

Defense Attorney Perspective

By Eric Whitcher, Pennington County Public Defender and
Member of the South Dakota Association of Criminal Defense Attorneys

Presented on June 22nd, 2021 to the Adult Use
Marijuana Study Subcommittee of the South Dakota Legislature.

About Eric Whitcher. Mr. Whitcher graduated from the University of South Dakota in 1993 with a Bachelor of Science degree in Political Science and Speech Communications and the University of Nebraska College of Law in 1996 with a J.D. Mr. Whitcher has practiced criminal defense for twenty-five years and was the Public Defender for Lawrence County South Dakota from 2006 to 2013 and was appointed as the Pennington County Public Defender in 2013. The Law Office of the Pennington County Public Defender is assigned approximately 6,000 cases each year. Mr. Whitcher is a member of the South Dakota Association of Criminal Defense Attorneys.

TABLE OF CONTENTS		Page
1.	SD Statutory Consequences	3
2.	Collateral Consequences	4
3.	National Legal Landscape	5
4.	Current South Dakota Patchwork	5
5.	Inequities	5
5.	Solution and Recommendation	6

STATUTORY CONSEQUENCES

The following is a brief summary of the current statutory penalties and a brief description of the most common penalties imposed upon conviction. Note: each case is unique, so many sentences are more or less severe.

Misdemeanor possession or consumption. Currently the use or possession of less than two ounces of marijuana is a class 1 misdemeanor, with a possible penalty of one year in jail and/or a \$2,000 fine. In Pennington County, a first conviction generally leads to a penalty of a fine and suspended jail and this is likely the most common sentence throughout the state. Distribution without consideration of less than ½ ounce is a misdemeanor. Sentences usually result in a fine and suspended jail. See, SDCL § 22-42-6 and 22-42-7.

Felony possession or distribution. Possession of more than two ounces is a felony and the felony classes increase with the total possessed weight with the maximum being a class three felony (15 years) for over ten pounds. All distributions for consideration are felonies with the maximum penalty being a class 3 felony (15 years) for the distribution of over one pound. Typical felony possession sentences are probationary sentences with local jail. Some of the lower level felony sentences will be presumptive probation sentences. Prosecutors seek the penitentiary for distribution cases, though the sentencing is always up to the Judge. See, SDCL § 22-42-6 and 22-42-7. A distribution of marijuana case has a 30 day mandatory minimum, while a distribution of controlled substance case has a one year mandatory minimum.

The SDACDL agrees that tiered system for enhanced penalties should be adopted. Whether that line is between two ounces and a pound, one pound to ten pounds, is up to the legislature. The SDACDL does not believe any distribution case should have mandatory minimum sentences.

COLLATERAL CONSEQUENCES

Collateral consequences of a conviction are often more impactful than the sentence imposed by the court. Below is a brief overview of the most common collateral consequences we see, but is by no means an exhaustive list of all the consequences of a misdemeanor or felony drug conviction.

Collateral consequences for South Dakota residents or visitors for convictions of misdemeanors.

- a. **Revocation or ineligibility for professional licensure.** Insurance, attorney, social work, medical, etc. Often convictions trigger a licensure review process and may result in revocation. Federal law prohibits certain professional licensures as well.
- b. **Ineligible for federally subsidized student aid.** If receiving student aid, a conviction may require a return of student aid.
- c. **Travel restrictions.** Some countries deny travel due to a marijuana conviction. Canada, as an example, deems a person convicted of possession of marijuana “criminally inadmissible.”
- d. **Employment.** Many employers run background checks and may deem a prospective employee ineligible due to a conviction or may choose an equally qualified applicant without a conviction.
- e. **Driver’s license.** Revocation for 90 days if possession was in a motor vehicle. SDCL § 32-12-52.3. A commercial driver’s license will be revoked for one year or lifetime if a second offense. SDCL § 32-12A-36.

Additional collateral consequences for South Dakota residents or visitors convicted of a felony.

- a. **Military Service.** Any person convicted of a felony is ineligible to enlist in any service of the armed forces.
- b. **Privacy rights.** Required to provide a DNA sample. SDCL § 23-5A-4. Refusal to supply a sample is a felony, see SDCL § 23-5A-14.
- c. **Civil forfeiture.** Personal property, including vehicles. SDCL § 34-20B-70.
- d. **Housing.** Housing assistance consequences. 24 C.F.R. § 982.553. Landlords often conduct background checks and convictions harm ability to obtain rent.
- e. **Adoption/foster.** Can’t foster or adopt for five years. See, The Adoption and Safe Families Act (ASFA).
- f. **Firearms.** Possess a firearm if convicted of SDCL § 22-42-7.
- g. **College athletics.** Revokes eligibility to for intercollegiate extracurricular competition. SDCL § 13-53-42.
- h. **Revocation of passport.** 22 USCA § 2714.
- i. **Immigration.** There are vast immigration consequences for felony drug offenses.

NATIONAL LEGAL LANDSCAPE

The United States has experienced a revolution in marijuana laws over the past twenty-five years. The first state legalized medical marijuana in 1996. In 2012, Colorado became the first state to legalize recreational marijuana. Currently, there are seventeen states which have legalized recreational marijuana, with South Dakota voting to do so in 2020. Currently 48 states, two territories and DC have either legalized recreational, allow medical or CBD. This creates confusion for citizens. They may lawfully purchase a product such as an edible in one state and find themselves charged with a felony while traveling through South Dakota. Recreational marijuana is approved by approximately 60% of the US population and medical marijuana is approved by over 90% of the population. Marijuana laws are likely to continue to change rapidly throughout the US and may under federal law.

CURRENT SOUTH DAKOTA PATCHWORK OF ENFORCEMENT

Currently in South Dakota, some counties are not prosecuting small amounts of marijuana and some are. Some police departments are citing and releasing, some are arresting and some are taking no action. Some circuit judges consider edibles a controlled substance, some consider them marijuana. These and other enforcement differences create a patchwork of inequality from one jurisdiction to the next, yet all under the same laws. An affirmation of law is for all persons to be equal under the law. That is not happening in South Dakota right now.

If an individual is charged with a felony-controlled substance allegation for having a marijuana concentrate, they have to remain in jail until a judge sets bond. That can be multiple days if the arrest is over a weekend. If a person happens to be caught with an edible and have their children around, they have been charged with felony child abuse and neglect.

INEQUITIES

When laws do not enjoy public support, are unequally applied to citizens or are difficult or confusing to follow for citizens (all such conditions currently exist in South Dakota), many inequities follow. Persons who have no idea they are committing a crime, are arrested, prosecuted, fined, jailed, imprisoned, become unemployed, etc. right here in South Dakota. As criminal defense lawyers, we meet the cancer patients who were prescribed marijuana from the Mayo Clinic in Rochester and then get arrested here in South Dakota. They will now enjoy an affirmative defense on July 1st, but they have still suffered. We also meet college students who risk having to drop out of college for being charged with possession of marijuana, yet a similar college student has no such worries in many other states. We meet the young professional who bought an edible in Colorado and had no idea it was a felony in South Dakota and now faces a loss of professional licensure, termination of employment, financial ruin and prison. These stories we hear often and they will continue until either Amendment A is upheld or the legislature fixes such inequities.

SOLUTION AND RECOMMENDATION

The South Dakota Association of Criminal Defense Attorneys urges this Subcommittee to recommend the passage of comprehensive legislation that mirrors the intent of the voters when they passed Amendment A. Such legislation would end the inequities we currently see in our practices and will ensure equal treatment under the law across our state.