

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

**August 14, 2017
Law Offices of the Public Defender
Training Room, 17th Floor
505 Marquette NW, Ste. 120
Albuquerque**

The first meeting of the Criminal Justice Reform Subcommittee (CJRS) of the Courts, Corrections and Justice Committee (CCJ) was called to order by Representative Antonio Maestas, co-chair, on August 14, 2017 at 9:10 a.m. at the Law Offices of the Public Defender (LOPD) in Albuquerque.

Present

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

Absent

Rep. Gail Chasey

Guest Legislator

Rep. Javier Martínez

Staff

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

Guests

The guest list is in the meeting file.

Handouts

Handouts and other written materials are in the meeting file.

Monday, August 14

Call to Order and Introductions

Representative Maestas and Senator Rue welcomed everyone to the meeting, and the subcommittee members introduced themselves. The co-chairs discussed the purpose and goals of the CJRS and its focus on both short-term reforms and more significant long-term reforms.

Welcoming Remarks

Richard Pugh, district defender, LOPD, thanked the subcommittee for visiting his offices and said that his staff includes seven lawyers assigned to juvenile cases and 40 lawyers assigned to felony cases. A public defender's initial work with a client includes discussing the client's personal and educational history to gain an understanding of the client's background and particular needs and any adverse childhood experiences.

Ben Baur, chief public defender, LOPD, said that the Public Defender Department was created by a constitutional amendment passed in 2012, and it is overseen by an independent commission. The LOPD has about 400 employees, one-half of whom are attorneys, and the department employs another 160 contract attorneys. In several New Mexico counties, public defense services are available only through contract attorneys.

Mr. Baur said that the state's criminal courts are being asked to solve social problems that the criminal justice system is not designed to solve. He specifically noted the lack of mental health resources and substance abuse services in the state. He said that law enforcement officers might not want to send an offender into the system, but that is frequently the only option available. He stressed that prosecutors, defense attorneys and policymakers need to take a careful look at the criminal justice system and the causes of crime to achieve effective reforms.

Subcommittee Itinerary and Goals

Senator Rue said that he hopes the subcommittee's 2017 work will be educational for the members and will help identify where criminal justice reforms are needed. He added that he hopes the subcommittee will reconvene during the 2018 interim with a goal of preparing comprehensive reform legislation for introduction during the 2019 legislative session.

Representative Maestas concurred with Senator Rue's comments and noted that he hopes the subcommittee's work will increase understanding and awareness of the criminal justice system and the areas in most need of reform. He said that the information gathered by members during the interim will help them and the whole legislature when considering legislation.

Opportunities for Justice Reinvestment in New Mexico

Carl Reynolds, senior legal and policy advisor, the Council of State Governments Justice Center (CSGJC), said that he relies on district attorneys and public defenders to learn about a state's criminal justice system. He described his experience working on criminal justice issues for the Texas Legislature and his later work as general counsel for the Texas Department of

Criminal Justice. His current work with the CSGJC involves assisting lawmakers in various states with identifying ways to effectively invest in criminal justice reforms. For about a year, his colleagues have been working in New Mexico on reforms to the state's juvenile justice system, and he is currently in communication with leaders in New Mexico about the possibility of working on reforms in the adult criminal justice system.

Mr. Reynolds reviewed crime statistics in New Mexico and nationwide, and he noted that the Federal Bureau of Investigation's 2015 Uniform Crime Reporting Program data show that New Mexico had the third-highest violent crime rate in the nation, with 656 reported violent crimes compared to the national average of 373 reported violent crimes per state. Nevada and Alaska had greater numbers of reported violent crimes, and Maine and Vermont had the lowest rates of violent crime for that year. The data also show that New Mexico's reported property crime rate was also significantly higher than the national average. In the period between 2005 and 2015, property-crime-related arrests in New Mexico increased by 57% and violent crime reports increased by 10%.

A 2015 report by the U.S. Bureau of Justice Statistics shows that New Mexico's imprisonment rate of 335 prisoners per 100,000 people was lower than the national average imprisonment rate of 442 per 100,000 people in that year. The same report shows that the state's supervision rates for parolees and probationers are also lower than the national averages. New Mexico is among a few states that saw growth in their prison populations between 2010 and 2015.

In response to a question from a subcommittee member, Mr. Reynolds confirmed that the statistics he reported relate to prisons and not county jails. In response to another question, Mr. Reynolds discussed the relationship between private prisons and prison populations and the fact that some private prisons are reimbursed based on prison occupancy.

A subcommittee member asked about the possible relationship between incarceration rates and crime rates. Mr. Reynolds said that there does not appear to be a correlation between the two. He said that data do not confirm that states with low incarceration rates have high rates of crime, and several states that have successfully decreased crime rates have taken various approaches; increased incarceration is not a common factor among those states.

The subcommittee expressed an interest in seeing data regarding the number of police officers present in communities and crime rates in those communities and rural versus urban crime rates. A subcommittee member also noted that it would be helpful to have a tool that projects crime rates and related statistics under various state budgeting conditions so that policymakers could see how appropriation of funding might affect crime statistics and public safety.

In the second portion of his presentation, Mr. Reynolds discussed the CSGJC's Justice Reinvestment Initiative, a data-driven approach to reducing corrections spending and reinvesting

the savings into policies and programs that reduce recidivism and increase public safety. The initiative is funded by the United States Department of Justice and The Pew Charitable Trusts. The initiative's four priorities are to reduce recidivism, repair harm, prevent offenses and build trust. He added that "preventing offenses" means that a state's criminal justice strategies are used to decrease crime and violence rather than simply to respond to reported crimes. He added that recidivism reduction approaches that respond to probation or parole violations swiftly, and with less severe sanctions, have been shown to increase efficiencies and reduce incarceration costs. Mr. Reynolds said that savings from a reduced prison population can be used to develop strategies to interrupt criminal behavior among persons who are awaiting trial, are incarcerated or are serving a period of probation or parole. He suggested that investments could be used for pretrial assessment tools, diversion programs and effective supervision programs.

Regarding sentencing, Mr. Reynolds said that more than 95% of cases result in sentencing through plea negotiations that are often negotiated hastily and with insufficient information, and the sentences are oriented toward retribution and incarceration rather than changing offenders' behaviors. He suggested that the approaches used in collaborative and problem-solving courts, such as drug courts, could be employed in other situations to achieve more positive resolutions in many cases.

Mr. Reynolds said that before it began justice reinvestment work, Alabama was facing prison overcrowding and related litigation. In 2008, Alabama's prison population was 25,874, and its prison system was designed for 13,138. That state's justice reinvestment goals were met by creating a new category of crime for lower-level felonies, many of which result in participation in community corrections programs. The state also added tools used in parole decision making and imposed a 45-day limit on certain supervision violations. With the money it saved, Alabama reinvested in victims' services, community treatment programs and programs to improve its probation and parole workforce.

Mr. Reynolds highlighted North Carolina's justice reinvestment work, which had outcomes that exceeded initial CSGJC projections. At the start of its reinvestment work, North Carolina's prison population was projected to exceed 43,000 by 2017. The CSGJC projected that with changes made through reinvestment work, the prison population could be reduced to 38,264. By 2015, following implementation of justice reinvestment policies in 2011, the state's actual prison population was well below projections at 37,794. He noted that during the course of that state's reforms, a new political party assumed administration of the state, but the work continued and the results were very positive. The primary policies implemented in North Carolina were the imposition of caps on penalties for supervision violations and increasing supervision personnel by 175 well-trained officers.

Mr. Reynolds reported that the results of West Virginia's justice reinvestment also included a decline in prison population that exceeded projections, without any significant changes to the state's sentencing laws. Mr. Reynolds said that the state is responsible for operation of county jails, and the operation is funded by county contributions to the state. In its

reinvestment work, the state prioritized funding for substance abuse, and that funding, along with the expansion of Medicaid, allowed for the provision of substance abuse services in all 34 counties in the state. The state's unique geographical, transportation and workforce issues resulted in a more localized approach to reforms.

Mr. Reynolds explained the two phases involved in the CSGJC's justice reinvestment work. Phase one usually takes about a year and involves working with the CSGJC on data analysis, engaging system stakeholders, developing policy options and estimating impacts. Phase two usually takes one to two years, includes federal funding assistance and focuses on implementation of new policies, targeting reinvestment strategies and monitoring outcomes. Policy issues that are commonly addressed through reform efforts include arrest and jail diversion options, training law enforcement officers to work effectively with people with mental illness, bail reforms and addressing lower-level felonies through intervention.

Mr. Reynolds said that it is critical to justice reinvestment work that all three branches of a state's government support and engage in the work. Common elements in successful criminal justice reform efforts include strong leadership, broad stakeholder engagement, comprehensive data analysis, evidence-based practices and strengthening of community supervision. He suggested that New Mexico could benefit from justice reinvestment work and said that a bipartisan consensus across all three branches of government should be established before the state embarks on justice reinvestment.

In response to a question from a subcommittee member, Mr. Reynolds explained that the CSGJC acquires data from many state agencies, including state sentencing commissions.

The subcommittee discussed previous reform efforts in New Mexico and the lack of support from all three branches of government. Mr. Reynolds added that, often, a state will embark on justice reinvestment in response to a prison overcrowding crisis or to increasing crime rates. Several members noted the strains on the state's probation and parole officers and the need for personnel that serve a social work function among those officers.

In response to a question about how justice reinvestment work progresses, Mr. Reynolds said that first a working group is established, and then the CSGJC makes several presentations over approximately 12 months to that group. The group will work to establish consensus on a broad package of reforms. The CSGJC will then meet with legislators and other stakeholders while continuing to brief the working group. The CSGJC's work is done both in-state and remotely.

In response to a question, Mr. Reynolds said that a good incarceration strategy emphasizes the need to house offenders who pose a threat to public safety. He also noted that successful reform strategies include reducing the use of mandatory minimums in sentencing because mandatory minimums have not been shown to be effective in reducing crime. With respect to community corrections, he added that significant savings can be realized because

incarceration costs an average of about \$60.00 per day, while community corrections costs closer to \$5.00 per day.

The subcommittee voted to send a letter to the Legislative Finance Committee (LFC) to request that the LFC include Mr. Reynolds' presentation at an upcoming meeting.

Public Comment

Susan Loubet, a representative of New Mexico's Women's Agenda, discussed the need to address human trafficking and services for victims. She informed the subcommittee of an interview she conducted with Melissa Ortiz, deputy director of administration and female facilities, Corrections Department, that aired on Saturday, August 12, 2017, a recording of which is accessible at KUNM.org. In response to a question, Ms. Loubet noted that the population in women's facilities increases in the winter months, which could indicate a need for housing.

Denicia Cadena, policy and cultural strategy director for Young Women United, noted that all female inmates in New Mexico prisons are currently held in the state-run facilities in Grants and Springer.

Paul Haidle, criminal justice advocate, American Civil Liberties Union New Mexico, said that the New Mexico SAFE (Supports and Assessments for Feeding and Eating) project includes 29 member organizations, and it recently released its 2017 legislative report, which assigned grades to legislation introduced in the 2017 session. He said he would provide copies of the report to subcommittee members.

Philip Larragoite, deputy chief public defender, LOPD, said that the communication of information and ideas among the CCJ, the CJRS and the LFC is necessary to ensure that funding decisions are made with full consideration of the impacts on the criminal justice system.

The "Front End" of the Criminal Justice System

Chris Dodd, public defender, LOPD, discussed concerns related to cases that involve digital evidence, such as data from cell phones. Digital evidence is used in an increasing number of cases and will likely be relied on in a majority of cases within the next several years. Mr. Dodd is one of two lawyers at the LOPD with expertise working with digital evidence, and he travels around the state to educate other public defenders on digital evidence. There are currently insufficient resources available to criminal defense lawyers to obtain and analyze digital evidence. Prosecutors use the assistance of 10 full-time employees at an FBI-affiliated facility — the Regional Computer Forensics Laboratory (RCFL) — to analyze digital evidence. However, there is no similar resource available to the LOPD.

Mr. Dodd said that discovery in a homicide case often involves several gigabytes of digital evidence. Last year, the RCFL processed approximately 252 terabytes of digital evidence for prosecutions. He noted that in its analysis, the RCFL searches for evidence based on instructions from prosecutors, but it does not search simultaneously for exculpatory evidence, the

presence of computer viruses or other evidence that could help a defense attorney. He noted that a public defender's ability to analyze digital evidence will be critical in the coming years, and financial provisions for analysis software and related resources will be needed.

In response to a question about a public defender's ability to review data analyzed using the RCFL's software, Mr. Dodd said that a public defender is permitted to review evidence identified by the RCFL and the prosecution by taking a computer with a clean hard drive to the RCFL's facility for on-site review of the evidence. The public defender is not permitted to take anything into the facility other than the computer and is not permitted to remove any evidence or files when leaving the facility. In some cases, public defenders have been unable to review digital evidence until a trial has begun.

Mr. Dodd said that defending a case involving digital evidence can be very expensive. He recalled a case in which a British politician was framed using digital evidence, and it cost the politician approximately \$500,000 to clear his name.

Jonathan Ibarra, public defender, LOPD, talked about his experience as a prosecutor and public defender and said that the use of evidence-based programs and sentencing approaches is important in a state like New Mexico, which has few resources. He also believes that the state should consider a revision of the entire Criminal Code, which includes provisions that in some ways support the prosecution and incarceration of low-level drug offenders over more violent offenders. Mr. Ibarra echoed Mr. Dodd's concerns about digital evidence resources for public defenders and said that clarity is needed on when a warrant is required for a law enforcement officer to collect items that could contain digital evidence. In response to a question, he said that supporting pre-prosecution diversion programs should be the state's priority in its reform of the criminal justice system. A few members noted that federal funding for specialty courts, such as DWI and drug courts, that was available in past years has been phased out and was never replaced with state funding to sustain the operation of the courts.

Representative Maestas said that the Criminal Code needs to be rewritten, and particular consideration should be given to the penalties associated with crimes. He offered a brief review of the structure of the state's crimes — petty misdemeanor, misdemeanor and four levels of felonies — and the incarceration time associated with each level. He noted that magistrate and municipal courts handle cases that involve, among other things, petty misdemeanors and misdemeanors, and for the most part, felony cases and hearings are held in the state's district courts.

Representative Maestas said that legislatures give priority to certain crimes by assigning penalties and sentences to those crimes. He said that it would be helpful if New Mexico had more than four felony levels to allow for more appropriate sentencing. He said that the penalties for certain crimes appear to be misaligned when compared with other crimes and their associated penalties, and he attributed that misalignment to the fact that the Criminal Code has been revised

by individual pieces of legislation over a number of years, often without consideration of the whole code.

Mr. Pugh said that many LOPD clients are being charged with crimes that do not necessarily fit their conduct, and he believes certain jury instructions contribute to the issue. He noted that in some cases, a prostitute will be asked by an undercover officer to obtain drugs for the officer, who will allow the prostitute to keep a portion of the drugs. If the prostitute agrees and obtains the drugs, the prostitute will often be charged with drug possession with intent to distribute, which is a second degree felony. He said that the statute and jury instructions for that offense allow for prosecution of drug abusers when the target of that statute is actually drug dealers. He referred to several examples of uniform jury instructions for several crimes and noted that in several cases, the language of uniform jury instructions should more closely track statutory language to ensure that only the targeted offenders are captured within the scope of a criminal law.

A subcommittee member suggested that the language of the distribution statute and jury instructions could include reference to the sale of a substance to try to capture drug dealers, rather than drug users, for distribution.

Regarding the promulgation of jury instructions, Mr. Pugh explained that the New Mexico Supreme Court's (NMSC's) Uniform Jury Instructions for Criminal Cases Committee is composed of eight to 12 attorneys from around the state. The committee drafts proposed instructions, and the NMSC revises the rules, if necessary, and approves them. He added that some offenses in the Criminal Code do not have related uniform jury instructions, so attorneys on both sides of a case involving those offenses spend a significant amount of time debating the proper form of the instructions that should be given to a jury.

Another example of a statute that Mr. Pugh suggested could use revision is Section 30-3-9.2 NMSA 1978, which relates to battery on a health care worker. He said that charges brought under that section result in conviction in fewer than 5% of cases, primarily because offenders charged with the crime often have mental illnesses. Despite the infrequent convictions under the statute, charges are still brought under the statute, and the LOPD expends considerable resources defending those cases.

Patricia Anders, managing attorney, LOPD, said that the approximate 60,000 misdemeanor cases in the metropolitan court each year are a growing and expensive part of the LOPD's work. Many of those cases involve other issues that would be addressed more effectively outside the criminal justice system. Regarding criminal justice reforms, she said that although the use of cannabis for medical purposes is legal in the state and efforts have been made to reduce penalties for possession of marijuana, the law on possession of drug paraphernalia, especially as paraphernalia relates to the use of medical cannabis, needs to be revised.

Ms. Anders said that potential reforms could include the reallocation of law enforcement resources used in connection with lower-level offenses to address more serious and violent offenses. The current criminal justice system disproportionately affects people who have lower incomes, who are members of racial minority groups or who have mental health issues. She said that incarceration should be used for those who pose a danger to the public, and she expressed appreciation for the legislature's work on bail reform.

Ms. Anders suggested that people who are indigent should be exempted from payment of court fees and fines, and she noted that processes to identify indigent defendants already exist in statute and could be used to assess court costs. If indigent defendants were exempted at the front end of a criminal proceeding, then the issuance of warrants later in the case for late payments and failure to pay the fees, which commonly occurs in cases involving poor defendants, could be avoided. When a person is jailed for failure to pay a fee that the person cannot afford to pay, even just three days in jail can bring ruin to the person's life through loss of housing, employment and family relations.

A subcommittee member noted that there was an effort to increase the bench warrant fine from \$100 to \$200, and a compromise was negotiated that would have allowed for an increase in the fine if all bench warrants issued to one person could be consolidated into one fine. Although that compromise was not realized, it presents a possible future solution. The subcommittee suggested that the LOPD meet with prosecutors to continue identifying areas for potential reform.

The subcommittee discussed the ways in which the current criminal justice system can amount to a "debtors' prison" and referred to Section 33-3-11 NMSA 1978, which relates to the service of time in jail to "work off" a fine or fee.

In response to a question, Ms. Anders explained that if indigent offenders were exempted from payment of court fees, a majority of fees would not be paid because so many offenders are indigent. She noted that the state would have to identify another funding source to replace the lost revenue from fees.

The subcommittee discussed the fact that significant law enforcement resources are expended when an officer stops a person on an open warrant and calls for a backup officer. A backup officer is often called because there is insufficient information about why warrants are issued, whether for a reason that justifies multiple officers or simply for nonpayment of court fines.

Another issue that could be addressed through reforms is the drug-free school zone policy that increases penalties for drug offenses that occur within approximately two-tenths of a mile of a school. Mr. Pugh noted that almost all charges in school zones are for conduct that occurs at night, not during school hours. The subcommittee discussed that the time of day during which an offense in a school zone occurs could be included as an element of the crime.

The subcommittee discussed institutional racism in the criminal justice system and the need for training on the subject, as well as the need for public defenders who speak Spanish. Ms. Anders said that diversity is a priority for the LOPD, and the office's attorneys participate in continuing education on working with Native American communities.

Representative Maestas noted that several battery statutes have been written to relate to particular victims in an effort to emphasize the importance of deterring crimes against those victims. Instead, he said, those statutes add elements to the crime — e.g., the profession or other status of the victim — making prosecution of the crimes more complicated rather than creating effective deterrents to crime.

Potential Front-End Reforms

Leo M. Romero, professor emeritus, University of New Mexico School of Law, addressed the issues of criminal culpability and *mens rea*. He said the Criminal Code is the foundation of the state's criminal justice system, and it establishes what conduct will be penalized. The code drives the work of law enforcement officers and authorizes prosecution in the state's courts. For these reasons, it is crucial that the code is just, effective and clear in describing criminal conduct and penalties.

Mr. Romero said that crimes consist of an act or omission that is committed under certain circumstances and with a certain *mens rea*, or mental state. He gave an example in which a person swings a bat and hits someone, explaining that the conduct could be considered assault, a negligent act or an accident depending on the person's mental state when swinging the bat; the person's mental state helps to determine the level of culpability that applies. He said that criminal statutes often do not specify a required *mens rea*.

Mr. Romero said that the American Law Institute (ALI) is composed of judges, lawyers and academics who draft model laws on a variety of issues, including criminal law. The ALI drafted a model penal code, which includes guidance for states on how to define crimes and *mens rea* requirements in criminal laws.

In response to a question about culpability, Mr. Romero used robbery as an example and said that robbery — theft committed upon a person in which the use of violence or a threat of violence occurs — does not include a *mens rea* requirement. By contrast, the crime of child abuse includes distinctions in levels of culpability, depending on whether a person purposely, recklessly or negligently brought harm to a child.

Liz Holmes, public defender, LOPD, said that pre-prosecution diversion programs that are currently in place allow a district attorney to send an offender through the program instead of proceeding with a prosecution. She noted that the purpose of the law is to remove from the criminal justice system offenders who are amenable to treatment. She said that the sections of law that relate to pre-prosecution programs could be revised to include more offenders who might be served well by the programs. She said that in some cases, admission to a pre-

prosecution diversion program requires an offender to admit to certain conduct or to the commission of the crime for which the offender was arrested, which many offenders will not do because they fear that the admissions will be used against them in the future.

John See, an attorney with the LOPD, said that the human brain does not stop developing until approximately 25 years of age, which means that impulse control and decision-making skills are not mature in young adults. That fact and the success of a specialty court in San Francisco are guiding the development of a pre-prosecution diversion program in New Mexico that aims to encourage young adults to accept accountability for their actions rather than proceed into the criminal justice system. The program would provide tools to young adults, including assistance with writing a resume, housing, addiction services and parenting classes. He also referred to a veterans court model that he and other representatives from New Mexico observed in Orange County, California. The training in California stressed the importance of considering the collateral consequences of conviction and the fact that sealing a formerly incarcerated person's criminal records could enable the person to obtain employment after release. He added that California permits all records from misdemeanor offenses to be sealed.

Craig Acorn, an attorney with the LOPD, told the subcommittee that he would not likely have become an attorney if not for a pre-prosecution diversion program that he participated in when he was 18 years old. He recalled House Bill 471 (2017), which addressed pre-sentencing and pre-conviction incarceration time credit toward sentences, and he encouraged the subcommittee to continue work on that kind of legislation. He also expressed support of legislation related to specialty courts, pre-prosecution diversion programs and substance abuse treatment programs, which are effective in addressing the causes of criminal behavior.

Mr. Acorn told the subcommittee that one of his clients is a young man who has a severe drug problem and was arrested five times in one month. His client is currently participating in a drug program in jail, and his client has expressed determination to complete substance abuse treatment. Mr. Acorn said that the data show that when a person like his client receives effective substance abuse treatment, it is unlikely the person will reoffend. The prosecutor in that case offered his client a plea agreement that provides for three to six years of incarceration, but his client will not receive credit for the time he has spent in jail and in substance abuse treatment programs there.

The subcommittee discussed legislation that would expand programs like Santa Fe's Law Enforcement Assisted Diversion program around the state. Mr. Acorn agreed that pre-prosecution programs that provide services to offenders are important criminal justice tools.

The subcommittee discussed how victims' needs are considered in the criminal justice system. Mr. Acorn said that restorative justice approaches are helpful in holding offenders accountable and in giving victims a voice in criminal cases. He added that successful pre-prosecution diversion programs offer close supervision of participants, and he added that an offender can still be prosecuted if the person fails to successfully complete the program.

The subcommittee co-chairs announced the dates for upcoming meetings: September 27, October 10 and October 27. The subcommittee will discuss back-end criminal justice reforms at its September 27 meeting. A subcommittee member requested that the Corrections Department be asked to present at a future meeting to discuss how addiction is treated in its facilities and how the department's probation and parole programs work.

Adjournment

There being no further business before the subcommittee, the first meeting of the CJRS of the CCJ adjourned at 4:43 p.m.