

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

**October 25, 2018
State Capitol, Room 322
Santa Fe**

The sixth meeting of the Criminal Justice Reform Subcommittee (CJRS) of the Courts, Corrections and Justice Committee (CCJ) was called to order by Senator Sander Rue, co-chair, on October 25, 2018 at 9:15 a.m. in Room 322 of the State Capitol in Santa Fe.

Present

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

Absent

Rep. Zachary J. Cook

Staff

Celia Ludi, Staff Attorney, Legislative Council Service (LCS)
Randall Cherry, Staff Attorney, LCS
Mark Peralta-Silva, Staff Attorney, LCS
Erin Bond, Research Assistant, LCS

Guests

The guest list is in the meeting file.

Handouts

Handouts and other written materials are in the meeting file.

Thursday, October 25

Call to Order and Introductions

Senator Rue and Representative Maestas welcomed everyone to the meeting, and the subcommittee members, staff and public introduced themselves.

Review of Legislative Finance Committee (LFC) Criminal Justice System Analyses and Recommendations

Jon Courtney, Ph.D., program evaluation manager, LFC, Theresa Edwards, fiscal analyst, LFC, and Ismael Torres, fiscal analyst, LFC, presented a review of LFC reports relating to public safety issues, going back to 2012 (Item 1). Dr. Courtney informed the subcommittee that the reports considered statewide crime rates, prison population, recidivism rates, the crime pipeline and more general system-wide issues, including capital outlay and data systems.

Regarding violent crime and property crime, Dr. Courtney noted that while the crime rate has decreased nationally, New Mexico has experienced an increase in its crime rate. For example, New Mexico saw a 12.2% increase in violent crime in 2016 and 2017, as opposed to a .2% decrease nationwide. Dr. Courtney explained that the violent crime increase was driven by crime in Albuquerque and that if Albuquerque is taken out of the equation, crime is generally down in the state.

Similarly, while the prison population nationally has started to decline, New Mexico's prison population is growing. Ms. Edwards explained that other states have seen their prison populations decline because of justice reinvestment and sentencing reform initiatives. Ms. Edwards noted that New Mexico's prison population grew 12% from fiscal year (FY) 2010 through FY 2018. Additionally, New Mexico imprisons more people in private prisons proportionally than any other state in the nation, with 51% of New Mexico prisoners held in private prisons. Contributing to an increasing prison population is the fact that New Mexico's recidivism rates are higher than most states, with the increase driven by technical parole revocations for drug use violations and absentee violations. These parole revocations cost the state about \$40 million a year. New Mexico has the eleventh-highest recidivism rate in the country, but Ms. Edwards cautions that comparing recidivism rates among the states is difficult due to how the rates are calculated.

Dr. Courtney explained that risk factors explain criminal outcomes and substance use disorders in New Mexico. He noted that poverty and adverse childhood experiences (ACEs) correspond with crime. While 11% of children nationwide experience three or more ACEs, 18% of New Mexico children experience three or more ACEs.

Dr. Courtney said that New Mexico is one of the poorest states in the nation, with 27% of children in poverty in FY 2017, and New Mexico children experience more ACEs than children in almost any other state. Further, New Mexico has seen a higher death rate attributable to alcohol and drug use than what is seen nationwide, and while amphetamine overdose death rates are increasing nationwide, New Mexico is experiencing an increase at a greater rate.

Generally, Dr. Courtney explained, children with ACEs engage in low-level crime. Low-level crime is often not addressed with swiftness and certainty, nor with diversion to address root causes. In turn, low-level offenders may then graduate to violent crime, which leads to them being incarcerated in prisons that fail to address root causes. A possible solution would be to

improve swiftness and certainty in prosecuting low-level offenses and address root causes to reduce criminal behavior and provide better outcomes.

Dr. Courtney recommended using evidence-based programming with two steps: 1) high-level policymakers adopting broad and general policies that authorize and drive administrative actions; and 2) agency management and frontline staff implementing evidence into practice and monitoring progress. As to the first step, the legislature could decide to invest more money in evidence-based programming. The second step anticipates receiving feedback from executive agencies and then accordingly appropriating funds through House Bill (HB) 2. As an example, Dr. Courtney highlighted the LFC's work with the Pew-MacArthur Results First Initiative, providing benefit-to-cost ratios from the LFC's 2013 Results First report.

According to Dr. Courtney, contributing to the crime pipeline is the fact that most system money is dedicated to the "back end" of the system with little money dedicated to prevention and early intervention. For example, New Mexico's Children, Youth and Families Department spends less money on preventive services than any state except South Carolina. Dr. Courtney recommended several evidence-based prevention programs proven to have a long-term link to crime: alternative response; home visiting or nurse-family partnerships; good behavior games; certain types of therapy, including multisystemic therapy; and family preservation services.

Expanding on these concerns, Mr. Torres noted that a significant proportion of the defendant population suffers from addiction or behavioral health issues, and incarceration is typically the least-effective method of treating those issues. Mr. Torres explained that the average cost of drug court is \$23.00 per person per day, whereas the average cost of incarceration is \$104 per person per day. The recidivism rate at drug courts is 21% versus 49% at the Corrections Department. Drug courts also have a high return on investment (ROI). Mr. Torres reported that New Mexico has recently seen a decline in the use of drug courts and graduation from drug courts, with a slight increase in recidivism. Mr. Torres recommended expanding evidence-based programs, such as the Law Enforcement Assisted Diversion (LEAD) Program and preprosecution diversion programs, and also requiring agencies to use data to ensure that specialty courts are utilized and delivering good outcomes. Mr. Torres noted that defendants sometimes have difficulty using preprosecution diversion programs because of the costs of participation; therefore, lowering or waiving the costs would help those who are indigent.

Regarding pretrial detention and supervision, Mr. Torres explained that the longer that a defendant is held in jail awaiting trial, the greater the likelihood of recidivism, suggesting that addressing pretrial detention may result in an increase in public safety. Mr. Torres noted that in Dona Ana County, there has been a decrease in jail population and an increase in cost savings due to implementation of pretrial supervision. Nevertheless, Mr. Torres highlighted significant issues in pretrial detention, with opportunities for pretrial supervision lacking in certain areas of the state and many rural areas left with either releasing defendants on their recognizance or detaining defendants. While organizing data statewide would be helpful, another concern is that some areas are not collecting data on pretrial detention or supervision. To address these

concerns, the Administrative Office of the Courts is requesting funding for a pretrial services statewide coordinator to work with rural counties to help managing pretrial service programs. Mr. Torres also recommended the use of valid risk assessments to match defendants with an appropriate pretrial service program.

Dr. Courtney informed the subcommittee that the LFC just completed a study of the Corrections Department, finding that the LFC knows less about corrections than it did in FY 2011. The LFC realized that the Corrections Department does not have outcome data for some of its programs. For example, the LFC does not know the gap between services available in prison and services needed. Furthermore, because substance abuse goes untreated, offenders with substance abuse issues tend to recidivate because they fail to receive the services they need. Dr. Courtney also noted the incarceration of geriatric and medically fragile inmates who show low risks of recidivating and would qualify for Medicaid. Recommendations include valid risk needs scores to match offenders with programming proven to work; a gap study, which the LFC is working on; performance funding for private prisons; using the geriatric parole statutes; legislation to define evidence-based programs and require collection of basic data, which Senator Rue is familiar with because of Senate Bill (SB) 71 (2017); and pulling programming out of HB 2 as line items.

Dr. Courtney explained that the LFC does not know how many people are participating in community corrections programs. In contrast, in FY 2011, Dr. Courtney could explain how many people were participating in community corrections programs and how much the state was spending and produce a unit cost. Related to community corrections programs, Dr. Courtney noted that post-incarceration intensive supervision paired with treatment is shown to be effective for preventing recidivism; however, there is no statutory requirement to pair supervision with treatment. Dr. Courtney recommended that agencies use valid risk and needs assessments to match former inmates with appropriate programs and perform a gap analysis and that legislation be introduced to require basic data collection, require treatment with intensive supervision and allow low-risk inmates to attend transitional living facilities with programming. Dr. Courtney noted that many of these recommendations are the same across the board because they are best practices.

Ms. Edwards reminded the subcommittee of the massive amount of money that the Corrections Department needs to bring its facilities up to speed. Ms. Edwards informed the subcommittee that the Corrections Department requested \$52 million to address immediate needs. In FY 2011, the Corrections Department requested \$26 million for repairs and remodels of state prisons. One solution would be for the state to build new housing units at public prisons, which could save millions of dollars. A member asked whether the requests were the same for purposes of making a fair comparison. In response to the member's question, Ms. Edwards explained that, over the years, the Corrections Department has requested additional money for largely similar repairs and items. Dr. Courtney noted that in 2014, the LFC did a cost-benefit analysis considering three scenarios: 1) the cost of doing nothing, which is not feasible; 2) the cost of business as usual or the current situation and deferred maintenance; and 3) the cost of

building a new medium-sized housing unit by building new housing units with 183 beds, designed to be more efficient than current buildings, taking into account inflation. Dr. Courtney explained that this analysis demonstrated that the state would make its money back quickly by building new housing units; within 10 years, the state would see a cost savings of \$2 million and within 20 years, the state would see a cost savings of up to \$20 million. Ms. Edwards said that the goal would not be to create new prisons as much as to supplant the beds at the current facilities. Ms. Edwards also noted that the cost of beds is not cheap, citing the construction of a 4,000-bed facility in Utah in 2015, with each bed costing about \$137,000, and the construction of a 2,000-bed facility in Kansas by CoreCivic, a private prison contractor, for \$100,000 per bed.

A member expressed approval of more front-end programs and is worried about talk of closing prisons and how the public will receive that information.

With regard to criminal justice data, Ms. Edwards noted that numerous data silos create additional workloads and issues with gathering information and that there are obstacles to data sharing, a lack of coordination within the system and a lack of system-wide goals and performance management. Ms. Edwards recommended requiring state and local government agencies to use a common identification numbering system; developing reporting standards and requirements for data; bringing state law into agreement with federal law and other states, specifically regarding behavioral health data; increasing data use and data sharing; and making the New Mexico Sentencing Commission the repository for this information and requiring that it analyze this information. Ms. Edwards said that the New Mexico Sentencing Commission requested a \$150,000 expansion to hire new employees.

A member asked about reentry and the feasibility of a joint hearing at the beginning of the session of the judiciary and finance committees of both houses for a presentation on criminal justice reform. Dr. Courtney stated that it would be helpful to speak to the committees for a total request of money for criminal justice reform. Other members expressed interest in a presentation from the LFC. Dr. Courtney mentioned that such a presentation would be helpful, in addition to fiscal impact reports on specific bills. A member noted that a joint hearing could be held on the second Tuesday of the session, January 22.

A member asked what the LFC believes is the primary cause of recidivism. Dr. Courtney explained that based on the LFC's study, drug use and drug possession appear to be a significant cause of recidivism; technical drug use violations bring many formerly incarcerated individuals back to prison. A member asked Dr. Courtney whether treatment reduces recidivism, mentioning a long-term inpatient treatment center. Dr. Courtney referred to his presentation, specifically data from the LFC's Results First report that showed that treatment programs have positive ROI, contrasting these positive results with intensive supervision alone, which has no positive ROI.

A member expressed concern over the time it took for stakeholders to have this conversation and consternation over the lack of attention paid to children with ACEs and the high number of parole revocations for drug tests and missed appointments.

A member asked Representative Daymon Ely, co-chair of the Criminal Justice and Public Safety Task Force created by 2018 House Joint Memorial (HJM) 16 (Task Force), about the Task Force's recommendations and how they overlap with the LFC's recommendations. Representative Ely confirmed that many of the Task Force's recommendations parallel the LFC's recommendations. A member also asked what proportion of the total prison population is in prison for technical violations. Dr. Courtney could not recall those numbers offhand but stated that he would get them to the subcommittee. A member commented that if the member recalled correctly, the number in prison for technical violations is about one-half of the prison population, and the member said that removing technical violations could mean shutting down a prison or two.

A member asked Dr. Courtney for the costs of intensive supervision; pretrial services; hiring behavioral health workers, social workers and probation and parole officers; and transitional housing. Dr. Courtney can pull from the reports to provide costs for particular legislative proposals. He can also provide a per-unit cost for certain programs, such as the LEAD Program, but there are some gaps that make it difficult to provide accurate costs for all statewide programs.

In response to a member's question, Dr. Courtney mentioned that, nationally, the recidivism rate for individuals age 55 and older is 3.2%. On the other hand, the rate of recidivism for individuals between ages 18 and 29 is 45%.

A member mentioned that other states have saved significant costs; for example, North Carolina saved money by closing a prison.

A member also asked how to verify a pretrial release tool. Dr. Courtney answered that a pretrial release study would likely cost a few hundred thousand dollars and could be done in six months.

A member asked which prisons would be the most cost-effective to close. Dr. Courtney could not recall the information offhand but said that there is an answer.

A member highlighted that the Corrections Department budget has increased while other state agencies have pared down. A member inquired about the recommendation to pull programming from the Corrections Department budget. Dr. Courtney noted that the current budget asks for programs generally but does not specify exactly which programs. Dr. Courtney confirmed that building new housing units is more cost-effective than deferred maintenance.

A member expressed concern over running too fast into full-scale criminal justice reform.

Discussion of Possible Legislation

Representative Maestas summarized a handout titled "Criminal Justice Reform Bills, 2015 Session". Five criminal justice reform bills were passed and signed in 2015: SB 83, Senate

Floor Substitute for SB 95, SB 107, Senate Judiciary Committee Substitute for SB 42, Senate Joint Memorial 4 and HB 85. Three criminal justice reform bills passed and were pocket vetoed in 2015: SB 358, HB 89 and SB 106. Seven criminal justice reform bills were not introduced, and the remainder of the bills died.

Representative Maestas then moved on to a handout titled "Vetoed Criminal Justice Reform Bills 2011-2018". There were dozens of criminal justice reform bills that had bicameral, bipartisan support and were vetoed by Governor Susana Martinez.

Representative Maestas noted that Senator Jacob R. Candelaria may introduce a bill to defelonize simple possession of all controlled substances and drug paraphernalia. In response to a member's question, Representative Maestas said that he does not believe that any state has taken possession of a small quantity of a controlled substance off the books. Representative Maestas also noted that Senator Candelaria wants to introduce a bill abolishing a "gay or trans panic defense" to murder and other violent crimes, which other members of the subcommittee supported.

Members requested that the vote tallies and the governor's message, if available, be included when discussing bills to help in determining the political feasibility of reintroduction. A member noted that victims feel lost in the process and that the omnibus bill should consider how to involve the victims in the criminal process.

A member expressed that feasibility of expungement depends on details and scope of proposal. Another member expressed concern on the erasing of history by expungement, noting that details of convictions can exist in newspaper articles. Yet another member brought up the notion of expungement by sealing a conviction. A member expressed concern over selling certain elements to the public, specifically defelonization of simple possession of all controlled substances.

A member suggested waiting to see what the appellate courts do with the bail issue before addressing it with legislation.

The members discussed the New Mexico SAFE 2019 Legislative Roadmap and other possible requests for legislation that might be included in an omnibus bill.

The members acknowledged concerns about possible "logrolling" in an omnibus bill and directed staff to notify them if any questions arise.

Representative Maestas stated that he plans to introducing a bill on the Law Enforcement Protection Fund to prevent it from being swept by providing more money to law enforcement. Representative Maestas plans to allocate money to other public safety agencies, including the district attorneys and public defenders.

Ms. Ludi summarized a handout titled "HJM 16 Task Force Legislative Proposals". The bills include: creating a unique biometric identifier; mandating data collection, sharing and analysis; increasing prosecutorial discretion for preprosecution programs and diversion; creating a recidivism reduction grant fund; loan repayment programs for criminal justice system workers; rewards for criminal justice workers who are eligible to retire or have retired; and supplemental funding of the PAX Good Behavior Game Initiative. The recidivism reduction grant fund would have enumerated purposes. A member recommended that the enacting legislation for the fund require attendance at the district coordinating councils. Several members provided suggestions on name changes for the fund. A member suggested that the fund have \$150 million, with \$50 million to spend each year for next three years.

A member inquired about what some terms mean, such as "overcriminalization". Representative Maestas mentioned that there has been a move to decriminalize certain activity. Mr. Reynolds mentioned that there has also been a push to include a mens rea requirement. Representative Maestas also noted that, historically, a blanket mens rea has been considered but faced opposition from district attorneys and public defenders.

Ms. Ludi reminded the subcommittee that there have been three groups working on criminal justice reform: the CCJ, the CJRS and the Task Force, as well as the Council of State Governments Justice Reinvestment Initiative. Representative Ely and Justice Chavez expressed the Task Force's preference to work with the CJRS on an omnibus bill.

Going forward, the plan is to review all of the proposals and determine on November 13 which bills will be in the omnibus bill and which bills will stand alone.

On November 16, the CJRS will finalize its proposals and recommendations for the final CCJ meeting.

Public Comment

Bill Zunkel has attended many committee and subcommittee meetings. Mr. Zunkel finds this subcommittee's conversation timely considering the opioid epidemic, and he believes in the benefit of treatment and applauds the subcommittee's approach.

Tom Starke is a physicist who retired from Los Alamos National Laboratory. Mr. Starke complimented the efforts of the subcommittee. Mr. Starke has been involved with addiction nonprofit organizations and is familiar with the issues confronting the state. He noted the importance of ACEs and reminded the subcommittee to remember the family and children affected by policing and incarceration. For example, one out of 10 children has an incarcerated or formerly incarcerated parent, and having an incarcerated parent constitutes an ACE.

Mr. Starke voiced support for the notion of not overcharging a defendant, and he asked the subcommittee to consider how the state can step up for children when it is penalizing parents with incarceration.

Additionally, he asked the subcommittee to consider child support payments accruing for those in prison even though they do not make money that would allow them to satisfy those payments.

Finally, Mr. Starke noted that the number of prisoners who are lesbian, gay, bisexual, transgender or queer (LGBTQ) is disproportionate to the general population, and prisons are not built for LGBTQ individuals. This issue is particularly salient for the female population, 47% of whom identify as LGBTQ, he said.

Adjournment

There being no further business before the subcommittee, the sixth meeting of the CJRS adjourned at 3:00 p.m.