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*An Epidemic within a Pandemic: Understanding Substance Use and  
Misuse in America*

U.S. House Committee on Energy & Commerce  
Subcommittee on Health

Wednesday, April 14, 2021

Chairwoman Eshoo, Ranking Member Guthrie and Distinguished Representatives:

Thank you for the opportunity to testify before you and for the work that you are doing and have done on behalf of the nation with respect to the drug epidemic that is ravaging our country. I am proud to speak to you on behalf of The National District Attorneys Association, the nation's oldest and largest association of prosecutors, with over 5,000 members nationwide.

The challenges that we face are daunting. Systemic use and over-use of opioids has led to fentanyl, an opioid so potent that the five-pound weights that my 95-year-old father-in-law uses to exercise would constitute a lethal dose for every person in the state of South Dakota. For frame of reference, this is what a lethal dose of fentanyl looks like:



Alongside this crisis, we are seeing a continuation and a resurgence of methamphetamine, perhaps the most addictive controlled substance of wide-spread abuse we have ever seen and one for which there was, until recently, no Medication-Assisted Treatment (MAT) model. “While there are U.S. Food and Drug Administration-approved medications for other substance use disorders, no medications have yet received FDA approval for methamphetamine use disorder.”<sup>1</sup> That has changed. The good news of this ground-breaking study is that it more than quadrupled early success in methamphetamine treatment. The bad news is that the success rate went from 3.4% to 16.5%.<sup>2</sup> This illustrates the challenge that addiction to methamphetamine poses for individuals attempting to get clean.

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<sup>1</sup> <https://www.nih.gov/news-events/news-releases/combo-treatment-methamphetamine-use-disorder-shows-promise-nih-study>

<sup>2</sup> Ibid

Dealing with methamphetamine must also be a priority, as methamphetamine carries with it long-term consequences in brain activity and, during use, leads to paranoia, hyper-vigilance and aggression. In my 32 years as a prosecutor, only PCP has ever rivaled methamphetamine as a leading indicator of violence. In fact, an individual using methamphetamine is substantially more likely to engage in violent behavior compared with when they are not, even after adjusting for other substance use and socio-demographics. Using the number of days of use in the past month, a person with 1–15 days of use multiplied violent behavior by a factor of 2.8. A person with 16 or more days of use multiplied violent behavior almost ten-fold, a factor of 9.5.<sup>3</sup> All illegal activities carry a risk of violence. Methamphetamine use, even if entirely legal, would still carry risks to others.

### **Prosecutor History as Innovators**

In the face of these threats, I am proud to detail the work of our nation’s prosecutors, who have long led the way in finding and implementing improved mechanisms for communities ravaged by drug abuse.<sup>4</sup> Shortly after I began working for her, Janet Reno created the first Drug Court, then a ground-breaking model that used not just intensified probation services, but offenders in group settings to give a chance to offenders who were otherwise heading to long-term incarceration.<sup>5</sup> From that beginning emerged what are often categorized as specialty courts, dealing with defendants in drug and DUI cases. A similar model is common for Mental Health courts and Veterans’ courts. One would be hard pressed to find a county, much less a state, where offenders did not have access to one or more of the courts that spring from this lineage.

As positive as the specialty courts have been, the model upon which they were based was inherently limited to those offenders who were otherwise facing prison. The initial thought was that those offenders were most likely to be desirous of seeking a change in their lives and that the threat of prison was important to ensure participation and compliance with the program requirements. It is certainly true that the specialty courts have been proven to be successful in modifying behavior. But there are costs, both to the offender and to the community. If intensive treatment is reserved for repeat offenders, we run a grave risk of making addiction the only disease where “we expect people to diagnose themselves by ‘hitting bottom.’”<sup>6</sup> Families and

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<sup>3</sup> Does methamphetamine use increase violent behaviour? Evidence from a prospective longitudinal study. Rebecca McKetin, Dan I. Lubman, Jake M. Najman, Sharon Dawe, Peter Butterworth, Amanda L. Baker  
First published: 08 January 2014 <https://doi.org/10.1111/add.12474>

<sup>4</sup> An overview of prosecution perspectives and changes can be found in To Prosecute, Interviews about Early Decision-making, Emily LaGratta, 2020.  
<https://static1.squarespace.com/static/5d260fabfdbd0000011668cb/t/5f33f2ca0f254020169d5139/1597240019869/To+Prosecute%2C+Interviews+About+Early+Decision-making+booklet.pdf>

<sup>5</sup> Federal Probation, No. 72, vol. 1; [https://www.uscourts.gov/sites/default/files/72\\_1\\_2\\_0.pdf](https://www.uscourts.gov/sites/default/files/72_1_2_0.pdf)

<sup>6</sup> Regina LaBelle, Criminalizing Addiction Isn’t Working. Prevention and Treatment Deserve a Chance. August 23, 2019. <https://www.cato-unbound.org/2019/08/23/regina-labelle/criminalizing-addiction-isnt-working-prevention-treatment-deserve-chance>

communities are also left with the consequences of that on-going substance abuse, with behaviors that range from neglect and poverty to theft and violence.

### **The Rise of Prosecutor-Led Diversion**

Recognizing these limitations, prosecutors over the last five to ten years have increasingly added diversion programs, and like Ms. Reno, are some of the earliest developers and implementers of diversion programming. These programs are not intended to replace the specialty courts, but rather to fill a gap which those courts cannot. There are many different models of diversion. Some of the important distinctions include:

1. Time of intervention
  - a. Pre-arrest
  - b. Pre-charge
  - c. Post-charge
2. Offenses covered
  - a. Misdemeanors (often DUI's and domestic violence cases are not eligible)
  - b. Drug offenses (sometimes only certain drugs are eligible, usually marijuana)
  - c. Property crimes (these may include both misdemeanor and felony theft)
3. Offender Eligibility
  - a. Young adults (often 18-25)
  - b. All adults
  - c. Juveniles

In Pennington County, our program began in 2016 with misdemeanor charges of Possession of Marijuana and Petty Theft. We now have diversion programs that are available to persons of all ages who are arrested on virtually all non-violent misdemeanors and many non-violent felonies. We started slowly, looking for proof of concept. We owe a great deal to Cy Vance, District Attorney in Manhattan, and Darcel Clark, District Attorney in The Bronx, both of whom gave us a great deal of assistance and guidance as we first began to create this programming.

Our Diversion programs all follow the same procedures. We begin post-charge. An offender who is eligible, on an eligible offense:

1. Receives an intake interview (usually about an hour), is given a contract tailored to his/her specific needs, and admits guilt and, where appropriate, makes plans for restitution<sup>7</sup>;
2. Completes the contract (for Young Adult diversion, we target completion within 30-90 days), at which point the underlying criminal case is dismissed; and
3. Begins a 1-year period of "obey all laws." If successful, the offender can (with our assistance) seal and expunge both the criminal case and even the arrest.

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<sup>7</sup> In South Dakota, restitution is a constitutional right of the victim, which we do not waive (although we frequently have victims voluntarily waive restitution as part of diversion).

We tell our community that we have four basic rules for diversion:

1. It will be harder than pleading guilty (in terms of personal effort);
2. It will be achievable for the accused;
3. It will give the offender and the community a better chance at long-term success; and
4. There will never be a fee to participate. Even if there is programming associated with the contract, the costs of that will be borne by someone other than the offender.

**There is no pay to play.**

One of the most important and difficult aspects of our diversion is ensuring that the contract is tailored to the offender's history, the offense behavior and the underlying causes of that history and behavior. Because we have limited resources, we rely on community resources, including government agencies and NGO's, along with civic, church and charitable organizations. There are four kinds of contract clauses that are the most common.

1. Effort-based: Community service, letters of apology and group works are the most common. Community service is permitted in any non-profit or government organization that is chosen by the offender (assuming that they are equipped, insured, etc.) and in any community, not just in Rapid City.<sup>8</sup>
2. New Peers: All manners of civic and cultural associations are included. The idea is that an offender who has a renewed purpose and a social group built around that purpose is at substantially less risk of re-offending.<sup>9</sup>
3. Education/Counseling: This might include GED classes, drug treatment, parenting classes or any other self-improvement education.<sup>10</sup>
4. Employment: This includes job-shadowing, job internships and even job apprenticeships, which carry a full-time, living wage job if successful.<sup>11</sup>

In 2020, just before the outbreak of COVID-19, we initiated programming for methamphetamine and opioid users. Up until that point, we did not feel that we had any mechanisms available to give participants a realistic chance of success. But in 2018, Pennington County opened its "Care Campus," which provides an alternative to jail with "safe beds" Detox services, mental health crisis care and, in 2019, residential meth/opiate treatment beds. Just last week, we signed an MOU with the Oglala Sioux tribe, which will allow us to place Native American diversion participants in Native Women's Health Care and Native Healing, which provide a wide range of health care options, including residential substance abuse treatment, beginning in June 2021.

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<sup>8</sup> Two of the most popular examples include our Humane Society and Habitat for Humanity.

<sup>9</sup> The cultural component of activities is important for some offenders. We work with a wide range of groups, including the Wambli Ska Pow-Wow and Indigenous American Legacy (IAMLegacy), among many others. For some insight into how cultural considerations are made part of the programming, there is a Tedx Talk: Lighting a Path for At-Risk Youth; <https://www.youtube.com/watch?v=0KkIBJv3LvA>

<sup>10</sup> Our most frequent partners include Lifeways and Love, Inc., along with school district and other local educational institutions.

<sup>11</sup> Our apprenticeship opportunities are exemplified by Scull Construction, which has taken diversion candidates both as interns and as apprentices. Our internships and apprenticeships are all paid.

## **The Role of Criminal Justice in Addiction**

The Sheriff in Pennington County, Kevin Thom, has said that our communal response to addiction needs to be a three-legged stool consisting of prevention, enforcement and treatment. Just as we cannot incarcerate our way out of an epidemic, neither can we ignore it and expect it to go away. I certainly believe that we need to be treating addiction more like a medical crisis, but that mentality needs to be more than mere rhetoric. Merely calling for legalization or decriminalization is not the answer. The families and communities that are being torn apart by meth and opioids deserve protection.

Instead, we need to invest in human capital just as we invest in infrastructure...and with the same understanding of the short-term costs. I guarantee that every prosecutor and every sworn law enforcement officer in the country would be thrilled to take to the sidelines of our national struggle with addiction (and for that matter, mental illness and homelessness). We are all well aware that we are not experts in those matters. But inch by inch, we have found over the last 50 years that the institutions designed to deal with addiction, mental health and homelessness were poorly-run, expensive, or both. So, they ended up being under-funded or eliminated.

And we left the consequences of that abdication to the criminal justice system. Instead of dealing with the addict, we wait until the addict has caused a problem for someone else and, when they do, law enforcement is required to respond. Leading up to the criminal case, there are untold consequences to families, neighbors, children and friends. There are victims of theft and assault, even of rape and murder. So, this process needs to be initiated much earlier, with investment in treatment and intervention long before the criminal justice system would be needed. Every intervention that prevents violence is a step narrowing and focusing the role that law enforcement is required to fill.

That will not be easy, but there are steps that Congress can take.

First, provide additional funding and resources to match the Congressional rhetoric about the need to break down the silos between the criminal justice system and the public health sphere. Take seriously the description that this is a medical problem. Allow Medicaid and Medicare funding to pay for MAT models even for off-label uses. At the same time, move up the intercept point. Instead of waiting until I am involved, government and community treatment and prevention programs need to be active in finding and helping people.

Second, do not try and figure everything out in DC. NDAA represents more than 5,000 members who serve in the nation's 2,341 independent prosecutors' offices. We do not pretend to have all of the answers, but we are exceptional laboratories of innovation and we talk to each other.<sup>12</sup> The more you can do to incentivize that innovation, as with Comprehensive Addiction and Recovery Act (CARA) and subsequent legislation to address the disease of addiction, the better.

Third, remove the federally-imposed collateral consequences of state drug convictions. If a young person convicted of a state charge of Possession of Marijuana cannot get student loans, is disadvantaged in seeking work on a construction crew on a federal contract and cannot get HUD (or NAHASDA) housing, it should surprise no one that much of their income will be from selling drugs to (or stealing from) those among us who are most vulnerable.

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<sup>12</sup> NDAA is in the middle of a collaborative effort with the Urban Institute Justice Policy Center to create an interactive tool to allow prosecutors and interested partners to research and find diversion programming around the country.