

Bridging the Divide: Improving Parole Outcomes for Native Americans in South Dakota

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Brief

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From the Center Director

As part of our work with the Justice Reinvestment Initiative, Vera collaborated with state governments and provided technical assistance aimed at facilitating the successful implementation of new policies and programs. We helped policymakers prioritize their needs, identify resources that would build their capacity, and develop performance measures to help track their progress.

The program discussed in this report is just one example of the many innovative solutions that jurisdictions involved in the Justice Reinvestment Initiative are employing. Focusing squarely on improving parole outcomes, and ultimately reducing the re-incarceration rate of Native Americans in South Dakota, the featured pilot seeks to address the historical overrepresentation of Native Americans in that state's criminal justice system. Unlike many past efforts, this solution gives the tribe the authority and responsibility of supervising its state parolees; it also incorporates a "Wellness Team" into the supervision process, which has successfully engaged the Native American community like never before.

This featured program renews our optimism in the capacity of the criminal justice system to transform itself, despite significant historical and jurisdictional challenges. We hope this brief inspires other states to undertake similar reforms.



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The Justice Reinvestment Initiative

In 2010, the U.S. Department of Justice's Bureau of Justice Assistance (BJA) launched the **Justice Reinvestment Initiative** (JRI) in partnership with the Pew Charitable Trusts. JRI is a data-driven approach to improve public safety, examine corrections and related criminal justice spending, manage criminal justice populations in a more cost-effective manner, and reinvest savings in strategies that can hold justice system-involved people accountable, decrease crime, and strengthen neighborhoods. At least 30 states throughout the nation engaged in this process. Between 2011 and 2016, BJA funded the Vera Institute of Justice (Vera) to provide technical assistance to eight of these states, helping them collect and analyze data on the drivers of criminal justice populations and costs, identify and implement policy and programmatic changes, and measure the fiscal and public safety impacts of those changes.¹

One JRI milestone is for states to pass comprehensive criminal justice reform legislation to usher in new policies, practices, and programs. This brief focuses on a promising program in South Dakota that addresses a problem common to many jurisdictions: providing effective supervision to Native Americans who leave prison and return to live on tribal lands. After describing the problem, this brief summarizes the new approach taken by South Dakota and ends with a report of the program's initial successes. This brief is the first in a series of three that focuses on JRI activities in states where Vera has worked.

The problem

South Dakota was invited to participate in the Justice Reinvestment Initiative in 2012, embarking on a comprehensive effort to improve public safety and reduce the state prison population and its costs. Stakeholders included a bipartisan, multi-branch group of state officials. They acknowledged the challenge of improving outcomes for people on parole. Analysis showed that the number of people on parole who failed to comply with the terms of their supervision grew as a share of the prison population from 18 percent in 2000 to 25 percent in 2012.² The annual number of people who violated their parole and were admitted into prison almost tripled in that same period, from 270 people in 2000 to 768 in 2012.³ Further analysis revealed that people who identify as Native American constituted 44 percent of those who were returned to prison for a parole violation, despite making up only 24 percent of the entire parole population.⁴ Among this group of Native Americans in South Dakota, the rate of return to prison within three years of their release was 53.2 percent, compared to 38.8 percent for all others statewide.⁵

These statistics may not have surprised the Native Americans who left prison and returned to live on tribal lands or the Department of Correction (DOC) parole agents who supervised them. Native American parolees and their parole agents face a number of challenges that have contributed to high failure rates:

- > *Challenging residential conditions:* From the time of their release from state prison, Native Americans who return to tribal lands face supervision conditions that are challenging to uphold. Although Native Americans in South Dakota can live on tribal lands upon release, their conditions of release often require that they live in one of the state's urban regions to maximize their chance of finding employment. Although the parole board no longer imposes this condition as often as it once did, its prioritization of employment over family connections through this residential condition ignores the reality that many Native Americans will ultimately return to their tribal home. This emphasis on employment over family conflicts with evidence-based practices indicating that parolees who return to a strong support network are more likely to succeed.

- > *Limited access to services in tribal areas:* When Native Americans return to tribal lands, they may have access to fewer services than many who return to a non-tribal area. For instance, the person's parole agent may work 50, 100, or even 200 miles away, making it extremely challenging to establish a good working relationship or receive effective and helpful supervision. Reentry resources, such as substance use or mental health treatment or housing assistance, are scarce on reservations. What's more, the tribal community at large is typically not engaged in the reentry process. Most Native Americans view the state parole process suspiciously and fail to see how the parole infrastructure could potentially help a family member or friend. Unfortunately, the perception that many tribal members hold is that parole is an agency whose goal is to "throw...loved ones in jail."⁶
- > *Inability to hold parolees accountable:* Federally recognized tribes are considered domestic dependent nations that possess "tribal sovereignty"—the inherent and inextinguishable authority to govern themselves to the exclusion of local state jurisdiction.⁷ Tribes' special legal status evolved over centuries of government-to-government dealings between the United States and certain Native American tribes, and it is one that these groups are eager to preserve and enhance.⁸ Because state authorities cannot assume jurisdiction over tribal lands without a tribe's consent, South Dakota's state parole agents have limited ability to supervise Native Americans who live on tribal lands.

Although state parole agents can try to extradite parolees alleged to have violated the conditions of their supervision, in practice this does not usually happen because of the relative lack of state-tribal relations and the resulting low level of collaboration between the state and tribal law enforcement and with the community in general.⁹ Agents often know only about a parolee's emergency contacts and do not regularly communicate with the person's wider support network. This means that if there is a violation, no matter how major or

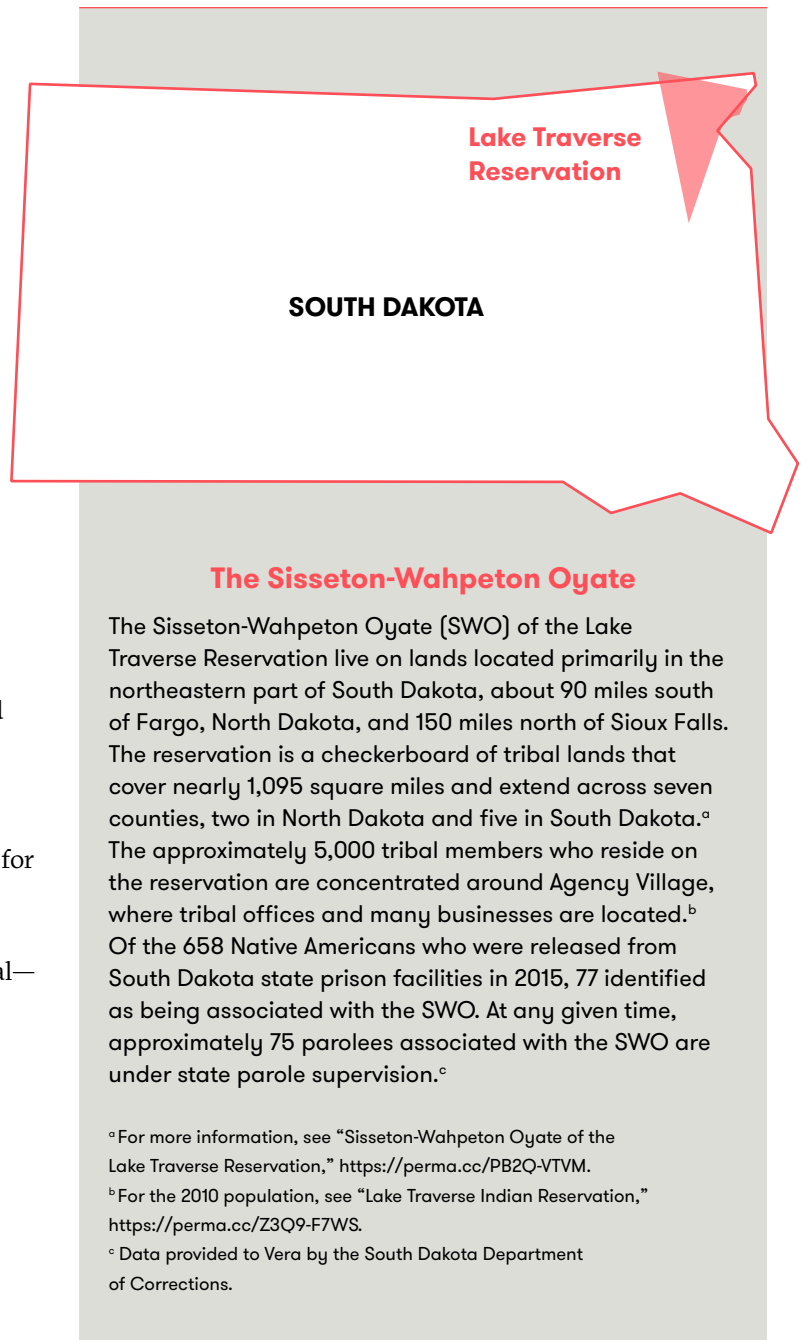
minor, the only real options for the supervision agent are to do nothing or officially revoke people from parole as absconders and pick them up on a warrant once they leave tribal lands. Given these challenges, the DOC has historically chosen the latter option, so that by 2012, more than half of parolees who absconded from state parole supervision were Native Americans.¹⁰

A new approach

South Dakota's JRI legislation, the Public Safety Improvement Act (SB70), which was initiated and signed into law by Governor Dennis Daugaard in February 2013, encompasses a broad range of criminal justice reforms, including authorizing the DOC to create parole supervision pilot programs tailored to tribal communities.¹¹

With this mandate, and knowing the challenges of supervising tribal members on parole, Governor Daugaard directed the DOC to reimagine parole supervision for this population. Over a series of months, senior DOC staff including Secretary Denny Kaemingk held meetings with seven of the state's nine recognized tribes to discuss ideas for the pilot program and explore possible partnerships. Even more important than determining the exact shape of the pilot program, finding the right tribal partner was essential—one large enough to justify its own parole program and, critically, interested in collaborating with the DOC.

Ultimately, the Sisseton-Wahpeton Oyate (SWO) of the Lake Traverse Reservation agreed to work together to develop a pilot program. Over the previous decade, 325 incarcerated people who identified themselves as being associated with the SWO had been released from prison.¹² During that period, there was a total of 335 admissions to prison (new court and parole violation admissions) of individuals who self-identified as being associated with the SWO. As a result, members of the SWO Tribal Council were persuaded to set aside historical differences with the state and agreed to work cooperatively because they appreciated that the community would benefit from a program focused on improving parole outcomes.



^aFor more information, see "Sisseton-Wahpeton Oyate of the Lake Traverse Reservation," <https://perma.cc/PB2Q-VTVM>.

^bFor the 2010 population, see "Lake Traverse Indian Reservation," <https://perma.cc/Z3Q9-F7WS>.

^cData provided to Vera by the South Dakota Department of Corrections.

The SWO and the South Dakota DOC signed an agreement in April 2014. The Tribal Parole Pilot program granted the SWO the authority—and responsibility—to supervise parolees who returned to SWO tribal lands, upending the “us versus them” dichotomy that previously existed. This, along with two additional features described below, made the pilot program unique.

It’s a tribal program, not a DOC program.

The director of the SWO Parole Office and the parole agent who oversees the caseload are employees of the tribe. Although the DOC pays for the agent’s salary, office space, and other expenses, the agent answers not to the DOC but to the tribal council and what’s called the Wellness Team—a multidisciplinary team of mostly tribal employees created specifically for this program. The team works with the parole agent and parolees to access services and provides appropriate supervision, support, and responses to violations.¹³

Despite this change, the tribal parole process is consistent with state parole supervision in many respects:

- > The tribal parole agent receives the same training as a state parole agent and has access to the state computer network, receives a state e-mail account, uses DOC databases and resources, and receives support from state parole colleagues. This allows for a consistent release planning system and makes data accessible for state analysis.
- > The supervision policies and response matrix of the Tribal Parole Office largely conform to those of the state, with a few cultural modifications. The tribal parole system applies swift, certain, and proportionate sanctions for prohibited behavior, along with incentives for compliance, just as state parole does.¹⁴
- > Similar to a state parole agent, the tribal parole agent’s duties include monitoring the day-to-day activities of parolees, such as conducting home visits and community visits to verify their compliance with release conditions.

Making the agent a tribal employee defused some of the jurisdictional tension that had affected parole outcomes for tribal members in the past. It showed good faith by the DOC that department leaders were serious about giving up control and letting the SWO supervise the people in the pilot program. By shifting the power dynamic in this way, South Dakota removed one of the barriers that historically made cooperation between a tribe and the state difficult.

The Wellness Team is an integral part of parole supervision.

The existence and role of the Wellness Team is the most significant way that the Tribal Parole Pilot differs from state parole supervision—and DOC and SWO members Vera interviewed consider it a key reason for the program’s success.

The Wellness Team is a loosely organized group of people from various organizations and agencies who have an interest in a parolee achieving success.¹⁵ Although there are no formal membership protocols or requirements, the team includes the tribal parole director and agent, as well as representatives from Sisseton-Wahpeton Law Enforcement, Sisseton-Wahpeton College, Dakotah Pride (a provider of inpatient and outpatient substance use treatment services), the South Dakota Human Services Department, the SWO Tribal Court, the SWO Drug Treatment Court, and tribal health programs. The state’s parole services director is also welcome at and periodically attends Wellness Team meetings. Meeting on a weekly basis, the responsibilities of the Wellness Team include the following:

- > welcoming the parolee back to the community officially and communicating that the team and the community are there to help, but that the parolee will be held accountable;
- > meeting with the parolee on an as-needed basis;
- > working with the tribal parole agent to review and develop appropriate responses to a parolee’s behavior, emphasizing a reliance on community-based resources—tribal, county, state, and others—to address relevant issues; and

- > receiving community input—from the parolee’s family members and friends and from other interested community members.

The first meeting after a parolee’s release—known as the Welcoming Meeting—is a critical part of the program. Tribal members returning from state prison may be suspicious and apprehensive of state parole. The Wellness Team uses the initial meeting to dispel myths or misconceptions that a parolee and his or her family might have about the Tribal Parole Office. They communicate this important message: “We are here to help you, but you need to work with us to succeed.”

When appropriate, the Wellness Team has the flexibility and discretion to draw on traditional and culturally relevant practices as a behavioral response. For parolees who adhere to traditional Native American beliefs and practices, reinforcing those traditions can be quite effective. As the tribal parole director explained, “Not everybody practices his or her traditional ways. The ones that do—we’ll use that. We ask them, ‘What are you doing to hold on to those practices?’ If they need to do community service, we’ll recommend that [as a response]. We’ll excuse them from [mandatory appointments, such as drug testing] so that they can participate in Sun Dance, which lasts several days.”¹⁶ Meaningful responses may include cutting wood or doing other work for Sun Dance and collecting rocks and helping with the sweat lodge. Although the Wellness Team reports that it does not often use traditional practices as a response or sanction, having the option is extremely meaningful to the community.

The Wellness Team has done more than just help the tribal parole agent deliver effective supervision. It has also promoted the involvement of parolees’ family members and other loved ones from the community to help people achieve success. Through the Wellness Team, family, friends, and other tribal members are engaged in the reentry process and with people on parole as never before in DOC history. Community members no longer wonder what to do when faced with a parolee’s negative behavior; they intervene, communicate with the Wellness Team, and make efforts to help the person reintegrate into the tribe.

How the pilot works

On a recent Wednesday afternoon, John, a member of the SWO, arrives for his scheduled parole appointment at the SWO Parole Office in Agency Village. John has recently tested positive for marijuana and knows he will face some consequences. Around the table at his appointment are his tribal parole agent, the director of the SWO Parole Office, and members of the Wellness Team, which, on that day, include Randy from the Sisseton-Wahpeton College who is also a former parolee; George from the Sisseton-Wahpeton Law Enforcement; and Diane and Robert from Dakota Pride, a provider of inpatient and outpatient substance use treatment services. Everyone present is a member of the SWO.

John is worried, not because he thinks he will return to jail or prison, but because he knows that the people at the table—some of whom he has known since he was a child—will hold him accountable for his actions in other ways. He is worried because he considers Randy and George role models and they will be disappointed in him. The team talks with John about what happened and what led to his drug use. The parole agent has previously spoken with John’s mother. Together, John and the Wellness Team determine a response to his behavior; in this case he ultimately enrolls in outpatient treatment. John is on the path to recovery.*

* This is a hypothetical situation meant to represent a typical meeting for a person who has violated his or her parole.

The tribe must return parole violators to the DOC.

A nonnegotiable component of the program is the requirement that the tribe return parolees to DOC if they violate terms of their supervision *and* the parole agent and Wellness Team recommend revocation. This requirement is significant because of the complex jurisdictional issues between the state and federally recognized tribes that have historically limited the effectiveness of DOC supervision. As Bradley Lewandowski, the director of the DOC’s Parole Services, described:

We don’t have jurisdiction on tribal land. As a state entity, I don’t have jurisdiction over tribal members when they are on the reservation. We let them return home. I can meet with them at their house or when they attend treatment. But when they [are] in violation...even if I caught them violating

at their house, I can't arrest them and take them off tribal grounds. I would have to say to them: 'You're in violation. I want you to report to the county sheriff's office by x time.' I would go to the office and wait. If they fail to show up, then I can list them as an absconder. That's my only option. The state issues a warrant and whenever they are off tribal land, I can pick them up. The tribes do not extradite their people and turn them over to us. As a state agent, if I go to tribal law enforcement, they [do] not have permission to cooperate with me. They will not arrest them for us. The parolee doesn't show up out of fear that they will automatically be sent back to prison.¹⁷

The hope now is that the tribal parole program will help change attitudes and build mutual respect between tribal communities and state criminal justice agencies—and in doing so will lead to sustained collaboration with the SWO and serve as a model for future collaborations with other tribes.

Early successes

Before the pilot program, the parole success rate for SWO members was 43 percent. In other words, 57 percent of SWO parolees would have a violation report or return to prison because of a technical violation or a new criminal sentence.¹⁸

In the first two years of the program's operation (FY 2015 and FY 2016), the success rate climbed to 72 percent; out of 32 people discharged from the program, 23 successfully completed their parole terms and nine returned to prison.¹⁹ The absconding rate also dropped dramatically. In the first year, only two parolees of the 61 participating in the program were reported as absconding (3 percent); and in the second year, only eight of 67 participants absconded (12 percent).²⁰ Previously, 15 to 20 percent of SWO parolees absconded.²¹

Numbers aside, the key stakeholders of the program—staff from the SWO Parole Office and the DOC—agree that the greatest measure of success is the cultural change within the DOC and the tribe. Members of the SWO are invested in getting better results from parolees. Community members are engaged in the parole and reentry process. Family members, friends, and parolees themselves no longer view parole as an adversarial process, but one that can help and support the person involved in the justice system. Family members often explain to the tribal parole agent or the Wellness Team what is going on with their loved one and express their concerns; this communication serves as a “heads up” about behavioral issues. By working together, DOC staff and tribal members are building trust and respect for one another. As Joan White, the current director of the tribal parole office, said, “They were surprised when we said, ‘Welcome home.’ It really created a culture of trust.”

In July 2016, the pilot became a permanent part of the SWO and DOC administration. The state and the SWO signed a new agreement and the program has been absorbed into DOC's overall budget and funding requirements. The pilot program's success has the potential to transform parole supervision for Native Americans in South Dakota as well as in other states; the DOC is engaged in conversations with other South Dakota tribes to implement parole programs in their communities. The persistent sticking point is the requirement that a tribe return parolees to the DOC upon revocation. However, with help from SWO members who can vouch for the success of the program, it is hoped that other tribes can work with the DOC to help improve parole outcomes.

Endnotes

- 1 Vera worked with Arkansas, Delaware, Georgia, Kentucky, Louisiana, Oregon, South Carolina, and South Dakota.
- 2 South Dakota Criminal Justice Initiative Work Group, *Final Report*, (South Dakota: SDCJI, 2012) 5, <https://perma.cc/T3DQ-ZQRW>.
- 3 *Ibid.*
- 4 The South Dakota Department of Corrections tracks the race and ethnicity of its clients (people incarcerated at state prisons and people on parole supervision) based on self-reported responses to DOC intake forms. As such, the term “Native American” as used in this report may include some people who are not official tribal members of any federally recognized tribes, but choose to identify as Native American. Furthermore, throughout this report, the authors use the term “Native American” to refer to people who associate with an indigenous tribe of the United States, as it is the phrase used by members of the Sisseton-Wahpeton Oyate (SWO) of the Lake Traverse Reservation, the tribe that is the subject of this report. The authors acknowledge that the federal government uses the terms “American Indian” or “Alaska Native” to refer to the indigenous tribes of the continental United States (American Indians) and the indigenous tribes and villages of Alaska (Alaska natives such as Eskimos and Aleuts). This usage is reflected in the federal census and in the treaties and other legal documents between the federal government and those native groups that have been granted federal recognition and are eligible for benefits and services funded or directly provided by the federal Bureau of Indian Affairs.
- 5 For the percentage of Native Americans who returned to prison for a parole violation, see South Dakota Criminal Justice Initiative Work Group, *Final Report*, 9. The remaining data was provided by the South Dakota Department of Corrections.
- 6 Interview with Joan White, Director of SWO Parole Office, July 15, 2016.
- 7 See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet. 1) 1 (1831), in which Chief Justice John Marshall characterized tribes as “domestic dependent nations” and declared that federal legislation had always considered these nations to be “distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all lands within these boundaries, which is not only acknowledged, but guaranteed by the United States.” Also see *Worcester v. Georgia* 31 US 515 (1832), which noted that “treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.” That case, which dealt with the interaction of Georgia’s state law and the Cherokee Nation, declared that state law has no force and that “citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.” Subsequent case law has reinforced the principle of tribal self-government within tribal territory. See, for example, *Okl. Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 123–124 (1993) (denying application of state motor fuel tax to Indians in Indian country); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764–765 (1985) (barring state from taxing tribal royalties from mineral leases on trust land); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331–332 (1983) (denying state power to regulate non-Indian hunting and fishing on tribal land). In addition, Justice Marshall also recognized in the *Cherokee* case that the United States held a legally enforceable fiduciary obligation to protect tribal treaty rights, lands, assets and resources. Also see *Seminole Nation v. United States*, 316 U.S. 286 (1942).
- 8 Regarding the authors’ use of terminology, see note 4. Nell Jessup Newton, Robert T. Anderson, et al., eds, *Cohen’s Handbook of Federal Indian Law* (Albuquerque, NM: American Indian Law Center, 2012).
- 9 Currently all but two of the nine tribes in South Dakota have laws within their codes that describe procedures for the extradition of tribal members who are wanted in courts outside the reservation. See Frank Pommersheim, *South Dakota Tribal Court Handbook* (Vermillion, SD: USD School of Law, 2006) 13.
- 10 Office of Governor Dennis Daugaard, “Update on the Tribal Pilot Parole Program, June 19, 2015,” <https://perma.cc/8NAE-CPK9>.
- 11 The Public Safety Improvement Act also expanded access to specialty courts (such as drug courts and DUI courts), restructured the state sentencing framework to better differentiate between different levels of criminal conduct in order to prioritize prison space for people convicted of violent crimes or who are convicted multiple times, and invested heavily in behavioral health programs for justice system-involved people. See Senate Bill 70 (2013) at <https://perma.cc/M5B2-VZVP>.
- 12 Although some Native Americans prefer the term “nation” or “people,” the Sisseton-Wahpeton Oyate uses the word “tribe.” (The word “Oyate” means “people” or “nation.”) Under U.S. law, “tribe” is a bureaucratic term; to gain access to programs and to enforce rights due to Native Americans under treaties and laws, the federal government must recognize them. See 25 C.F.R. § 83.7 (2007), which lists the seven requirements for federal recognition. A tribe must meet all seven requirements under the regulations or the United States will not recognize the tribe per 25 C.F.R. § 83.6 (2007), and thus the tribe will not be eligible for the often critical services and benefits that recognition confers; see 25 C.F.R. § 83.2 (2007).

- 13 The concept of a Wellness Team was not new to the SWO. The tribe had previously used a similar team for members needing substance use or mental health treatment, and “wellness” is an important Native American concept. Its use as an integral part of the parole supervision process, however, was a novel adaptation of the model.
- 14 Research has shown that a swift response to an infraction is a vital tool in shaping behavior and improves the perception that the sanction is fair. See for example Angela Hawken and Mark Kleiman, *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii’s HOPE* (Washington, DC: National Institute of Justice, 2009).
- 15 The Tribal Parole Office does not have any formal policies about the Wellness Team. When inviting additional members, team members look for resources in the community and people who will contribute and help.
- 16 Sun Dance is a ceremony some indigenous tribes in the United States and Canada practice. It is a ceremony at which members offer personal sacrifices for the benefit of family and community. See <https://perma.cc/G7QN-TBUB>.
- 17 Interview with Bradley Lewandowski, director of the South Dakota Department of Corrections Parole Services, June 9, 2016.
- 18 Data provided to Vera by the South Dakota Department of Corrections.
- 19 Ibid.
- 20 Ibid.
- 21 Ibid.

For more information

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To learn more about the South Dakota Tribal Parole Program, contact Joan L. White, director of the SWO Parole Office, at 605-698-7017 or JoanW@swo-nsn.gov; and Bradley Lewandowski, director of South Dakota Department of Corrections Parole Services,

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An electronic version of this report is posted on Vera’s website at www.vera.org/bridging-the-divide.

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