			Number of Dependents		
Do You Pay Child Support? <input type="checkbox"/> Yes <input type="checkbox"/> No					
Significant Other					
NAME- Last, First, Middle (include Aliases)			DOB	Criminal Court Involvement-If so what?	
Other Members of Household					
NAME- Last, First, Middle (include Aliases)			DOB	Criminal Court Involvement-If so what?	
Next of Kin		Relationship		Telephone Number	
Current Employer		Monthly Income		Receive Disability? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Are You an Addict? <input type="checkbox"/> Yes <input type="checkbox"/> No		Primary Drug of Choice			
Primary Care Provider/Physician					
Mental Health Diagnosis? <input type="checkbox"/> Yes <input type="checkbox"/> No			Take Psychotropic Medications? <input type="checkbox"/> Yes <input type="checkbox"/> No		

List all Mental Health Diagnoses		List Medications	
Drug & Alcohol Evaluation Completed? <input type="checkbox"/> Yes <input type="checkbox"/> No		LSI-R Completed? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Agency Completing	Date	Score	Date
Highest Grade Completed		GED <input type="checkbox"/> Graduation <input type="checkbox"/>	
Skill or Trade		Certification or Degree? <input type="checkbox"/> Yes <input type="checkbox"/> No	
On Probation Currently? <input type="checkbox"/> Yes <input type="checkbox"/> No		Probation Officer	
Current Charges			Offense Date:
Do you have any matters pending in any other court? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, name of court		Charges	
Have you ever been sentenced to drug court before? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, name of court		Date:	
Have you ever been sentenced to the Penitentiary? <input type="checkbox"/> Yes <input type="checkbox"/> No		Date:	
Defense Attorney Name		Telephone Number	
"The defendant consents to the disclosure of Drug/DUI Court application information, including a Risk/Needs Assessment and a Treatment Needs Assessment, prior to entry of a plea, for purposes of obtaining information useful for acceptance into the Drug/DUI Court Program."			
_____ Defense Attorney Signature Date		_____ Applicant Signature Date	

CONSENT FOR DISCLOSURE OF CONFIDENTIAL SUBSTANCE ABUSE TREATMENT INFORMATION

I, _____, having agreed to enroll and participate in the Adult Drug Court Program, hereby acknowledge that treatment information normally is confidential under federal law. I understand that any disclosure made is bound by Part 2 of Title 42 of the Code of Federal Regulations, which governs the confidentiality of substance abuse patient (or client) records, and Part 164 of Title 45 of the CFR, which governs the confidentiality of mental and physical health records generally. I also understand that it is unlawful to violate these confidentiality requirements, but that both requirements permit me to voluntarily consent to permit disclosure of my health and substance abuse treatment information.

Therefore, I, _____, consent to allow the release of employment, medical, psychiatric, treatment, educational, mental health, or other documents and records which are deemed necessary for Drug Court purposes concerning Case No(s). _____. I also consent to the disclosure of on-going communications about my diagnosis, prognosis and compliance status, which includes, but is not limited to, the following:

- Assessment results pertaining to Drug Court eligibility, treatment needs, and supervision needs;
- Attendance at scheduled appointments;
- Drug and alcohol test results, including efforts to defraud or invalidate drug or alcohol tests;
- Attainment of treatment plan goals, such as completion of a required counseling regimen;
- Evidence of symptom resolution, such as reductions in drug cravings or withdrawal symptoms;
- Evidence of treatment-related attitudinal improvements, such as increased insight or motivation for change;
- Attainment of Drug Court phase requirements, such as obtaining and maintaining employment or enrolling in an educational program;
- Compliance with electronic monitoring, home curfews, travel limitations, and geographic or association restrictions;
- Adherence to legally prescribed and authorized medically assisted treatments;
- Procurement of unauthorized prescriptions for addictive or intoxicating medications;
- Commission of or arrests for new offenses; and
- Menacing, threatening, or disruptive behavior with staff members, fellow Participants or other persons.

These communications may be disclosed among the following parties or agencies involved in the Drug Court Program: the Drug Court judge, the Drug Court team members, the employees engaged in the Drug Court operations and administration, court services officers in the Drug Court Program, treatment providers utilized by me during the Drug Court Program, the Drug Court defense attorney, and/or other referring or treating agencies involved in the direct delivery of services through the Adult Drug Court Program.

I understand that the purpose of and the need for this disclosure is to: inform the court and the other above-specified agencies of my eligibility and/or acceptability for substance abuse treatment services; to report on and adequately monitor my treatment, attendance, prognosis, and compliance with the terms and conditions of the program; to discuss and assess my status as a Participant in the Drug Court Program; and, to assess and comment on my progress in accordance with the Drug Court's reporting and monitoring criteria.

I agree to permit the disclosure of this confidential information only as necessary for, and pertinent to, hearings, and/or reports concerning the status of my participation and compliance with the conditions of my probation as defined by the Drug Court. I understand that information about my medical status, mental health and/or drug treatment status, my arrest history, my levels of compliance or non-compliance with the conditions of my Drug Court participation (including the results of urinalysis or other drug screening tools,) and other material information will be discussed and shared among members of the Drug Court team.

I further understand that as an essential component of the Drug Court Program summary information about my compliance or non-compliance will be discussed in an **open and public courtroom**, including but not limited to, whether I have attended all meetings, treatment sessions, the results of urinalysis or other drug testing as required, and the disclosure of my compliance or noncompliance with the terms and conditions of the Program as defined by the Court. It is entirely possible that third parties will attend these court sessions and will hear these discussions. This process will require the redisclosure of confidential treatment information to individuals who have not been individually and specifically authorized to receive such information. Therefore, **I hereby specifically consent to any potential redisclosure to third persons who may be in attendance at any of my Drug Court sessions.**

I further understand that if I re-disclose confidential information of any other Participant to another party, I expose myself to legal liability for unauthorized disclosure of confidential information.

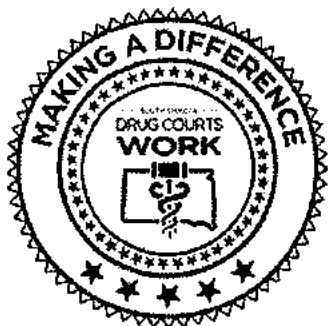
Recipients of this confidential information may re-disclose it only in connection with their official duties. I understand that this consent will remain in effect and cannot be revoked by me until there has been a formal and effective termination of my involvement with the Drug Court for the case named above such as the discontinuation of all court-ordered supervision or probation upon my successful completion of the Drug Court requirements, or upon sentencing for violating the terms of my Drug Court involvement.

Drug Court Participant

Date

Witness

Date



Drug Court Publicity Consent Form

I hereby consent to and authorize the use, publication and reproduction of all media by the Drug Court or anyone it authorizes, for all photographs/video taken of me, with or without names as the case may be, for any editorial, promotional, advertising, educational or other purpose.

I understand that any photographs or videos may be used in any publication for promotion of Drug Courts. I realize that this coverage may place my picture, with or without further explanation, alone or accompanied by other pictures, in a story, on a website, or on a cover of any or all publicity materials for Drug Courts. I hereby release the Drug Court, its staff, and employees, or anyone it authorizes, from all claims relating to or arising from the uses consented above.

I am over eighteen years of age, have read this consent and release, or have had it read and explained to me, fully understand its contents, and enter into it voluntarily and without coercion.

Print Name _____

Address _____

City, State, Zip _____

Phone _____

Date _____

Signature _____

**DRUG COURT
TREATMENT PROGRAM BASIC UNDERSTANDING,
WAIVERS AND AGREEMENTS**

Defendant's Name: _____

Address: _____

Date of Birth: ____/____/____ Phone Number(s): _____

I UNDERSTAND THAT:

Before I can be accepted into the Drug Court Treatment Program, I must give up certain statutory and/or constitutional rights. I hereby voluntarily agree and consent to give up the following statutory and/or constitutional rights upon my acceptance into the Drug Court Treatment Program enumerated below:

1. **LEGAL WAIVER:** I do hereby release and forever discharge the complaining witnesses, victim(s), the Drug Court Judge, the State's Attorney's Office, the Defense Attorney on the Drug Court Team, the Court Service Officer(s), the Drug Court Staff, and their respective heirs, successors, executors, administrators, and assigns from any and all claims of any kind or nature whatsoever, either in law or in equity, arising out of my arrest, participation in, or termination from, the Drug Court Program, and do expressly release and forever hold them harmless from any criminal or civil action which I may have a right to bring as a result of my arrest or participation in the Drug Court Program. (____)
2. **RELEASE OF INFORMATION:** I agree to complete a diagnostic evaluation for the development of my Drug Treatment Program as ordered by the Court. I hereby authorize release of all treatment information by the provider to the Court, Court Services, and the Drug Court Team. The Team and Court may consider any such information in deciding whether I remain in the Drug Court Treatment Program. (____)
3. **STATUS OF PROGRAM:** I have no legal right to participate in the Drug Court Treatment Program, and my acceptance and participation is a privilege. I may be excluded or terminated from the Program at any time. (____)
4. **PROGRAM LENGTH:** The length of the Program varies, with the minimum time to complete all levels of programming being one (1) year. It may take up to three (3) years, depending on my needs, abilities, and motivation to achieve nine (9) months of sobriety and meet Program objectives. Upon successful completion of Drug Court, I may be ordered to complete the remainder of their probation period on standard probation. (____)
5. **GENERAL REQUIREMENTS:** I must attend all Drug Court sessions well-groomed and professionally dressed. I must also attend treatment sessions, pass repeated drug screens, and address problems such as corrective thinking that contribute to my addiction. I must reduce risk factors, which may include improving my family situation, bettering my employment status, increasing my educational level, moving from known drug distribution areas, etc. I may be required to pay restitution, fees for participation in the Program, fines, my Court Appointed Attorneys Fees, and any other related costs. I must make suitable progress towards controlling my addiction, and the Program will set individual requirements that I must meet. (____)

6. **INDIVIDUALIZED TREATMENT PLANS:** The Clinician I am assigned to will set my individual treatment plan requirements, which will then be reviewed by the Drug Court Team. The final decisions regarding my progress, compliance with Program requirements, and continued participation are in the Judge's sole discretion. I have no right to appeal the Court's decisions. (____)
7. **TERMINATION:** I can quit the Program at any time but I must meet with the Judge and discuss my reasons for this decision and he/she may delay my withdrawal from the Program for up to one (1) week to make sure my decision is firm. If I voluntarily quit the Program, abscond from the Program, or am involuntarily terminated, I understand that I will be subject to sanctions by my sentencing judge. (____)
8. **FEES:** I will have to pay for some components of the Program, such as:
- A. Drug Testing;
 - B. Ankle Bracelet Monitoring System;
 - C. Treatment/Counseling;
 - D. 24/7 Sobriety Program.

Money I pay into the Program is non-refundable. If I quit, am terminated from the Program, or if the Program ends for any reason, I will not get my money back. (____)

9. **SANCTIONS:** If I do not fully comply with the Program, the Judge may impose sanctions at his/her sole discretion. Additionally, my Court Service Officer(s) (CSO) may impose administrative sanctions if I violate my curfew, have unauthorized visitors, or violate my weekly schedule. I will have to complete the sanctions to continue in the Program. The sanctions could include community service, a return to jail, or anything deemed appropriate by the Judge. Additionally, as a condition of my participation in the Drug Court Program, I do not have a right to an Evidentiary Hearing to contest the imposition of sanctions nor do I have the right to appeal the decision of the Drug Court Judge. The Judge may also terminate me from the Program. (____)
10. **COMMISSION OF A CRIMINAL OFFENSE:** If I commit an additional criminal offense, excluding minor traffic offenses, I may be expelled from the Program. (____)
11. **COURT PROCEEDINGS:** The Drug Court proceedings will be informal and performed in open Court. However, I am required to be well groomed and dressed in professional attire for all Court appearances. Clothing bearing drug or alcohol related themes, or promoting alcohol or drug use is not allowed. Violent or belligerent behavior will not be tolerated. (____)
12. **SEARCHES:**
- A. I will submit to random searches of my blood, breath or urine, person, possessions, vehicle or residence for controlled substances, alcohol, or any paraphernalia at the request of the Court Service Officer(s) (CSO). I will comply with all other rules of the Intensive Supervision Program. I am aware that my Court Service Officer(s) (CSO) and/or law enforcement will be conducting random home visits as a part of my participation in the Program. (____)
 - B. I will submit to searches of my blood, breath or urine, person, possessions, vehicle or residence for controlled substances, alcohol, or any paraphernalia at the request of law enforcement with reasonable suspicion. (____)

- C. I will be subject to random searches of my blood, breath or urine, person, possessions, vehicle or residence for controlled substances, alcohol or any paraphernalia by treatment provider staff or their designee while participating in the treatment program or while on treatment provider property. Failure to comply with these requirements may result in sanctions. (____)
13. DRUG TESTING: I will not use or possess any urine adulterant products. Possession or use of any such products will be deemed a violation of this agreement. I understand that results of my tests shall be admissible as evidence in the Drug Court. (____)
14. ATTORNEY: I understand that I will not have an attorney to represent me while in the Drug Court Program. I also understand that Drug Court is a non-adversarial forum and, therefore, treatment and accountability is the primary concern. I also understand that the attorney who represented me in the criminal case does not represent me in Drug Court, and the defense attorney who participates in the Drug Court is not acting as my attorney (even if the same attorney who represented me is also the defense attorney who participates in Drug Court). If the attorney who represents me in the criminal case is the same attorney who participates in the Drug Court, I waive any claim of conflict that might otherwise arise if that attorney is required to later represent me in court proceedings (for example, if I am terminated from the Drug Court Program). (____)
15. DISCUSSIONS IN MY ABSENCE. I understand and acknowledge that the members of the Drug Court Team, including the Defense Attorney and the Prosecuting Attorney, will be talking to the Drug Court Judge about me, my progress in the Program, and any problems that I might be having. The Team may also discuss with the Judge, at various times, sanctions or rewards, which I may receive because of my participation in the Program. I also understand and acknowledge that I will not be present for these discussions with the Judge. It has been explained to me these discussions with the Judge without me being present are necessary in order for me to receive the maximum benefit from the Program. I understand this and waive my presence at these meetings and discussions with the Drug Court Judge. (____)
16. WAIVER OF PRIVACY: Program officials may require me to provide very personal information. This may include, but will not be limited to: my criminal record, financial and tax information, child support records, education and work history, family history, and medical and psychiatric information. I understand and agree that these things may be discussed in open Drug Court session, in treatment sessions, or in other settings related to participation in the Program. I agree to sign specific releases promptly to allow the gathering of this information. (____)
17. DUTY TO NOTIFY: I must obtain permission from my Court Service Officer(s) (CSO) prior to making any change in my residence or mailing address, any change, or disconnection of my phone number, or any change in my employment. I must also notify my Court Service Officer(s) (CSO) immediately after any law enforcement contact. (____)
18. REARRESTS: I must obey all laws, and notify my Court Service Officer(s) (CSO) of any criminal charges that are made against me, including any driving violations or minor offenses. My arrest or conviction on other charges, or my failure to report other charges, may result in termination from the Program. (____)

19. **TRUTHFUL DISCLOSURE:** Acceptance in the Program is based partly on my criminal history. I have truthfully, disclosed any previous arrests and convictions. (____)
20. **NO ALCOHOL OR CONTROLLED SUBSTANCES:** I understand that I cannot drink, possess, or otherwise ingest alcohol, nor may I associate with those who do, while I am a participant in the Drug Court Program. I also understand that I cannot use or possess marijuana, K2 or like substances, synthetic marijuana, scheduled controlled substances, over-the-counter drugs except as authorized herein, or any mind-altering substances, nor associate with those who do, while I am a participant in the Drug Court Program. (____)
21. **MEDICATIONS:** I understand that I will be required to provide frequent and random searches of my blood, breath or urine, person, possessions, vehicle or residence for controlled substances, alcohol, or any paraphernalia as a condition of my participation in the Drug Court Program. I agree that I will not take any medications, including cough, cold, and any other over-the-counter medications without prior approval from my treatment provider and my Court Service Officer(s) (CSO). I also agree to provide a complete list of my medications to my treatment provider and my Court Service Officer(s) (CSO). I also will not use or consume any food or beverage that contains poppy seeds while I am in the Drug Court Program. (____)
22. **MEDICAL NEEDS:** I, unless authorized by the Drug Court Team, will have only one doctor meeting my primary health needs. All appointments must be scheduled with that doctor or medical professional with the knowledge and permission of the Drug Court Team or my CSO, including emergent needs. (____)
23. **ALCOHOL/DRUG TREATMENT AND COUNSELING:** I will attend alcohol/drug treatment and participate in group, family, and/or individual counseling. (____)
24. **HOUSING:** I understand that stable housing is necessary for my recovery and must be approved by the Drug Court Team. I agree to comply with their recommendations and restrictions. (____)
25. **EMPLOYMENT/EDUCATION/JOB TRAINING:** I agree to maintain approved employment and/or attend any education or job training programs to which I am referred. I will maintain at least a 30-hour work-week. The 30-hour work-week does not include treatment unless it is day treatment. The 30-hour week only includes work, school, or community service hours unless it is otherwise approved by the Drug Court. (____)
26. **GAMBLING:** I will not gamble nor enter any gambling establishments where the primary source of revenue is gaming funds without the written permission of my supervising officer. (____)
27. **INCARCERATION:** I understand that I may be incarcerated as a sanction for violations of the participant agreement, and I agree to comply with the incarceration. (____)
28. **CURFEW:** I agree to abide by a curfew as determined by the Drug Court Team. The curfew will have a beginning time when I am to be home and an ending time when I may leave. During my curfew, I may be on my property, as long as I am able to hear and get to the telephone. (____)

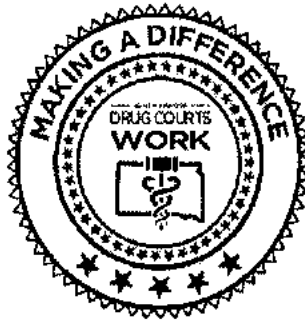
29. **SEXUAL HARASSMENT POLICY:** All participants are entitled to an atmosphere that is free from any sexual harassment. Sexual harassment is any unwanted comments, gestures, writings, physical contact, and innuendo that are sexual in nature. If I sexually harass another participant or service provider, I will be subject to a disciplinary review and could face severe consequences, including termination from the Program. (____)
30. **FRATERNIZATION:** I am not to engage in any sexual relationships with other Program participants. This type of fraternization is not conducive to a healthy treatment environment, and will not be tolerated by the Drug Court Program. (____)
31. **NO FINANCIAL DEALING:** I am prohibited from having any financial dealings with other Drug Court participants while in the Program, except with the permission of the Drug Court Judge. The term "financial dealings" shall include, but not be limited to, lending or borrowing money or property, purchasing or selling real or personal property, or working for each other, or exchange of gifts. A violation will result in sanctions for all involved participants. (____)
32. **WAIVER OF RIGHT TO REMAIN SILENT:** I give up my right to remain silent. I agree to fully and *HONESTLY* participate in all Drug Court meetings. (____)
33. **PHOTOGRAPH:** I agree to have my photograph taken for Drug Court files. (____)
34. **FREE, VOLUNTARY, KNOWING AGREEMENT:** My participation in the Program requires that I waive very important rights. I have fully discussed my rights with the Defense Attorney on the Drug Court Team before agreeing to enter into the Program. I am satisfied that I understand how the Program will affect my rights. At the time of executing this document, my thinking is clear and I am not under the influence of any substance. The decision to waive my rights and enter the Program is mine alone and made of my own free will. I expressly agree to accept and abide by all the terms and conditions of the Drug Court Treatment Program as established by the Court and the Treatment Provider. (____)
35. **NO REVOCATION OF ASSIGNMENT:** I hereby consent to this case being assigned to the Drug Court Judge for all purposes, including sanctions. (____)
36. The defendant consents to the disclosure of Drug/DUI Court application information, including a Risk/Needs Assessment and a Treatment Needs Assessment, prior to entry of a plea, for purposes of obtaining information useful for acceptance into the Drug/DUI Court Program. (____)

SIGNATURE OF DEFENDANT

DATE

SIGNATURE OF WITNESS

DATE



Drug Court Participant Manual Receipt and Acknowledgement

I, _____, acknowledge receipt of the Drug Court Participant Manual. I understand that it is my responsibility to read and comply with the policies contained in the handbook and any revisions made to it.

Participant's Printed Name: _____

Participant's Signature: _____

Date: _____

Court Services Officer Signature: _____

SOUTH DAKOTA PRESCRIPTION DRUG MONITORING PROGRAM

The South Dakota Prescription Drug Monitoring Program gathers data from dispensers who serve South Dakota residents and makes it available to prescribers and pharmacists to enable them to make better decisions when providing controlled substances to their patients. In addition, law enforcement can access this tool to reduce doctor-shopping, prescription forgery, and the diversion of prescription medications into illegitimate channels. All controlled substances in Schedules II – IV are tracked by the SD PDMP.

I, _____, having agreed to enroll and participate in the Drug Court Program, hereby acknowledge that treatment information normally is confidential under federal law. I understand that any disclosure made is bound by Part 2 of Title 42 of the Code of Federal Regulations (CFR), which governs the confidentiality of substance abuse patient (or client) records, and Part 164 of Title 45 of the CFR, which governs the confidentiality of mental and physical health records generally. I also understand that it is unlawful to violate these confidentiality requirements, but that both requirements permit me to voluntarily consent to permit disclosure of my health and substance abuse treatment information.

Therefore, I, _____ give consent to _____ (Court Services Officer and Team) to obtain my Prescription Drug Monitoring Program data from the South Dakota Pharmacy Board for the purpose of assisting the Drug Court with my case, specifically for supervision and treatment. All information obtained through the PDMP program will be kept confidential between the Drug Court Team. I understand that this consent will remain in effect and cannot be revoked by me until there has been a formal and effective termination of my involvement with the Drug Court for the case named above such as the discontinuation of all court-ordered supervision or probation upon my successful completion of the Drug Court requirements, or upon sentencing for violating the terms of my Drug Court involvement.

Signature _____

Date _____

Witness Signature _____

Date _____

APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

NO. 27790

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
v.

LEE ANN STENSTROM,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE ROBIN HOUWMAN & THE HONORABLE PATRICIA RIEPEL
Circuit Court Judges

MARK KADI	MARTY JACKLEY
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Notice of Appeal Filed March 10th, 2016.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,	*	
Plaintiff and Appellee,	*	Case #27790
v.	*	REPLY BRIEF
LEE ANN STENSTROM,	*	
Defendant and Appellant.	*	

PRELIMINARY STATEMENT

The Appellant renews factual statements and legal arguments originally presented in the Appellant's brief. Reference to the trial court's record remain the same as in the Appellant's brief.

ARGUMENT

The Appellee argues that Due Process does not require a drug court participant's counsel to attend Drug Court Team meetings upon request. Appellee Brief at 17 et seq., citing People v. Anderson, 833 N.E.2d 390 (Ill.App. 2005). Anderson, actually assists the Appellant in her argument. Anderson confirms that a drug court participant has a protected conditional liberty as would any probationer or parolee. Anderson, 833 N.E.2d at 395. In discussing the State and defendant's common interest, the Anderson court

stated "Like defendant, society had an interest in not having him dismissed from the program based on erroneous information." Id. In the present case, the Appellant voiced concerns regarding not being present to address issues that might come up during the Drug Court Team's deliberations. T4:13-14. A participant's actual legal counsel would be able to address "erroneous information" that might arise in deliberations, via the prosecutor or other team member, which might not have been stated in open court.

U.S. v. Wade, 388 U.S 218 (1967), cited by the Appellee, provides that critical stages of a proceeding occur where "certain rights might be sacrificed or lost". An incarcerated drug court participant's placement status is reviewed in meetings each week. T3:22. Each week presents an opportunity where a participant's conditional liberty might be restored via their release from custody. "Erroneous information" surfacing during team meetings might further inhibit the participant's liberty interest. These meetings are critical.

This Court found no federal constitutional right to counsel or due process deficiency when a court service officer performs a presentence investigation interview and

reports to a judge regarding the presentence investigations, in the face of allegations that the court service officer assumed the role of an inquisitor. See State v. Garreau, 2015 S.D. 36, 864 N.W.2d 771.¹ This Court reasoned that "Because the court services officer 'is not an agent of the prosecution, ... has no adversarial role in the sentencing proceedings, ... and acts as a neutral information gatherer for the judge,' the right to counsel does not attach." Garreau, 2015 S.D. at ¶23, 864 N.W.2d at 778. In the present case, the prosecutor who serves dual roles as the prosecutor of the state's case while also as a member of the Drug Court Team, falls under the Garreau distinction of being an agent of the prosecution. The prosecutor's role is adversarial in these proceedings. The right to counsel should attach at team meetings via constitutional due process and right to counsel principles, in addition to SDCL 23A-40-6.

The Appellee equates drug court team meetings with jury deliberations. Appellee Brief at 23. It suggests that "Attorneys are not allowed to go back to the jury room to make sure that the jury instructions are followed properly and to address juror questions that may come up during

¹ The defendant in Garreau did not assert rights using state law such as SDCL 26A-40-6.

deliberations." Id. The record refutes this assertion. In this Drug Court proceeding, the prosecutor who is "doing the hearing" for the State also serves on the Drug Court Team who attends the team meetings. T3:7-8. The prosecutor bringing forth the termination report in open court to terminate the Appellant from the program also goes into a "private" team meeting where the prosecutor receives access to the Drug Court's "jury". The prosecutor may then address team member "questions that may come up during deliberations." Appellee Brief at 23. In contrast, the Appellant's legal counsel is still excluded from the "jury" to perform any similar function.

Differences between the Drug Court Team and juries abound. Challenges for cause or peremptory challenges to remove individuals (such as prosecutors representing the State in the same case) from a jury panel are permitted in jury trials but not drug court. SDCL 23A-20-9; SDCL 23A-20-19. Judges do not sit with a jury during their deliberations. They instruct the jury as to how the law applies to facts which the jury determines but Judges do not participate in determining the facts of a given case.

Drug Court Teams may consider anecdotal and hearsay information brought up at prior team meetings and are not necessarily limited to "evidence and argument in the court

room." Cf. Appellee Brief at 23. Ironically, Parker's lack of knowledge of the case might have made her an ideal juror, while it required exclusion of her vote on the Drug Court Team Meeting in this case. T4:14-15. Juries are required to reach a unanimous final verdict, whereas the drug court team takes an advisory vote. SDCL 23A-26-1; Appellee's Brief at 20. Similarly, deliberations of juror members are not recorded nor may internal deliberations be admitted into evidence and subjected to appellate review later. SDCL 19-14-7.² This Drug Court directed the court reporter to record the final team meeting deliberations sua sponte. T4:14.

The State asserts that the Appellant claims that the "Drug Court Team 'investigates' allegations of misconduct". This assertion is correct. Appellee Brief at 21. It is based on the undisputed testimony of Michael Miller that the Drug Court Team investigates whether termination should occur. T3:8. Presumably, this investigation occurs by reviewing factual allegations preceding the initial termination report through information gathered and related

² Although such a practice might help decisively determine certain issues on appeal, such as whether jury instructions were actually being followed, it might undermine the State's interest in achieving true finality of judgments by encouraging adventures into collateral proceedings. See Siers v. Weber, 2014 S.D. 51, ¶30, 851 N.W.2d 731, 741 .

during pre-court staffing meetings, where each participant's case are discussed every week. T3:22; compare Appellee Brief at 21 ("the only 'investigating' done is 'whether termination from the program is warranted under the circumstances'"). The termination reports at issue list allegations of narcotics use that may be charged as a separate criminal offense. SDCL 23A-40-6, whose very text lists "investigations" and "probation", applies in this case, especially where the Appellant had been incarcerated during the scope of the proceedings. A right to an attorney is afforded to the Appellant via SDCL 23A-40-6 by its very text.

The State argues that during the final team meeting, the Drug Court found the Appellant "violated the terms and conditions of the drug court program." Appellee Brief at 24 (emphasis added). It then attempted to alter the record noting, in a footnote, that it "appears that the trial court's choice of words was incorrect." Appellee Brief at 24, n.10 (emphasis added). Despite the court transcript clearly denoting the Drug Court made a finding concerning "probation" and not the "drug court program", the Appellee invites this Court to ignore the verbatim record for convenience's sake.

The Appellee's use of the term "appears" betrays the State's argument as being entirely speculative on this point.³ The transcript demonstrates that the Drug Court stated "probation" and meant it. The Drug Court took steps to correct the situation regarding team member Parker voting without knowledge of the case when it became apparent. If it was so inclined to correct what the Appellee rationalizes as a "word choice" regarding its finding regarding a violation of probation, it could have

³ For example, it would be speculative for the Appellant to argue that use of court reporter to record the Drug Court Team's deliberations was an attempt to further any potential future argument that if error occurred via counsel exclusion, such error was harmless, structural error notwithstanding: open exposure of the deliberations would allegedly demonstrate there was nothing to see here, and an appellate court should move along. However, use of a court reporter has shown that issues were present, in this case. Appellant's Brief at 30 et seq.

The Appellant has been unable to find within the black letters of the Best Practice Standards or its comments that such a practice is authorized or encouraged. Assuming, arguendo, ordering a court reporter to transcribe the Team's deliberations is a legitimate judicial power, it invites parties to request the Drug Court to use such power in future cases. The decision to use or not use such power would be later subject to some standard of review. In that the Several States may grant greater rights to its citizens than the federal government, the availability of such power in post-conviction proceedings may raise constitutional due process issues supporting its availability in proceedings of more importance, such as pre-conviction jury deliberations. While this Court might not accept the existence of such a right, numerous attempts to establish such rights may nevertheless be attempted. The presence of a participant's own attorney while the acting prosecutor remains in the Team Meeting avoids all such issues.

reacted similarly. In addition, the reactions of the Drug Court Team, or the lack thereof, demonstrated its tacit acceptance of signs and portents to come.

The Appellee presents a general copy of a Drug Court Manual which participants usually acknowledge they received and reviewed. Appellee Brief at 16. It concedes any Manual receipt the Appellant signed was not submitted into evidence. Appellee Brief at 16, n.9. The State was represented by counsel at the proceedings below. No effort was made to introduce such documents below.⁴ A waiver of rights issue was not raised by the State, inviting the Appellant to then respond with legal argument or evidence regarding whether a voluntary waiver initially occurred or was subsequently revoked. Issues not presented before the lower court are waived on appeal. See In re M.S., 2014 S.D. 17, ¶17 n.4, 845 N.W.2d 366, 371 n.4. Accordingly, the State has waived any alleged Appellant waiver of rights on this appeal.⁵

⁴ Appellant's counsel had stipulated to admission of numerous State exhibits during the proceedings below.

⁵ Ironically, the Best Practice Standards II commentary advises that the majority of jurisdictions permit withdrawal of drug court waivers citing applicable caselaw:

"Although no case has addressed this issue squarely in the context of Drug Court, the weight of legal authority suggests defendants and probationers are entitled to

The State's characterization regarding the relationship of the black letter rules of the Best Practice Standards and their respective comments almost suggests they exist in conflict with each other. Appellee Brief at 22. Drug Court Teams are described in the rules but guidance via comments as to what happens at the Team's meetings and who may attend them must inexplicably be shunned. Appellee Brief at 22. Commentary which exists to provide the Drug Court with further "guidance" and "clarity" as what each rule encompasses should be reviewed rather than discarded when inconvenient. See Appellee Brief at 13.

CONCLUSION

The Appellee cited nothing in the record *in this case* nor any theoretical example as to how the presence of a participant's legal counsel in the Drug Court Team

withdraw such waivers and reassert their right to counsel at critical stages in the proceedings such as when they face a potential jail sanction or probation revocation (McKaskle v. Wiggins, 1984; Menefield v. Borg, 1989; Robinson v. Ignacio, 2004; State v. Pitts, 2014). Regardless of the legality of such waivers, defense representation should be encouraged rather than discouraged in Drug Courts because doing so is associated with significantly better outcomes and ensures participants' due process rights are protected (Hora & Stalcup, 2008; NADCP, 2009)." Standards II, p. 40.

Meeting(s) undermines any Drug Court function. General concerns about confidentiality proved to be pre-textual in this case as the court ordered a transcript of team deliberations for the all concerned to review later. If confidential concerns actually existed in any given case, protective orders can be utilized while still allowing a participant's counsel to advocate on their client's behalf, and to hold at bay any "erroneous information" which might arise at a Team Meeting.

Allowing attendance of legal counsel at a Team Meeting detracts nothing from the Drug Court or its functions. Nor does it diminish the efforts, ideas and accomplishments of those who advanced the merits of Drug Court at its inception. The presence of counsel would merely add to the collective knowledge base of the Drug Court Team by adding a new perspective to Drug Court Team discussions. It also counter balances any actual or theoretical effects of the presence of the prosecutor on the Team who elected to pursue termination of the participant in open court. The procedural and substantive facts of this case require reversal.

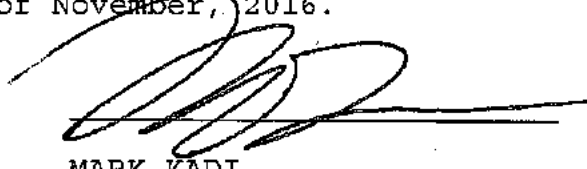
REQUEST FOR ORAL ARGUMENT

The Appellant requests 20 minutes for oral argument.

CERTIFICATE OF COMPLIANCE

This brief meets applicable page and word limitations required by this Court.

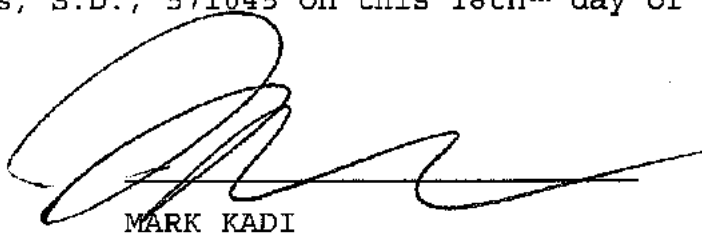
Dated this 18th day of November, 2016.



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Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Appellant's Reply Brief in the matter of State v. Stenstrom was served by email, upon Kelly Marnette, Assistant Attorney General, 1320 E. Hwy. #14, Ste. 1, Pierre, S.D. 57501, and Aaron McGowan, Minnehaha County States Attorney, c/o LeAnne Harries, 415 N. Dakota Avenue, Sioux Falls, S.D., 571045 on this 18thth day of November, 2016.



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