

MINUTES

Offenses Regarding Controlled Substances Interim Study



Representative Steven Haugaard, Chair
Senator Craig Kennedy, Vice Chair

**Second meeting, 2019 Interim
Monday
September 23, 2019**

**Room 362
State Capitol
Pierre, South Dakota**

The second meeting of the Offenses Regarding Controlled Substances Interim Study Committee was called to order by Representative Steven Haugaard (Chair), at 10:00 a.m. CDT, on September 23, 2019, in Room 362 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. Aaron McGowan, Mr. Jason Ravnsborg, Ms. Patricia Riepel, Mr. Greg Sattizahn, and Mr. Kevin Thom. Staff members present were David Ortbahn, Chief Research and Legal Analyst, and Cindy Tryon, 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."

Approval of Minutes

Senator Partridge moved, seconded by Senator Stalzer, that the August 19, 2019, meeting minutes be approved. Motion prevailed on a unanimous roll call vote.

Review of Other States' Laws Regarding the Possession or Ingestion of Drugs

Mr. Matt Frame, Research Analyst, LRC, provided information regarding simple possession and ingestion statutes in other states ([Document 1](#), [Document 2](#)).

There are six general types of simple possession statutes governing offenses for possession of illegal controlled substances. **Traditional** statutes apportion penalties based on the type and weight/quantity of the drug. **Tiered** statutes create different degrees of offenses based on the seriousness of the offense. **Simplified Felony** statutes maintain a low-level blanket felony for all weights and types of controlled substances. **Simplified Misdemeanor** statutes create a high-level blanket misdemeanor for all weights and types of controlled substances. **Threshold** statutes provide bright-line rules for determining the crime charged and the penalty received. **Drug Felony and Misdemeanor** statutes create drug felonies and misdemeanors independent of the normal penalty structure. South Dakota uses Simplified Felony statutes, which are the most common type.

Many states base their penalties on the seriousness of the drug as determined by a drug schedule ([Document 3](#)). There are five drug schedules based on accepted medical use of the drug and the potential for abuse. Drugs with the highest potential for abuse (e.g. Heroin, LSD, Marijuana, Ecstasy) appear on Schedule I while drugs with the lowest potential for abuse (e.g. cough medicine with low levels of codeine, diarrhea and constipation relievers, and nerve pain medications) are listed under Schedule V. Some states have created a sixth schedule for marijuana or have exempted marijuana from Schedule I and created a separate criminal penalty for possession. South Dakota adopted the drug schedule system in 1970 with the exception of combining Schedules IV and V. Colorado developed a specific felonies and misdemeanors schedule under which an offender who completes drug abuse treatment can have the level of their offense lowered on their record.

Mr. Frame presented 2017 statistics on arrests in 13 states including South Dakota. Of the 63,625 arrests in South Dakota, 8,900 were for drug-related offenses, with the majority being for possession. While California had the highest overall number of drug-related arrests at 212,025, South Dakota had the highest percentage of arrests relative to population. In 2019, nearly 33 percent of South Dakota inmates were incarcerated for drug offenses. Despite the high rate of drug arrests, the state ranks 48th in the number of deaths by drug overdose.

A review of drug ingestion statutes among states showed the offense is usually classed as a misdemeanor; some states also consider it as public intoxication. In South Dakota, unauthorized ingestion of a controlled drug or substance is a Class 5 or 6 felony while ingesting a substance (other than alcohol) for the purpose of becoming intoxicated is a Class 1 misdemeanor.

Mr. Sattizahn asked if South Dakota's high arrest rate could be tied to public safety or recidivism rates. Mr. Frame said he found no correlations.

Senator Partridge inquired if there was a particular state whose drug statutes South Dakota should consider modeling. Mr. Frame responded it would depend on the direction the committee wants to take.

Regarding whether statutes should look at the strength of the drug involved, Representative Hammock commented that the higher the quantity of certain ingredients, the quicker the user can become addicted and the more intense the addiction can become. While there may be fewer users of a particular drug, the drug itself could be of a higher quality.

Representative Haugaard asked if courts still tested for the purity of a substance as it relates to quality of a drug. **Mr. Mark Vargo, State's Attorney, Pennington County**, said the federal government does test for potency but he was not aware of many states that do that. He was unsure if the state laboratory has that capability. Mr. McGowan (committee member and State's Attorney for Minnehaha County) added that prosecutors sometimes take items that were field tested and then test them further to confirm the positive result needed to proceed with charging the drug offense.

Mr. Thom noted the information presented did not include tribal communities. He said making some offenses misdemeanors does not make the problem go away and it may be necessary to force people into drug treatment in some cases. Ms. Riepel agreed that whatever policy is instituted, it needs to include an evaluation for treatment.

Mr. McGowan inquired if South Dakota's drug arrest rate combined arrests for marijuana and scheduled drugs and whether states with legalized marijuana would have fewer arrests. Mr. Frame said yes, in both cases.

Committee members then scrutinized Nebraska's drug statutes. Representative Haugaard commented that while Nebraska has the same number of people booked through their system as South Dakota, they issue citations rather than completing an arrest. Mr. McGowan replied that city attorneys prosecute misdemeanors and state's attorneys prosecute felonies so there would be more citations with the misdemeanors.

Representative Haugaard wondered then what South Dakota is doing right and what could be improved. Mr. McGowan said the state is doing a lot of things right including drug courts, diversion programs with treatment, suspended impositions of sentence, and presumptive probations. He cited the methamphetamine crisis in South Dakota as a major drug issue for the state and stressed that treatment needs to be a part of the solution.

Mr. Ravensborg asked what other states are doing in terms of rehabilitation for drug offenders. Mr. Frame offered to further research that area for the committee.

Mr. Leidholt provided information on South Dakota's corrections system, saying there are about 3,100 people on parole, not including youth or those on probation. Parole provides a good opportunity to positively impact outcomes if there were enough staff available to properly case manage parolees. Rehabilitating offenders while they are incarcerated can be difficult because sentences are often too short to allow time for effective treatment.

Mr. Sattizahn said the Unified Judicial System will be asking for seven court services officers in the upcoming budget but acknowledged the number of new staff is just a starting point for what is needed. Senator Kennedy asked if it would be possible to estimate the number of staff needed if individuals who are now being incarcerated in the state penitentiary were instead put on misdemeanor probation. Mr. Sattizahn replied that such an estimate could be made once the size of the probation pool was identified.

Unified Judicial System Response to Committee Questions from August 19, 2019 Meeting

Mr. Greg Sattizahn, State Court Administrator, Unified Judicial System (UJS), followed up on information requested by the committee at its August meeting ([Document 4](#)).

In Fiscal Year 2019, there were 2,104 cases of possession of a controlled substance involving 1,843 individuals and 939 cases of ingestion of a controlled substance involving 877 individuals. There were 156 individuals having both possession and ingestion convictions on a case. The trends have remained consistent since 2009.

There were 194 cases where ingestion was the highest charged offense and the offender was sent to the state penitentiary without probation. That same fiscal year, in 93 cases statewide, ingestion of a controlled

substance was not the highest charged offense in the case but the individual ultimately pled guilty to that charge and the higher offense was dismissed ([Document 5](#)). Twenty-five of those pleas resulted in a prison sentence with 58 resulting in probation. From January 1, 2014, to June 30, 2019, 363 people took part in the Honest Opportunity with Enforcement (HOPE) program with 134 of them successfully completing the probation. Forty-one were revoked to the state penitentiary. As of September 10, 2019, 37 percent of HOPE probationers were employed.

Mr. Paul Bachand, Executive Director, South Dakota State's Attorneys Association, provided criminal histories on several of the 25 individuals sentenced to prison for ingestion of a controlled substance.

Mr. Vargo discussed the use of trace or residual amount information in determining the level of drug related charges. While these terms do not have specific definitions, most states deem a "quantifiable amount" as an amount sufficient enough for testing purposes. Of the 48 cases charged in the last nine months, 24 involved clearly measurable amounts of controlled substances while 12 of the remaining 24 cases involved more than a trace amount.

According to Mr. Vargo, three of the 48 cases went to the Attorney General. Of the 45 remaining cases, many of the defendants had committed other offenses resulting in 31 new controlled substance cases with 16 in bench warrant status. Methamphetamine use was a factor in half of the violent crimes committed in South Dakota. He stressed the importance of looking at the individual's behavior, regardless of the amount of controlled substance their arrest involved.

Ms. Noreen Plumage, Director, Problem Solving Courts, reported there are 19 problem-solving courts statewide with a Fiscal Year 2020 total operating budget of \$4.6 million. The courts operate with 37 full-time employees along with community partners, state's attorneys, contracted judges, and law enforcement. Ms. Riepel, who serves as a Drug Court Judge, noted that the stipend judges and attorneys receive is not comparable to the time they actually serve on the program but most people are involved because they believe the program is worth supporting.

In Fiscal Year 2019, 594 clients were served through the Drug Court program with a cost per client of \$8,015. Ms. Plumage said treatment is effective if people have access to it. Drug Court participants have to go to treatment to successfully graduate from the program and those that do are not seen in the courts again.

Staffing is a challenge for Problem Solving Courts. Volunteers can be overwhelmed by the task of micromanaging the lives of the participants and salaried employees are often pulled in many different directions to provide necessary resources. Committee members involved with the program said while additional staff have been added in some areas, more are needed.

Drug Treatment Options Currently Available in South Dakota

Ms. Laurie Gill, Secretary, and **Ms. Amy Iversen-Pollreisz, Deputy Secretary, Department of Social Services**, reviewed the publicly funded substance use disorder treatment services available in the state ([Document 6](#)).

Publicly funded services offered through the Division of Behavioral Health include prevention services and substance use disorder treatment services. About 11,000 youth and adults with substance use disorders receive treatment services through 34 contracted substance use disorder providers. Inpatient and outpatient services are offered as well as residential and detoxification treatment services. The \$33 million budget is funded through state and federal funds. To access services, the individual meets with a behavioral health provider for an assessment to determine diagnosis and treatment needs and, based on that assessment, treatment services are recommended.

In Fiscal Year 2019, 6,971 adults and 552 adolescents received outpatient services and 582 adults and 237 youth received inpatient services. Eight-hundred-fifty-three clients were served in low intensity residential services. Seventy-two percent were successfully discharged from services and those who were, experienced a 63 percent increase in their ability to control their substance use from the time of admission to the time of discharge.

Representative Duba asked if the timeframe for treatment services is the same for all clients. Ms. Iversen-Pollreis said it varies from individual to individual as substance abuse treatment is not a one-size-fits-all solution. Some clients are able to go into outpatient treatment directly and succeed while others make multiple attempts before being successful.

Representative Haugaard inquired about the type of support individuals receive after discharge. Ms. Iversen-Pollreis explained there are continuing supports including follow-up and supervision, and peer support services are being developed.

Senator Partridge asked if individuals with private insurance are included in the client service numbers. Ms. Iversen-Pollreis noted they are not.

Special Population Services include Intensive Methamphetamine Treatment and Justice Involved and Correctional Treatment Services.

Ms. Iversen-Pollreis told the committee methamphetamine use in South Dakota was declared an emergency in March of 2017, and the number of intensive methamphetamine treatment providers in the state was increased in response to that situation. Intensive services, which can take up to 18 months in some cases, are offered in Mitchell, Rapid City, Rosebud, and Sioux Falls. There were 250 clients served through those locations in Fiscal Year 2019. Of those served, their ability to control their substance use increased from 28 percent at admission to 100 percent at discharge, based on the perception of the client.

Justice referred clients are those who receive treatment services in their communities rather than being incarcerated. Two programs are utilized for this purpose: Cognitive Behavioral Interventions for Substance Abuse (CBISA) and Moral Reconciliation Therapy (MRT). CBISA emphasizes skill building activities to develop cognitive, social, emotional, and coping skills. MRT addresses criminal thinking patterns and assists offenders in making better decisions. Telehealth options are offered in rural or remote areas. Fiscal Year 2019 statistics show 2,680 clients were served through CBISA (164 via telehealth) and 1,200 were served through MRT (75 via telehealth).

Mr. McGowan asked for an actual recidivism rate for those receiving justice referred services. Ms. Iversen-Pollreisz said she could get the information from UJS.

Correctional treatment services are provided to incarcerated individuals. All persons coming into the correctional system undergo an integrated assessment at the time of admission and a treatment plan is developed. Individual and group therapy and psychiatric services are available for inmates with mental health disorders. Substance use disorder treatment services include CBISA, MRT, and Aftercare Services. Once offenders are released back into the community, DSS staff link them to ongoing treatment which may include medication management, psychiatric services, and ongoing mental health and/or substance use disorder services.

Mr. Jaeger asked if a 24/7 hotline was available for private citizens needing services. Ms. Iversen-Pollreisz replied that community providers publish their contact information and the 211 Helpline Center is available for resource information. Responding to Representative Haugaard on whether service through the Helpline Center had improved, Ms. Iversen-Pollreisz reported her agency is working with them to add more information about available treatment systems and an 1-800 opioid number is being developed that will work for any substance abuse disorder.

Mr. Ravensborg and Mr. McGowan inquired about bed capacity and costs. Ms. Iversen-Pollreisz said there are 67 publicly funded beds with privately funded beds also available. Costs for intensive methamphetamine treatment services were \$2.3 million.

Ms. Riepel asked what treatment programs exist for the Native American population in South Dakota, referencing the White Bison program based in Colorado. Ms. Iversen-Pollreisz responded contracts are in place with tribal providers and work is underway on cultural competency programs.

Senator Partridge wondered what funding options exist for treatment programs. Ms. Iversen-Pollreisz clarified that General Fund dollars and Medicaid are funding sources and the South Dakota Legislature has supported the need for programs by increasing funding when requested. DSS also pursues federal funding when applicable although many of the federal dollars currently available are for opioid treatment programs and cannot be used for methamphetamine treatment.

Representative Hammock asked if protocols are in place to handle suicidal clients. Ms. Iversen-Pollreisz noted such protocols exist more on the local level with suicide prevention service providers working closely with law enforcement on such cases.

Ms. Riepel and Representative Haugaard requested the methamphetamine treatment program numbers be broken down further to indicate ethnicity, age, and geographic location. Ms. Iversen-Pollreisz agreed that could be provided.

Care Campus and Jail Addiction Treatment Services

Mr. Kevin Thom, Sheriff, Pennington County, discussed the Care Campus Addiction Treatment facility that has been operating in Rapid City since 2018 ([Document 7](#)).

The county facility has 160 total beds with 8 beds available for crisis care. A mental health provider is available 24/7. On average, 150 people are enrolled at any given time in the facility's outpatient services.

From September 26, 2018, to August 31, 2019, there were 22,389 total admissions to Care Campus. Sixty-eight percent of admissions were for the Safe Solutions program and 64 percent were self-referrals. The majority of participants (85 percent) are Native American and male (77 percent). During that time period, law enforcement diverted 1,050 individuals to Care Campus.

Mr. Thom also provided information on Project Recovery which provides medication-assisted treatment in Rapid City for counseling groups, Cornerstone Rescue Mission, Care Campus, the Pennington County Jail, and the Addiction Recovery Center, as well as in Pine Ridge. Access is available five days a week and the services are free for anyone who meets the financial hardship criteria set by the Division of Behavioral Health.

According to Mr. Thom, between 90 and 95 percent of the admits at the Pennington County Jail are due to drugs or alcohol. Pennington County posts felony drug arrest information on a weekly basis to raise awareness about the methamphetamine epidemic and provide information on how to get treatment and how to report a crime. While jails should not be used as treatment facilities, they can play a role in providing treatment to those who need it.

Senator Partridge asked if there are any difficulties in working with multiple agencies. Mr. Thom noted that Pennington County has always had strong working connections between agencies, and it is important to have that level of collaboration to make the programs work. He said good communication among a network of people on the street has helped to build interest in the Care Campus; they are clear in their message that the facility is not a "flophouse" and policy decisions are being made as to how often a person can be admitted and for how long.

Senator Kennedy inquired if the people who self-admit run the risk of being charged with a crime. Mr. Thom replied the goal is not to criminalize people who are seeking treatment. There is an amnesty box outside the facility where people can dispose of items before entering.

Update on Activities of the Leverage Telehealth and Telemedicine Task Force

Representative Linda Duba, member, Leverage Telehealth and Telemedicine Task Force, updated the committee on that group's progress to date during the 2019 Interim. The task force has met twice already, on July 17 and August 27, with its next meeting scheduled for September 24, 2019.

Among the information the group has reviewed are current state laws and the type of services available via telehealth; an overview of services offered through DSS and Lutheran Social Services; how virtual mental health services can be efficiently provided through community mental health centers; the need for telehealth services in correctional facilities; and the development of programs to address mental health issues among youth in schools. Some of the challenges curtailing the growth of telehealth and telemedicine in South Dakota are a shortage of mental health professionals and the costs and logistics of expanding broadband coverage in remote areas.

The task force will be discussing priorities at its next meeting and determine what further action will need to be taken to increase telehealth and telemedicine services to South Dakotans.

Public Testimony

Mr. Justin Bell, South Dakota Association of Criminal Defense Lawyers, thanked the committee for studying the issue and asked them to consider dropping ingestion of a controlled substance from a felony offense to a misdemeanor offense like most other states. He said South Dakota arrests people for drug use at a much higher rate than any other state and that over-criminalizing people has not been successful.

Ms. Alexis Tracy, State's Attorney, Clay County, commented that reducing drug offenses from felonies to misdemeanors will not solve the problem but merely switch who pays the costs. She advocated offering more treatment and rehabilitation services.

Mr. Mike Walsh, President, South Dakota Fraternal Order of Police, advised the committee that law enforcement needs more options for handling drug users and addicts at the street level. Once an addict is arrested, it is difficult for law enforcement to get more information from them so they can pursue drug dealers. Officers need more tools to help drug users and their communities. The organization is against efforts to lower drug offenses to misdemeanor levels.

Mr. Troy Wellman, Sheriff, Moody County, noted that in the statistics provided today, while South Dakota was rated high in the number of arrests relative to population, it was rated low in the number of deaths attributed to drug use. That may be an indication that law enforcement is doing its job on the streets in preventing these deaths. It is important to remember that there is not a one-size-fits-all solution to what law enforcement agencies need to deal with drug-related crimes. Counties with smaller staffs and no jail facilities of their own face extra challenges. Although treatment for drug users is a necessity, funding should be made available for jails and prisons, too. He also advised committee members to look more closely at recidivism rates.

Mr. Vargo testified that diversion is important and there are times when treatment can be an effective tool to divert first time offenders and prompt them to change their behavior. However, there has to be an incentive to complete any residential or outpatient program.

Mr. Bachand reiterated the shortage of probation and parole officers and the need for unique diversion programs and quicker supervision after arrest. While there are no easy or inexpensive solutions, he urged the committee members to examine all options and give them timely consideration, although it does not have to be this legislative session.

Staff Directives and Next Steps

Representative Haugaard instructed members to take some time to analyze the information they received at today's meeting and think about what is needed by the different sectors involved: law enforcement, the courts, and treatment programs. Action items should be turned in as soon as possible so final recommendations can be compiled. The committee's next meeting will be October 22, 2019.

Adjournment

Senator Partridge moved, seconded by Senator Stalzer, that the meeting be adjourned. Motion prevailed on a unanimous voice vote.

Chair Haugaard adjourned the meeting at 3:15 p.m.