



New Mexico
CRIMINAL DEFENSE LAWYERS ASSOCIATION

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Las Cruces

September 22, 2014

President-Elect
Matthew Coyte
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Dear Members of the Criminal Justice Reform Subcommittee:

Vice President
Margaret Strickland
Las Cruces

The New Mexico Criminal Defense Lawyers Association (NMCDLA), a statewide organization of both private and public defender attorneys from throughout New Mexico, strongly supports the criminal justice legislative proposals presented by the Public Defender Department at the September 24th meeting of the Criminal Justice Reform Committee. These proposals address many of NMCDLA's legislative priorities, which include, without limitation, the elimination of mandatory sentencing measures, treatment alternatives to incarceration, and reform of unduly harsh sentencing schemes that are currently disproportionate to the seriousness of the crime.

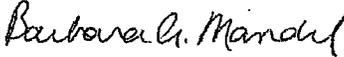
Secretary
Molly Schmidt Nowara
Albuquerque

We are grateful for the committee's attention and work.

Treasurer
Angelica Hall
Albuquerque

Sincerely,

Executive Director
Cathy Ansheles
Santa Fe


Barbara Mandel, President

Legislative Coordinator
Susan Saleska Hamilton
Santa Fe

**THE LAW OFFICES OF THE PUBLIC DEFENDER SUBMIT:
PRIORITY ISSUES FOR CRIMINAL JUSTICE REFORM INTERIM SUBCOMMITTEE**

- **30-31-6. Schedule I**
 - Remove marijuana from Schedule I – 30-31-6(C)(10) and;
 - Reduce the level of punishment of possession for sale and selling small quantities of marijuana to misdemeanor offenses;

- **30-31-23. Possession of Controlled Substances.**
 - Permit conditional discharge with substance abuse assessment and option of treatment for all first-time offenders;
 - 30-31-23(B) – make the possession of personal use of marijuana up to 1 ounce legal for those over the age of 21 and create similar regulatory statutes as for cigarette possession and use;
 - Convert to civil fine only for possession of more than 1 but less than 2 ounces marijuana;
 - 30-31-23(E) – defining felony possession. Consider **no felonies** (misdemeanor only) for simple possession to reduce jail expenses and court resources;

- **30-31-25.1 Possession of Paraphernalia.** Currently a full misdemeanor regardless of the affiliated substance. Paraphernalia should carry substantially less penalties than possession of the affiliated drug;
 - Currently defined broadly – consider narrowing “paraphernalia” to include only items typically used only for purposes of drug use and *directly* used to consume drugs, rather than normal household or automotive items that may be used indirectly to store or process them (belts, empty baggies, scales, spoons, burnt light bulbs, etc.) and exclude items which are consistent with use of legal products such as tobacco (pipes, hooka pipes, electronic clips, etc.)
 - Clarify that residue on a pipe, for example, cannot be separately charged as simple possession of the substance where the residue is used to establish that the pipe is indeed drug paraphernalia. Currently the residue is allowed to be punished as possession of a controlled substance as a second degree felony;

- **30-6-3. Contributing to the Delinquency of a Minor**
 - Either reduce to misdemeanor or limit to cases that actually *cause* delinquency (i.e., strike “or tends to cause”). *See State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256 (affirming felony contributing conviction for child’s having read a sexually explicit story, although child’s only response was to report it); Narrowly define the meaning of “delinquency” to be encouraging behavior or conduct which is a violation of the criminal statutes if committed by the minor;
 - Incorporate an intent requirement; knowingly or willfully. *See State v. Webb*, 2013-NMCA-027 (affirming felony contributing conviction for *failing to verify* child’s permission to get a piercing, thereby furthering child’s piercing against her parents’ wishes);

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<p>§ 30-6-3. Contributing to the delinquency of a minor consists of any person committing any act or omitting the performance of any duty, <u>with the intent to cause or encourage the delinquency of a minor</u>, which act or omission causes or tends to cause or encourages <u>the delinquency of any person under the age of eighteen years to commit an illegal act, and where the minor attempts to or does commit that act.</u></p> <p>Whoever commits contributing to the delinquency of a minor is guilty of a fourth-degree felony <u>misdemeanor.</u></p>	<p><i>Requires actual delinquency to result; makes it a misdemeanor.</i></p> <p><i>Note: This conduct may give rise to accessory liability, so the person would <u>also</u> be liable for an accomplished crime committed by the minor.</i></p> <p style="text-align: right;">→</p>
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- **30-1-13. Accessory.** In light of accessories receiving identical punishment to principals, narrow the scope to those who *actively participate* in accomplishing the crime.
 - Statute currently includes anyone who “procures, counsels, aids or abets in its commission.” *See also* UJI 14-2822 NMRA (requires jury to find accessory “helped, encouraged or caused the crime to be committed” so that mere *encouragement* is enough to incur identical liability to the principal actor);

<p>Proposed Amendment:</p> <p>A person may be charged with and convicted of the crime as an accessory if, <u>intending that the principal commit the crime</u>, he procures, counsels, aids or abets in its commission, <u>thereby contributing substantial support in its commission and</u>, and although he did not directly commit the crime and although the principal who directly committed such crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or has been acquitted, or is a child under the Children’s Code.</p>	<p><i>Accounts for the intent that the principal commit the crime and the substantial contribution of an accessory, to avoid total liability for an unwitting or de minimus act of “aid” not warranting equal liability to the principal; and excludes the possibility of a conviction where the one who committed the crime has been acquitted of the purported crime. This prevents the injustice of the actor getting acquitted while a person alleged to aid the actor might be convicted.</i></p> <p><i>Note: Lesser acts may still give rise to lesser culpability via Contributing to delinquency of a minor or Conspiracy statutes.</i></p>
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- **30-2-1. Murder.** Limiting first-degree murder to pre-meditated and deliberate intention.
 - Depraved mind murder is a second-degree murder in most other states;
 - Many states have repealed felony-murder in recognition of reduced culpability where the death was not intended. Consider repealing or reducing to second-

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degree murder, but a first-degree felony sentence (rather than capital) to maintain the deterrent effect for undertaking dangerous felony conduct;

<p>§ 30-2-1(A) First degree murder.</p>	<p>A. Murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused: (1) by any kind of willful, deliberate and premeditated killing; (2) in the commission of or attempt to commit any felony; or (3) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life. Whoever commits murder in the first degree is guilty of a capital felony.</p>
<p>§ 30-2-1(B) Second degree murder.</p>	<p>B. Unless he is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful justification or excuse commits murder in the second degree if:</p> <p style="padding-left: 40px;"><u>(1) in performing the acts which cause the death he knows that such acts create a strong probability of death or great bodily harm to that individual or another, or</u></p> <p style="padding-left: 40px;"><u>(2) in the commission of or attempt to commit any felony; or</u></p> <p style="padding-left: 40px;"><u>(3) by any act greatly dangerous to the lives of others, acts with depraved disregard for human life.</u></p> <p>Whoever commits murder in the second degree is guilty of a second degree felony resulting in the death of a human being.</p> <p>Murder in the second degree is a lesser included offense of the crime of murder in the first degree.</p>

- **30-16-3. Burglary.** Clarify that commercial burglary does not apply during business hours for a trespasser (previously warned) who shoplifts – this is trespassing and shoplifting punishable separately and should not be elevated to a felony offense. Alternatively, reduce such scenario to a misdemeanor burglary;

<p>Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein.</p> <p>A. Any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of a third degree felony.</p> <p>B. Any person who, without authorization, enters any vehicle, watercraft, aircraft or other structure, movable or immovable, with intent to commit any felony or theft therein is guilty of a</p>	<p style="text-align: center;">Alternatively:</p> <p><u>C. Any unauthorized entry into a structure while that structure is open to the public does not constitute burglary pursuant to this section, but may be subject to trespassing under NMSA 1978, Section 30-14-1(B).</u></p>
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<p>fourth degree felony.</p> <p><u>C. Any person who, without authorization, enters the publicly accessible areas of a commercial business while that business is open for business, with intent to commit any felony or theft therein is guilty of a misdemeanor.</u></p>	
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Pre-arrest/detention/citation considerations:

- Consider requirements for citations/summons to appear over formal arrest for non-violent offenses;
- Consider mandatory evaluation of arrested persons using risk assessment tools for individualized risks of further violence to an actual victim or actual risk of flight (clarifying that neither the failure to appear in the past nor the number of failures to appear is not in itself sufficient justification for a finding of flight risk);
- Consider mandating immediate attention to the mental health needs of the arrested person with a stated presumption that professional attention to the mental health needs will be provided over incarceration in a typical jail setting;
 - Consider redirecting funding from prisons/jails and where appropriate increasing funding for mental health facilities and treatment programs to accommodate the provision of mental health services for those who are confronted by law enforcement during apparent criminal behavior which clearly appears to be a result of a psychotic episode. Too often, law enforcement is left with no alternative but to incarcerate the person which studies have shown further causes deterioration of the mental condition of the person who does not obtain adequate service while incarcerated.

§ 31-1-5	[new material] <u>D. For any person who, after arraignment, is remanded to detention on pending charges, the place of detention must evaluate the detainee for mental health needs within 48 hours of arraignment to determine whether the detainee should be held in a mental health facility in lieu of detention.</u>
§ 31-1-6	[amendment] A. A law enforcement officer who arrests a person without a warrant for a petty misdemeanor or any offense under Chapter 17 NMSA 1978 may <u>shall</u> offer the person arrested the option of accepting a citation to appear in lieu of taking the person to jail. <u>The officer may issue a citation to appear in lieu of arresting any person subject to arrest for a non-violent felony. When the person is arrested and transported to custody, a independent risk assessment tool will be utilized to determine the probabilities of risk of harm or failure to appear. The detention center receiving custody of the person arrested shall have the duty to conduct the risk assessment and if the risk is low, shall issue a</u>

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	<u>citation to appear in court no more than thirty (30) days following the issuance of the citation.</u>
§ 31-3-2	[new material] <u>C. In order to find that a person has “willfully failed to appear,” the court must make a reasonable inquiry of the prosecution to determine whether the person is in state or federal custody. Where the prosecution informs the court that it is not aware of such custody status but cannot confirm that a search was made to determine custody status, before the court shall order the prosecution to conduct such search and report back before any finding that the person has “willfully failed to appear” may be made.</u> [subsequent subsections re-lettered accordingly]

Pre-Prosecution/Charging:

- **31-16A-4. Pre-prosecution diversion and court diversion eligibility criteria**
 - Amend to strike Subsection (A)(6) so that drug offenders are not disqualified;
 - Mandate drug court programs in every judicial district, metropolitan, magistrate and municipal court for offenses which are non-violent, de minimus violence and involved the use or possession of small quantities of a controlled substance;
 - Increase the types of diversionary programs available (bad checks, misdemeanor domestic violence, DWI, etc.) and mandate them throughout every jurisdiction and court;
 - Provide as an incentive for successful completion in the diversionary programs the withdrawal of any guilty plea required to be entered before admission into the programs with the dismissal of the charges. In the case of a DWI diversionary program, a dismissal would not bar subsequent use of that offense as a prior conviction for purposes of enhancement of subsequent offenses;
 - Create a mechanism of a civil compromise to ensure restitution to victims of crimes whereby the victim of a crime can move the court to dismiss the charges when they have been compensated for the direct losses suffered from the actions of the defendant;
 - Determine a swift and certain matrix for increased consequences for status offenses while on these diversionary programs always favoring reinstatement;
 - establish no limit on the number of times a person on diversion is found in violation without committing a new non-divertable offense until the maximum amount of custody time has been imposed pursuant to the matrix;
 - allow persons with multiple divertable offenses to be included in diversion programs with a maximum of three felony non-violent offenses;
 - Review Drug Court procedures; tailor realistic conditions that provide for more swift and certain measures for relapse; promote minimum standards state-wide for consistency among the judges implementing the program throughout the state;

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- Develop statutory guidelines governing law enforcement contact, investigation, pre-prosecution and prosecution procedures:
 - Mandate police reports and complaints be lodged with the jail for any arrests made without which the person will not be accepted into the jail and instead will be issued a citation/summons to appear in court;
 - Develop timelines and procedures for which physical evidence will be lodged, stored and reported to all interested parties including but not limited to any prosecuting agency (state, city, county or district attorney) and the defendant or counsel for the defendant;
 - Mandate the provision of police reports and other discovery to the defense of indigent defendants at no cost the defendant or counsel for defendant;
 - Establish stringent Eyewitness ID accuracy procedures – one of the most unreliable and yet most persuasive forms of evidence (*See, e.g.*, SB 489 & 490 (2013));
 - Limit use of criminal grand jury proceedings to second and first degree felonies only;

Sentencing:

- **Overhaul of classifications and basic sentences**
 - **31-18-15.** Increasing number of felony grades from 4 to allow for smaller jumps between degrees;
 - Reserve higher grade felonies for truly serious offenses in light of collateral consequences of a felony record;
 - Reclassify all second degree non-violent felonies to fourth degree felonies and first degree non-violent felonies to third degree felonies;
 - Reclassify all non-violent fourth and third degree felonies as misdemeanors;
 - Reclassify some less serious violent felonies one grade lower from current grades so that some less serious violent first degree felonies are second degree; some second degree are third degree; some third degree are fourth degree; and some fourth degree are misdemeanors;
 - Considerations: identifiable victims, ability to provide reparation or restitution

Decriminalize the traffic code

- Truly criminal conduct in the traffic code should be re-codified in the criminal code; regulatory violations should not carry criminal penalties and should only carry civil or monetary consequences;

Prohibit “debtor’s prison”:

- Eliminate any ability to incarcerate a person for a failure to pay fines, fees or other costs;
- Before there is a finding (preliminarily or otherwise) of a violation of a court’s order to pay fines, fees or other costs, establish a right to be heard on the ability to

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pay fines, fees or other costs; and grant the court discretion to waive some or all such fines, fees or other costs upon a finding of inability to pay;

- Indigent defendants who cannot afford to pay their fines, fees or other costs may be arrested and arraigned without prior notice on failure to pay or demonstrating an inability to pay and are then required to serve time in lieu of paying those costs. This incarceration in lieu of payment costs more in housing expenses than it would to simply waive the fees on the basis of a court's finding of inability to pay;
- When the court finds the defendant has the ability to pay some or all of the imposed fines, fees or other costs require the court to establish a realistic payment plan which meets the defendant's ability to pay without finding a violation of probation or the court's order.

Probation/parole:

- Consider establishing standards of supervision for parolees and probationers based upon the particular location of residence and specialized needs of the defendant;
- Consider repealing parole requirement for all offenses except capital crimes;
 - Alternatively, consider revising the duration of parole if compliant by discharging the parolee after 1 year of satisfactory compliance;
 - Also alternatively, eliminate the requirement that because a person who is otherwise eligible to be released from prison on parole he will not because he does not have a residence;
 - Require that arrangements shall be made for the housing of the person in a non-custodial location for the entire duration of parole if necessary.
- **31-21-10.1 – sex offender parole:**
 - Clarify that parole board *must* release the parolee after 5 years *unless* there is clear & convincing evidence to keep them on parole longer with an opportunity confront the nature of that evidence and to be heard;

§ 31-21-10.1(A)	<p>...</p> <p>A sex offender's period of supervised parole may be for a period of less than the maximum if shall not exceed five-years unless, at a review hearing provided for in Subsection C of this section, the state is unable to prove by <u>clear and convincing evidence</u> that the sex offender should remain on parole. <u>Upon a determination of the need to extend parole, findings of fact shall be prepared clearly articulating the reasons and the evidence relied upon for the findings.</u></p>
§ 31-21-10.1(C)	<p>C. When a sex offender has served the initial five years <u>an aggregate of five years</u> of supervised parole, <u>including in house parole</u>, the board shall review the duration of the sex offender's supervised parole. <u>If parole is extended beyond five years, the board shall review the sex offender's parole duration at two year intervals thereafter.</u> At each review hearing, the attorney general shall bear the burden of proving by clear and convincing evidence that the</p>

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	sex offender should remain on parole. <u>To meet this burden, the attorney general must show that the defendant has received treatment, has not progressed with treatment or rehabilitation or has otherwise failed to comply with conditions of release.</u>
§ 31-21-10.1(G)	. If the board finds that a sex offender has violated the terms and conditions of parole, the board may revoke the sex offender's parole or may modify the terms and conditions of parole. <u>If parole is revoked and incarceration is imposed, the board shall review the sex offender's incarceration at one year intervals thereafter. At each review hearing, the attorney general shall bear the burden of proving by clear and convincing evidence that the sex offender should remain incarcerated, or else the sex offender should be re-released to parole pursuant to Subsections B through E of this section.</u>

→ *Similar amendments should be considered for indeterminate sex offender probation terms in Section 31-20-5.2.*

- Establish the right to a *de novo* appeal to a district court judge where it must be shown upon a hearing and an opportunity to be heard to a clear and convincing level for the need to extend parole;
- **31-21-10.1 (F)** designates the LOPD to represent parolees at their parole review.
 - Consider revising the provision so that if a parolee can afford to hire private counsel:

§ 31-21-10.1	F. The board shall notify the chief public defender of an upcoming parole hearing for a sex offender pursuant to Subsection C of this section, and <u>if the parolee does not obtain private counsel</u> the chief public defender shall make representation available to the sex offender at the parole hearing.
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- **31-21-25(D)** requires the parole board to develop criteria for evaluating whether to grant, deny, revoke, or discharge a parolee.
 - The LOPD is unclear whether the board has developed these criteria. Consider providing criteria for them to ensure consistency among reviews.
- **31-20-5(A)** currently caps district court probation exposure to 5 years and magistrate or metropolitan courts to the maximum sentence for the offense. Differentiating by sentence, rather than court, is more equitable to avoid probation terms beyond any possible incarceration exposure:

§ 31-20-5(A)	... Except for sex offenders as provided in Section 31-20-5.2 NMSA 1978, the total period of probation for district court shall not exceed five years and the total period of probation for the magistrate or metropolitan courts shall be no longer than the <u>period of deferment or suspension</u> [or] maximum allowable incarceration time for the offense or as otherwise provided by law.
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§ 31-18-15 New subsection→	<u>G. Where the defendant has been convicted of more than one felony offense, the most serious sentence shall be imposed pursuant with this Section as the base term. Additional counts imposed consecutive thereto shall be limited to one-third (1/3) the maximum exposure for each subsequent count. The aggregate terms for all additional felonies shall not exceed a term twice that of the most serious offense at initial sentencing.</u>
Re-Letter →	[G.] <u>H.</u> No later than October 31 of each year,

- Establish work furlough programs outside a jail setting for low-risk defendants convicted of misdemeanors and non-violent felonies. Such programs allow the defendants all rights to EMD while serving their sentences, will afford them the opportunity to continue with their employment and be restricted to the custodial status of the facility when not at work.

Jail capacity:

- Establish an acceptable cap for any jail facility to not exceed 80% of the maximum capacity for the facility allowing the ability to reach 100% maximum capacity not to exceed a period of 15 days in any one month period:
 - Establish the authority and the duty for jail administration to grant release from custody of pre-trial detainees on a GPS or other similar device when it appears jail population will exceed 80% of maximum capacity;
 - Establish the discretion for jail administration to grant early furlough to sentenced prisoners when it appears jail population will exceed 80% of maximum capacity;
- Establish the duty for counties to limit detention of pre-trial detainees and sentenced prisoners not sent to the department of corrections to the county in which the offense is prosecuted. If the county does not have a detention facility, limit detention of pretrial detainees and sentenced prisoners only to the neighboring counties. In no case shall any county be allowed to house such prisoners in a detention facility outside the state of New Mexico.
 - Too often counties are housing detainees and prisoners in different counties and in some instances different states.
 - Housing detainees and prisoners in different counties or states impedes on the person's constitutional right to communicate and assist with counsel in the preparation of his/her defense.
 - Further it isolates them from loved ones where visiting becomes difficult if not impossible due to costs and/or distances. Maintaining connections to loved ones is critical for successful reentry into the community.

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Juvenile Justice:

- §§ 32A-2-17, -20
 - The Sixth Amendment requires jury findings of facts that increase sentencing, *see Apprendi v. New Jersey*, 530 U.S. 466 (2000), yet the New Mexico Supreme Court held in *State v. Rudy B.*, 2010-NMSC-045, that a youthful offender's amenability to treatment is not such a finding. Ensure fair and equitable sentencing of youthful offenders by requiring a *jury* to evaluate evidence of amenability to treatment and that a finding of unamenability shall be upon proof beyond a reasonable doubt; mandate the determination of amenability prior to any trial on the issue of guilt.
 - Improve amenability provisions. Currently the "availability of facility" can determine the sentence for 18 to 21-year-olds, rather than the qualities of the children themselves;
 - Establish a presumption of amenability for treatment in the juvenile justice system where the offense can be prosecuted as an adult;
 - Establish a preference that within the juvenile justice system, the particular mental health and educational needs of the minor are paramount to a detention in custody;
 - Reserve custody in juvenile detention facilities only to those who pose a clear and present danger to others or to themselves or a significant risk of flight;
 - establish that if the sole reason to detain the minor in custody is due to the lack of adequate accommodations with a suitable parent or guardian, the minor shall be transferred from the juvenile detention facility to the child protective units of CYFD for appropriate placement in foster or group care;
 - when this develops, there should be a coordination of the minor's juvenile delinquency and neglect cases in order to maintain consistency in the delivery of services;
 - Delegate to the New Mexico Sentencing Commission, Juvenile Justice Subcommittee to establish factors for determining amenability to treatment in order to ensure state-wide uniformity and fairness;
 - Once there is a finding of unamenability, the minor will be certified over to the adult court system for processing as an adult;
- Consider establishing a mechanism whereby once the minor is convicted in adult court for conduct committed while a minor, using the same factors the court must re-evaluate the minor's amenability in light of the actual evidence presented in trial;
- Establish the requirement that unless the minor is found to be unamenable, all matters relating to the processing of the prosecution for delinquency conduct shall be confidential in nature
 - Currently, minors facing prosecution for traffic offenses are presented to a judge in adult court where other adults are presenting in court for their own matters. This will require all courts to maintain complete confidentiality by separating the minors' court appearances from those of adults;

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- Also, in courts throughout the state, other parties are allowed to sit in court while minors present themselves before the judge for their appearances on other criminal matters. These are not court personnel or attorneys and are primarily parents/guardians and their children waiting for their matters to begin. This would require that non-court personnel or attorneys must remain separated from the court proceedings of any minor. If a conflict does not exist in that the attorney does not represent the co-offender, attorneys from other matters may be present during the conduct of the juvenile proceedings.
- Expand upon educational and mental health treatments and programs for juveniles;
- Expand upon alternative diversionary programs for minor offenses including drug, mental health and other programs designed to help stabilize the minor's life depending on the particular need;
- Establish Juvenile Detention Alternative Initiative programs with standardized application state-wide;
- Require teen courts in every local junior and senior high school for infractions and low-level misdemeanor offenses which will be declined from further prosecution upon successful completion of any consequences imposed by the teen court;
 - Delegate to the New Mexico Sentencing Commission, Juvenile Justice Subcommittee to establish minimum criteria for the teen courts based on best practices principles on national standards;
 - This will allow minors to avoid the stigma of a juvenile case filing for minor offenses while holding them accountable for their conduct through restorative judgment. Teen court programs have proven success in diverting minors from further criminal conduct and at the same time they have inspired many;

Treatment intervention

- **Substance Abuse**
 - Create quantity tiers for trafficking penalties to reduce incarceration rates for users who sell off part of their own stash (*see below*);
 - Pre-prosecution diversion: consider Santa Fe's LEAD program as a possible model;
 - Expand the "drug court" program to incorporate prosecutions of crimes that do not fall within possession/trafficking statutes, but that are nevertheless committed *because of drug use/addiction*
- **Mental health**
 - Allowing for alternatives to prison and jail for mental health-induced criminal activity, even if deemed competent to stand trial. See above recommendations.
- **We need far more alternative facilities.** Outside of the criminal code, create incentives within the mental health/tax/licensure codes to facilitate the creation and operation of mental health/drug treatment centers in New Mexico, especially in the more rural areas. Focusing on treatment centers for women should also be a priority especially those with children or pregnant.

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DWI Reform

- Increase resources for rehabilitative alternatives to incarceration, especially in the rural communities;
 - DWI courts with incentives to get the charges dismissed upon successful completion of the diversion program. Such dismissal may not bar use of the conviction for purposes of enhancements of subsequent charges for DWI.
 - Give limited licenses to drive for people during participation of the DWI court and upon successful completion of the program, return the license without restriction.
- In rural areas, develop mass transportation systems such as Clovis' public transportation where the service can be called in advance to provide a ride at a nominal cost. This will give people the necessary transportation to travel and maintain employment without needing to drive, especially following the consumption of alcohol or while a person's license is suspended;
- Develop incentives to avoid driving home after drinking;
 - Develop and fund ride programs; possible alternatives can include:
 - Subsidize taxi fees charged by the mile;
 - Develop volunteer programs – call centers assign for designated drivers;
 - Provide a driver to follow with the owner's car;
 - Parking ticket forgiveness for leaving a car in a metered spot if retrieved by 10 a.m. the following morning;
 - Allow police officers to transport an intoxicated person home within a five (5) mile radius on the condition that the car remain where it is and that the person would have to visit the local station to pick up his keys.
- Retain the civil penalty deterrence for knowingly permitting use of a vehicle by someone whose license is suspended or revoked for DWI; do not criminalize it.
- **§ 66-9-102(F) through (J)** – all references to “upon [X] conviction,” insert “within 10 years” for internal penalty enhancements;
 - Parallels the habitual offender statute and better addresses true recidivism;

These proposals are submitted for the Subcommittee's consideration during the 2014 interim term.

The LOPD's legislative advocates are available to discuss any of these proposals and/or provide further information at the Subcommittee's request, by phone at (505) 476-0714, or by email:

Jorge A. Alvarado, *Chief Public Defender* – Jorge.Alvarado@lopdm.us
Bennett J. Baur, *Deputy Chief Public Defender* – BennettJ.Baur@lopdm.us
Kimberly Chavez-Cook, *LOPD Lobbyist* – Kim.ChavezCook@lopdm.us

§ 30-4-1. Kidnapping. (Current)

A. Kidnapping is the unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent:

- (1) that the victim be held for ransom;
- (2) that the victim be held as a hostage or shield and confined against his will;
- (3) that the victim be held to service against the victim's will; or
- (4) to inflict death, physical injury or a sexual offense on the victim.

B. Whoever commits kidnapping is guilty of a first degree felony, except that he is guilty of a second degree felony when he voluntarily frees the victim in a safe place and does not inflict physical injury or a sexual offense upon the victim.

Problems seen in kidnapping prosecutions:

The kidnapping statute is written very broadly so that “taking, restraining, transporting or confining” has no temporal or qualitative requirement so that even a split second of delaying someone’s departure qualifies for a 1st degree felony (mandatory 18 years) for what truly constitutes false imprisonment (4th-degree felony) + simple battery (a misdemeanor).¹ Relatively minor conduct like holding onto someone’s arm or threateningly saying “don’t move” can satisfy the restraint element.

Kidnapping is essentially “false imprisonment with intent.” See § 30-4-3: “False imprisonment consists of intentionally confining or restraining another person without his consent and with knowledge that he has no lawful authority to do so.” Yet, false-imprisonment is a 4th-degree felony and kidnapping is either a 1st (by default) or a 2nd, as currently drafted.

Although not really that different from false imprisonment at its core, the kidnapping statute is overly complicated; it attempts to account for all of the secondary harms that *might* occur during a kidnapping, even though those potentialities are already addressed by other statutory offenses. Consequently, standalone kidnapping conduct is not being fairly addressed.

The realities, in practice:

- Kidnapping is frequently charged along with a secondary assaultive crime (i.e., robbery, battery or a sex offense). Courts continue to struggle to define when restraint incidental to the true target crime may or may not give rise to the serious penalties for kidnapping;¹

¹ See, e.g., *State v. Trujillo*, 2012-NMCA-112, *cert. granted* (Court of appeals reversed kidnapping conviction where both kidnapping and battery were imposed for holding victim in order to beat him up, finding only battery was actually committed and restraint was “incidental”); *State v. Aceves-Rodriguez*, Ct. App. No. 30,938, Memorandum Opinion filed Oct. 29, 2012, *cert. granted* (momentarily grabbing victim’s arm to kiss him supported both first-degree kidnapping and attempted sex offense although no harm or sex offense was in fact inflicted); *State v. Enriquez*, Ct. App. No. 30,252, Memorandum Opinion filed March 8, 2012 (affirming kidnapping conviction for pointing a gun at victim with intent keep to him in location, but where victim was not effectively restrained and ran away instead, concluding “at the moment the gun was pointed at Victim, the restraint necessary for the kidnaping occurred”).

- Similarly, where first-degree kidnapping often involves a finding that injury or a sex offense was inflicted, double jeopardy law provides little protection from severe multiple punishments because those harms can be separately punished under other statutes *in addition to* enhancing the kidnapping to a first-degree felony.
 - It would help to indicate that the assaultive offense is subsumed within the kidnapping if used to enhance that penalty, such as for felony murder & predicate felony. *See State v. Frazier*, 2007-NMSC-032, ¶¶ 1, 40, 142 N.M. 120;
- Semantically, Subsection B's presumption of first-degree implicates unconstitutional burden-shifting in order to *reduce* to second-degree. The statute should be clarified so that only second-degree is established unless the State affirmatively proves the distinguishing elements (the victim was *not* released or *did* incur injury or a sexual offense);
- Subsection A(4) only requires "injury" to elevate to first-degree; consider narrowing it to great bodily harm, as injury can be *de minimus* and not necessarily warrant the elevated penalty
- Kidnapping typically requires movement of the victim from one location to another against his will; to restrain a person or prevent the person from their ability to freely move is false imprisonment. As such, the current definition of kidnapping includes elements of false imprisonment without anything further to provide a distinction between the two prohibited acts.

Proposed amendments: § 30-4-1

Alternative 1	<p>A. Kidnapping is the unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent:</p> <ul style="list-style-type: none">(1) that the victim be held for ransom;(2) that the victim be held as a hostage or shield and confined against his will;(3) that the victim be held to service against the victim's will; or(4) to inflict death, physical injury or a sexual offense on the victim. <p>B. Whoever commits kidnapping <u>and does not voluntarily free[s] the victim in a safe place</u> is guilty of a first <u>second</u> degree felony, <u>but if he does voluntarily free the victim in a safe place, is guilty of a third degree felony.</u></p> <p>C. <u>To give rise to a kidnapping conviction, the taking or transporting conduct must interfere substantially with the victim's liberty and carry significance beyond facilitating the commission of another offense.</u></p>
Alternative 2	<p>A. Kidnapping is the unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent:</p> <ul style="list-style-type: none">(1) that the victim be held for ransom;(2) that the victim be held as a hostage or shield and confined against his will;(3) that the victim be held to service against the victim's will; or(4) to inflict death, physical injury or a sexual offense on the victim. <p>B. Whoever commits kidnapping, is guilty of a first degree felony, except that he is guilty of a second degree felony when he voluntarily frees the victim in a safe place and does not inflict physical injury or a sexual offense upon the victim. and:</p> <ul style="list-style-type: none"><u>(1) voluntarily frees the victim in a safe place and does not inflict physical injury or a sexual offense upon the victim, is guilty of a third degree felony;</u><u>(2) either voluntarily frees the victim in a safe place or inflicts great bodily harm or a sexual offense upon the victim, is guilty of a second degree felony;</u><u>(3) does not voluntarily free the victim in a safe place and inflicts great bodily harm or a sexual offense upon the victim, is guilty of a first degree felony.</u> <p><u>Conduct relied on to increase the penalty for kidnapping by establishing that great bodily harm or a sex offense was inflicted may not separately form the basis for a separate criminal conviction.</u></p> <p>C. <u>To give rise to a kidnapping conviction, the taking or transporting conduct must interfere substantially with the victim's liberty and carry significance beyond facilitating the commission another offense.</u></p>

Explanatory Note: Both suggestions add Subsection C to narrow the types of restraints that can trigger kidnapping liability, addressing some of the *de minimus* factual scenarios outlined above.

Alternative 1 does away with first-degree kidnapping, makes most kidnappings second-degree felonies, and encourages safe release by establishing 3rd-degree kidnapping (recognizing that false imprisonment is a 4th-degree felony). Prosecutors are currently able to enhance the kidnapping sentence where a second offense is also committed by proving injury or a sex offense (1st-degree kidnapping), but are also able to separately charge for the injuring offense. Double jeopardy protections are not adequately preventing this since kidnapping is considered “complete” as soon as restraint begins; all subsequent acts are separately punishable under current law. The proposed amendment leaves it for prosecutors to charge additional offenses for any additional harms inflicted, such as battery, aggravated battery, robbery, or a sexual offense. It addresses each discrete crime distinctly, rather than forcing complex situations into a single crime, thus elevating even the simplest kidnappings to the highest felony level.

Alternative 2 leaves room for first-degree culpability where certain serious harms do occur, replacing “injury” with “great bodily harm” (recognizing that physical injury is still separately punishable via more specific statutes). The added language to subsection B is another possible solution to the severe sentences incurred in many of these cases, as double jeopardy is always a question of *legislative intent*.

§ 30-6-1. Child abuse.

The statute currently uses broad language that implicates a variety of conduct without clearly distinguishing penalty levels and has required a lot of judicial line-drawing. The proposal separates abandonment, negligent abuse and intentional abuse into separate statutory sections, more narrowly defining and clearly delineating these distinct offenses. This provides better notice to caregivers and more specific guidance to law enforcement and prosecutors to narrow the focus of criminal charges and to reasonably tie penalties to fact-specific conduct when compared with the general battery and homicide penalties.

Recommended penalty structure tying punishment with culpability, as well as resulting harm:

- **Abandonment, no GBH**
 - No GBH/death = misdemeanor (no change)
 - GBH/Death = second-degree felony (no change)
- **Negligent abuse**
 - No GBH/death = 4th-degree felony, no internal enhancement (HOE)
 - *Compare:* Aggravated battery (injury but not GBH) is a misdemeanor; elevated to felony for child victim
 - GBH 12-18 = 3rd-degree felony (3 years)
 - GBH under 12 = 2nd-degree felony (9 years)
 - Death 12-18 = 2nd-degree felony resulting in death (15 years)
 - Death under 12 = 1st-degree felony (18 years, mandatory)
- **Intentional abuse**
 - No GBH/death = 4th-degree felony + *internal enhancement of 2 years per prior w/in 10 years*
 - *Compare:* Agg battery (injury but not GBH) (misdemeanor)
 - GBH 12-18 = 3rd-degree felony (3 years) + *internal enhancement of 2 years per prior w/in 10 years*
 - GBH under 12 = 2nd-degree felony (9 years) + *internal enhancement of 2 years per prior w/in 10 years*
 - Death 12-18 = 2nd-degree felony resulting in death (15 years) + *internal enhancement of 2 years per prior w/in 10 years*
 - *Compare:* Same penalty as 2nd-degree murder, but without requiring intent to kill
 - Death under 12 = 1st-degree felony (18 years, mandatory) + *internal enhancement of 2 years per prior w/in 10 years*
 - *Compare:* Greater penalty than 2nd-degree murder, but without requiring intent to kill
 - Death + intent to kill, child of any age = 1st-degree felony resulting in death of a child (life)
 - *Compare:* Same penalty as first-degree murder but without having to prove willful, deliberate, premeditated intent

Note: All child abuse crimes are felonies and in appropriate cases, prosecutors may pursue first-degree felony murder in a child abuse case resulting in death, whether intentional or negligent.

PROPOSAL:

<p>§ 30-6-1. Abandonment or abuse of a child <u>Definitions.</u></p>	<p>A. As used in this section <u>article</u>:</p> <p>(1) “child” means a person who is less than eighteen years of age;</p> <p>(2) “neglect” means that a child is without proper parental care and control of subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parents, guardian or custodian or their neglect or refusal, when able to do so, to provide them; and</p> <p>(3) “negligently” refers to criminal negligence and means that a <u>describes acts that disregard a substantial, foreseeable risk, where the person knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child, but did not act intentionally;</u> and</p> <p>(4) “intentionally” refers to acts that <u>are done purposefully and means that the person knew the danger involved and acted with purpose, even if the person did not intend the resulting harm.</u></p>	<p><i>New sections are added below to define the different crimes previously consolidated in Section 30-6-1; definitions are expanded to clarify the differences between negligent and intentional conduct.</i></p>
<p>§ 30-6-1.1. Abandonment of a child.</p> <p>[New section number modifying 30-6-1(B)]</p>	<p>A. Abandonment of a child consists of the parent, guardian or custodian of a child <u>knowingly or intentionally</u> leaving or abandoning the child under circumstances whereby the child may <u>is at foreseeable risk of</u> or does suffer neglect.</p> <p>B. A person who commits abandonment of a child is guilty of a misdemeanor, unless the abandonment results in the child’s death or great bodily harm, in which case the person is guilty of a second degree felony.</p> <p>C. <u>Abandonment may be a lesser-included offense of negligent or intentional child abuse by</u></p>	<p><i>Including “knowingly” mens rea to allow for new Subsection C. In certain factual circumstances, Abandonment should be a lesser-included offense of abuse. See State v. Garcia, 2014-NMCA-006, ¶¶ 45-50 (Vigil, J., dissenting), cert. granted.</i></p>

	<p><u>endangerment.</u></p> <p>C. A parent, guardian or custodian who leaves an infant less than ninety days old in compliance with the Safe Haven for Infants Act shall not be prosecuted for abandonment of a child.</p>	<p>→ Previous Subsection C is relocated, infra.</p>
<p><u>§ 30-6-1.2.</u> <u>Negligent abuse of a child.</u></p> <p>[New section number modifying 30-6-1(D-H)]</p>	<p>[D]A. <u>Negligent Abuse</u> of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be[-]</p> <p>(1) placed in a situation that may endangers the child's life or health,[-]</p> <p>(2) tortured, cruelly confined or cruelly punished; or</p> <p>(3) exposed to the inclemency of the weather.</p> <p><u>by creating or disregarding a substantial and foreseeable risk of significant harm to the child.</u></p> <p>[E]B. A person who commits <u>negligent</u> abuse of a child that does not result in the child's death or great bodily harm is, for a first offense, guilty of a third <u>fourth</u> degree felony, and for second and subsequent offenses is guilty of a <u>second degree felony</u>.¹</p> <p>C. If the <u>negligent</u> abuse results in great bodily harm to the <u>a child under the age of twelve</u>, the person is guilty of a <u>first second</u> degree felony. <u>If the negligent abuse results in great bodily harm to a child twelve to eighteen years of age, the person is guilty of a third degree felony.</u></p> <p>[F]D. A person who commits negligent abuse of a child that results in the death of the <u>a child under the age of twelve</u>, <u>the person is guilty of a first degree</u></p>	<ul style="list-style-type: none"> • Removes “permitting” because permitting should only be a crime if done purposefully. Too many scenarios become “negligently permitting” when parents leave their kids with a <u>potentially</u> risky babysitter. Poor people are unduly impacted by this charge because they can't always be extremely discriminating in what family members they rely on for free child care and have to make judgment calls that should not incur criminal liability. “Intentionally permitting” means you are knowingly allowing abuse to be committed by another, and falls within the scope of criminal liability. • Removes the specific provision for “weather” endangerment, instead moving that to the “prima facie” provisions to avoid

¹ An alternative to existing self-enhancement from second to third-degree felony: A person who commits negligent abuse of a child not resulting in death or great bodily harm and who has incurred a prior conviction for negligent abuse of a child within ten years of the occurrence for which he or she is being sentenced under this section may have his or her basic sentence increased by one year for each prior negligent child abuse conviction.

	<p>felony. <u>If the negligent abuse results in the death of a child twelve to eighteen years of age, the person is guilty of a second degree felony resulting in death.</u> <u>E. Upon conviction pursuant to this section, the corrections department shall provide counseling and parenting education to the offender in its custody. While the offender is on probation or parole under its supervision, the corrections department shall also provide ongoing parenting education or require the offender to obtain ongoing parenting education as a condition of release.</u></p>	<p><i>redundancy.</i></p> <ul style="list-style-type: none"> • <i>Amends penalties to achieve the overarching penalty tiers described above.</i> • <i>Rather than increasing penalties for a “second and subsequent” offense, relying on Habitual Offender enhancements to address recidivism. An alternative: internally enhance by 1 to 2-year increments for each prior, rather than the six year jump (third to second-degree felony) for a second offense that is currently codified.</i> <p><i>*Adds mandatory counseling.</i></p>
<p><u>§ 30-6-1.3.</u> <u>Intentional abuse of a child.</u></p> <p>[New section number modifying 30-6-1(D-H)]</p>	<p><u>A. Intentional abuse of a child consists of a person knowingly and intentionally, and without justifiable cause, causing or permitting a child to be</u></p> <p style="padding-left: 40px;"><u>(1) placed in a situation that endangers the child’s life or health; or</u> <u>(2) tortured, cruelly confined or cruelly punished.</u></p> <p><u>[G]B. A person who commits intentional abuse of a child that does not result in the child’s death or great bodily harm is, for a first offense, guilty of a third fourth degree felony.</u></p> <p><u>C. If the intentional abuse results in great bodily harm to the a child under the age of twelve, the person is guilty of a first second degree felony. If the intentional abuse results in great bodily harm to a child twelve to eighteen years of age, the person is guilty of a third degree felony.</u></p>	<ul style="list-style-type: none"> • <i>Primarily focusing on the penalty scheme to avoid the rational tiering described above, including the highest penalty for intentional abuse “with intent to kill,” and recognizing availability of battery and homicide charges in appropriate cases, including first-degree felony murder.</i> • <i>Unlike the negligent abuse proposal, has built in recidivism enhancements (two years per prior), but they are permissive, not mandatory.</i> • <i>Adds mandatory</i>

	<p><u>D. A person who commits intentional abuse of a child twelve to eighteen years of age that results in the death of the child is guilty of a first second degree felony resulting in death.</u></p> <p><u>[H]E. A person who commits intentional abuse of a child less than twelve years of age that results in the death of the child is guilty of a first degree felony resulting in the death of a child.</u></p> <p><u>F. A person who commits intentional abuse of a child with intent to kill that results in the death of the child is guilty of a first degree felony resulting in the death of a child.</u></p> <p><u>G. A person who commits intentional abuse of a child and who has incurred a prior conviction for abuse of a child within ten years of the occurrence for which he or she is being sentenced under this section may have his or her basic sentence increased by two years for each prior child abuse conviction.</u></p> <p><u>E. Upon conviction pursuant to this section, the corrections department shall provide anger management counseling and parenting education to the offender in its custody. While the offender is on probation or parole under its supervision, the corrections department shall also provide ongoing anger management and parenting education or require the offender to obtain ongoing anger management and parenting education as a condition of release.</u></p>	<p><i>counseling.</i></p>
<p>§ 30-6-1.4. Prosecution of abandonment or abuse of a child.</p> <p>[New section number modifies Section</p>	<p><u>[F]A. Evidence that demonstrates that a child has been negligently or intentionally exposed to the inclemency of the weather that presents a substantial and foreseeable risk of harm to the child's life or health shall be deemed prima facie evidence of abuse of the child.</u></p> <p><u>B. Evidence that demonstrates that a</u></p>	<ul style="list-style-type: none"> • <i>Incorporates "inclement weather" provision by codifying it as prima facie abuse by endangerment.</i> • <i>Clarifying ambiguities related to chemical exposure and drug use.</i>

<p>30-6-1(I-K)]</p>	<p>person child has been knowingly, and intentionally or negligently allowed to enter or remain in a motor vehicle, building or any other premises that contains <u>exposed a child to chemicals and equipment used or intended for use in the manufacture of a controlled substance shall be deemed prima facie evidence of abuse of the child.</u></p> <p>[F]C. Evidence that demonstrates that a <u>person child has been knowingly and intentionally exposed a child to the use or consumption of methamphetamine shall be deemed prima facie evidence of abuse of the child.</u></p> <p>[K]D. <u>A parent, guardian or custodian who leaves an infant less than ninety days old in compliance with the Safe Haven for Infants Act shall not be prosecuted for abandonment of a child. However, A a person who leaves an infant less than ninety days old at a hospital may be prosecuted for abuse of the infant for actions of the person occurring before the infant was left at the hospital.</u></p>	<ul style="list-style-type: none"> • <i>Combines the Safe Haven provisions into the same Subsection.</i>
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30-36-5. Worthless checks

Currently, presenting a check for over \$25 carries 1-3 years in prison (mandatory minimum is 1 year).

Worthless checks is unique among property offenses in its penalty/value tiers. It would be reasonable to create tiers similar to other Larceny/Fraud crimes in Article 16. Recognizing the statute's goal of targeting multiple very small amount checks, consider lower dollar-amount tiers, finishing at "more than \$1000" instead of Larceny's "over \$25,000" outer limit.

PROPOSAL

Any person violating Section 30-36-4 NMSA 1978 shall be ~~punished~~ sentenced pursuant to Section 31-18-15 NMSA as follows:

A. when the amount of the check, draft or order, or the total amount of the checks, drafts or orders, are for more than one dollar (\$1.00) but less than twenty-five dollars (\$25.00), imprisonment in the county jail for a term of not more than ~~thirty~~ fifteen days or a fine of not more than one hundred dollars (~~\$100~~ 50), or both such imprisonment and fine;

B. when the amount of the check, draft or order, or the total amount of the checks, drafts or orders, are for more than twenty-five dollars (\$25.00) or more but less than one hundred dollars (\$100.00), imprisonment in the ~~penitentiary~~ county jail for a term of not less than ~~one year~~ fifteen days nor more than ~~three years~~ thirty days or the payment of a fine of not more than ~~one thousand dollars (\$1,000)~~ two hundred fifty dollars (\$250) or both such imprisonment and fine;

C. when the amount of the check, draft or order, or the total amount of the checks, drafts or orders, are for more than one hundred dollars (\$100.00) but less than one thousand dollars (\$1,000.00), imprisonment in the county jail for a term of not more than one year or the payment of a fine of not more than five hundred dollars (\$500) or both such imprisonment and fine; or

D. when the amount of the check, draft or order, or the total amount of the checks, drafts or orders, are for one thousand dollars (\$1,000.00) or more, imprisonment in the penitentiary for a term of not less than one year nor more than three years or the payment of a fine of not more than one thousand dollars (\$1,000) or both such imprisonment and fine.

Reduce mandatory minimum sentences

§ 31-18-17. Habitual Offender Enhancements

Consider limiting habitual offender enhancements for prior offenses which are for violent felonies which can only be imposed on a current violent felony conviction

Also consider establishing ranges limiting the amount of habitual offender time as an enhancement so that for the first such imposition of an enhancement would be an additional 2 years; the second imposition of an enhancement would be an additional 4 years; the third imposition of an enhancement would be an additional 6 years; and the fourth or subsequent enhancements would be an additional 8 years.

Alt 1	<i>Throughout</i> § 31-18-17(E)	“prior <u>violent</u> felony conviction” (each occurrence) E. As used in this section, “ non violent felony offense” means application of force, threatened use of force or a deadly weapon was not used by the offender in the commission of the offense.
Alt 2	§ 31-18-17(A)	A. A person convicted of a noncapital felony in this state whether within the Criminal Code or the Controlled Substances Act or not who has incurred one prior felony conviction that was part of a separate transaction or occurrence or conditional discharge under Section 31-20-13 NMSA 1978 is a habitual offender and his basic sentence shall be increased by one year. The sentence imposed pursuant to this subsection shall not be suspended or deferred, unless the court makes a specific finding that the prior felony conviction and the instant felony conviction are both for nonviolent felony offenses and that justice will not be served by imposing a mandatory sentence of imprisonment and that there are substantial and compelling reasons, stated on the record, for departing from the sentence imposed pursuant to this subsection.
	§ 31-18-17 <i>New Material</i> [E] thus re-lettered as F	<u>E. Any sentence imposed pursuant to this section shall not be suspended or deferred, unless the court makes a specific finding that the prior felony conviction(s) and the instant felony conviction are for nonviolent felony offenses and that justice will not be served by imposing a mandatory sentence of imprisonment and that there are reasons, stated on the record, for departing from the sentence alteration defined in this section.</u>

Alternatively, consider using prior felony convictions as a discretionary aggravating factor for the current conviction under the totality of the circumstances, and doing away with “enhancements” altogether. The current habitual offender statutes often results in absurd sentences for minor felonies solely based on *past* behavior or treatment as a recidivist where the *history* is truly minor and/or unrelated to violence or recidivism thereby costing increased costs in detention and litigation where the chance of greater exposure of custody time is present.

Treating it as an aggravating factor instead would help ensure that an individual is *primarily* sentenced for the current charges. Any *potential* increases based on prior conduct would be limited to true recidivists by allowing the court to balance any mitigating factors against any aggravating factors in determining the appropriate sentence considering the nature of the defendant and the current crime.

<p>§ 31-18-15.1</p>	<p>A. The court shall hold a sentencing hearing to determine if mitigating or aggravating circumstances exist and take whatever evidence or statements it deems will aid it in reaching a decision to alter a basic sentence. The judge may alter the basic sentence as prescribed in Section 31-18-15 NMSA 1978 upon:</p> <p style="padding-left: 40px;">(1) a finding by the judge of any mitigating circumstances surrounding the offense or concerning the offender; or</p> <p style="padding-left: 40px;">(2) a finding by a jury or by the judge beyond a reasonable doubt <u>or admitted by the defendant</u> of any aggravating circumstances surrounding the offense or concerning the offender, <u>or a finding by the judge of the existence of a prior felony conviction or convictions arising from separate transactions or occurrences from the instant offense(s).</u></p> <p style="text-align: center;">* * *</p> <p>C. For the purpose of this section, the following shall not be considered aggravating circumstances:</p> <p>(1) the use of a firearm, as provided in Section 31-18-16 NMSA 1978;</p> <p>(2) a prior felony conviction, as provided in Section 31-18-17 NMSA 1978;</p> <p>(3) the commission of a crime motivated by hate, as provided in the Hate Crimes Act; or</p> <p>([4]3) any evidence relating to the proof of an essential element of the offense.</p> <p><i>Incorporate definition of “prior felony conviction currently defined in § 31-17-17(D).</i></p>
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§ 31-20-5, Probation.

Subsection A currently caps district court probation exposure to 5 years and magistrate or metropolitan courts to the maximum sentence for the offense. Differentiating by sentence, rather than court, is more equitable to avoid probation terms beyond any possible incarceration exposure:

PROPOSAL:

§ 31-20-5(A)	... Except for sex offenders as provided in Section 31-20-5.2 NMSA 1978, the total period of probation for district court shall not exceed five years and the total period of probation for the magistrate or metropolitan courts shall be no longer than the <u>period of deferment or suspension</u> [or] maximum allowable incarceration time for the offense or as otherwise provided by law.
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➔ *This would make a misdemeanor with the maximum exposure of custody at one year subject to no more than one year probation.*

§ 33-2-34: Earned Meritorious Deductions Act (EMDA)

Grant discretion to the Department of Corrections to award earned time as a useful “carrot” in managing prison population by adding incentives to inmates to conduct themselves appropriately by amending Section 33-2-34 (L)(4) to remove mandatory serious violent offenses (“SVOs”) currently ineligible for earned time.

Alternatively consider providing better guidance for finding *discretionary* SVOs under Section 33-2-34(L)(4)(o). Sentencing judges increasingly treat discretionary SVOs as presumptively ineligible for day-for-day earned time.

PROPOSAL:

§ 33-2-34(A)	<p>A. To earn meritorious deductions, a prisoner confined in a correctional facility designated by the corrections department must be an active participant in programs recommended for the prisoner by the classification supervisor and approved by the warden or the warden's designee. Meritorious deductions shall not exceed the following amounts:</p> <p>(1) for a prisoner confined for committing a serious violent offense, up to a maximum of four days per month of time served;</p> <p>(2) for a prisoner confined for committing a nonviolent <u>the initial sentence for an offense conviction</u>, up to a maximum of thirty days per month of time served;</p> <p>(3)(2) for a prisoner confined following revocation of parole for the alleged commission of a new felony offense or for absconding from parole, up to a maximum of four days per month of time served during the parole term following revocation; and</p> <p>(4)(3) for a prisoner confined following revocation of parole for a reason other than the alleged commission of a new felony offense or absconding from parole:</p> <p>(a) up to a maximum of eight days per month of time served during the parole term following revocation, if the prisoner was convicted of a serious violent offense or failed to pass a drug test administered as a condition of parole; or</p> <p>(b) up to a maximum of thirty days per month of time served during the parole term following revocation, if the prisoner was convicted of a nonviolent offense</p>
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Additionally, establish a comparable structure of mandatory earned meritorious time for local *jail sentences* including in the calculations any pre-conviction custodial status or restrictive conditions such as house arrest or limited mobility monitored by a GPS or similar device.

Clarify the eligibility for earned meritorious time for presentence confinement and other “jail” scenarios, such as transport detention, conditions of release where the defendant’s liberty is restricted through a GPS or other electronic device; delays between arrest and trial, and

conviction and sentencing, which effectively *extend* sentences which would otherwise be reduced by earned time.

PROPOSAL:

§ 33-2-34	A. To earn meritorious deductions, a prisoner confined in a correctional facility designated by the corrections department, <u>a county jail or other facility, or comparably confined under stringent conditions of release, including confinement entitled to presentence confinement credit under NMSA 1978, Section 31-20-12,</u> must be an active participant in programs recommended for the prisoner by the classification supervisor and approved by the warden or the warden's designee, <u>if such programs are available in the prisoner's place of incarceration.</u> Meritorious deductions shall not exceed the following amounts: * * *
	D. A prisoner confined in a correctional facility designated by the corrections department is eligible for lump-sum meritorious deductions as follows: * * *