

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

**November 26, 2013
Room 309, State Capitol
Santa Fe**

The first meeting of the Criminal Justice Reform Subcommittee (CJRS) of the Courts, Corrections and Justice Committee was called to order by Representative Antonio "Moe" Maestas, co-chair, on November 26, 2013 at 9:15 a.m. in Room 309 of the State Capitol.

Present

Rep. Antonio "Moe" Maestas, Co-Chair
Sen. Lisa A. Torracco, Co-Chair
Rep. Gail Chasey
Rep. Zachary J. Cook
Sen. Cisco McSorley
Sen. Bill B. O'Neill
Rep. Jane E. Powdrell-Culbert
Sen. Sander Rue

Absent

Guest Legislators

Sen. Jacob R. Candelaria
Sen. Daniel A. Ivey-Soto

Staff

Douglas Carver, Staff Attorney, Legislative Council Service (LCS)
Caela Baker, Staff Attorney, LCS
Jennifer Dana, Legislative Intern, LCS

Guests

The guest list is in the meeting file.

Handouts

Handouts and other written testimony are in the meeting file.

Tuesday, November 26

Welcome and Introductions

Members of the subcommittee and staff introduced themselves.

The South Dakota Criminal Justice Reform Experience

Jerry Madden, a senior fellow at Right on Crime, introduced Jim Seward, general counsel, Office of the Governor of South Dakota. Mr. Madden explained that South Dakota has recently enacted significant criminal justice reforms, and Mr. Seward will offer the subcommittee a road map of the reforms that South Dakota has implemented in areas such as sentencing and court reform.

Mr. Seward told the subcommittee that South Dakota is similar to New Mexico in terms of its rural and Native American populations, which are factors that can affect decisions related to criminal justice reform. Mr. Seward gave an overview of criminal justice reform efforts in South Dakota, including formation of the Criminal Justice Initiative (CJI) Work Group and enactment of the South Dakota Public Safety Improvement Act.

Mr. Seward told the subcommittee that South Dakota's prison population had grown by more than 500% over the past 35 years and that the women's prison population hit an all-time high in the fall of 2011. Mr. Seward stated that the secretary of the South Dakota Department of Corrections approached him about the problem and explained that other states had undertaken reforms to reduce prison populations, rather than building new prisons. At that time, the South Dakota prison population was projected to grow by 25% over the next 10 years, at a cost of \$224 million. Mr. Seward explained that these statistics were similar to trends in other states that were experiencing rising imprisonment rates despite an overall decline in crime.

In light of these statistics and with the desire to reduce the prison population, South Dakota formed the CJI Work Group. The first step of the CJI Work Group was to hold stakeholder meetings. These meetings revealed that most of the stakeholders agreed that reforms were needed to improve public safety and reduce corrections spending. Most stakeholders agreed that this could be accomplished by focusing resources on violent, chronic and career criminals, or those "people we are afraid of, not just mad at". Following the stakeholder meetings, the CJI Work Group engaged in a bipartisan effort to create a formal work plan to address these goals. The CJI Work Group also engaged the assistance of The Pew Charitable Trusts. According to Mr. Seward, The Pew Charitable Trusts offers assistance to states by collecting and analyzing data related to corrections practices and identifying areas that may benefit from reform.

A subcommittee member asked Mr. Seward about the optimal number of members for a work group. Mr. Seward responded that a small work group of 12 to 18 people is preferable. The CJI Work Group was a bipartisan work group consisting of members from all three branches of government.

Mr. Seward discussed data related to the criminal justice system in South Dakota. He explained that in fiscal year 2012, over 80% of offenders admitted to South Dakota prisons had been sentenced for nonviolent crimes, and over 50% had been sentenced for drug- or alcohol-related crimes. Of the drug-related crimes, 70% were convicted of drug possession and only 30% were convicted of drug distribution or manufacturing. Additionally, one out of four inmates was in prison due to a parole violation.

Upon reviewing relevant data, the CJI Work Group identified three broad goals: 1) improve public safety by investing in programs, practices and policies that have been proven to reduce recidivism; 2) hold offenders more accountable by strengthening community supervision; and 3) reduce corrections spending and focus prison space on violent, chronic and career criminals. These broad goals translated into the development of the following policy areas, which were used as a framework for the development of a work plan: 1) supervision and reinvestment; 2) statutory review; and 3) efficiency and sustainability. The CJI Work Group chose not to address issues involving the legalization of any drugs, the release of current inmates from prison, the juvenile justice system, the death penalty, the sex offender registry or the root causes of crime, such as education or poverty.

In addition, a Council of Advisors was formed to provide advice to the CJI Work Group. The Council of Advisors consisted of law professors, former attorneys general, judges, district attorneys and others with expertise in criminal justice. One subcommittee member commented that having a council of advisors seems problematic in terms of efficiency, if there are already a work group and other subgroups. Mr. Seward responded that a council of advisors is not mandatory, but South Dakota officials found its Council of Advisors beneficial because it acted as a "sounding board" for the CJI Work Group. Mr. Seward added that the CJI Work Group was metaphorically looking at reforms from a 30,000-foot level, while the Council of Advisors was looking at reforms from a 50,000-foot level.

Another subcommittee member asked about the budget South Dakota had for the CJI Work Group. Mr. Seward responded that the CJI Work Group did not have a budget. Instead, the CJI Work Group was composed of state and county employees who received their normal salary or per diem. Mr. Seward stated that the only expense was that of food and coffee, but The Pew Charitable Trusts frequently picked up the bill. In response to a question from another subcommittee member, Mr. Seward told the subcommittee that the CJI Work Group met for about six months.

Supervision and Reinvestment

Mr. Seward explained that the supervision and reinvestment focus of the CJI Work Group addressed the supervision of high-risk offenders and the creation of an earned-discharge program. Under the earned-discharge program, South Dakota probationers and parolees earn reductions in parole or probation sentences in 30-day blocks. For each 30-day period that a probationer or parolee is "perfectly compliant", the probation or parole sentence is reduced by 30 days. Mr. Seward told the subcommittee that the rationale behind this program is to reduce the number of

persons that probation and parole officers must supervise and to direct their attention to offenders who actually need supervision, rather than those who are perfectly compliant. Since July 2013, 95% of South Dakota parolees have earned credit under the earned-discharge program. Mr. Seward commented that statistics show that New Mexico has high caseload levels for probation and parole officers, which is similar to South Dakota's situation prior to implementation of the earned-discharge program.

In addition, efforts in this category involved improving drug and specialty courts, such as "HOPE" courts, which, according to Mr. Seward, are an effective way to deal with nonviolent drug addicts. Under the HOPE program, drug offenders are assigned a particular color and must call a toll-free number on a daily basis to determine if their color is "up" for that particular day. If an offender's color is "up", the offender must submit to drug testing on that day. If the offender tests positive for an illegal substance, the offender is jailed for a predetermined amount of time. According to Mr. Seward, statistics have shown that offenders are 50% less likely to use drugs and return to prison under these programs. Additionally, of those who do use illegal substances, such a relapse typically occurs only one time during the probation or parole sentence. Programs such as the HOPE courts implement "swift and certain sanctions" by utilizing predetermined penalties pursuant to a "sanctioning grid" or "response matrix". The earned-discharge program and HOPE courts are examples of evidence-based practices that have proven successful in other states.

Another program that South Dakota implemented is the 24/7 program for driving while intoxicated (DWI) offenders. Mr. Seward explained that under this program, certain DWI offenders must report to their local sheriff's office two times per day to submit to a breath test. Mr. Seward explained that the goal of this program is to allow people to remain in the community rather than in prison, while remaining clean and sober.

Mr. Seward noted that the CJI Work Group worked closely with personnel in county sheriffs' offices and county jails so that they understood that the intention of the reforms was not to shift the burden from the prison system to county jails. A provision in the reforms was enacted to ensure that if counties observe an influx of probationers in county jails, the state will reimburse the counties for the increased expense.

Another effort of the CJI Work Group that fell under the supervision and reinvestment category involved implementation of the effective practices in community supervision (EPICS) interviewing technique by parole and probation officers. EPICS was developed by Professor Edward Latessa of the University of Cincinnati. EPICS provides a structure for probation and parole officers to identify high-risk thinking and anti-social attitudes that lead to criminal behavior. South Dakota implemented a similar program, the level of service inventory – revised assessment. This assessment helps to predict violent recidivism and violations among the probation population, as well as institutional misconduct among incarcerated offenders.

One subcommittee member asked whether reforms such as the implementation of EPICS were made in statute or by administrative regulations. Mr. Seward responded that the use of EPICS could be mandated by statute or put into administrative regulations. He added that The Pew Charitable Trusts may be able to help legislators understand what aspects of criminal justice reform in New Mexico are better addressed in the New Mexico Administrative Code.

Other efforts in the area of supervision and reinvestment involved an examination of housing for parolees, negotiations concerning a pilot program for Native American parolees, improvements to the victim notification system and limiting preliminary hearings to felony cases. Mr. Seward explained that 47% of parole violations in South Dakota involve Native American parolees, and frequently the violations occur when a parolee absconds to a reservation. Overall, Native Americans constitute 9% of the population of South Dakota. Under the South Dakota pilot program, the tribes and the state would enter into agreements similar to a tribal-state compact. Under this agreement, a tribe would be permitted to hire a tribal parole officer using state funds, which would enable Native American parolees to complete their supervised probation sentences within their reservations. Pursuant to such an agreement, the tribe would promise to return parole violators to state custody. South Dakota is currently negotiating this type of agreement with two tribes, although the agreements have not yet been finalized.

Housing for parolees has been a challenge in South Dakota. In the past, the same housing units were used to serve both parolees who had recently been released from prison and parolees who had recently violated their conditions of parole and were being sent back to prison. South Dakota initiated a pilot program that eliminates this practice in some cases and provides \$250,000 for additional housing for parolees. Data from the pilot program will be reviewed to determine whether the approach is working.

A subcommittee member asked whether the CJI Work Group sought input or assistance from the housing community and observed that parolee housing is also a problem in New Mexico. The member noted that in New Mexico, parole revocations are frequently a result of some type of housing issue, particularly a lack of affordable housing. The member further commented that felony offenders are ineligible for Section 8 housing. Another member commented that housing can also be a challenge because halfway houses are often unwelcome in neighborhoods, and housing placement is particularly difficult for sex offenders. The member suggested that inviting residents of the neighborhood to become involved in some capacity may be helpful.

Concerning housing, Mr. Seward stated that the CJI Work Group tried to focus on parolees who are most likely to have difficulty finding housing after release from prison; however, he acknowledged that this is an issue with which South Dakota is currently struggling. Mr. Madden stated that Texas approached this problem by expanding its halfway house program to specifically address the needs of offenders suffering from drug addiction. Mr. Seward recommended that the subcommittee determine whether housing is a factor that is driving the prison population in New Mexico.

Finally, Mr. Seward indicated that every county in South Dakota is responsible for notifying victims when an offender is scheduled to be released from prison and inputting this information into the county system. Under the reforms, a state victim notification system was created, which is expected to save resources and provide improved notification to victims.

Statutory Review

Under the statutory review category, the CJI Work Group focused on differentiating levels of criminal conduct, creating presumptive probation for Class 5 and Class 6 felonies and developing "swift and certain sanctions". Class 5 and Class 6 felonies involving violence, a risk to public safety and sex offenses were excluded from the presumptive probation framework.

Mr. Seward told the subcommittee that, in differentiating levels of criminal conduct, South Dakota created a tiered controlled substance sentencing statute, created more targeted punishments for grand theft, enhanced options for sentencing DWI offenders and differentiated sentencing for the various levels of burglary.

One subcommittee member asked for clarification concerning the levels of felony offenses in South Dakota. Mr. Seward responded that a sixth degree felony is the lowest degree of felony. In the context of DWI offenses, a sixth degree felony carries a two-year maximum sentence. A fifth degree felony is the second-lowest degree of felony in South Dakota, carrying a five-year maximum sentence for a DWI offense. As part of the reform efforts, the maximum sentence for a fifth degree felony was lowered from 10 years to the current five-year maximum.

Another subcommittee member asked if South Dakota looked at specific crimes to determine whether a felony charge was appropriate. Mr. Seward responded that the CJI Work Group studied this issue, and he provided the case of methamphetamine use as an example. He explained that in Wyoming, methamphetamine use is a misdemeanor offense. In South Dakota, on the other hand, methamphetamine use previously had been a felony offense. The CJI Work Group addressed this in its efforts to create a tiered controlled substance sentencing statute that differentiates between a college student using methamphetamine, for example, and "drug kingpins" who possess or distribute methamphetamine.

Efficiency and Sustainability

Finally, the focus on efficiency and sustainability involved measuring and evaluating the implementation of reforms and improving training on evidence-based practices that have been proven to reduce recidivism. Under this category, reform efforts were enacted to require a 10-year fiscal impact statement on any bill that will significantly change the prison population.

According to Mr. Seward, the South Dakota criminal justice reforms are estimated to save the state \$207 million in construction and operating costs through 2022.

Mr. Seward stated that additional information on criminal justice reform in South Dakota can be found at <http://psia.sd.gov>.

Subcommittee Questions and Comments

Former New Mexico Attorney General Harold D. "Hal" Stratton, Jr., expressed support for the efforts of the subcommittee. Secretary of Corrections Gregg Marcantel was unable to attend the subcommittee meeting, but sent his regards to members of the subcommittee.

Subcommittee members discussed South Dakota criminal justice reform and indicated that there has been strong bipartisan support for this subcommittee and that New Mexico has not undertaken substantial criminal justice reforms for decades. One member of the subcommittee expressed a desire to make improvements to the juvenile justice system and to request the Legislative Finance Committee (LFC) to undertake a financial analysis that would demonstrate the fiscal impact that criminal justice reforms would have in New Mexico. Another member stated that serving a prison sentence has a lasting impact on the prisoner's family and that this should be considered when recommending reforms.

Several members indicated that enacting criminal justice reform would save New Mexico money in the short term, while also producing long-term public safety savings. Members of the subcommittee discussed a conference on criminal justice reform offered by the National Conference of State Legislatures. One subcommittee member will be attending the conference and offered to report back to the subcommittee.

Another subcommittee member asked Mr. Seward if the South Dakota reforms were passed as part of an omnibus bill. Mr. Seward responded in the affirmative and indicated that the bill was titled "An Act to Improve Public Safety". Mr. Seward told subcommittee members that the CJI Work Group believed that passage of the entire reform package was more likely if it was offered in the form of an omnibus bill. Mr. Madden stated that Texas enacted significant criminal justice reform through an appropriations bill and through work with the state budget. Some members of the subcommittee expressed support for the omnibus bill approach.

One subcommittee member asked Mr. Seward whether South Dakota changed any constitutional provisions. Mr. Seward responded in the negative. The member indicated that the Constitution of New Mexico was changed in 1985 or 1986 to address forfeiture. The member stated that funds were formerly used for education, but under the current law, funds are used for police, which has created a kind of bounty system. The member expressed support for a change that would direct forfeiture funds toward programs such as rehabilitation.

Another subcommittee member asked Mr. Seward whether South Dakota has experienced a dramatic increase in the number of women in prison, similar to the trend in New Mexico. Mr. Seward responded that South Dakota did see a significant increase in female inmates and found that over half were addicted to drugs or alcohol. South Dakota responded by creating more treatment opportunities. The member asked whether South Dakota has any special programs for geriatric offenders. Mr. Seward responded that South Dakota did not make any changes regarding geriatric offenders because they did not constitute a significant portion of the prison population. Finally, the member asked how South Dakota defines recidivism. Mr. Seward

responded that South Dakota put the definition of recidivism in statute, and it is defined as returning to prison within three years of release. Mr. Seward stated that prior to the reforms, the recidivism rate in South Dakota was 44%. Current statistics following implementation of the reforms are not yet available. Mr. Madden indicated that the recidivism rate in Texas is 28%.

One subcommittee member noted that programs requiring an offender to pay the cost of participating in an alternative program may not be effective in cases where the offender does not have the means to pay. As a result, the member indicated that the subcommittee should consider whether it is worth paying \$70.00 to \$90.00 per day to keep the inmate in prison, or just structure the reforms so that the state pays for the alternative programs, rather than requiring fees from the offenders.

Another subcommittee member expressed support for programs that offer cognitive or behavioral treatment for offenders, particularly those in the abuse and neglect system. Another member asked whether it is feasible to have different work groups to look at different aspects of criminal justice reform. Mr. Madden responded that, in his opinion, it is best to have one work group. If specific groups are needed to look at discrete issues, they should be organized under the umbrella of the main work group.

Subcommittee members asked whether a formal letter should be sent to initiate contact with The Pew Charitable Trusts to request assistance with data gathering and analysis. Mr. Carver responded that he has been in contact with The Pew Charitable Trusts representatives and those representatives indicated that the letter should be sent after The Pew Charitable Trusts gathers initial data. A subcommittee member indicated that the New Mexico Sentencing Commission (NMSC) has already gathered a significant amount of data concerning corrections in New Mexico and The Pew Charitable Trusts may be able to use some of this data.

Tony Ortiz, executive director of the NMSC, told subcommittee members that the NMSC has more than 100 reports on its web site concerning correctional issues in New Mexico. Additionally, the NMSC has been working with the Pew-MacArthur Results First Initiative for two years. Mr. Ortiz indicated that specialty courts, such as pre-prosecution diversion programs, already exist in New Mexico, although they could be improved. Additionally, Mr. Ortiz indicated that earned meritorious deductions have been in place in New Mexico since 1999, although this program is not frequently used.

One subcommittee member asked what the status of the NMSC's budget has been over the last few years. Mr. Ortiz responded that the NMSC's budget has been reduced by about 30% in recent years. He further indicated that he recently briefed the governor on a possible \$50,000 expansion to the NMSC's budget that would enable it to assist the LFC, which is currently working with the Pew-MacArthur Results First Initiative.

Another subcommittee member noted that a stumbling block in New Mexico is the fact that the news media is saturated with stories concerning crime, and residents have prior

prejudices against defendants who have destroyed families and communities. The member asked how the subcommittee can overcome these obstacles to reform. Mr. Madden suggested that "the numbers" should drive decisions. Mr. Seward responded that people want programs that hold offenders more accountable, reduce the caseload of probation officers and improve public safety.

Several members expressed concern about the volume of traffic citations that are clogging the court system, particularly in the Bernalillo County Metropolitan Court.

Eleven-Point Plan for New Mexico

Mr. Madden presented an 11-point plan to the subcommittee, outlining the steps he suggests that New Mexico take in order to successfully reform its criminal justice system. These steps include developing a clear mission statement, analyzing data, asking for input from stakeholders, working on a broad scale, developing a time line, undertaking reform as a bipartisan effort, reviewing existing programs to see if they can be improved and engaging the assistance of outside experts.

Mr. Madden indicated that sending inmates to prisons in other states may be an option to save money on corrections. A subcommittee member asked why sending inmates out-of-state would save money. Mr. Madden responded that in Texas, up to 1,000 inmates per day had to be transported long distances to attend medical appointments and court appearances. He indicated that in some instances, moving inmates out-of-state could be a sound fiscal decision.

Public Comment

Ed Apodaca read a letter to the subcommittee concerning his son, Joshua Apodaca, who was killed in New Mexico in 2007. Mr. Apodaca stated that he and his wife, Brenda Barela, support the subcommittee's efforts to strengthen criminal laws in New Mexico.

Margarita Sanchez thanked the subcommittee for its efforts and stated that criminal justice reform in New Mexico is long overdue. She stated that Chicanos and African Americans comprise a substantial percentage of the prison population and the prison population needs to be reduced. She further stated that she would like to see: 1) sentencing adjusted to reflect the severity of the crimes; 2) an effort to provide financial and housing resources to inmates reentering the general population; 3) a limit on the use of long-term solitary confinement; and 4) improved access to medical care for inmates. Finally, she commented that organizations such as legal aid should be consulted by the subcommittee for input.

Sister Sarah Rahman stated that she volunteers in the corrections system. She would like to see a review of the policies concerning adding time to inmates' sentences for behavior infractions while incarcerated. She also expressed a desire for the subcommittee to review the process for approving or denying parole plans and to review the quality of medical care provided in prison facilities.

One of the subcommittee co-chairs summarized a letter from the Honorable Thomas A. Donnelly, former district judge for the First Judicial District in New Mexico. The letter gave an overview of historical revisions to the Criminal Code, which began in 1957. A letter from Dr. Steven A. Vaughn was also summarized. Dr. Vaughn is a former medical director for the Corrections Department. He expressed support for a review of the inmate health care system.

Gerald Madrid, owner of Gerald Madrid Bail Bonds in Albuquerque, addressed the subcommittee. He explained that his business deals with the front end of the criminal justice system. He told the subcommittee that offenders are increasingly being released on their own recognizance with no bond requirement, and this results in a greater percentage of pretrial violations, such as failure to appear in court.

Barri Roberts, executive director of the Bernalillo County Forensic Intervention Consortium, told the subcommittee that she would like to see reforms aimed at keeping people who suffer from mental illness from entering the criminal justice system. Ms. Roberts told the subcommittee that use of the "Sequential Intercept Model" may be helpful in these endeavors because it is a framework for understanding how people with mental illness interact with the criminal justice system. The Sequential Intercept Model was developed by the federal Substance Abuse and Mental Health Services Administration GAINS Center. Finally, Ms. Roberts told the subcommittee that citations issued to homeless individuals, in particular loitering citations, are increasing the workload of courts because these individuals are frequently unable to pay the citations. Ms. Roberts suggested that these types of offenses could be changed from criminal to civil penalties.

Robert P. "Rick" Tedrow, 11th Judicial District attorney for Division 1, and president of the New Mexico District Attorney's Association, expressed support for the work of the subcommittee.

Henry Valdez, director of the Administrative Office of the District Attorneys (AODA), told the subcommittee that the AODA keeps data for all cases involving district attorneys and would be happy to provide that data to the subcommittee.

Robert Mitchell, administrator of the Alternative Sentencing Division of San Juan County, told the subcommittee that he works mostly with misdemeanor offenders who are participating in alternative treatment programs. He asked the subcommittee members to consider where misdemeanor offenders fit into reform efforts, as well as the role of magistrate judges in supervising misdemeanor offenders participating in alternative compliance programs.

Peter Bochert, the statewide drug court coordinator for the Administrative Office of the Courts, told the subcommittee that there is a need for a standardized statewide assessment of alternative programs. Additionally, he stated, programs should be evaluated to ensure that they are targeting the appropriate offender groups, in particular, those who are at a high risk of committing repeat offenses. Finally, he told the subcommittee that persons suffering from

mental health issues often spend more time in county jails than persons who do not suffer from mental illness, and this is an issue that may warrant review.

The Way Forward for New Mexico

Members of the subcommittee discussed the goals that they envision for the subcommittee. Several members expressed a desire to quickly identify the areas that the subcommittee should not address and to create a mission statement. Several members indicated that New Mexico's juvenile justice system, while not perfect, is in good shape, and it is not an area on which the subcommittee should focus. Another member disagreed and expressed opposition to excluding juvenile justice from the purview of the subcommittee.

Other areas that were identified for possible review by the subcommittee include:

- ▶ treatment programs for sex offenders;
- ▶ review of the sex offender registry to determine whether it includes offenders who should not be required to register;
- ▶ examination of whether incarceration for DWI offenders is appropriate;
- ▶ the lack of funding for post-release programs;
- ▶ housing for parolees;
- ▶ pre-prosecution diversion programs;
- ▶ the possibility of closing probation and parole offices and having probation and parole officers spend more time in the field;
- ▶ earned-discharge programs;
- ▶ mental and behavioral health programs; and
- ▶ employment opportunities for rehabilitated offenders.

Members of the subcommittee determined that the next meeting of the subcommittee will be held on December 16, 2013 at 9:00 a.m.

The co-chairs of the subcommittee invited the public to submit comments to CJRS@nmlegis.gov and visit the Criminal Justice Reform Subcommittee web site, which can be found at <http://www.nmlegis.gov/lcs/default.aspx> under the link for "Committees" and then "Interim Committees".

Adjournment

There being no further business before the subcommittee, the first meeting of the CJRS of the Courts, Corrections and Justice Committee was adjourned at 4:25 p.m.