

MINUTES

Offenses Regarding Controlled Substances Interim Study



Representative Steven Haugaard, Chair
Senator Craig Kennedy, Vice Chair

**First meeting, 2019 Interim
Monday
August 19, 2019**

**Room 414
State Capitol
Pierre, South Dakota**

The first meeting of the Offenses Regarding Controlled Substances Interim Study Committee was called to order by Representative Steven Haugaard (Chair), at 10:04 a.m. CDT, on August 19, 2019, in Room 414 at the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members answering the roll call: Representatives Linda Duba, Dayle Hammock, and Steven Haugaard (Chair); Senators Craig Kennedy (Vice Chair), Jeff Partridge, and Jim Stalzer; and public members Mr. Gary Drewes, Ms. Laurie Gill, Mr. Gary Jaeger, Mr. Mike Leidholt, Mr. Jason Ravnsborg, Ms. Patricia Riepel, Mr. Greg Sattizahn, and Mr. Kevin Thom. Mr. Aaron McGowan was excused. Staff members present were David Ortbahn, Chief Research and Legal Analyst, and Kelly Thompson, Senior Legislative Secretary.

All material distributed at the meeting is attached to the original minutes on file at the Legislative Research Council (LRC). For continuity, these minutes are not necessarily in chronological order. This meeting was recorded by South Dakota Public Broadcasting. The archived recording is available at the LRC website at <http://sdlegislature.gov> under "Interim."

Committee Member Introductions

Representative Steven Haugaard, Chair, asked each member to introduce themselves and explain what experience they bring to the committee. Among the members are state agency heads, a Drug Court judge, current and former law enforcement officers, attorneys, county officials, and legislators serving on appropriations, judiciary, and mental health committees. At the conclusion of today's meeting, members will be asked to share their goals and focus for the committee.

Drug Related Convictions Data

Mr. Greg Sattizahn, State Court Administrator, Unified Judicial System (UJS), provided statistics on drug related convictions from 2009 to 2019 ([Document 1](#)).

In the past 10 years, the number of convictions for possession of a controlled substance in South Dakota have increased 125 percent. The highest number of convictions in a single year was 2,144 in Fiscal Year 2018. "Possession" covers a variety of circumstances including trace residue in a pipe, pounds of controlled substances in a vehicle, and drugs carried within a person's body. The majority of drug convictions involve methamphetamine; opioids account for less than 5 percent of convictions. Minnehaha County has the highest number of convictions for possession of a controlled substance.

Data prior to 2014 regarding possession of a controlled substance includes convictions for ingesting a controlled substance. Ingestion of a controlled substance was created as a separate law with the passage of Senate Bill 70 by the 2013 Legislature. From 2014 to 2019, convictions for ingestion of a controlled substance in South Dakota increased 109 percent. The highest number of such convictions in a single year was 991 in Fiscal Year 2018. Pennington County has the highest number of convictions for ingestion of a controlled substance.

Representative Haugaard asked if those convicted of possession could also have been charged with ingestion of a controlled substance. Mr. Sattizahn confirmed the cases could involve multiple charges. The level of offense is the same for both charges.

Ms. Riepel inquired if statistics were available comparing the number of residue cases to cases involving quantifiable amounts of controlled substances. Mr. Sattizahn said the UJS system does not capture that specific data but it could be found by reviewing the police reports. When Representative Haugaard wondered if county data could be used to determine the number of residue cases, Mr. Sattizahn responded it may be possible to work with state's attorneys and law enforcement to access that information.

Representative Hammock asked if UJS could identify what drug the charges involved. Mr. Sattizahn replied the database has that capability for cases going back to 2012.

Representative Duba and Senator Partridge wondered how the accuracy of the data could be improved. According to Mr. Sattizahn, if data were reviewed on the offender level instead of a case level, it would be possible to use unique identifiers such as name and date of birth to identify how many people were convicted for each type of individual charge.

Mr. Sattizahn reported on the numbers of convictions for manufacturing or distributing a controlled substance from 2009 to 2019. Enhanced penalties were added in 2014. The number of convictions has remained consistent over the past 10 years; the highest number in a single year was 320 in Fiscal Year 2015. The majority of convictions on these charges occur in Minnehaha County.

Representative Haugaard asked if drug manufacturing in South Dakota has been curtailed because drugs are cheaper to buy from outside of the state. Mr. Sattizahn agreed, saying drugs are being trafficked into the state from across the southern border. Mr. Ravnsborg noted the latest crime report showed seven drug labs in South Dakota.

Representative Hammock inquired about statistics for federal convictions. Mr. Sattizahn said that while UJS does not have access to that federal data, it may be possible to work with federal officials to get the numbers. Mr. Ravnsborg added that the agency may be able to contact federal U.S. attorneys for information on cases the two jurisdictions have partnered on.

Data was presented on the number of "other" controlled substance convictions in South Dakota for the past 10 years. The most common conviction in this category is for misrepresentation to obtain a controlled substance. According to Mr. Sattizahn, the number of convictions for the manufacture and distribution of a controlled substance has remained steady since 2009 with a peak of 46 convictions in Fiscal Year 2013.

In fiscal year 2019, there were 93 convictions in cases where ingestion of a controlled substance was not the highest charged offense in the case but the defendant ultimately pled guilty to ingestion while higher offenses were dismissed. Of that number, 13 convictions each occurred in Brookings and Walworth Counties. For those who were convicted, 58 received probation, 25 were sentenced to the state penitentiary, and 10 were sentenced to something other than probation or prison, typically a county jail sentence or fine. The data presented did not include charging decisions that were made before the case was filed with the court.

Representative Haugaard commented it would be helpful to know if in residue cases, a higher offense besides ingestion was charged. He also requested a breakdown of all the offenses defendants were initially charged with prior to agreeing to plead guilty to the ingestion charge.

In 2014 as part of Senate Bill 70, the Honest Opportunity Probation with Enforcement (HOPE) program was implemented. The program is geared towards individuals who have had problems with probation in the past, for example, failing drug tests and missing appointments. Mr. Sattizahn said in the past fiscal year, 226 people have gone through the program. Fifty-seven participants were successful, 42 were arrested for subsequent crimes, 15 were transferred to Drug Court, and the rest are currently awaiting their final outcome. The primary resistance to the HOPE program has been the heavy lift it creates for law enforcement, higher usage of local jails, and the program's intensive reliance on court services and probation officers.

Representative Hammock wondered if the statistics included tribal numbers. Mr. Sattizahn replied while there could be tribal members within those categories, the numbers were compiled only through state courts.

Ms. Gill asked about the successful completion rates for the program and feedback from treatment providers. Mr. Sattizahn responded that treatment providers have been supportive because they know there is a responsive probation officer participating in the targeted intervention efforts.

Mr. Jaeger inquired if any workforce data was available on HOPE program participants. Mr. Sattizahn said he will look into what statistics are available through Chuck Frieberg who oversees the program for UJS.

Mr. Ravensborg asked about trends by county or geographical area. According to Mr. Sattizahn, the program is used most extensively by rural counties who do not have access to Drug Courts.

South Dakota Problem Solving Courts

Ms. Patricia Riepel, Drug Court Judge, spoke about her experience presiding over Drug Courts in South Dakota ([Document 2](#)). The goal of a Drug Court is to stop the revolving door of a person offending, going through the court system, being sentenced to prison, serving their time, and then re-offending after their release.

While motivation to change is internal for most people, it is external for drug addicts. To teach them how to change, it is necessary to provide training, knowledge, and treatment. Offenders make the choice to participate in Drug Court or go to prison.

Drug Courts rely on the collaboration of experts in the field including judges, treatment providers, alcohol and drug counselors, state's attorneys, public defenders, court services officers, and mental health professionals.

Drug Courts and traditional processing both involve a treatment needs assessment, development of a treatment plan, and specified levels of care. In addition to the care levels provided during traditional processing, Drug Courts also provide preparatory group for community support meetings and specialized relapse prevention programs.

Other problem solving courts in South Dakota include DUI Court, Veterans Court, and Mental Health Court.

Ms. Riepel described a typical day as a Drug Court participant:

- Attend treatment;
- Report for drug and alcohol testing;
- Attend community support groups;
- Parent kids (for those participants who have children);
- Gain and maintain employment;
- Attend weekly status hearings;
- Change people, places, and things (disassociate themselves from people and places that encourage them to do drugs); and
- Participate in life (focus on moving forward to sobriety).

The most difficult step for most participants is changing people, places, and things. This may involve finding a new place to live, new friends, and cutting themselves off from family members who contribute to their addiction.

From Fiscal Year 2012 to Fiscal Year 2019, 856 people have participated in Drug Courts in South Dakota with 304 people graduating from the program. The majority of participants had problems with methamphetamine; opioids and marijuana were other drugs of choice. Twenty-eight percent of Drug Court participants were homeless when they entered the program with 7 percent homeless upon exit. Caucasians represented 71 percent of participants with 24 percent Native American.

DUI Courts served 367 people during the same time period with 187 people completing the program. Sixty-six percent of participants were Caucasian and 28 percent Native American.

Senator Kennedy asked about eligibility requirements for Drug Court. Ms. Riepel said the individual must be high risk with high needs based on their treatment needs assessment, be at least 18 years old, have been convicted of a drug-related charge that does not involve drug distribution, and be a non-violent and non-sex offender.

Representative Hammock inquired about the cost to successfully get one person through the program. Ms. Riepel responded that information would be available from UJS, and she understood the importance for legislators to know where the funding is coming from and how it is being used.

Representative Duba asked if data includes the impact of the situation on the offender's family. Ms. Riepel clarified the statistics are strictly related to the offender only.

Mr. Sattizahn commented that the capacity exists to take more people into the problem solving court programs, and each court differs in what they are staffed for and how many participants they can handle.

Representative Haugaard said treatment programs need to focus on changing the lives of the offenders, many of whom have never had what could be considered a normal life. While a statewide direction plan does not exist, such a comprehensive criminal justice plan is needed that covers restraint, retribution, and rehabilitation. It should consider what is the best end result for the individual before determining where funding will come from to provide it.

Public Testimony Regarding the Committee's Scope of Study

Mr. Eric Whitcher, Public Defender, Pennington County, told committee members that because South Dakota's drug statutes are so different from other states, the state has not only a drug problem but also a law problem. Some cases at the felony level in South Dakota would be misdemeanor level cases in states like Iowa, Nebraska, and Wyoming. High levels of felony cases mean heavy caseloads for attorneys and high costs for court systems. County law enforcement and jails are burdened with repeat offenders who eventually reach the level of offense that results in a prison sentence.

Mr. Whitcher said the state should consider an enabling statute for "street level diversion", a practice in which a law enforcement officer at the time of arrest offers the drug offender the opportunity to go immediately to detox, be assessed, and start treatment or go to jail. He also suggested the felony ingestion statute be repealed and that South Dakota model Nebraska's statute on quantifiable amounts as opposed to trace amounts of controlled substances.

Representative Hammock noted that in the case of street level diversion, law enforcement officers may not always have the level of experience to make such a determination. Mr. Whitcher replied localized rules could be put in place to assist them.

Senator Partridge commented that officers in larger cities may be able to identify some of the offenders because of frequent arrests but that would not be the case in rural areas. Mr. Whitcher agreed.

Mr. Thom expressed concern over the concept of street level diversion, saying it would put a lot of responsibility on the officers and would be problematic during situations like the Sturgis Motorcycle Rally that bring high numbers of unknown people into the state.

Representative Haugaard said there may be differences in how counties applied such laws and statewide uniformity in their application would be necessary for the program to work.

Mr. Leidholt recalled that during his years as a rural county sheriff, taking an offender to "detox" meant taking them to the county jail, except for Minnehaha and Pennington Counties which have more resources. Capacity issues exist with treatment providers, too, meaning people may not be able to go into

treatment immediately. Mr. Witcher admitted there are challenges to street level diversion strategies but some jurisdictions have overcome them.

Senator Kennedy asked if any of the surrounding states have a separate ingestion statute. Mr. Witcher responded it was his understanding that only South Dakota has an ingestion statute that considers it a felony offense.

Mr. Sattizahn remarked the state of Colorado made ingestion of a controlled substance a felony but Colorado's interpretation of the law should be examined; clarification is needed to determine if South Dakota is the only state to interpret and enforce the law in the manner in which it does. He also noted that if ingestion is a misdemeanor offense, it would not prompt the offender to pursue alternatives such as Drug Court or HOPE probation the way a felony offense would. Mr. Witcher countered that outside of Drug Courts, the state is not doing a good job of helping people become clean and sober during the normal probation process.

Mr. Ravensborg asked if changes in state law would make possession of heroin, cocaine, and fentanyl misdemeanor offenses in some cases. Mr. Witcher responded yes, for ingestion only, and it may be necessary to redefine what constitutes a controlled substance.

Ms. Riepel wondered if the number of charges against an individual would increase such as if the person did not appear in court on the ingestion charge and subsequently picked up an additional charge of failure to appear. Mr. Witcher said such incidents are commonly worked out in plea agreements.

Mr. Sattizahn asked if dropping the level of offense from a felony to a misdemeanor would hamper law enforcement's ability to get further information from drug offenders about drug dealers and operations. Mr. Witcher replied that the same plea agreements that are applicable to felony cases could be applied to misdemeanor cases.

Senator Partridge inquired about what role access to technology plays in plea agreements. Mr. Thom answered that when a person is arrested on a drug charge, law enforcement has access to their cell phone and computer which can sometimes provide information on drug dealers. In order to use that information to obtain a conviction for a dealer, you need the offender's cooperation. Representative Haugaard commented that most low level drug users do not have enough information about drug operations to be useful to law enforcement.

Mr. Ravensborg said the amount of cooperation law enforcement has received has declined since the passage of Senate Bill 70 because there is no benefit for a person to cooperate with authorities when they already know what kind of probation they are going to get. He asked Mr. Witcher if he was asking for a policy change or a statute change to allow for street level diversion. Mr. Witcher offered to provide members with a copy of an Illinois law that illustrates what he is proposing for South Dakota. Senator Partridge suggested a street level diversion statute could be permissible so a local jurisdiction could decide whether to offer it. Representative Haugaard and Mr. Witcher believed that could result in inconsistencies among jurisdictions in how the law is applied.

Ms. Libby Skarin, Policy Director, ACLU of South Dakota, then addressed the group, thanking them for tackling the issue of how controlled substance offenses are handled. Her organization has partnered with the Urban Institute to compile data that may be helpful to the discussion. She offered to make the information available if the committee wanted it.

Committee Discussion

Regarding Drug Courts, the committee determined that while they are jurisdictional, the basic entry requirements and handbooks are applied statewide as is the funding structure. Individual operation is based on the resources available in that geographic area.

Mr. Leidholt and Ms. Riepel inquired how the state could better encourage people to participate in problem solving courts and use up currently unused capacity. Better buy-in is needed from state's attorneys, public defenders, and defense attorneys and overall, increased education about the program would be beneficial.

Mr. Ravensborg expressed interest in statistics on the number of court services officers in South Dakota and whether there are enough to handle probationary duties. Mr. Sattizahn responded that UJS is in the process of compiling those numbers. Representative Haugaard wondered if it were not possible to hire a fully trained court services officer, if staff could be hired to assist those already working in the system.

Representative Haugaard asked committee members for their initial goals for the committee, saying that the diversity of its membership ensures different perspectives that can be focused on the same final goal.

Goals offered included:

- Development of pilot programs to define processes and infrastructure needs;
- Review and implementation of treatment programs for offenders;
- Enforcement tools to dissuade offenders from "playing" the legal system;
- Educational component for teenagers on the dangers of drug addiction to deter them from using drugs and ending up in the criminal justice system;
- Finding alternate funding sources for counties who currently have to use their own budgets to support costs relating to law enforcement and services for drug offenders;
- Identification of co-occurring issues with mental health and drug addiction; and
- Community engagement to battle drug addiction epidemics and the resulting impact on communities.

Representative Haugaard said all of these goals involve balancing the competing interests – what is best for the drug addict and offender, what is most effective for law enforcement and the court system, and how to manage the impact on local governments and citizens. He acknowledged that the change will not happen instantly and will require years of commitment to be effective.

Staff Directives

Mr. David Ortbahn, Chief Research and Legal Analyst, LRC, listed the information he will provide to members which includes a link to the Drug Court Program Evaluation and information on ingestion and possession laws from other states. He will also pursue presentations from Secretary Gill (Department of Social Services) on treatment options available in the state, an update from the Leverage Telehealth and Telemedicine Task Force, resources being used by Pennington County on community collaboration, and budget estimates on specific programs (Drug Court, HOPE probation, etc.) for the committee's remaining meetings.

Next Steps

Representative Haugaard advised that the committee will hold three meetings total. The second meeting will be informational and include presentations while the third meeting will be used for recommendations and proposed legislation. The next meeting of the Offenses Regarding Controlled Substances Interim Study Committee is September 23, 2019.

Adjournment

Mr. Ravensborg moved, seconded by Representative Hammock, that the meeting be adjourned. Motion prevailed on a unanimous voice vote.

Chair Haugaard adjourned the meeting at 2:48 p.m.