

**MINUTES
of the
FIRST MEETING
of the
CRIMINAL JUSTICE REFORM SUBCOMMITTEE**

**July 18, 2018
State Bar Center
5121 Masthead Street NE
Albuquerque**

The first meeting of the Criminal Justice Reform Subcommittee was called to order by Senator Sander Rue, co-chair, on July 18, 2018 at 9:14 a.m. at the State Bar Center in Albuquerque.

Present

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

Absent

Rep. Zachary J. Cook

Guest Legislator

Sen. Bill B. O'Neill

Staff

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

Guests

The guest list is in the meeting file.

Handouts

Handouts and other written materials are in the meeting file.

Wednesday, July 18

Call to Order and Introductions

Senator Rue and Representative Maestas welcomed everyone to the meeting, and the subcommittee members, staff and public introduced themselves. Senator Rue expressed an intent for the subcommittee to produce a package of legislative proposals during the interim.

Collateral Consequences of Conviction

Paul Haidle, senior policy strategist, American Civil Liberties Union of New Mexico, guided the subcommittee through a true/false quiz on the collateral consequences of the crime in New Mexico (Item 1). Mr. Haidle explained that the National Inventory of the Collateral Consequences of Conviction has determined that New Mexico has 680 collateral consequences in its statutes and rules. These consequences can stem from arrests or convictions because even arrests that do not result in conviction may be reported on commercial background checks for seven years. He added that one-half of the Federal Bureau of Investigation's (FBI's) background checks are inaccurate or out of date. Individuals who successfully complete a conditional discharge in New Mexico do not have a criminal conviction by law; however, Mr. Haidle noted, this can be inaccurately reflected on a background check. An individual may also be led to believe that he or she has a conviction when none exists. Mr. Haidle explained that when using background checks in pre-employment screenings, employers should make individualized determinations for applicants rather than use bright-line rules.

Mr. Haidle stated that New Mexico has the highest proportion of imprisoned Latinos in the nation, while black adults are imprisoned at over six times the rate of white adults. By age 23, approximately one-third of Americans will have been arrested. Mr. Haidle noted that New Mexico is one of 12 states with a prison population that grew between 1999 and 2015. The number of women in prison increased by 587% from 1980 to 2011, and 10% of New Mexico children have had a parent incarcerated. One in four people in New Mexico prisons is treated for a serious mental illness on any given day, and 85% of people imprisoned in New Mexico suffer from substance abuse problems.

Working through his presentation at Item 1, Mr. Haidle explained several commonly used terms in collateral consequences discussions. "Criminal record" includes anything from arrest to conviction and can also include conditional discharges, deferred sentences, probation and jail or prison time. Mr. Haidle defined "repository" as a location where records are kept and described who has access to them, including arresting agencies, the FBI, district attorneys, courts and the National Crime Information Center.

Mr. Haidle informed the subcommittee that background checks come in several varieties. A consumer reporting agency's background check is based on an applicant's name and date of birth, which can be problematic for individuals with common names. Consumer reporting agencies must follow the federal Fair Credit Reporting Act (FCRA) so individuals can correct errors in reports. Mr. Haidle explained that the New Mexico Court Case Lookup provides free online access to New Mexico court data to the public, and the Department of Public Safety (DPS) can provide a New Mexico-specific record of arrests and prosecutions (RAP) sheet for \$15.00. The FBI also performs background checks for security clearances using fingerprints.

Mr. Haidle explained that laws at every level of government can influence collateral consequences. At a federal level, the FCRA and the federal Civil Rights Act of 1964 have the greatest impact. Agencies such as the Equal Employment Opportunity Commission (EEOC) and

the state's Human Rights Commission have also worked on collateral consequences. In New Mexico, the "Ban the Box" law removed a question on public job applications asking if a person has ever been convicted of a crime. Mr. Haidle stated that a similar bill for the private sector was introduced and passed in the 2017 legislative session but was vetoed by the governor. Under the Criminal Offender Employment Act, a conviction may not be an automatic bar to licensure or public employment. New Mexico also allows limited expungement of criminal records. Cities and counties may also develop ordinances for their jurisdictions.

Mr. Haidle repeated that New Mexico has 680 collateral consequences of conviction, and he highlighted several of the most common. He explained that an individual can regain voting rights after probation or parole by presenting the secretary of state with a certificate of completion. However, the certificate is complicated, and county clerks may not understand what is needed from the certificate, leading an individual to give up on the process. Regarding voting rights of persons convicted of crimes, New Mexico falls somewhere between states such as Florida, where a conviction means an individual may never vote again, and Vermont, where an incarcerated person can vote.

Mr. Haidle told the subcommittee that a person with a conviction may believe that he or she cannot obtain subsidized housing, but only convictions for drug manufacturing in public housing and sex offender convictions are barriers to obtaining public housing. While a local public housing authority can set rules requiring that convicts must wait several years before they are eligible for subsidized housing, Mr. Haidle said that private landlords can and do reject potential tenants for arrests and convictions for fear of troublesome tenants.

Mr. Haidle mentioned the commonly held belief that an individual with a criminal record cannot obtain financial aid, especially for education. He stated that the only permanent barrier to obtaining financial aid is a conviction for manufacturing drugs while receiving financial aid.

Mr. Haidle discussed collateral consequences in private employment. He stated that under the FCRA, regular employers can see convictions that are not sealed or expunged as well as arrests from the past seven years on a commercial background check. Mr. Haidle said that an employer could choose to research more by sending staff to a courthouse to examine public records, but this is often expensive. He commented that under the Civil Rights Act of 1964 and EEOC rules, employers should make individual determinations on applicants with convictions. These determinations should be based upon whether the conviction has a bearing on the job, as well as the circumstances around the conviction. Applicants may bring supporting information to their interviews. However, Mr. Haidle continued, enforcement of the policy is difficult. He said that corporations have paid millions of dollars for employment lawsuits stemming from policies barring individuals with any criminal record from employment.

Mr. Haidle informed the subcommittee that specialized employers dealing with vulnerable populations or security clearances often have statutory requirements for background checks. He provided examples of employers that may be restricted from hiring people with past

convictions, such as schools that require FBI background checks and medical positions that require security clearances. He stated that individuals should be informed of these restrictions before they pursue such positions via an application or education. Mr. Haidle reiterated that in New Mexico, a criminal background cannot be the sole reason an occupational license is denied.

Mr. Haidle stated that it is important to know one's rights regarding background checks because background checks are often wrong. He stated that an applicant must be given a copy of a background check that results in adverse action so that the applicant may challenge it. Under the FCRA, a consumer reporting agency is required to fix an incorrect background check. He also stated that a free background check may be requested once a year under the FCRA. FBI background checks can also be requested, and the New Mexico Court Case Lookup can be utilized freely.

Mr. Haidle explained that because people of color are arrested and convicted more often, they often suffer more from collateral consequences. The Civil Rights Act of 1964 and the theory of disparate impact have been used in court cases against large corporations that preclude people of color from jobs because of convictions. Mr. Haidle said that major employers are now aware of such behaviors, but smaller employers may not yet be aware of the changes.

Mr. Haidle concluded his presentation by encouraging the legislature to continue its work in reducing collateral consequences of conviction.

In response to a question, Mr. Haidle explained that correcting an FBI background check can be difficult because the FBI compiles information reported by criminal justice agencies. Challenging and correcting such a report would require correcting the reporting agency, which must then update the FBI. Upon further inquiry, Mr. Haidle stated that information found on the internet can also be difficult to combat if it comes from a newspaper or private citizen. A libel or slander lawsuit is the only known recourse. Mr. Haidle also stated that the internet is primarily a concern in high-profile cases and that attempting to remove headlines and newspaper articles could be seen as infringing upon the First Amendment.

At the request of a subcommittee member, Mr. Haidle discussed efforts to reduce collateral consequences in other states and at a federal level. He stated that approximately 15 states have "banned the box" for private employment. Expungement and viewing collateral consequences as violations of human rights vary widely by state. No uniform process is set for expungement of criminal records, and some states view the denial of a job based on a mere arrest to be a human rights violation, as arrests can be wrongfully made. He informed the subcommittee that the Council of State Governments Justice Center (CSGJC) has compiled an inventory of expungement laws by state. Mr. Haidle stated that there is bipartisan support for criminal justice reform on a federal level; however, the work done at a federal level is more related to sentencing.

In response to a question, Mr. Haidle discussed expungement as a way of growing a labor force and reducing recidivism by allowing skilled workers to reenter the workforce. A member of the subcommittee reiterated the need for expungement for victims of identity theft, as well as the need to reduce collateral consequences for individuals who were convicted several decades ago and have never reoffended. Members of the subcommittee expressed concern that expungement and other criminal justice reform efforts might be seen by the public as being soft on crime or lacking evidence.

Proposed Uniform Collateral Consequences of Conviction Act

Jack Burton, commissioner, Uniform Law Commission (ULC), discussed efforts to pass the Uniform Collateral Consequences of Conviction Act. Mr. Burton informed the subcommittee that the ULC drafting committee for the bill includes current and former judges, as well as assistant attorneys general. The aim of the bill is to help offenders to reintegrate into society by informing defendants of the collateral consequences that would apply to them and providing a process to mitigate some of those consequences.

Mr. Burton provided a brief history of the bill creating the Uniform Collateral Consequences of Conviction Act in New Mexico, stating that the first iteration of the bill passed both chambers and was vetoed with a message on desired alterations. The changes were made, but the second version of the bill was vetoed entirely. The third and most recent draft was pocket vetoed. Mr. Burton expressed hope that the next administration might be more amenable to the bill.

Mr. Burton explained that the bill would require a defendant's lawyer to provide written notification that if the individual pleads guilty or no contest or is convicted for an offense, certain consequences besides jail or prison, probation, parole and fines will likely occur. The bill also establishes a process whereby an individual may petition for relief from collateral consequences. Mr. Burton elaborated that the individual must prove that the need for relief meets certain terms, providing that the relief would not harm the public or any victims. Certain consequences are not eligible for relief, such as requirements imposed by the Sex Offender Registration and Notification Act or the possession of firearms. Victims may participate in the proceedings in the method set out in the Victims of Crime Act.

Mr. Burton expressed his continued support for the bill and his belief that relief from collateral consequences is needed.

In response to a question, Mr. Burton explained that prior to the veto message, the bill required the court to notify a defendant of collateral consequences. In response to the veto message, a defendant's lawyer was given the responsibility. He also explained that the Public Defender Department has expressed concern that the requirement could increase the burden of already overworked public defenders. Mr. Burton stated that an individual could be given written notification and told to research the consequences in an inventory developed by the New Mexico Sentencing Commission (NMSC).

At the request of a subcommittee member, Mr. Burton explained the time frame during which a relief petition could be made. At sentencing, the defendant can ask that consequences be relieved and that he or she be granted a court order showing such. The Parole Board is unlikely to have the time or human resources to hear such petitions. Members of the subcommittee expressed concern that individuals might only become cognizant of some consequences at a much later date and have no way to petition for relief.

In response to a inquiry from the subcommittee, Douglas Carver, deputy director, NMSC, explained that the NMSC, which is the identification agency named in the bill, would use the CSGJC inventory of collateral consequences in creating a collection of New Mexico's collateral consequences.

Court Fees Assessed to Criminal Defendants

Cynthia Pacheco, manager, Warrant Enforcement Program, Administrative Office of the Courts (AOC), informed the subcommittee that the Warrant Enforcement Program is funded by warrant fees of \$100 every time a warrant is issued.

Ms. Pacheco told the subcommittee that the New Mexico Supreme Court has adopted new rules on the payment of fines, fees and costs. The court will evaluate a defendant's ability to pay fines, fees and costs at the time of sentencing. Those who are found able to pay must do so in accordance with the court's sentence. Defendants who are unable to pay will be permitted to perform community service instead. Ms. Pacheco stated that under the previous rules, defendants first had to fail to pay before community service was considered.

Ms. Pacheco explained that the rules were also changed to require that a summons to appear be issued before a warrant for failure to pay be issued. At the hearing, the court may alter the payment agreement or convert the payment to community service. If jail is to be imposed, adequate procedural due process must be allowed.

Ms. Pacheco stated that her office has several ongoing and developing projects to reach out to people more effectively. Individuals and communities can be engaged and contacted through postcards, social media and text messaging, as well as more traditional methods such as telephone calls and letters. "Safe Surrender" events are also held periodically throughout New Mexico. These events are coordinated with a specific court and are designed to help defendants with compliance before they are contacted by law enforcement. A recent event was held in Albuquerque with the Bernalillo County Metropolitan Court and was attended by approximately 600 individuals.

Ms. Pacheco described the development of a customer call center. The call center will assist defendants with routine questions about criminal case processing; it will also issue phone calls and text messages reminding defendants about upcoming deadlines, including hearings, payments and other compliance matters. Ms. Pacheco stated that the AOC hopes to reduce the number of fee-funded positions in the courts and will be asking the legislature for money to

move at least one-half of the positions funded by warrant fees to positions funded by the General Fund.

Ms. Pacheco also referred subcommittee members to her handout (Item 4), which provides a summary of fees by court type.

In response to a question from the subcommittee, Ms. Pacheco explained that while 600 people attended the Albuquerque Safe Surrender event, there are approximately 100,000 cases in which individuals are not in compliance. Roughly one-half of those individuals are believed to be out of state and unlikely to become compliant. In New Mexico, an average individual without court experience might be concerned that an appearance in court will lead to an arrest. This, when compounded with the transient nature of society, can make it difficult to contact people and convince them to make an appearance. A member of the subcommittee noted that individuals in rural parts of the state may not receive notifications if the notifications are sent to a physical address rather than a mailing address, but this problem should be resolved since driver's licenses now include both physical and mailing addresses. The member added that rural courts often have limited hours and payment methods, which may discourage individuals who wish to be compliant. Ms. Pacheco stated that multiple payment types, including cash and credit or debit cards, are now accepted to meet the needs of a diverse population.

At a member's request, Ms. Pacheco explained that the AOC does not view the new rules and Safe Surrender events as amnesty because amnesty encourages noncompliance. She stated that the 600 individuals who attended the Albuquerque event were processed on Saturday and Sunday. She provided an example of the process, stating that an individual with a failure to appear warrant could attend the Safe Surrender event and be arraigned by a judge. The judge will then provide the individual with a new appearance date.

In response to a question, Ms. Pacheco stated that fees collected by the courts are not retained by the collecting court as part of the unified budget but, instead, are primarily sent to other agencies, and a small portion of those fees is delivered to the General Fund.

Upon questioning, Ms. Pacheco informed the subcommittee that the courts have several methods of obtaining addresses for noncompliant individuals, including skip tracing, law enforcement and social media. Tax returns can also be intercepted to pay fees. However, the courts shall not use addresses and personal information from tax returns to locate individuals.

In response to inquiries on warrants, Ms. Pacheco informed the subcommittee that the AOC can have a court issue a summons. If an individual does not pay or respond, then a warrant may be issued. She recognized that if an individual cannot pay the initial fine, it is unlikely that he or she would be able to pay the \$100 warrant fee. The AOC can consolidate warrant fees or waive the fee, if needed. Ms. Pacheco also informed the subcommittee that a central warrant team could identify outstanding warrants and that not all warrants require an individual to go before a judge.

In response to a question, Ms. Pacheco told the subcommittee that the call center is still under development but that the first phase should be complete by September 1. The call center will allow the AOC to be proactive, as reminders will be sent before an individual becomes noncompliant.

Criminal Record Clearance

Representative Maestas discussed expungement legislation from 2009 that was vetoed. He informed the subcommittee that the State of Kentucky passed a law allowing low-level felony expungement in 2016. The bill was supported by the Kentucky Chamber of Commerce, which helped promote expungement as an economic issue because criminal records keep many out of work. He stated that a similar bill for nonviolent felonies could grow New Mexico's labor force and reduce recidivism.

Representative Maestas provided a brief history of expungement bills in the New Mexico Legislature, stating that several bills have been introduced since 2007 but that any bills that were sent to the governor were vetoed. These bills have differed in details such as the period of time between conviction and expungement, but all have sought to establish a basic framework for the expungement of criminal records.

In response to a question, Representative Maestas explained that the AOC and the DPS would create rules on the process of expungement. He informed the subcommittee that a nonconviction, including a nonconviction due to identity theft, could be expunged anytime.

The subcommittee discussed similar measures in other states. It was noted that felonies and misdemeanors vary by state, which can make a true comparison difficult. Representative Maestas added that some states developed their expungement laws prior to the rise of the internet, when misdemeanors did not carry the same weight and felonies were the primary focus of expungement.

The subcommittee also discussed the public's reaction to expungement legislation. It was noted that the term "expungement" may have negative connotations to some constituents, while others may view it as an opportunity to reduce recidivism and grow the economy. Representative Maestas stated that the Greater Albuquerque Chamber of Commerce (GACC) and the *Albuquerque Journal* have opposed the bill in the past; however, the executive director of the GACC is a member of the new Criminal Justice and Public Safety Task Force. Representative Maestas expressed hope that the GACC may alter its policy to a more neutral stance. A member of the subcommittee noted that the Koch brothers have publicly supported expungement, which may encourage more bipartisan support of the initiative. A member of the subcommittee expressed concern that expungement could harm public records and reduce government transparency. The member also questioned if the hearings on expungement would be included in the public record.

In response to an inquiry, Representative Maestas explained that in the proposed legislation, multiple convictions could be expunged under one incident because sometimes the same incident results in multiple charges. He also explained that the court may have discretion in granting expungement to allow for personal circumstances. Upon further questioning, Representative Maestas noted that an expunged or sealed record would allow an individual to state that he or she had not been convicted of crime without committing perjury.

Parole Costs Assessed to Criminal Defendants

Daniel Barela, acting probation/parole director, Corrections Department (NMCD), referred the subcommittee to his handout (Item 5). He stated that individuals on parole or probation are assessed a \$35.00 monthly fee to be paid to the NMCD. Two million five hundred thousand dollars of the NMCD's operating budget should come from these fees; however, in fiscal year 2018, only \$2.18 million was collected.

Mr. Barela informed the subcommittee that the NMCD also collects fees to be distributed outside of the department. These include restitution payments, DNA fees and court fines. Restitution is always paid first if payments to multiple recipients are required. Fees are collected monthly as cashier's checks or money orders and are processed by two full-time employees. Mr. Barela stated that nonpayment of the required costs is a violation of parole or probation, but many individuals do not have jobs and, thus, have no source of income from which to pay fees and fines. Probation and parole officers encourage individuals to pay what they are able; the officers are responsible for assessing a person's ability to pay. Officers can request a waiver or modification to fees or restitution agreements.

Mr. Barela explained that individuals who have not fully paid their restitution amounts before supervision ends are expected to sign a promissory note. A copy of the promissory note is placed in an individual's file and sent to the victim. If an individual refuses to sign the promissory note, the matter will proceed to court.

Mr. Barela told the subcommittee that the NMCD also collects a monthly fee of \$35.00 from individuals involved in community corrections. He stated that numerous individuals participate in specialized programs through community corrections and that the fee supports those programs.

In response to questions from the subcommittee, Mr. Barela said that approximately 17,000 individuals are on probation or parole. While New Mexico statutes state that the NMCD can impose parole and probation fees of between \$25.00 and \$150, increasing the cost would not significantly increase the amount of money collected. Mr. Barela stated that more than one-half of the individuals involved lack social and family support, including housing and jobs, which can make fee collection difficult. He noted that approximately one-half of the population in question have issues with substance abuse and job skills and that the NMCD offers mental health services to offenders, but participation is low. He also stated that mental health resources are limited in the southern portion of the state because there are few providers available.

In response to a member's inquiry on programs offered by other states or by the federal government, Mr. Barela said that what has worked elsewhere may not work in New Mexico because of limited resources and a lack of data. He noted that the NMCD recently implemented the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk and needs assessment tool, which will provide data for comparison with other states in approximately three years. The NMCD has also partnered with the Pew Research Center to create an inventory of programming. The subcommittee member requested that Mr. Barela look into programs that might work for New Mexico and provide a contact for the program, as well as a possible cost.

In response to a question, Mr. Barela explained that about one-half of the individuals required to pay probation or parole fees are noncompliant. He stated that there are no meaningful consequences for noncompliance, but he expressed a belief that a law allowing fees to be based on a sliding scale might be more effective than a flat fee rate.

The subcommittee discussed possible topics and schedules for later meetings.

Adjournment

There being no further business before the Criminal Justice Reform Subcommittee, the subcommittee adjourned at 3:36 p.m.