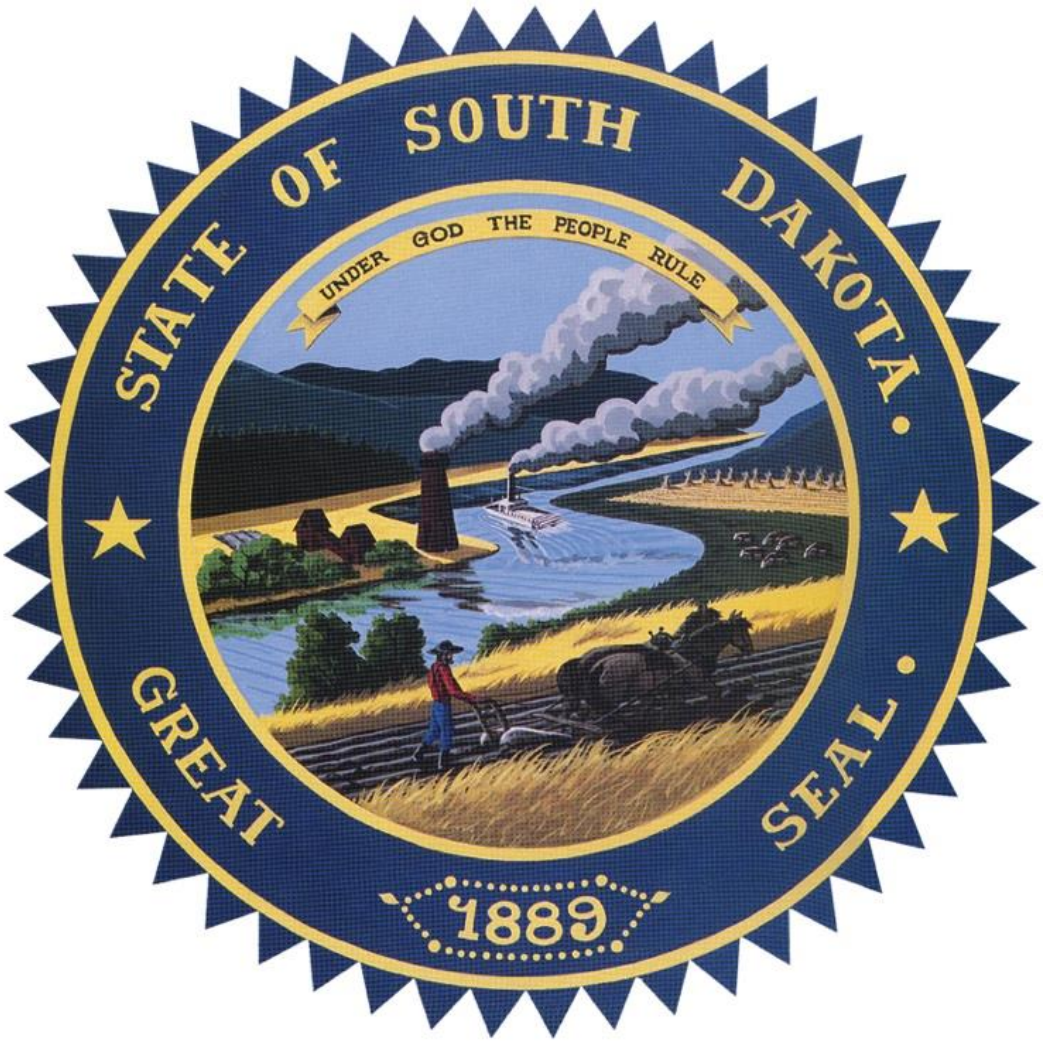
FINAL REPORT

December 15, 2016



SMART ON CRIME

WORK GROUP

Acknowledgements

The Governor would like to thank the following individuals who offered their time and expertise to serve on the work group this summer.

Work Group Members

- Jim Seward – Governor's General Counsel, chair
- Tony Venhuizen – Governor's Chief of Staff
- Marty Jackley – Attorney General
- Denny Kaemingk – Secretary of Corrections
- Senator Craig Tieszen
- Senator Billie Sutton
- Representative Tim Johns
- Representative Spencer Hawley
- Representative Jeff Partridge
- Scott Myren – Presiding Judge of the 5th Circuit
- Steven Jensen – Presiding Judge of the 1st Circuit
- Craig Pfeifle – Presiding Judge of the 7th Circuit
- Greg Sattizahn – State Court Administrator
- Mike Leidholt – Hughes County Sheriff
- Mark Vargo – Pennington County State's Attorney
- Aaron McGowan – Minnehaha County State's Attorney
- Traci Smith – Minnehaha County Public Defender

Other Acknowledgments

- AJ Franken — Governor's Office
- Patrick Weber—Governor's Office
- Sadie Stevens — Governor's Office
- Amy Iversen-Pollreisz – Department of Social Services
- Trevor Jones – Secretary of Public Safety
- Bryan Gortmaker – Director of Division of Criminal Investigation
- Kevin Frampton – Program Coordinator, Midwest HIDTA

Technical Assistance Acknowledgments

- The Pew Charitable Trust

Background

Responding to an increase in methamphetamine use in South Dakota, Governor Daugaard convened the Smart on Crime work group to develop policy recommendations to help curtail the methamphetamine epidemic and related public safety concerns.

With representation from law enforcement, judges, prosecutors, defense attorneys, legislators, the executive branch, the Unified Judicial System, and the attorney general's office, the collection of statewide experts examined policies affecting South Dakota's criminal justice system, with the goals of increasing public safety, increasing offender accountability, and focusing resources on serious offenders. The work group used the three goals to guide the meetings as they reviewed regional and statewide data concerning the increase in methamphetamine use and its impact on the criminal justice system.

Using data as the foundation of the proposed policy changes, the work group developed a three-pronged set of recommendations to halt methamphetamine trafficking into the state, prevent the use of methamphetamine, and help addicts quit.

Executive Summary

South Dakota faces an unprecedented stress on its criminal justice system due to the increased use of methamphetamine. With the assistance of the Pew Charitable Trusts, the group examined the current criminal justice system to quantify the methamphetamine issue. The group reviewed data surrounding arrest, disposition, probation, incarceration, and parole.

Key Findings

Drug-related arrests are up and specialty court capacity has grown.

- Between FY 2014 and FY 2015, arrests for drug offenses grew 20%. Arrests related to methamphetamine grew 40%.
- HOPE probation, and Drug and DUI court capacity has grown 198% since FY 2014.

Drug-related offenses contributed to the increase in new admissions.

- New admissions grew 20% since FY 2015.
- The percentage of prison admissions for drug crimes increased from 35% in FY 2015 to 41% in FY 2016.
- The top three offenses among new commitment admissions are:
  - Possession of a controlled substance (Schedule I & II);
  - Unauthorized ingestion of a controlled substance; and,
  - Distribution of a controlled substance (Schedule I &II).

Probation Violator Admissions contributed to the increased prison population.

- Probation violator admissions to prison have grown 39% since FY 2014.
- 8% of probation violator admissions were for violent offenses in FY 2016.
- Probation admissions for drug related offenses grew 69% since FY 2014.
- The length of stay for probation violators and parole violators has increased.

Even in early results, a majority of individuals on probation are succeeding.

- 56% of probationers in the FY 2014 cohort were successfully discharged from supervision.
- 74% of the probationers of those sentenced to presumptive probation in FY2014 successfully completed supervision.

Recommendations

Establish an interstate drug trafficking task force.
The state will establish an interstate drug trafficking task force to curtail interstate drug trafficking of methamphetamine and other drugs. The task force will publish statistics that include the number of arrests and amount of drugs seized.

Amend South Dakota's wiretapping statutes.
The state code does not provide law enforcement the ability to wiretap a cell phone. The statute would be amended to update the tools for law enforcement to more effectively disrupt criminal enterprises.

Support and expand ongoing efforts to prevent methamphetamine use.
The managers of current and future state anti-meth programs shall meet biannually to coordinate and discuss the ongoing efforts of their department's program.

Institute a minimum sanction of incarceration for positive drug tests for probationers and parolees and implement annual reports outlining the use of sanctions and incentives for both probationers and parolees.
Probationers or parolees with a positive urine analysis will be subject to mandatory incarceration for an initial positive test. Aggregate data on the number of infractions, sanctions, and incentives for probationers and parolees will be included in the Annual Report to the Oversight Council.

Expand HOPE 24/7 Probation to all counties.
The state will incentivize statewide rollout of HOPE 24/7.

Add crimes to the list of crimes exempt from a presumption of probation as defined by SDCL 22-6.
While Class 5 and Class 6 felonies carry a presumption of probation, certain crimes are exempt and do not receive this presumption. Possession of a firearm by a felon, assault by prisoner in county jail, or the promotion of prostitution of a minor will be added to the list of crimes ineligible for presumptive probation. Cases of public corruption will also be exempt.

Incentivize successful completion of treatment.
Offenders who complete a court-ordered clinical assessment and successfully complete the requirements of their treatment within one year will have one opportunity to reduce a drug possession or ingestion charge from a felony to a Class 1 misdemeanor and have the felony removed from the criminal record. This would only be available one time for any person.

Focus supervision resources on high risk offenders and encourage compliance with supervision conditions by codifying and strengthening early discharge from supervision.
Statutes will be amended to allow supervision to be terminated and an individual be discharged if a probationer or parolee meets certain criteria, which include conditions such as completion of required treatment and compliance with all other conditions of their release.

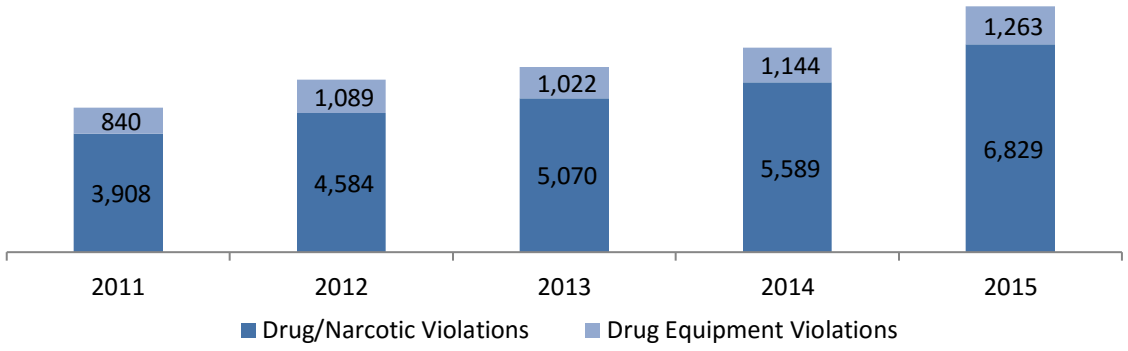
Increase training for prosecutors.
Statutes that outline prosecutor training will be updated to include training on evidence-based practices.

System Assessment

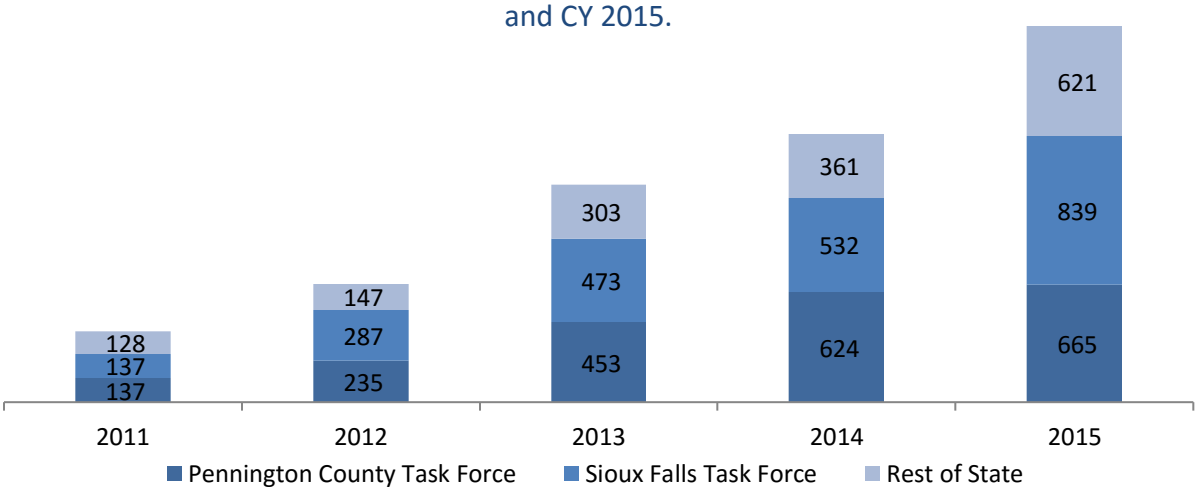
Arrests

Between CY 2014 and CY 2015, reported incidents of crime rose 9% and arrests increased 6%. During that same timeframe, arrests for drug offenses grew 20%, and arrests related to methamphetamine grew 40%. The increase in methamphetamine use and arrests correspond to the regional increase in methamphetamine trafficking that has impacted many regions across the Midwest.

Arrests for drug offenses increased 20 percent between CY 2014 and CY 2015.



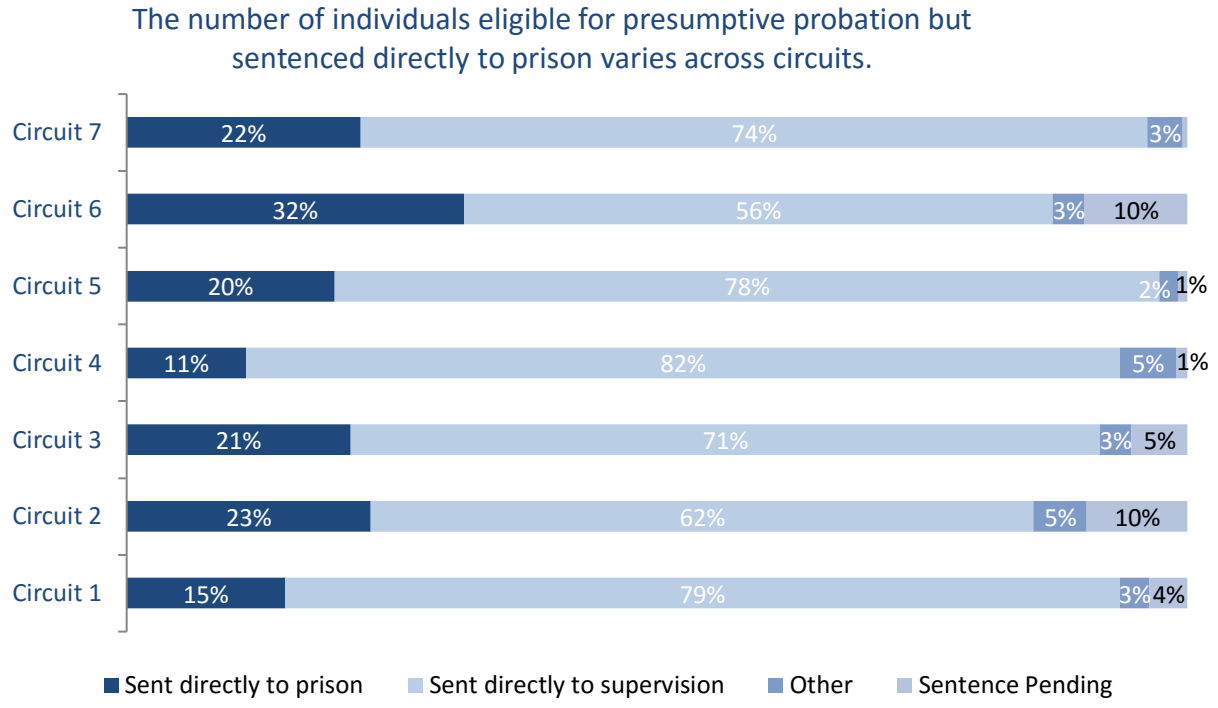
Methamphetamine-related arrests increased 40 percent between CY 2014 and CY 2015.



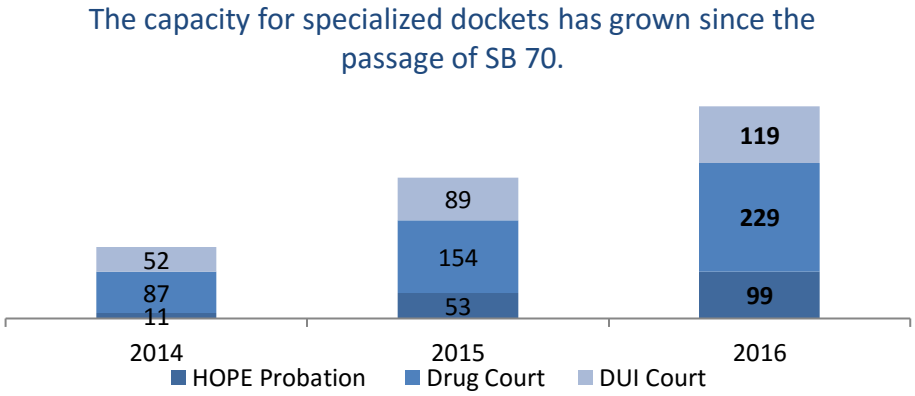
While the number of methamphetamine-related arrests remained consistent in Pennington County, the Sioux Falls area alone saw almost a 58% increase in methamphetamine-related arrests between 2014 and 2015.

Dispositions

Since FY 2014, the number of felony case filings increased 15%, with over half the filings occurring in the second and seventh circuit. The total number of felony convictions also increased 20% since 2014. Most of the individuals who were eligible for presumptive probation were sent directly to supervision. However, many eligible probationers are still being sent directly to prison. Sentencing results of presumptive probation eligible offenders vary by circuit.



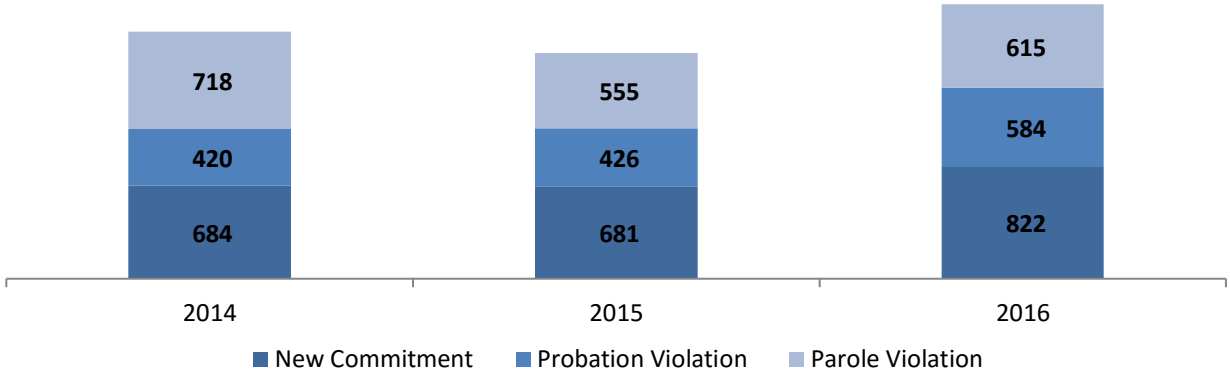
Since the passage of SB 70, the criminal justice system has seen an increase in the use of specialized court dockets. HOPE probation, and Drug and DUI courts have all increased in capacity. Combined, the capacity has grown 198% since FY 2014.



Prison

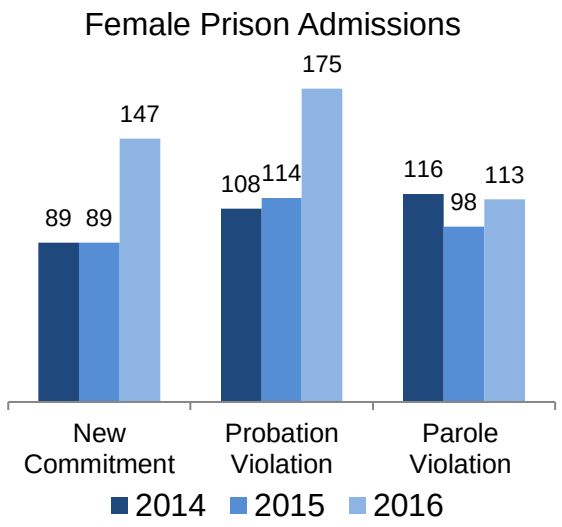
Admissions

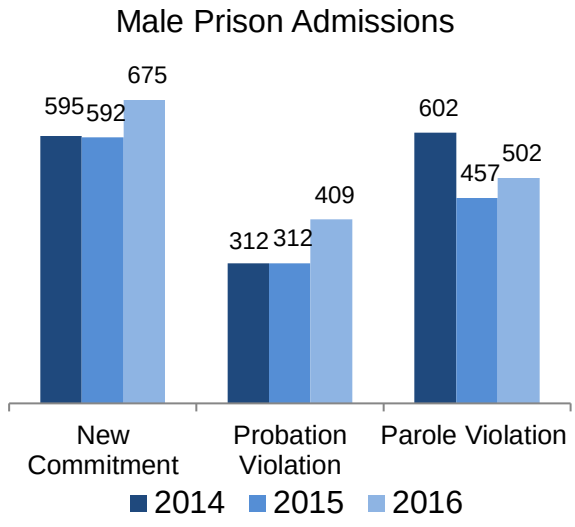
While the prison population declined in FY 2015, it grew 5% in FY 2016 and exceeded the projection established with the 2013 Public Safety Improvement Act reforms. Although the population was above the projection, the population remained below what the population would have been without the reforms. The admissions continued this same trend, experiencing a dip in 2015 but an increase of 22%. The decline in 2015 was driven by a decline in parole violator admissions.



The new crime admissions and probation violator admissions were flat through 2015, but all admissions grew in 2016. On average, these new commitments spend about two years in prison. Most notably is the increase for new commitments and probation violations. Both the male and female new commitment admission rates were stable in 2015, but grew a combined

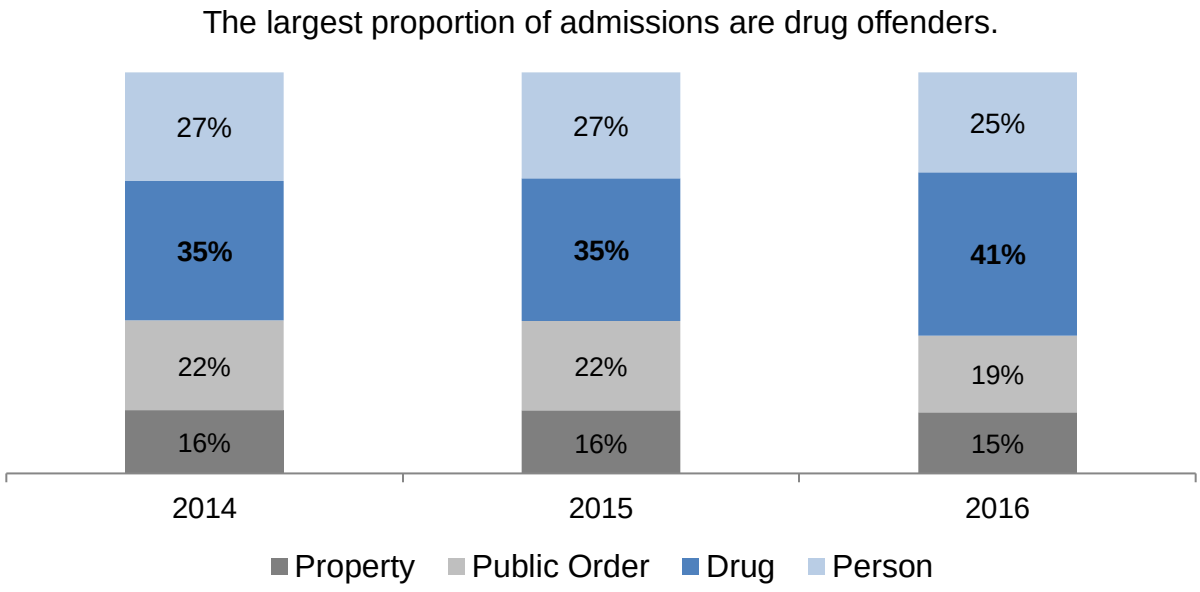
20% the following year. While there has been an increase in new commitment admissions, these offenders spend roughly the same amount of time in prison.





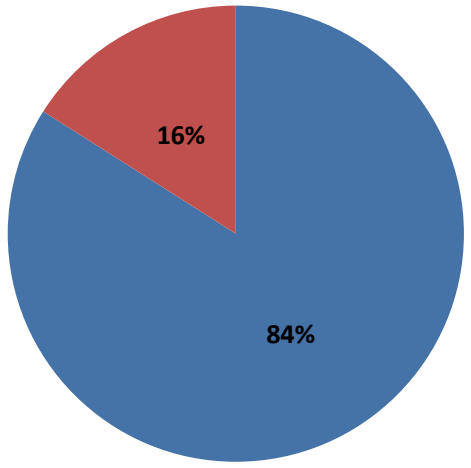
Drug Offenses

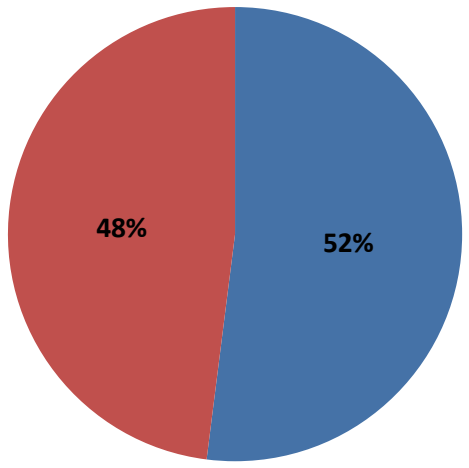
Drug offenses make us the largest percentage of prison admissions. The top three offenses of new commitment admissions are possession of a controlled substance (Schedule I & II), unauthorized ingestion of a controlled substance, and distribution of a controlled substance (Schedule I &II).



Violent and Nonviolent Offenders

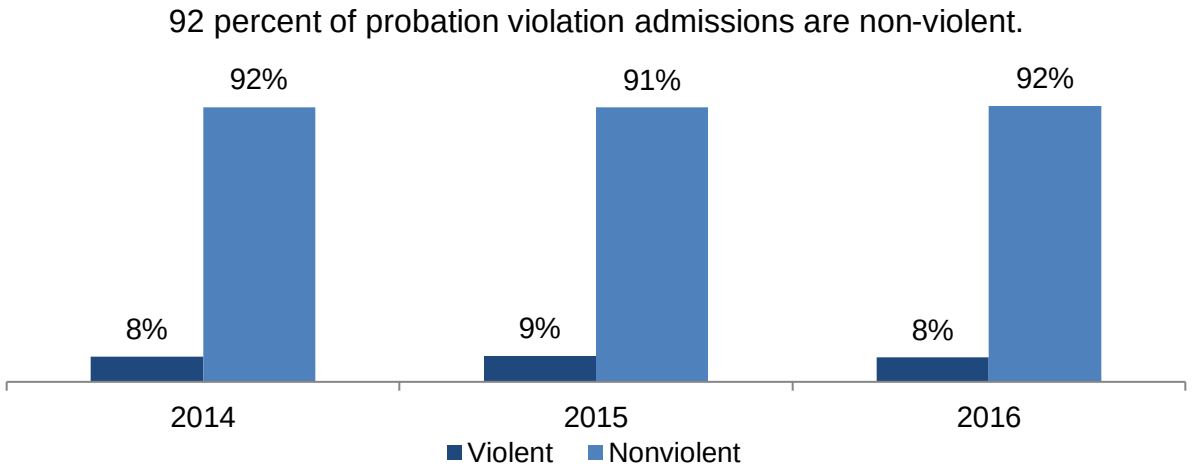
While the male population only grew 3%, the female population was up 23% between FY 2015 and FY 2016. On June 30, 2016, 84% of the female population was categorized as nonviolent. On that same day, 52% of the male population was also nonviolent.



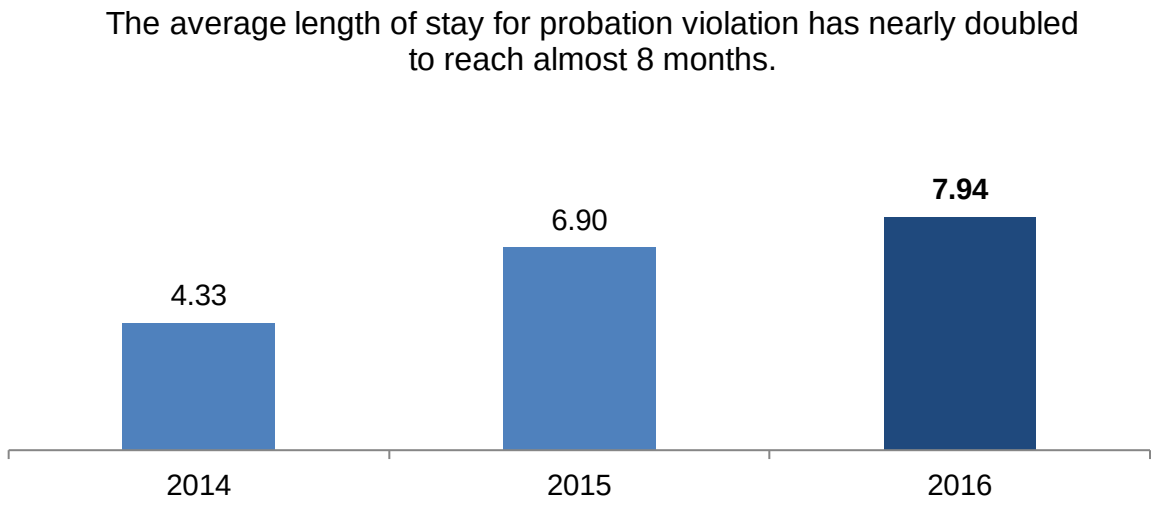


Probation Violators

Since FY 2014, probation violation admissions to prison have grown 39%, with the largest increase between FY 2015 and FY 2016. This trend is apparent in both the male and female populations. The underlying offense of probation violator admissions is overwhelmingly nonviolent; in FY 2016, only 8% of probation violation admissions were violent.



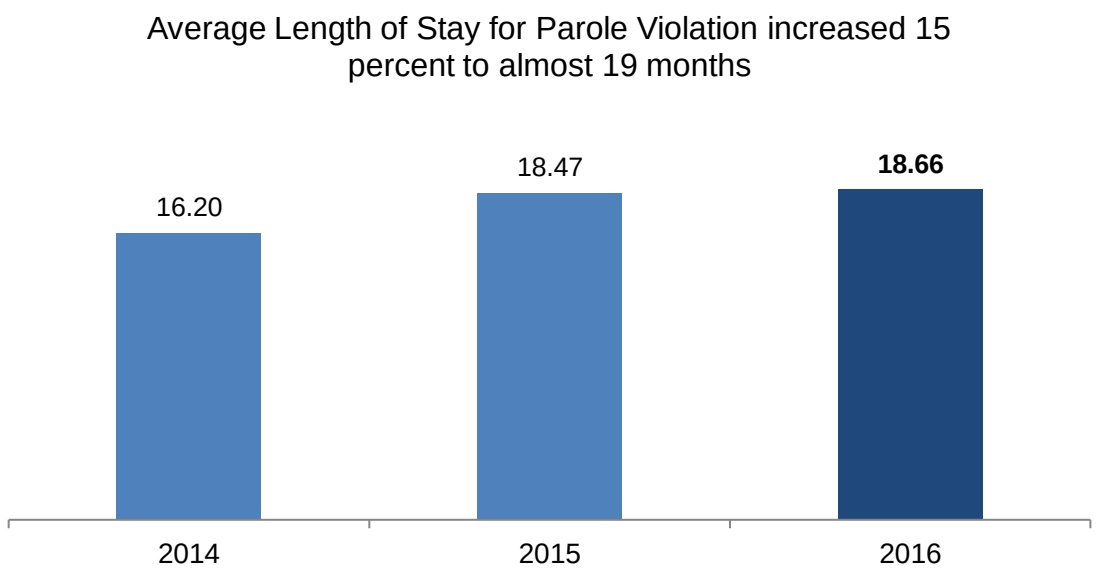
In FY 2016, 76% of the probation violations were for technical violations of supervision and the average length of stay in prison for probation violators is up 83%—increasing from a little over four months to almost eight months.



Parole Violation

Although the parole violation admissions are above the FY 2015 numbers, they still remain below the FY 2014 numbers for both the male and female population. As with probation, most of the parole violations are technical violations of supervision. In FY 2016, 89% of the violations were technical in nature. Only 11% consisted of a new crime.

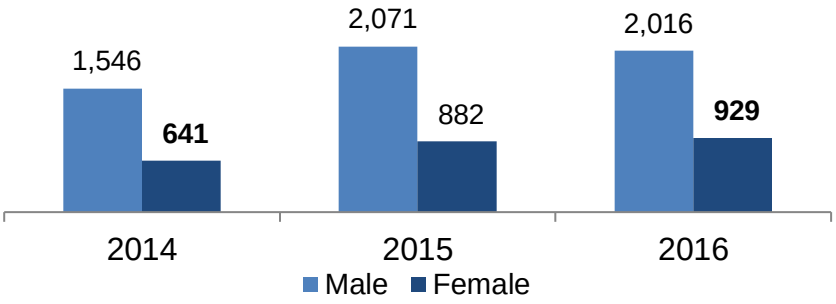
The average length of stay for a parole violators has also increased 15% to almost 19 months.



Probation

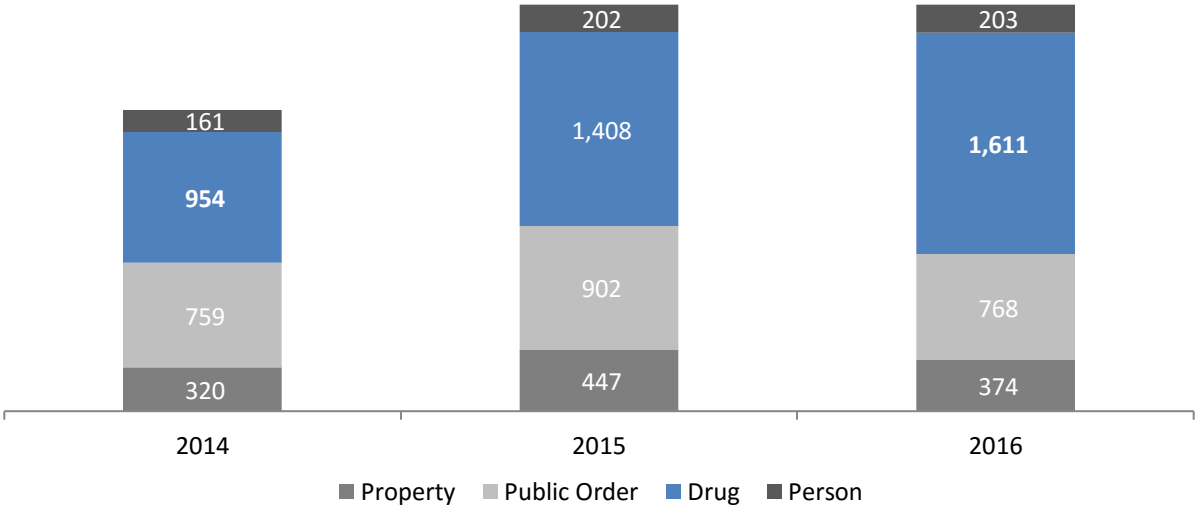
Since FY 2014, the felony probation population increased 33%. Those admitted to felony probation also grew 35%, with the largest increase occurring between FY 2014 and FY 2015 before stabilizing the following year. While most of the admissions are male, an increasing number and proportion are female offenders.

Female felony probation has increased 45 percent since 2014.



Since 2014, admissions to probation for drug related offenses have grown 69%. Crimes against a person, as well as property crimes, have remained relatively stable. The number of people admitted to probation for public order crimes increased between FY 2014 and FY 2015, but decreased to the rate consistent with FY 2014 in FY 2016.

Probation Admissions for drug related offenses has grown 69 percent since FY 2014.

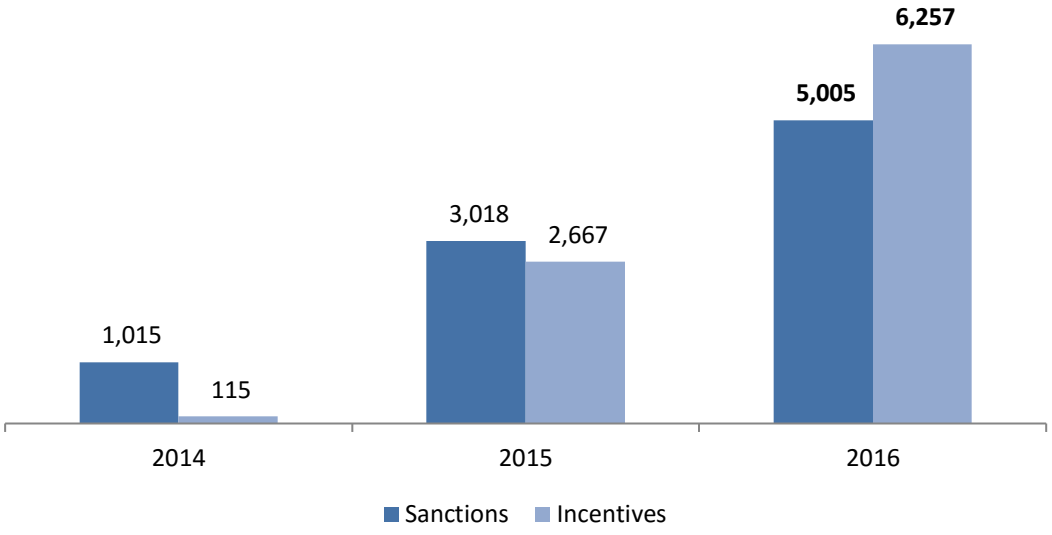


Possession and ingestion offenses are the leading offenses amongst those placed on probation. The only two categories to see a decrease is the distribution or possession with the intent to distribute 1 ounce or less of marijuana and possession of one to ten pounds of marijuana.

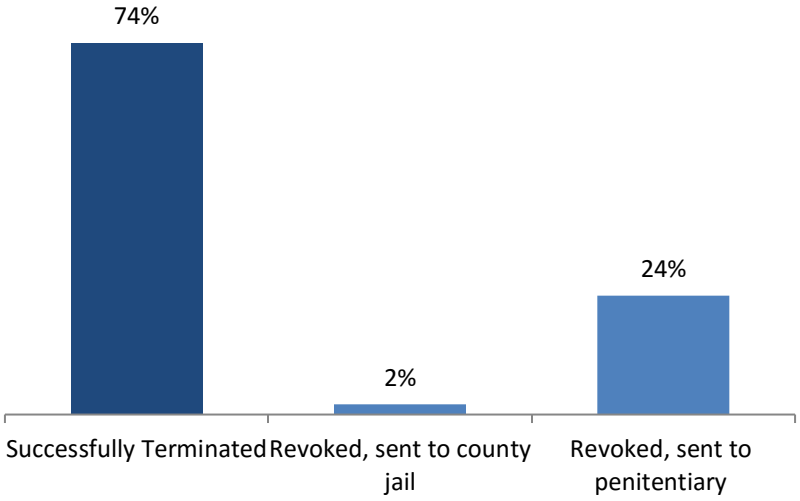
Offense	2014 N	2016 N	Difference
Possession Controlled Substance in Schedules I or II	230	802	248.7%
Unauthorized Ingestion of Controlled Drug/Substance in Schedules I or II	156	571	266.0%
Possession Controlled Substance in Schedules III or IV	11	48	336.4%
Possession of Marijuana More 2oz Less One-Half Pound	23	28	21.7%
Distribution/Possession with Intent to Distribution Marijuana 1oz Less	32	26	-18.8%
Possession more than 10 pounds of Marijuana	3	16	433.3%
Distribution/Possession with Intent to Distribution 1lb or More Marijuana	14	15	7.1%
Unauthorized Ingestion of Controlled Drug/Substance in Schedules III or IV	10	13	30.0%
Possession marijuana ½ pound less than One Pound	3	12	300.0%
Possession one to ten pounds Marijuana	19	10	-47.4%

Probation Sanctions and Incentives

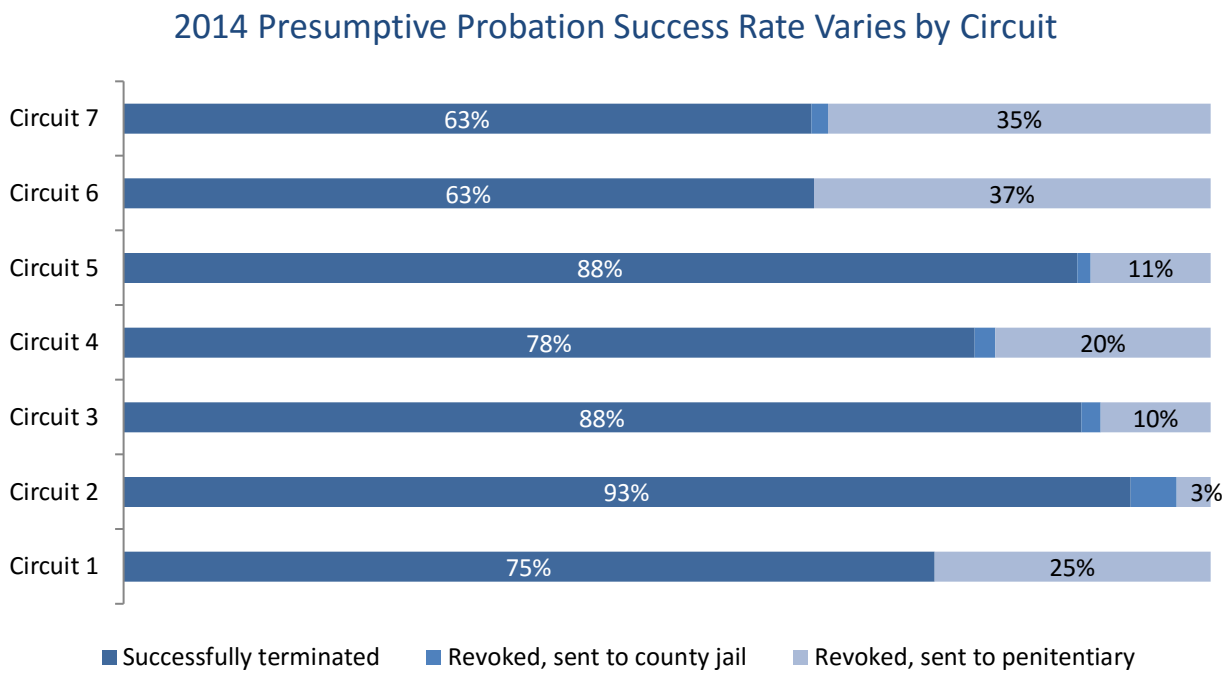
Since FY 2014, there has been an increase in the use of sanctions and incentives for probationers. While sanctions were the primary mechanism for behavior change through 2015, the use of incentives for behavior change bypassed the use of sanctions in FY 2016.



Based on the FY 2014 cohort of probationers, 56% of all probationers successfully discharged from supervision. Of those disposed to probation for a presumptive probation crime in FY 2014, 74% successfully completed supervision.



Successful completion rates vary by circuit, from 88% in the fifth circuit to 63% in the sixth and seventh circuits. Circuit 6 revokes the most probationers back to the penitentiary. Circuit 2 revokes the most individuals to the county jail.



Policy Recommendations

To address the growing strain methamphetamine is placing on South Dakota's criminal justice system; the state must employ a multi-faceted approach. The policy proposals the work group recommended fit into three categories: stopping the influx of methamphetamine into the state, preventing people from using methamphetamine, and helping those who are addicted to methamphetamine to break that addiction through treatment.

Policy Area: Stop Methamphetamine from Coming into the State

1. Create an interstate drug trafficking task force.

The 40% increase in methamphetamine-related arrests is a clear signal that South Dakota is facing a growing methamphetamine problem. The most direct way to address this problem is to curb the flow of methamphetamines and other illegal drugs into the state. The increase in methamphetamine arrests has corresponded with a decrease in convictions for methamphetamine production. The increase is due to increased trafficking, not homemade production.

To address the increase of methamphetamine into the state, South Dakota will create a joint Division of Criminal Investigation (DCI) and Highway Patrol (HP) team to focus on interstate drug trafficking. The state will fund four new HP troopers to focus on methamphetamines and other illegal drugs coming in on the interstates. Further, DCI will assign two agents to the task-force. To track the effectiveness of the effort, the task force will publish the following statistics every quarter:

- Number of arrests made;
- Underlying felonies for those arrests; and
- Amount of drugs seized.

2. Amend South Dakota's wiretapping statutes

As home production of methamphetamine has been replaced with interstate trafficking, the complexity of the criminal enterprises surrounding methamphetamine has also increased. These vast criminal enterprises can be difficult to successfully prosecute. Often individual pieces of the enterprise will be prosecuted, but the body as a whole will continue to move forward. In order to properly address these criminal enterprises, law enforcement must be able to gather the necessary intelligence to curtail this trafficking.

Chapter 23A-35A of the South Dakota code is outdated. It does not provide law enforcement the ability to wiretap a cell phone, only land lines. The chapter would be amended to update

the tools for law enforcement to more effectively disrupt criminal enterprises. No changes will be made to the criminal due process of suspected criminals. A warrant will still be required.

Prevent Methamphetamine Use

3. Support and expand ongoing efforts to prevent methamphetamine use.

Currently, the state has three distinct programs in place to prevent the use of methamphetamine.

- The Department of Social Services unveiled a program titled "Meth Changes Everything" which is geared at educating high school students and communities across the state on the dangers of methamphetamine use.
- The Attorney General unveiled a program titled "NO. METH. EVER." which is a campaign and competition. The first phase solicits video entries from college students on the problems with methamphetamine and the second phase seeks to publicize these videos.
- In 2016, the Legislature created a summer study committee to address the issue of methamphetamine and opioid abuse prevention. That committee has not yet issued its final report, but one of the recommendations from the group is a program that specifically targets methamphetamine prevention for Native American students.

It is important for all of these programs across the state to fit together and for the agencies running them to ensure that there are no lost opportunities for cooperation. The directors of any methamphetamine prevention program shall meet biannually to discuss their respective programs.

Help People Who are Addicted to Quit

4. Institute a minimum sanction of incarceration for positive drug tests for probationers and parolees and implement annual reports outlining the use of sanctions and incentives for both probationers and parolees.

In the furtherance of swift and certain sanctions, any probationer or parolee that has a positive urinalysis for a controlled substance will be subject to a minimum sanction of incarceration. The sanction is for the initial positive test for an infraction and will not cover residual positive urinalyses or "clean out" UAs. If the court has approved a sanctioning grid for a specific individual that differs from this requirement, the court's direction controls.

Further, as part of the annual report to the oversight council, UJS (for probation) and DOC (for parole) shall include aggregate statistics on the number of probation or parole infractions and the sanction for each. The report shall also include a report of the incentives given to probationers or parolees under supervision.

5. Expand HOPE 24/7 Probation to all counties.

The state will incentivize statewide rollout of HOPE 24/7 so that it is available in every county. This will be done through the use of grants to help counties build the infrastructure necessary to administer the program.

Currently, South Dakota has HOPE 24/7 Probation programs running in Brown, Walworth, Edmunds, Marshall, Gregory, Tripp, and Charles Mix counties. Fifth Circuit Presiding Judge Scott Myren has led the state's adoption of these programs.

HOPE 24/7 is an evidence-based program that originated in Hawaii as a program to treat the most severe drug addiction cases in the community as an alternative to incarceration. Early results are encouraging and it is a flexible program that can be modified to meet the needs of each county. The program mirrors the philosophy of intense supervision and swift sanctions South Dakota has already adopted through the 24/7 program.

6. Add crimes to the list of crimes exempt from a presumption of probation as defined by SDCL 22-6.

Class 5 and Class 6 felonies in South Dakota carry with them a presumption of probation as defined by SDCL 22-6-11. Certain crimes are exempt from that presumption as the crime itself is deemed to pose enough of a risk to the public that probation is not the presumed sentence. The following three crimes should be added to that list of exemptions so that they do not receive presumption of probation.

SDCL 22-14-15	Possession of firearm by a felon
SDCL 22-18-29	Assault by prisoner in county jail
SDCL 22-23-2(2)	Promoting prostitution of a minor

Further, cases of public corruption will also be exempt from the presumption. The Attorney General will bring legislation in the 2017 Legislative Session to clarify these crimes.

7. Incentivize successful completion of treatment.

Today, we rely only on penalties or "sticks," to convince people to complete treatment without any incentives or "carrots." Beyond the obvious benefits of a sober lifestyle, there are no concrete incentives built into the system to encourage successful treatment. Research and evidence have shown that incentives bundled with penalties are a much more successful model to change behavior than penalties alone.

For this reason, offenders who complete a court-ordered clinical assessment and successfully compete any recommendations of that assessment within one year will have one opportunity to reduce their charge from a felony to a Class 1 misdemeanor and to have the felony removed

from the criminal record. This option will be available to an offender only once. This incentive is expected to increase the completion rate for evidence-based treatment programs.

8. Focus supervision resources on high risk offenders and encourage compliance with supervision conditions by codifying and strengthening early discharge from supervision.

Probation and parole statutes will be changed so that supervising officers terminate supervision and discharge the individual if a probationer or parolee:

- Has been under supervision for at least 12 months;
- Has completed all treatment programs required as a condition of supervision;
- Has not been found in violation of conditions of supervision;
- Is currently in compliance with all conditions for all of the cases for which the person is on probation or parole; and
- Is under supervision for a presumptive probation crime.

This change will allow parole and probation supervisors to concentrate on high-risk offenders and those in the criminal justice system that are struggling to reintegrate with society.

9. Increase training for prosecutors.

As ministers of justice, prosecutors play an important role in implementing evidence-based practices throughout the system. Statutes currently exist for training in evidence-based practices to be provided to judges, along with those who supervise probationers and parolees. These statutes should be updated to include prosecutors in order that they might receive training in evidence-based practices.