

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

**INCARCERATION ISSUES COMMITTEE**

Wednesday, April 20, 2016  
Harvest Room, State Capitol  
Bismarck, North Dakota

Senator Ron Carlisle, Chairman, called the meeting to order at 10:00 a.m.

**Members present:** Senators Ron Carlisle, John Grabinger, Terry M. Wanzek; Representatives Ron Guggisberg, Kim Koppelman, Jon O. Nelson; Citizen Members Leann K. Bertsch, Thomas Erhardt, Rozanna Larson, Judge Douglas Mattson, Presiding Judge Frank Racek, Aaron Roseland, Attorney General Wayne Stenehjem, Chief Justice Gerald W. VandeWalle, Randy Ziegler

**Members absent:** Citizen Member Art Walgren

**Others present:** Senator Ray Holmberg, Grand Forks, Senator Rich Wardner, Dickinson, and Representative Kathy Hogan, Fargo, members of the Legislative Management  
Kelly M. Armstrong, State Senator, Dickinson  
Marc Pelka, Council of State Governments Justice Center, New York  
Ladd Erikson, State's Attorney, McLean and Sheridan Counties, Washburn  
Lindsey Nieuwsma, Attorney, North Dakota Supreme Court, Bismarck  
Sally Holewa, State Court Administrator, Bismarck  
Captain Andy Frobog, Jail Administrator, Cass County Sheriff's Office, Fargo

**It was moved by Representative Koppelman, seconded by Senator Grabinger, and carried on a voice vote that the minutes of the January 26, 2016, meeting be approved as distributed.**

**COUNCIL OF STATE GOVERNMENTS**

Chairman Carlisle called on Mr. Marc Pelka, Council of State Governments Justice Center, for information (Appendices [A](#) and [B](#)) relating to criminal justice system trends in North Dakota.

Mr. Pelka said North Dakota is one of five states currently studying Justice Reinvestment. Although the overall prison population in the state is low, he said, the North Dakota prison population is experiencing some of the largest rates of growth in the country. He said the cost of doing nothing is about a 75 percent growth in the prison population over the next decade. He said the increase in resident population and pressures on the system are factors contributing to the increase in sentences.

In response to a question from Representative Koppelman, Mr. Pelka said the Council of State Governments (CSG) is aware of the depressed oil market and the fact that the census data does not portray a completely accurate picture. Mr. Pelka said it is difficult to predict where the impacts of the depressed oil market will be felt, but CSG can see the opportunity to have the resources and programs to support the system.

Mr. Pelka said North Dakota is one of the safest states in the United States and the data presented to the committee during this presentation analyzes 9 years of data, which is about 336,387 court records, including case filings, dispositions, and sentences.

In response to a question from Chairman Carlisle, Mr. Pelka said the data for the period between 2011 and 2014 demonstrated a significant change and CSG is beginning to understand the impact of the oil industry on the state's criminal justice system.

Mr. Pelka said there are several challenges with the data. He said courts do not always use the same offense codes when recording data. In addition, he said, about 80 percent of the records were missing race information and 52 percent did not have gender information. He said cases also did not differentiate between consecutive or concurrent sentences.

Chief Justice VandeWalle said North Dakota's population was not always as diverse as it is today. He said the records may not contain race information because there was not anything to report.

In response to a question from Judge Mattson, Mr. Pelka said CSG hopes to address the substance abuse and mental health piece in a specific presentation in June or July.

In response to a question from Ms. Larson, Mr. Pelka said the data will show how a case left the court system, including whether it was through supervised probation, unsupervised probation, a pretrial diversion, or incarceration.

Mr. Pelka said felony sentence events doubled between 2011 and 2014, with drug offenses being the primary driver of those sentences. He said Class C felonies are the lowest level felony yet comprise 83 percent of felony sentence events in North Dakota. He said the four western districts saw significant increases over the time period studied, however, the entire state had an increase in sentences of 23 percent. He said the felony sentence events for drug offenses increased two and one-half times between 2011 and 2014. He said 40 percent of the felony offenses were drug related, 79 percent of which were for possession. In 71 percent of those cases, he said, the offenders were sentenced to incarceration. He said 25 percent of felony offenses were property offenses, of which 77 percent were theft. While North Dakota had higher incarceration rates for drug offenses, he said, other states have higher sentences of probation for similar offenses. He said the overall sentencing rate for drug offenses in the United States is 33 percent.

In response to a question from Mr. Erhardt, Mr. Pelka said the data does not include probation revocations.

In response to a question from Representative Hogan, Mr. Pelka said Idaho and North Carolina invest a portion of behavioral health resources to specifically serve individuals on probation and parole.

Presiding Judge Racek said this data is very difficult to interpret because the only sentence available for a felony offense in North Dakota is incarceration through the Department of Corrections and Rehabilitation (DOCR). He said he finds it difficult to believe 56 percent of individuals whose sentences relate to a drug offense actually spend time in prison, as most of that time is likely suspended or an individual receives credit for time served in county jail awaiting trial or sentencing.

Mr. Pelka said probation is used for 20 percent of the lowest level felony sentences. He said felony sentences vary considerably across the judicial districts. He said CSG has determined misdemeanor probation is not available across the state. In North Dakota, he said, a smaller proportion of felony offenses result in probation than the national average and most other states involved in Justice Reinvestment.

Presiding Judge Racek said recent legislation has allowed judges to sentence felony offenders to unsupervised probation.

In response to a question from Representative Nelson, Mr. Pelka said North Dakota is a parole state, meaning everyone who enters prison is eligible for parole except for an individual sentenced to life.

Presiding Judge Racek said DOCR has to work to deal with the increased numbers just as the court system does. He said the agencies have to work with the resources available.

Mr. Erhardt said there has to be a release valve for the number of people coming into the criminal justice system or the state would be in an even bigger crisis.

Mr. Pelka said offenders in 41 percent of misdemeanor cases are sentenced to incarceration, with 83 percent of misdemeanor sentencing events involving some period of suspended sentence and supervised probation. He said the 41 percent does not include probation failures or revocations.

Mr. Pelka said a common theme among the stakeholders with whom CSG spoke was a concern regarding a lack of treatment options to address mental health and substance abuse needs. He said the majority of judges have sentenced individuals to prison to connect the individuals with mental health or drug and alcohol programming. Across the country, he said, effective probation applies the risk, need, and responsivity principles. He said jurisdictions are embracing the risk of recidivism and focusing supervision on the highest risk offenders, prioritizing programs addressing the needs most associated with recidivism, and delivering programs based on the learning style, motivators, and circumstances of each offender.

Presiding Judge Racek said talking about risk needs to include consideration of the seriousness of the offense. He said judges use the tools mentioned. However, he said, when weighing the needs, the dangerousness of what has occurred is often left out. He said the system has to find a balance, and society is not interested in taking much risk if the danger is great.

Mr. Pelka said there are several opportunities for North Dakota to address the current challenges. He said the state could avert significant increases in corrections spending by prioritizing incarceration for the highest risk offenders convicted of the most serious offenses. He said North Dakota could lower recidivism by focusing on effective supervision and treatment for high-risk probationers and parolees, while increasing stakeholder confidence by improving community-based treatment capacity.

### **REPORT ON BEHAVIORAL HEALTH STUDY**

Chairman Carlisle called on Representative Kathy Hogan, Chairman, interim Human Services Committee, for information (Appendices [C](#), [D](#), [E](#), [F](#), [G](#), and [H](#)) regarding the status of that committee's study of behavioral health.

Representative Hogan said one of the major bills that likely will come out of the interim Human Services Committee will set forth the roles and responsibilities for state agencies, particularly the Department of Human Services (DHS). She said the role of the State Hospital is a major debate.

In response to a question from Representative Nelson, Representative Hogan said there are two different models for crisis teams. Representative Hogan said the teams consist of a group of professionals which responds like first responders by going into a person's home to ensure that person is connected to services and to potentially divert the person from inpatient care. She said the two models operate in the same manner although they consist of different professionals.

Representative Hogan said the private sector behavioral health system is very fragile. She said this results in a many emergency calls diverted to nowhere and individuals needing psychiatric evaluations being told an evaluation is not available.

In response to a question from Senator Grabinger, Representative Hogan said the discussion in the interim Human Services Committee surrounding the use of the State Hospital involves both substance abuse and mental health. Representative Hogan said the focus is shifting to look at how children are being served.

Representative Hogan said DOCR and DHS work together, however, the services being provided through DOCR do not necessarily have anything to do with imprisoning an individual. She said at some point the Legislative Assembly needs to set forth the expectations to confirm what each agency can expect from the other. She said court diversion services and pre-sentencing activities would create better treatment options and reduce the prison population. Although for some individuals there is a clear pipeline from birth to prison, she said, early intervention with children can work.

Presiding Judge Racek said judges put people on probation, but the court system does not have much influence on the particular programs in which an individual may participate. He said probation and the courts traditionally were designed for very low-risk people who did not need many services, but the services made people feel good and the people never committed another crime. He said the question of what can be done initially through an evaluation is to keep those low-level people out of the system immediately.

### **Committee Discussion**

Mr. Erhardt said the only thing accomplished by charging people with felonies is creating more felons. He said North Dakota has increased the number of felony offenses by 39 percent since 1995. He said the felony label gets in the way of an individual getting better. He said DOCR is proud of the treatment programs offered at its facilities, however, DOCR has become the catch all for treatment services.

Mr. Roseland said it would be interesting to look at what were the initial charges for the offenses CSG is analyzing and whether the charges were ultimately reduced to a Class C felony.

Representative Nelson said access to treatment is going to continue to be an issue unless personnel from higher education are part of the conversation. He said the further an individual goes from a major city, the more difficult it is to find services and determine who will pay for those services.

Mr. Pelka said the states that have tried to increase availability have determined the states will either use resources to pay for people to be incarcerated or pay to provide services in the community.

Presiding Judge Racek said there may be a disconnect between treatment and prison because treatment is a life-long process. He said the immediate concern for the court is when an individual is at a low point in life, a determination must be made as to whether that individual can safely remain in the community. He said the response must be flexible and fast, but DHS is set up to be slow and long-term. He said each agency involved sets rules based on what works best for that agency, rather than what works best for the overall system.

Ms. Bertsch said the state has some level of investment because the state would not be in this position had there been appropriate funding for behavioral health services. She said the conversation is always about how we do not want to grow state government, however, that is not always practical nor is it saving money.

Representative Guggisberg said consideration should be given to using impact bonds as a way to fund Justice Reinvestment.

Ms. Larson said she would be concerned if funding were removed from the state level because costs would be passed to the county. She said having the state run the expansion of services would create uniformity and eliminate existing inconsistencies.

### **Comments by Interested Persons**

Chairman Carlisle invited comments by interested persons in attendance.

Mr. Ladd Erikson, State's Attorney, McLean and Sheridan Counties, said the discussion is about incarceration issues that are decades old. He said costs are being passed on to the property owners and county jails where services are not available.

Ms. Lindsey Nieuwsma, Attorney, North Dakota Supreme Court, said the lack of race data should not be overlooked. She said the 2012 race and bias study shows there is a disproportionate incarceration rate for minorities in the state.

Ms. Sally Holewa, State Court Administrator, said the state does not collect race data. She said the information would need to be collected when individuals check in for court appearances or as a part of the initial complaint.

Captain Andy Frobog, Jail Administrator, Cass County Sheriff's Office, said county jails are required to collect race data. He said the 24/7 sobriety program has a high number of violations, but the administration of the program is more cost effective than jail.

### **COMMITTEE DISCUSSION**

Representative Nelson said communication with and involvement of the tribal community is an important piece of the issue.

Ms. Larson said pretrial programs must pass constitutional challenges because at that stage in the process an individual only has been charged with an offense.

Mr. Erhardt said there are very distinct conflicts with the criminal justice system and the behavioral health model. He said failure should be expected when people are imprisoned.

No further business appearing, Chairman Carlisle adjourned the meeting at 2:55 p.m.

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Samantha E. Kramer  
Counsel

ATTACH:8