

Kramer, Samantha E.

From: Carlisle, Ron
Sent: Monday, May 23, 2016 7:25 AM
To: Kramer, Samantha E.
Subject: Fw: Incarcerations Issues Committee

From: Mark Boening <mark.boening@gmail.com>
Sent: Sunday, May 22, 2016 6:21 PM
To: Carlisle, Ron; Nelson, Jon O.; Guggisberg, Ron L.; Koppelman, Kim A.; Grabinger, John; tmwanzwk@nd.gov
Cc: Burdick, Birch
Subject: Incarcerations Issues Committee

Dear Legislators,

I am sending you this letter as as members of the Incarceration Issues Committee. I have practiced law since 1982. I have been an Assistant Cass County State's Attorney since 1985. I live and pay taxes in Fargo.

I do not speak for Cass County State's Attorney Birch Burdick. My comments in this email are my personal opinions.

I have reviewed the presentation by the Council of State Government's Justice Center submitted to you on 20 April 2016. I have the following thoughts:

#1 The presentation makes clear that a very significant portion of the felony convictions in North Dakota are for possession of a controlled substance in violation of N.D.C.C. sec. 19-03.1-23(7). That statute provides:

7. It is unlawful for any person to willfully, as defined in section 12.1-02-02, possess a controlled substance or a controlled substance analog unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this chapter, but any person who violates section 12-46-24 or 12-47-21 may not be prosecuted under this subsection. Except as otherwise provided in this subsection, any person who violates this subsection is guilty of a class C felony. If, at the time of the offense the person is in or on, or within one thousand feet [300.48 meters] of the real property comprising a public or private elementary or secondary school or a public career and technical education school, the person is guilty of a class B felony, unless the offense involves one ounce [28.35 grams] or less of marijuana. Any person who violates this subsection regarding possession of one ounce [28.35 grams] or less of marijuana is guilty of a class B misdemeanor. (Emphasis added.)

Possession of a controlled substance as a class C felony is premised on a "rational actor" model, namely, the assumption that people weigh the benefits of conduct against potential negative consequences.

No rational person would risk possessing a controlled substance without a valid prescription when the potential consequence is a felony conviction.

But we are not dealing with rational actors. We are dealing with addicts. They use compulsively without regard for negative consequences. A recent defendant in one of my files said, "I use drugs because my life sucks."

The rational actor model doesn't deter addicts.

There are many consequences of a felony conviction, but in our capitalist economy I think it starts with a job. It is a lot harder to find any sort of job when you need to tell a potential employer that you are a convicted felon. How do you live in our society without a job?

Many drug addicts fail supervised probation. When they fail they frequently become convicted felons for the rest of their lives.

Addicts are not zombies in our society who must be eradicated, but the human beings for whom we fight the War on Drugs. Like alcoholism, addiction can be treated, if not cured. We should stop branding a large virtual "F" for felon in the middle of the foreheads of addicts.

President Nixon declared the War on Drugs in 1971. That was a different world before the advent of personal computers, smart phones and the Internet.

There was a time when it was difficult to figure out if a person was a convicted felon. That's not true today.

There is no procedure in North Dakota law by which it is even theoretically possible to expunge a felony conviction.

The courts can coerce drug users into needed treatment with A misdemeanor convictions for Possession of a Controlled Substance.

The whole purpose of treatment and rehabilitation of addicts is to bring them back into society. By permanently branding addicts as felons for the rest of their lives we condemn them to live on the fringes of society.

Money doesn't grow on trees. North Dakota must prioritize the incarceration of violent and sex offenders. North Dakota can no longer afford to lock up in the State penitentiary persons whose crime is mere possession of a controlled substance.

Albert Einstein is reported to have noted that insanity is doing the same thing over and over again and expecting different results.

It is time to try a different approach.

Here's my suggestion. **Make possession of a controlled substance a class A misdemeanor.**

This is a "kill two birds with one stone" proposal.

It would reduce for DOCR the number of convicted felons DOCR needs to deal with. That will save money.

It would reduce the stigma of a conviction for use or possession of a controlled substance. That will increase the likelihood that an addict can be successfully treated and rehabilitated.

#2 I realize that the presentation may not have been intended to address all the issues you are considering, but there is nothing in the presentation which addresses pretrial detention.

I know that pretrial detainees are a very substantial portion of the inmates in the Cass County Jail. (If you are interested, then I believe those numbers can be obtained from the Cass County Sheriff's Department.)

A federal prosecution differs from a state district court prosecution in that a U.S. Probation and Pretrial Services Officer may be used to supervise an accused person without incarcerating the accused person.

That's not possible in state court because there is no one who does pretrial supervision in state court prosecutions. The net result is that many more people get locked up in state court prosecutions until their case is resolved.

I suspect that DOCR will not even suggest to you that DOCR should do even more that it does now by doing pretrial supervision. If DOCR doesn't get additional resources to do pretrial supervision, then counties will have no alternative but to build bigger jails.

Bricks and mortar in enlarging county jails paid for by the local property tax payer are an expensive proposition. It would make sense to try to do something in North Dakota similar to what the federal government does.

Sincerely yours,

Mark Boening
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