



Assessing the Impact of South Dakota's Sentencing Reforms

Justice Reinvestment Initiative

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South Dakota's prison population reached an all-time high in 2012 and was projected to grow an additional 25 percent over the next decade at a cost of \$224 million. In response, state policymakers enacted sweeping reforms to improve probation and parole supervision, increase the use of these alternatives to incarceration, and invest in treatment programs proven to reduce recidivism. In February 2013, Governor Dennis Daugaard signed into law Senate Bill 70 (SB 70), the Public Safety Improvement Act.

SB 70 sought to improve public safety and reduce corrections spending by imposing shorter prison sentences for nonviolent crimes, increasing placements to probation for offenses related to drug abuse and addiction, and investing in evidence-based programs that reduce the likelihood of reoffending. Chief among the reforms adopted to accomplish these goals is a new presumption of probation for the least serious crimes, Class 5 and 6 felonies, and the reclassification of several offenses into these classes.

South Dakota's prison population declined slightly in the two years after SB 70 was enacted and was 8 percent lower at the end of 2015 than experts had projected three years earlier. This brief summarizes the impact of the presumptive probation policy and felony reclassifications on the state's prison population and public safety.

Drawing on South Dakota's data, we identified four major impacts from these policy changes in the two years following legislative enactment:¹

- Judges used probation more frequently—the probation placement rate for offenses subject to presumptive probation increased from 69 to 80 percent;

- Fewer people were sent to prison—new court commitments for offenses subject to presumptive probation were down 16 percent;
- Prison terms were shorter for drug abuse and addiction offenses—sentence lengths for drug possession and ingestion were cut in half; and
- More people were sentenced for felony offenses—convictions increased 26 percent, driven by an increase in total felony filings (14 percent) and convictions for drug possession and ingestion, Class 5 and 6 felonies subject to presumptive probation increased 77 percent.²

Experts say that it will take three to five years really to see all the results of these reforms and know if they have had the effect we intended. Still, the early data is promising, and I'm hopeful these reforms will save the state money, hold offenders accountable, and make South Dakota an even safer place.

—Governor Dennis Daugaard

South Dakota's presumptive probation policy and felony reclassifications played a significant role in averting South Dakota's prison population growth. But there is an opportunity to build on the success of these sentencing reforms and further reduce over-incarceration related to drug abuse and addiction. For example, the following policies are consistent with the goals of South Dakota's ongoing justice reform efforts:

- Reclassifying ingestion of a controlled substance from a Class 5 or 6 felony to a Class 1 misdemeanor
- Reclassifying possession of a controlled substance from a Class 5 or 6 felony, depending on the drug schedule, to a Class 1 misdemeanor
- Tightening reporting requirements and requiring the Unified Judicial System to collect and analyze data on departures from presumptive probation
- Expanding presumptive probation to nonviolent Class 4 felonies
- Continuing to expand problem-solving courts and investing in community-based substance abuse treatment programs

Background

In 2012, South Dakota's criminal justice system was in crisis. The prison population had grown more than sixfold (566 percent) since 1977 and was projected to increase another 25 percent over the next decade. This growth was straining the state budget and raising questions about the public safety return for taxpayers. By 2013, the corrections budget was over \$100 million, and state officials estimated that future growth would require the construction of two new prisons at a cost of \$224 million (Pew Charitable Trusts 2013). Yet increasing imprisonment had not produced proportionate improvements in public safety: while crime in the United States declined 21 percent from 2001 to 2011, South Dakota's crime rate declined only 11 percent during the same period (Pew Charitable Trusts 2013).

In spring 2012, the state took decisive action to change direction. Governor Dennis Daugaard, Chief Justice David Gilbertson, Senate Majority Leader Russell Olson, and House Majority Leader David Lust established the Criminal Justice Initiative Work Group to address these challenges. This bipartisan group brought together legislators, members of the executive and judicial branches, prosecutors, defense attorneys, and social service providers to identify what was driving the growth in South Dakota's prison population and recommend policy solutions to avert continued growth while improving public safety.

State leaders also requested intensive technical assistance through the Justice Reinvestment Initiative (JRI), a public-private partnership jointly funded by the Bureau of Justice Assistance and the Pew Charitable Trusts (Pew). With support from Pew and the Crime and Justice Institute, the work group spent 2012 assessing data from South Dakota's criminal justice system and consulting more than 400 stakeholders in 36 meetings across the state (Pew Charitable Trusts 2013).

Through this process, the work group identified two major drivers behind South Dakota's prison growth. First, most people were being sent to prison for nonviolent crimes. In 2012, 81 percent of new admissions were for nonviolent offenses. As a result, 61 percent of South Dakota's prison population was incarcerated primarily for a nonviolent offense. Most of these nonviolent offenses were related to drug abuse and addiction. Of those imprisoned for a drug offense, more than two-thirds (68 percent) were convicted of drug possession as opposed to sales or manufacturing. Second, parole revocations represented an increasing share of the prison population and had grown from 18 percent of the total population in 2000 to 25 percent in 2012 (South Dakota Criminal Justice Initiative Work Group 2012).

Based on these findings and the recommendations of the work group, South Dakota's legislature approved SB 70, the Public Safety Improvement Act, which Governor Daugaard signed into law on February 6, 2013. The reforms contained in the legislation were projected to avert most of the expected prison population growth, reduce unnecessary incarceration of people convicted of nonviolent crimes, and free up resources to invest in evidence-based supervision and treatment programs. Key policy changes contained in SB 70 include the following:

- Reclassifying grand theft from a Class 4 felony to a Class 5 for stolen goods worth \$2,500–\$5,000 and a Class 6 for goods worth \$1,000–\$2,499; reclassifying third-degree burglary (unoccupied, uninhabitable) from a Class 4 to a Class 5 felony

- Creating a tiered controlled substance statute and reclassifying drug possession and ingestion from a Class 4 to a Class 5 felony for Schedule I and II controlled substances and a Class 6 felony for Schedule III and IV controlled substances
- Establishing presumptive probation for Class 5 and 6 felonies
- Authorizing earned discharge from probation and parole (up to 30 days of credit for each month of full compliance with the conditions of supervision)
- Requiring the use of evidence-based supervision practices, including imposing graduated sanctions for violations

This brief summarizes the preliminary impact of presumptive probation and the felony reclassifications of drug possession and ingestion in the two years following implementation. These policy changes were direct responses to the drivers of South Dakota’s prison population growth—the large numbers of people admitted for nonviolent crimes, in particular drug offenses—and were projected to dramatically affect the South Dakota justice system.

In the two years following the implementation of SB 70, South Dakota’s prison population declined slightly and was 8 percent lower than experts had projected in 2012. Other important impacts include reductions in the average parole caseload (18 percent), reductions in parole revocations (41 percent), and increased participation in drug courts, substance-abuse treatment, and other recidivism-reduction programming. According to the Public Safety Improvement Act Oversight Council (Oversight Council), SB 70 had saved the state more than \$34 million by 2015 (Oversight Council 2015).

Presumptive Probation and Felony Reclassifications

To address the large numbers of prison admissions for nonviolent offenses, South Dakota established presumptive probation for its lowest felony classes. South Dakota has nine felony classes: Class A through Class C crimes, followed by Class 1 through 6 offenses. The least serious offenses are Class 5 and 6 felonies, with respective maximum imprisonment terms of five and two years.

South Dakota’s Presumptive Probation Law: The sentencing court shall sentence an offender convicted of a Class 5 or Class 6 felony, except those convicted under [a specific array of offenses] to a term of probation. The sentencing court may impose a sentence other than probation if the court finds aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation under this section. If a departure is made, the judge shall state on the record at the time of sentencing the aggravating circumstances and the same shall be stated in the dispositional order.

Nearly all Class 5 and 6 felonies are now subject to presumptive probation, which requires judges to impose a sentence of probation unless someone is a significant public safety risk. A small subset of Class 5 and 6 felonies is not subject to the policy, but a judge may still choose to sentence someone convicted of

these offenses to probation. Examples of offenses exempt from presumptive probation include simple assault on a law enforcement officer, failure to register when convicted of a sex offense, and the distribution or sale of less than a half-pound of marijuana.

Importantly, SB 70 also reclassified several of the offenses most commonly resulting in a prison sentence from Class 4 felonies to Class 5 and 6 felonies. These offenses include drug possession and ingestion, grand theft, and third-degree burglary (table 1). Including low-level DUI and fraud, which were already Class 5 and 6 offenses, these crimes accounted for nearly 40 percent of the prison population in 2012 (South Dakota Criminal Justice Initiative Work Group 2012).

TABLE 1

South Dakota Senate Bill 70 Reduced the Maximum Sentence for Several Felony Offenses

Crime	Pre-SB 70		Post-SB 70	
	Felony	Maximum sentence	Felony	Maximum sentence
Drug possession or ingestion, Schedule III and IV drugs	Class 4	10 years	Class 6	2 years
Drug possession or ingestion, Schedule I and II drugs	Class 4	10 years	Class 5	5 years
Third-degree burglary (unoccupied building)	Class 4	10 years	Class 5	5 years
Grand theft \$1,000-\$2,500	Class 4	10 years	Class 6	2 years
Grand theft \$2,501-\$5,000	Class 4	10 years	Class 5	5 years

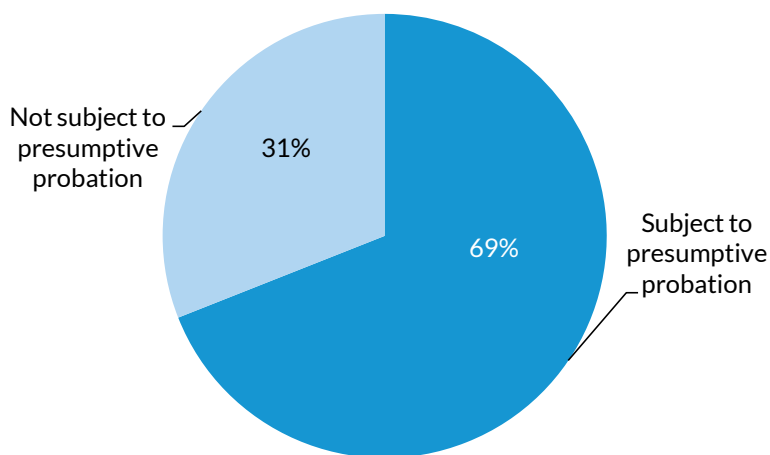
The offenses affected by the presumptive probation policy represent a large and growing share of felony convictions in South Dakota. In 2015, nearly 7 in 10 felony convictions were subject to presumptive probation (figure 1), up from 53 percent in 2014.³

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FIGURE 1

Most Felony Convictions in South Dakota Are Subject to Presumptive Probation

State felony convictions, 2015



Source: Authors' calculations based on data from South Dakota's Unified Judicial System.

The Impact of Presumptive Probation and the Felony Reclassifications

In partnership with the Oversight Council, Urban analyzed more than a decade of state data to assess sentencing trends and evaluate the initial two-year impact of presumptive probation and the felony reclassifications contained in SB 70. The analysis is primarily drawn from court data provided by the Unified Judicial System, but it also incorporates arrest data from the Division of Criminal Investigation and prison admission and time served data from the Department of Corrections.

SB 70 REFORMS REDUCED PRISON ADMISSIONS AND SENTENCE LENGTHS

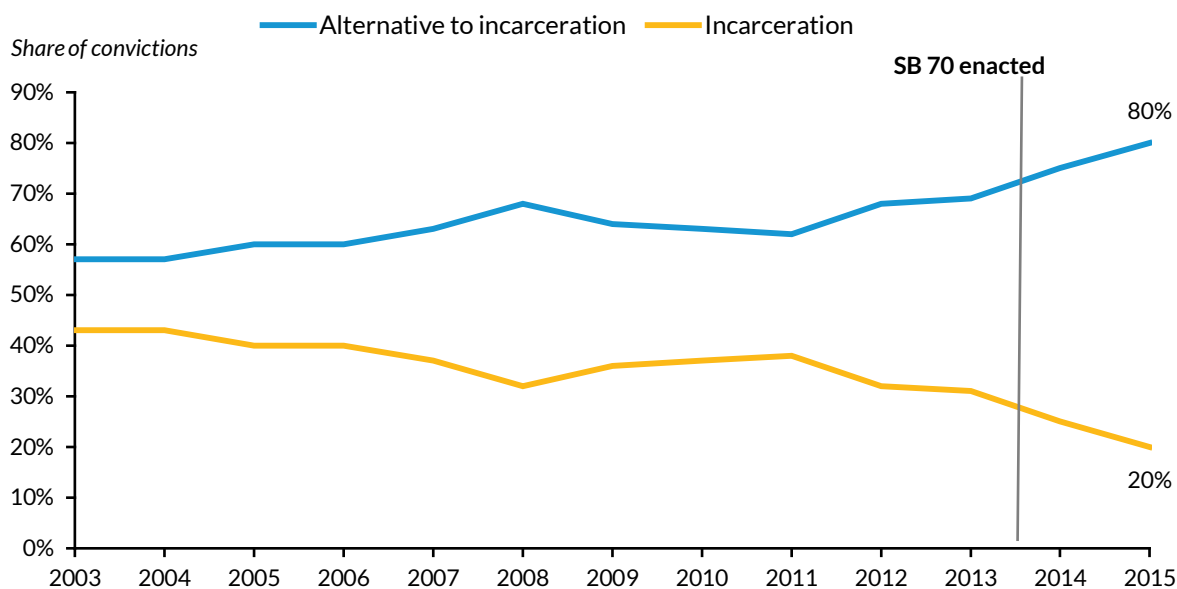
Overall, presumptive probation and the felony reclassifications reduced prison admissions for related offenses from 2013 to 2015 and contributed to South Dakota's averted prison population growth. For offenses subject to the presumptive probation policy, both the rate at which people are sentenced to prison and the absolute number of admissions were down. In the two years following the enactment of SB 70,⁴ the rate of placements to probation or another alternative to incarceration increased from 69 to 80 percent (figure 2). This reflects both an existing trend toward greater use of probation in the state and an acceleration of that trend following the passage of SB 70.

Presumptive probation and the felony reclassifications reduced prison admissions and helped avert South Dakota's prison population growth.

FIGURE 2

South Dakota Judges Are Using Probation More Frequently

Disposition of cases subject to presumptive probation



Source: Authors' calculations based on data from South Dakota's Unified Judicial System.

Note: Includes Class 5 and 6 felonies subject to presumptive probation, third-degree burglary, grand theft of items worth less than \$5,000, drug possession, and drug ingestion.

As part of its work monitoring the implementation of SB 70, the Oversight Council established a performance goal to depart from presumptive probation in 20 percent or fewer cases. In 2015, South Dakota judges met that goal, issuing a sentence of probation in 80 percent of relevant Class 5 and 6 felony cases. The state is also reducing incarceration in the process; prison admissions for offenses subject to presumptive probation declined 16 percent since from 2013 to 2015.

On average, judges departed from presumptive probation for people with longer criminal histories and reserved prison sentences for more serious cases. As part of our analysis, we created criminal history scores for people convicted of offenses subject to presumptive probation since the enactment of SB 70. The mean criminal history score for people who received a prison sentence was 40 percent higher than the score for those who received a sentence of probation.

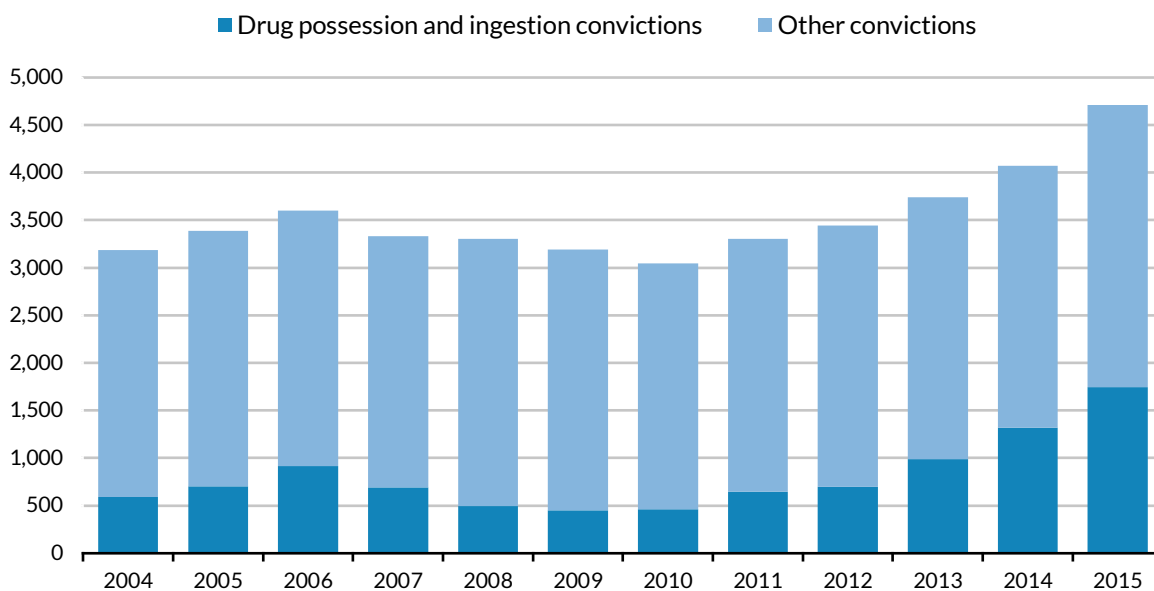
In addition to reducing admissions, presumptive probation and the felony reclassifications reduced sentence lengths. In 2012, drug possession (including ingestion) was the primary conviction for 12 percent of the prison population (Pew Charitable Trusts 2013). In the decade before SB 70, prison sentences for these offenses averaged 482 days. In the two years after the law passed, those sentences were cut nearly in half to 242 days.

FELONY CONVICTIONS INCREASED

While admissions to prison for offenses subject to presumptive probation decreased as intended under SB 70, an increasing number of people are receiving felony convictions. Statewide, convictions increased 26 percent between 2013 and 2015. This growth follows three years of increases in felony convictions but represents a significant acceleration of that trend. Indeed, the increase between 2013 and 2014 is concentrated within the reclassified drug offenses (possession and ingestion of a controlled substance), which increased 77 percent (figure 3).

FIGURE 3

Increases in South Dakota Felony Convictions Driven by Drug Possession and Ingestion



Source: Authors' calculations based on data from South Dakota's Unified Judicial System.

In 2015, there were 670 convictions for drug ingestion alone, and 1,076 convictions for drug possession.⁵ These offenses accounted for 37 percent of all convictions in 2015 and 78 percent of the total increase in convictions between 2013 and 2015.

These increases occurred statewide but were particularly acute in Pennington and Minnehaha, the two largest counties in South Dakota. Convictions in Pennington for drug possession and ingestion rose 125 percent between 2013 and 2015, accounting for nearly one-third of the increase in total convictions statewide. Of the 670 convictions for drug ingestion statewide in 2015, 283 (42 percent) occurred in Pennington County. Overall, Pennington saw a 40 percent increase in felony convictions between 2013 and 2015. Total convictions in Minnehaha rose 34 percent during the same period. Combined, the two counties accounted for two-thirds (67 percent) of the increase in total convictions statewide.

This trend is worrying because numerous negative collateral consequences are associated with a felony conviction. Additionally, some share of those who are sentenced to probation will ultimately have

their probation revoked and be sent to prison for violating the conditions of supervision. While probation revocation data is not reliable before 2013, more than half of supervision terminations between 2013 and 2015 were because of revocations. As more people are placed on probation, these revocations are likely to become a larger driver of prison admissions.

The fact that the increase in felony convictions is being driven by ingestion of a controlled substance is particularly troubling. South Dakota is one of the only states in the nation that classifies ingestion as a felony offense. In fact, the Criminal Justice Initiative Work Group recommended reclassifying it as a misdemeanor. Instead, SB 70 created a new ingestion statute (it had previously been subsumed in the drug possession statute as a Class 4 felony) and reclassified it as a Class 5 felony for Schedule I and II controlled substances and a Class 6 felony for Schedule III and IV controlled substances.⁶

Probation services continue to be one of the most active and effective programs within the Unified Judicial System...Dedicated Court Services Officers quietly work day in and day out to supervise citizens who have broken our criminal or juvenile laws but who can be rehabilitated within their community.

—Chief Justice David Gilbertson

FELONY FILINGS AND RECONVICTIONS ON SUPERVISION DRIVING INCREASE IN CONVICTIONS

The rise in felony convictions that has occurred since SB 70 is an acceleration of an existing trend. Felony convictions increased each year since 2011 and grew 43 percent between 2011 and 2015. Analysis of law enforcement and court data suggests this growth has been driven by felony filings—criminal charges brought by prosecutors—rather than an increase in crime or arrests.

From 2011 to 2015, arrests increased only 11 percent while felony filings increased 44 percent. In other words, felony filings are growing at more than three times the rate of arrests. Looking just at felony filings from incidents that resulted in at least one conviction, charges for Class 5 and 6 offenses have jumped 244 percent since the enactment of SB 70.⁷ Some of this increase is explained by the reclassifications, but reductions in the other felony classes mean the growth in filings is concentrated entirely in these low-level offenses. While the most recent data suggest drug arrests are increasing, arrests with at least one drug-related charge increased only 8 percent from 2013 to 2014.⁸

As noted above, admissions to prison and sentence lengths for drug possession and ingestion declined between 2013 and 2015. This suggests that net widening in these years was concentrated in filings and convictions since increases at those decision points had not resulted in increased prison admissions.

However, the most recent data available suggest this may be changing. Arrests with at least one drug charge increased 19 percent (from 7,036 to 8,380) from calendar year 2014 to 2015. This increase was

also reflected in the prison population: prison admissions for probation violations, parole violations, and new crimes from July to December 2015 increased 11 percent over admissions in the prior six months. Driven by these changes, the South Dakota prison population also increased and stood slightly higher in January 2016 than it was at the end of fiscal year 2015, though it remained lower than in 2014, the first year after the passage of SB 70.⁹

TABLE 2

Felony Filings Grew Faster Than Arrests in South Dakota

	2011	2012	2013	2014	2015	Change, 2011-15
Arrests	26,511	28,248	27,973	28,650	29,928	+11%
Felony filings	7,795	8,568	9,267	9,839	11,263	+44%
Convictions	3,303	3,441	3,742	4,070	4,711	+43%

Source: Authors' calculations based on data from South Dakota's Unified Judicial System and Division of Criminal Investigation.

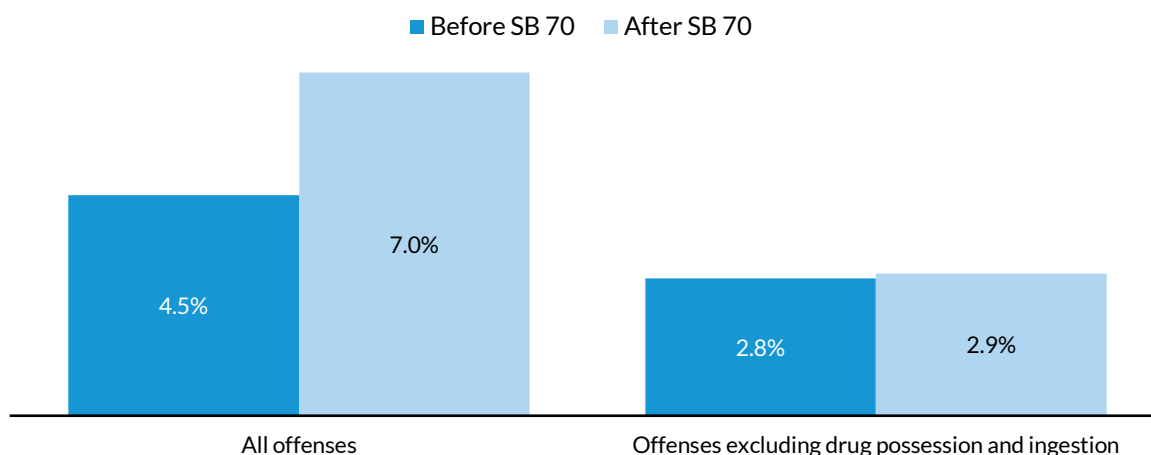
Note: Felony filings are by calendar year; arrests and convictions are by fiscal year.

Another driver of the increase in felony convictions appears to be reconvictions of people on supervision. While both first offenses (new felony convictions with no prior supervision) and subsequent convictions (reconvictions either while on probation or after supervision is terminated) increased, the largest percentage increase was among those currently on supervision. This is not surprising, given the increase in the number of individuals sentenced to probation who would have received a prison sentence before SB 70 was implemented.

While not enough time has passed for a comprehensive recidivism analysis, the rate of felony reconvictions within one year of placement on probation increased. Comparing people placed on probation before SB 70 to people placed on probation after SB 70 for an offense that is (or would have been) eligible for presumptive probation, we find that the one-year reconviction rate increased from 4.5 percent to 7.0 percent. However, as with the broader growth in felony convictions, reconvictions within one year of placement on probation are directly attributable to increases in reconvictions for drug possession and ingestion. When those offenses are excluded as recidivism events, the one-year reconviction rate was nearly identical (2.8 percent to 2.9 percent) and no longer statistically significant.

FIGURE 4

Reconvictions on Supervision in South Dakota Are Most Common for Drug Possession or Ingestion
Felony reconviction rates within one year of placement on probation



Source: Authors' calculations based on data from South Dakota's Unified Judicial System.

Note: Difference between reconviction rates for all offenses before and after SB 70 is statistically significant at the $p < .001$ level.

Policy Recommendations

Despite the increase in felony convictions, the presumptive probation policy and felony reclassifications played a significant role in averting South Dakota's prison population growth in 2014 and 2015. The reforms below would build on the success of these sentencing reforms and help South Dakota further reduce its prison population while freeing up resources to invest in evidence-based programs that reduce recidivism. Several of these policy changes were considered—or even recommended—by the Criminal Justice Initiative Work Group. Many have been implemented in other states and are delivering positive results.

These recommendations focus on ways to further improve presumptive probation and sentencing policy, in particular for nonviolent offenses. Despite the gains made since SB 70, crimes related to drug and alcohol abuse continue to be a driver of South Dakota's prison population, and additional investments are needed across the state to disrupt the cycle of addiction.

South Dakota should reclassify ingestion of a controlled substance to a Class 1 misdemeanor, expand presumptive probation to nonviolent Class 4 felonies, and continue to expand problem-solving courts and invest in community-based substance abuse treatment programs.

First and foremost, South Dakota policymakers should reclassify ingestion of a controlled substance from a Class 5 or 6 felony, depending on the drug schedule, to a Class 1 misdemeanor. South Dakota is one of the only states in the nation to classify ingestion as a felony, and its reclassification as part of SB 70 appears to be challenging South Dakota’s efforts to concentrate prison space on people who have committed violent acts or who pose a substantial risk to public safety.

Convictions and prison sentences for drug possession also continue to be a major driver in South Dakota. Given the state’s emphasis on reducing the number of people incarcerated for nonviolent crimes and reinvesting savings in drug and alcohol treatment, the state may want to consider further changes to the drug possession statute. Utah, Connecticut, and California have defelonized possession of controlled substances in recent years. South Dakota could similarly reclassify possession of a controlled substance from a Class 5 or 6 felony, depending on the drug schedule, to a Class 1 misdemeanor.

Several steps also can be taken to strengthen presumptive probation. Judges are required to state on the record their reason for departing from the presumptive probation policy before sentencing an individual to prison. These justifications are recorded in the judgment of conviction and should include evidence that the individual poses a “significant risk” to public safety. South Dakota could tighten reporting requirements and require the Unified Judicial System to collect and analyze data on departures. Given the success of the policy and ongoing improvements to probation supervision, South Dakota could also expand presumptive probation to nonviolent Class 4 felonies.

Finally, South Dakota should continue to expand problem-solving courts and invest in community-based substance abuse treatment programs. The state has allocated more than \$8 million to support implementation of SB 70 and fund training on evidence-based practices, a number of pilot supervision programs, and expansion of drug and DUI courts and substance abuse and mental health treatment programs. South Dakota is poised to build on those investments as further prison population reductions are achieved.

Conclusion

South Dakota took significant steps toward reforming its criminal justice system with the 2013 enactment of SB 70, the Public Safety Improvement Act. In the two years following the adoption of SB 70, the state averted its projected prison population growth and began investing in community-based alternatives and treatment for substance abuse. The two policies expected to have the biggest impact—presumptive probation and the felony reclassification of several nonviolent offenses, including drug possession and ingestion—produced results immediately.

After SB 70 took effect, placements to probation for Class 5 and 6 felonies increased and prison admissions and sentence lengths both decreased. The probation placement rate for offenses subject to presumptive probation increased in 2014 and 2015, and the state met its performance goal of sentencing 80 percent of eligible individuals to probation. At the same time, prison sentences declined 16 percent, and the average sentence length for drug possession and ingestion, the biggest drivers of South Dakota’s prison population, was cut in half.

But there are also some worrying trends. Felony convictions, particularly for Class 5 and 6 drug offenses, increased dramatically from 2013 to 2015. This rise in convictions appears to have been driven by an increase in felony filings rather than an increase in arrests. At the beginning of 2016, these increases spread to other parts of the justice system, with drug arrests, prison admissions, and prison populations all increasing. These increases challenge the progress South Dakota made toward its reform goals in 2014 and 2015 and suggest a need to continue improving the effectiveness of the South Dakota justice system.

In 2012, the Criminal Justice Initiative Work Group recommended reclassifying ingestion of a controlled substance to a Class 1 misdemeanor. Instead, the state created a new ingestion statute, separating it from the Class 4 drug possession statute, and defined it as a Class 5 felony for Schedule I and II controlled substances and a Class 6 felony for Schedule III and IV. With nearly 700 convictions for ingestion in 2015 alone, South Dakota should consider revisiting that recommendation to build on the success of SB 70 and further reduce unnecessary incarceration.

Notes

1. Since the enactment of SB 70 refers to changes since June 30, 2013.
2. Convictions include both suspended executions of sentence and suspended impositions of sentence and are defined as a criminal incident resulting in at least one conviction.
3. Urban Institute analysis of South Dakota court data.
4. Unless otherwise indicated, all years reported are fiscal year.
5. Drug ingestion was previously subsumed in the drug possession statute (22-42-5) but is now defined and classified in its own statute (22-42-5.1).
6. Drug schedules are defined in South Dakota statute 34-20B. Drugs are classified into schedules based on their potential for abuse, medical uses, and the consequences of abuse. Schedule I drugs have the highest potential for danger and abuse.
7. Other than the total number, data on felony filings that did not result in at least one conviction were not available.
8. These are calendar years.
9. These numbers are based on calculations by the Unified Judicial System and the Department of Criminal Investigation.

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