

**MINUTES
of the
FOURTH MEETING
of the
CRIMINAL JUSTICE REFORM SUBCOMMITTEE
of the
COURTS, CORRECTIONS AND JUSTICE COMMITTEE**

**October 27, 2017
Ladera Golf Course Banquet Hall
3401 Ladera Drive NW
Albuquerque**

The fourth meeting of the Criminal Justice Reform Subcommittee (CJRS) of the Courts, Corrections and Justice Committee (CCJ) was called to order by Representative Antonio Maestas, co-chair, on October 27, 2017 at 8:55 a.m. at the Ladera Golf Course in Albuquerque.

Present

Rep. Antonio Maestas, Co-Chair
Sen. Sander Rue, Co-Chair
Sen. Gregory A. Baca
Rep. Gail Chasey
Rep. Zachary J. Cook
Rep. Jim Dines
Sen. Richard C. Martinez
Sen. Cisco McSorley

Absent

Guest Legislators

Sen. Jacob R. Candelaria
Sen. Linda M. Lopez

Minutes Approval

Because the subcommittee will not meet again this year, the minutes for this meeting have not been officially approved by the subcommittee.

Staff

Monica Ewing, Staff Attorney, Legislative Council Service (LCS)
Diego Jimenez, Research Assistant, LCS
Celia Ludi, Staff Attorney, LCS

Guests

The guest list is in the meeting file.

Handouts

Handouts and other written materials are in the meeting file.

Friday, October 27

Call to Order and Introductions

Representative Maestas and Senator Rue welcomed everyone to the meeting, and the subcommittee members and staff introduced themselves. Senator Rue discussed the future of the subcommittee and an intent for the subcommittee to produce a legislative plan during the next interim.

Collateral Consequences of Conviction

Sheila Lewis, former public defender, discussed her past experience as a public defender and her current work with NM Safe, a public safety organization. Ms. Lewis defined collateral consequences as the many negative things that arise following a person's conviction. Examples of collateral consequences include negative effects on a person's ability to secure work, housing, loans and child custody.

Ms. Lewis said that, according to the Council of State Governments Justice Center (CSGJC), there is a total of 680 collateral consequences in New Mexico statutes and rules. She reports that 90% of job applicants apply for jobs that require a background check that will reveal a previous conviction, and one in four adults in the United States has a felony conviction. Ms. Lewis discussed the need to address collateral consequences in criminal justice reform.

Ms. Lewis discussed the Criminal Offender Employment Act and highlighted the barriers to employment that should be removed to make rehabilitation feasible. Ms. Lewis discussed previous "ban the box" legislation noting that, if convictions unrelated to a person's potential job duties are not taken into consideration until the applicant has been selected as a finalist for a position, it could help people with criminal records to obtain work. Ms. Lewis told the subcommittee that many women are convicted of a felony for fighting back against domestic abuse and a ban-the-box-type law could help those women find post-incarceration employment.

Ms. Lewis discussed voting rights for individuals with a past felony conviction and described the method to regain their voting privileges. She stated that all rehabilitated offenders can register to vote in New Mexico after they have completed their entire sentence, including probation and parole.

Ms. Lewis said that collateral consequences have immediate and lasting effects, including effects on immigration status and sex offender registration. She reported that the New Mexico Supreme Court (NMSC) has held that in order to provide competent counsel, defense attorneys must inform clients, prior to a guilty plea, that collateral consequences may exist that could change their immigration status or require registration as a sex offender. Ms. Lewis stated that a plea could be found invalid if a person's defense counsel fails to provide that information. She said that many people may become nervous or less compliant when their defense attorney inquires about immigration status, but that status must be disclosed to provide competent counsel.

Ms. Lewis discussed options that could help reintegrate the formerly incarcerated to society. She suggested assistance with obtaining proof of identification, positive record

building, limiting access to criminal background information for non-law enforcement purposes, enacting the Uniform Collateral Consequences Act, providing notice and education on collateral consequences, encouraging civil engagement and expanding the scope of the ban the box law to include private employers and housing.

Ms. Lewis discussed New Mexico's deferred sentencing statutes. She said that under current statutes, a deferred sentence carries collateral consequences because the criminal case is dismissed and not expunged. She recommended amending a statute to alleviate collateral consequences when a conditional discharge is completed.

Ms. Lewis discussed the "recap of action steps" slide from her presentation materials. She stressed that the most important recommendation that could be adopted is the enactment of an expungement law.

In response to a question, Ms. Lewis discussed methods to encourage companies to alter their practices, such as business incentives and penalties. The subcommittee discussed the level of difficulty to expunge a record under current law and policy; a need for statistical evidence to garner legislative and community support of policy changes; and potential obstacles to using federal funds to assist felons. Ms. Lewis noted that when an individual is released from prison, an inability to secure housing increases recidivism rates sevenfold. She discussed public housing projects in Albuquerque that include both public and market rate housing.

In response to a question, Ms. Lewis discussed collaborative efforts to alleviate collateral consequences, such as criminal justice coordinating councils.

Alleviating Stress on the Criminal Justice System — House Bill (HB) 428 (2017)

Bennet Baur, chief public defender, Public Defender Department (PDD), Ricki-Lee G. Chavez, legislative coordinator, New Mexico Criminal Defense Lawyers Association, and Rick Tedrow, president, New Mexico District Attorneys' Association (NMDAA), introduced themselves. Ms. Chavez provided an overview of HB 428 (2017). The bill sought to shift several crimes listed in the Motor Vehicle Code to become civil penalty assessments rather than misdemeanors. In 2017, the bill passed the legislature, but was vetoed by the governor. Ms. Chavez described how the bill would positively affect the criminal justice system. The members of the subcommittee discussed the governor's veto message of the bill.

Mr. Baur said that the PDD, the courts and district attorneys' offices are underfunded and overworked, noting that the situation worsens with time. He acknowledged other important fiscal priorities of the state, including health care and education. He said that HB 428 served as a way to improve the justice system outside of funding requests. He reported that the bill would decrease incoming cases while placing priority on dangerous criminals and chronic DWI and domestic violence offenders. Mr. Baur noted that the bill did not remove all associated penalties and only removed the criminal aspect, which does not affect community safety. He stated that a 3% decrease in caseloads, as could be expected if the bill had become law, would be significant for all criminal justice-involved agencies.

Mr. Tedrow stated that the NMDAA did not give an opinion on this bill during the last session but said that there are certain concerns within the bill.

Ms. Chavez and Mr. Tedrow agreed in sharing a desire to work on the language in the bill to garner support and move criminal justice in a positive direction. The subcommittee discussed potential benefits of this bill becoming law, including relief of demands on scarce resources, fewer collateral consequences for offenders and law enforcement time prioritization.

In response to a question, Ms. Chavez explained that she has not reached out to the governor to evaluate options for the bill in the future. A member of the subcommittee referred the panel to the New Mexico Association of Counties for further information and collaboration. Mr. Baur reported that he intends to coordinate efforts with the Administrative Office of the Courts (AOC).

Expungement as an Economic Development Tool

Representative Maestas discussed expungement legislation from 2011 that was vetoed. He discussed a 2016 Kentucky law that provides for low-level felony record expungement. He said that expungement of certain criminal records can help individuals find employment and reduce recidivism. He said that a similar bill in New Mexico could apply to nonviolent felonies and would likely save the state approximately \$91 million.

Paul Haidle, criminal justice advocate, American Civil Liberties Union (ACLU) of New Mexico, discussed past work experience in community legal aid in Chicago, Illinois. He discussed the ACLU materials titled "Back to Business—How Hiring Formerly Incarcerated Job Seekers Benefits Your Company". He told the subcommittee about testimony on a bill by Crossroads for Women that reported success through offering housing, training and job connections.

The subcommittee discussed erroneous information in background checks; erasure of public memory for crimes; libel, public domain, social media and the internet; and private industry initiative to change background check protocol. The subcommittee discussed past bills on expungement and the exclusion or inclusion of DWI offenses and violent felonies from the proposals. In response, Mr. Haidle said that New Mexico is one of the few states without an expungement law and that New Mexico should use the lessons from more than 40 other states to craft a policy. He described the differences between expungement and sealing of records.

Representative Maestas told the subcommittee that in the last decade, states with expungement laws have had more than 91,000 nonviolent felonies, and more than 100,000 misdemeanor offenders became eligible for expungement of their records. He explained that under most policies in other states, timetables for expungement begin upon completion of a person's sentence. He discussed a former client who lost employment when the employer discovered a previous conviction. The client has since been unable to find another job. Representative Maestas said it is in the best interest of the community for that client to be employed.

In response to a question, Mr. Haidle explained that the National Crime Information Center (NCIC), controlled by the Federal Bureau of Investigation, complies with state orders to expunge records. He also noted that the NCIC is only accessible to certain entities, such as law enforcement, and is not normally available to the public.

Chris Moffat, Fathers Building Futures, discussed his experience working for the nonprofit organization. He reported to the subcommittee that since 2012, the organization has worked with more than 300 individuals, helping them to find employment. In his experience, the "convicted felon" check box on a job application is the first barrier encountered by a formerly incarcerated person trying to find employment.

Joseph Shaw, operations manager, Fathers Building Futures, told the subcommittee of his experience as a former client of the nonprofit. He reported that, due to assistance provided by the organization, he has remained sober and away from crime. He said he is unable to volunteer in his children's schools or participate in school field trips due to his criminal record.

A member of the public and a parent, Mr. Jackson told the subcommittee about his experience witnessing his son struggle with collateral consequences and with a mental illness.

Ms. Lewis told the subcommittee that the "convicted felon" check box on job applications and the whole criminal justice system in the state have disparate impacts on members of certain races.

How Did We Get Here? — *State v. Brown* and Court Rule 5-401 New Mexico Rules Annotated (NMRA) — 2016 Constitutional Amendment and Court Rule 5-409 NMRA

Representative Maestas gave an overview and a history of criminal and detention policy, including review of:

- the Magna Carta, which established that individuals accused of a crime are presumed innocent pending trial;
- the Statute of Westminster, a British law clarifying the powers of Canada's parliament that established bailable offenses, prohibited excessive bail and provided criteria by which an individual should be released;
- the Frame of Government of Pennsylvania of 1682, which established that unless danger is great, all prisoners will be available for bond by sufficient sureties;
- the federal Judiciary Act of 1789, which provided an absolute right to bail except in capital cases;
- the Eighth Amendment to the Constitution of the United States of America, which prohibits excessive bail; and
- *United States v. Salerno*, a court case that allowed for a federal court to detain an arrested person until trial.

Representative Maestas discussed New Mexico's rules related to bail, which were written in 1972 and describe the format of court rules. He explained the NMSC's process for creating and amending rules. The legislature does not write court rules.

Representative Maestas discussed *State of New Mexico v. Brown*, noting that the opinion in that case did not create new law, and said the decision clarified that the bail policy in question was being implemented incorrectly. He said that in that case, the defense alleged that Mr. Brown was not a danger to the community, but the prosecution objected to his release, and he stayed in jail until the NMSC overturned his detention.

Representative Maestas said that a 2015 committee created by the court recommended amending the constitutional provisions on detaining an accused person, noting a need to be able to hold certain individuals without bond. In 2016, the legislature passed a constitutional amendment that was ratified by the voters later that year. The amendment intended to remove the ability to hold defendants due to indigence while providing that other defendants could be held if proven to be a danger to the community. The NMSC promulgated rules to establish procedure for bail and detainment that became effective July 1, 2017.

Jennifer Barela, attorney, PDD, discussed Article 2, Section 13 of the Constitution of New Mexico. She described the process of charging and arresting an individual accused of a crime. Upon being charged, arrested and placed in detention, the defendant is entitled to see a judge within 48 hours. In Bernalillo County, the first appearance before a judge falls under the jurisdiction of the Bernalillo County Metropolitan Court, and the district attorney and a public defender are both present. At that time, the district attorney can file for continued detention, in which instance the case would be transferred to district court. She said the procedure for pretrial detention is outlined in 5-409 NMRA.

Ms. Barela said that if the district attorney does not file for detention, the judge follows procedures outlined in 5-401 NMRA. She told the subcommittee that Bernalillo County uses a public safety assessment tool in connection with detention decisions. Under 5-401 NMRA, there are different tiers for pretrial release. She reported that a majority of arrested individuals are released and subject to conditions that can include pretrial services, and very few are released on their own recognizance. The different tiers include options for a judge to have a defendant report periodically, wear a global positioning system device or participate in other services. The majority of offenders are required to participate in pretrial services and are left on supervision for 60 days, during which time the state must decide how to proceed in the case. After 60 days, if the district attorney has not sought an indictment, the conditions of the person's release and the jurisdiction of the court no longer apply. If the district attorney does seek an indictment, the case is transferred to district court to determine conditions of release pending trial.

If the defendant is detained under preventive detention, the state has 10 days to indict or bring the case to a preliminary hearing if charges are to proceed. Ms. Barela reported that before the recent constitutional amendment regarding bail, clients who were unable to pay a \$100 minimum bond would stay in custody for up to 10 days.

Ms. Barela said 5-403 NMRA is the method by which a defendant's pretrial release can be revoked or modified. She said that she supports the bail rules and the new constitutional amendment because, as a public defender, her clients are not being held solely because of their economic status. She discussed her clients that are now under preventive holds under the new release and bail environment. Prior to the institution of the new rules, she said, potentially dangerous defendants could post a bond and quickly return to the community. After the institution of the amendment, if the state can produce evidence of dangerousness, the client will be held.

Representative Maestas said that bond is used to ensure a person's appearance in court and discussed bonding options. He noted that if a bonding agency is used, the agency is responsible for paying the bond if the person does not appear, and the agency has a financial incentive to make their clients appear in court.

The subcommittee discussed the constitutional amendment and judges' authority to detain. In response to a question, Ms. Barela said that the procedural rules of 5-409 NMRA are clear. She discussed evidence brought against her clients in motions to detain, including prior criminal complaints and violations of previous conditions of arrest.

Ms. Barela discussed the language of the bail constitutional amendment. She told the subcommittee that the language in the amendment was derived from federal bail reform law.

In response to a question, Ms. Barela noted that some judges consider people who commit property crimes to be a danger to the community and, therefore, they may be ineligible for bail. She told the subcommittee that the statistics indicate that prosecutors file for detention in about 13% of cases and about 4% of offenders are detained.

Mr. Tedrow said the NMDAA is tracking data on detention motions but it has not yet produced a report. The subcommittee recommended particular measures for the NMDAA to track.

Members of the subcommittee discussed their experiences as victims of crime; the clear and convincing evidence standard; previous standards and practices for detention; changes to rules as required by constitutional amendment; and deadlines for prosecuting.

Ken Christensen, sheriff, San Juan County, discussed his experience in law enforcement working with drug addicts and regularly rearresting certain individuals.

Members of the subcommittee discussed *State v. Brown* and Justice Charles Daniels' determination that the state was in violation of the U.S. Constitution under its previous bonding practices. Representative Maestas noted that 48 states have constitutions modeled after Pennsylvania's, in which a defendant does have a right to bail despite that the U.S. Constitution does not explicitly grant a right to bail.

Costs and Fees Imposed on Criminal Defendants

Rose Bobchak, director, Probation and Parole Division, Corrections Department, read from her presentation materials on costs and fees. Costs and fees are assessed by a sentencing authority and are no less than \$25.00 but no more than \$150 per month. She noted that the standard cost amount assessment was raised last year to \$35.00 per month. She told the subcommittee that other fees assessed may include restitution, fines, fees, community corrections fees, global positioning system device fees and sobriety monitoring fees.

Ms. Bobchak told the subcommittee that the agency places a priority on fees and encourages offenders to make restitution a priority. She said that as required by statute, payments are collected monthly by designated personnel in the agency. She said that probation and parole officers assess an offender's ability to pay costs based on financial status.

Cynthia Pacheco, manager, Warrant Enforcement Program, AOC, told the subcommittee that current statutes list requirements for judges to assess and collect fees and the law prevents them from taking certain actions with respect to those fees. Fees may vary based on charges, and contested and uncontested cases have different fees. She provided examples of several fees, including those related to certain traffic offenses, petty misdemeanors and misdemeanors, and certain fines.

In response to a question, Ms. Pacheco told the subcommittee that statutes require magistrates to assess and collect court costs. She discussed the section that prevents judges from waiving or suspending court cost fees. She said that if a defendant is unable to pay, the magistrate has options to avoid incarcerating a person for inability to pay, including payment arrangements and community service. She told the subcommittee that defendants are sometimes incarcerated due to unwillingness to pay.

Ms. Pacheco told the subcommittee that the state is owed more than \$18 million in fines and fees, and, of that amount, many thousands of dollars are owed by persons who live out of state. Ms. Pacheco said there are 43,000 active warrants in the state, of which 37,000 were issued for a failure to appear in court. Ninety percent of failure to appear warrants are for cases where the individual never appeared for the individual's first court appearance. Ms. Pacheco told the subcommittee that efforts to find defendants are frequently unsuccessful. Ms. Pacheco told the subcommittee that, during the last fiscal year, \$3.1 million was collected on 36,000 cases.

Ms. Pacheco told the subcommittee that in 2016, the United States Department of Justice required the state to reconsider protocols for determining indigence, alternatives to incarceration, meaningful notice and access to counsel.

The subcommittee discussed the Brain Injury Services Fund managed by the Human Services Department. Ms. Pacheco said that balances from brain injury and related funds are transmitted monthly to the AOC, which distributes the amounts to the state treasurer for disbursements to appropriate funds.

Ms. Pacheco told the subcommittee that the brain injury fee is \$5.00, the judicial education fee is \$3.00 and the court automation fee is \$10.00. She discussed other fees such as

the corrections fee, DWI crime lab fee, domestic violence treatment fee, warrant enforcement fee and a substance abuse fee. Ms. Pacheco said that with the exception of the magistrate fund, none of the fees or 21 funds have a sunset provision.

Ms. Pacheco told the subcommittee that due to extraordinary demands on the courts, administrative funds have been used to cover operational costs for magistrates over the last year. The administrative funds currently have insufficient balances to cover additional operational expenses and that has been a driver in some efforts to increase some fees.

The subcommittee discussed methods for issuing warrants and ensuring court appearances; previous legislative attempts to increase fines and fees; charging of fines per warrant issued; repercussions of outstanding warrants; monthly \$35.00 probation costs for defendants; accumulation of fees per criminal or civil charge; civil forfeiture; tax policy; and court funding.

In response to a question from the subcommittee, Ms. Bobchak said that the Corrections Department does not get involved in child support issues, but that it tries to assist offenders to stabilize personal finances. Ms. Bobchak discussed warrant roundups, noting that results from past attempts were financially unworkable. She discussed New Mexico's "safe surrender" program that was adopted from similar federal programs. The program uses an automated dialer, letters and postcards to notify offenders to appear in court on a specified date. She told the subcommittee that the courts are unable to promise that the defendant will not be arrested, but that the offender will see a judge with a recommendation of favorable consideration. In 2016, the courts hosted safe surrender events in six locations throughout the state.

Discussion of Criminal Penalty Revisions

Douglas Carver, deputy director, New Mexico Sentencing Commission, discussed past legislative attempts to revise criminal penalties. Mr. Carver also discussed public perception of crime and designation of felonies.

Mr. Carver spoke about the commission's 2008 publication on collateral consequences in New Mexico and the CSGJC's collateral consequences tracker. He said that collateral consequences are being addressed nationwide and detailed the United States Government Accountability Office summary sheet on nonviolent drug convictions.

Mr. Carver noted a criminal case out of the eastern district of New York where the judge determined that the collateral consequences were so severe that they could be considered punishment without imprisonment. Mr. Carver told the subcommittee that, in his research, he has learned that some states are reconsidering collateral consequences.

Mr. Carver commented on the piecemeal-style of amendment of the state's Criminal Code and the addition of crimes as a result of public attention. He discussed felony theft threshold amounts in other states. He addressed New Mexico's fourth degree felony for unauthorized reporting of campaign expenditures.

Mr. Carver suggested that the Criminal Code may have too many felonies and requested that the subcommittee consider which felonies could be reduced to misdemeanors, recommending nonviolent felonies as a starting point. Mr. Carver discussed other sentencing options and said that five states use misdemeanors with jail sentences in excess of one year.

Mr. Carver told the subcommittee that past legislatures made felonies out of certain actions without realizing the consequences that would exist today. He said that other states have up to five levels of misdemeanors and up to seven levels of felonies. He recommended that defelonization may be a more efficient way to address collateral consequences instead of finding all 680 instances in statute and rule.

In response to a question from the subcommittee, Mr. Carver explained that the last time the Criminal Code was revised was in the 1940s. The subcommittee discussed legislative strategy under the current administration; crime prioritization by courts; misdemeanor and felony classification; elevation of charges upon recidivating; automatic probation for low-level crimes; court dockets; the likelihood of legislative success for front- and back-end criminal justice system changes; a model penal code; and discretionary abilities of judges.

Public Comment

Gerald Madrid, president, Bail Bond Association of New Mexico, discussed court rules in relation to bonding and release.

Ms. Lewis discussed victims of domestic violence, batterer intervention programs and their role in criminal justice.

Juan Chavez, Metropolitan Bail Bonds, discussed court rules, bonding and ethics within the bonding industry.

Erin Muffaletto Baca discussed the high rate of New Mexicans with active warrants in their names.

Adjourn

The subcommittee adjourned at 4:27 p.m.

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