

**Bernalillo County Criminal Justice Review Commission**  
**Arthur W. Pepin, Chair**

**Report to Legislative Finance Committee**

**November 18, 2014**

The Legislature passed and Governor Martinez signed HB 608 in the 2013 session. Sponsored by Representative Rick Miera, HB 608 creates the Bernalillo County Criminal Justice Review Commission (BCCJRC or “Commission”) to exist July 1, 2013 to June 30, 2015.

**I. Composition and Purpose of the BCCJRC**

Members of the Commission are:

- Chief Judges at the Albuquerque district and metropolitan courts
- District Attorney
- County Sheriff
- Chief of Albuquerque Police Department
- Chair of the Bernalillo County Commission
- District Public Defender
- Region 2 Manager of NMCD Adult Probation and Parole
- Executive Director of the New Mexico Association of Counties
- Director of the Administrative Office of the Courts as Chair “under the supervision and direction of the supreme court”

The Commission’s charge is “reviewing the criminal justice system in Bernalillo county” to make written recommendations to revise or replace local and state laws and to “improve the delivery of criminal justice in Bernalillo county.” The Commission is required to make various reports, including a report “**to the legislative finance committee.**”

In addition to the statutory members, attendees at commission meetings have included a broad spectrum of interested parties, including Federal Magistrate Alan Torgerson who has overseen federal litigation over the jail population at the Metropolitan Detention Center (MDC) for more than ten years, Justices of the New Mexico Supreme Court, members of the New Mexico Sentencing Commission,

private defense attorneys including members of the New Mexico Criminal Defense Lawyers Association, members of the Institute for Public Law, and consultants from the National Center for State Courts provided by Bernalillo County under a grant from the State Justice Institute.

It is reasonable to state that for some time there have been insufficient resources throughout the county criminal justice system, including funding for the courts, district attorney, public defender, and police agencies. These resource constraints likely contributed to practices that extend the time for case disposition and result in a high population at MDC.

The MDC population has for many years been well above what might be expected on average for Albuquerque's population. Based on national averages, the expected MDC population for a city with Albuquerque's population would be 1,550, a figure MDC exceeded regularly by more than 1,000 before the reforms implemented in the past year. A significant contributing factor is pretrial detention. In August 2012, the New Mexico Sentencing Commission reported the average length of stay before adjudication in MDC at 222 days, but only 162 days in the other six New Mexico counties studied.

Delivering fair and speedy criminal justice is a critical goal for the courts, prosecutors, defendants and MDC. One product of failing to achieve that goal is excessive detention at MDC. The McClendon federal litigation, McClendon et al., v. City of Albuquerque, CIV 95-24 JAP/KBM, continues to apply pressure on Bernalillo County to limit the inmate population at MDC to 1,950 persons. By an order issued May 12, 2014, Bernalillo County is directed to "create an Emergency Management Plan in cooperation with Criminal Justice Review Commission (CJRC) to ensure that the population at MDC remains at or under 1,950."

The order imposed a deadline of August 11, 2014, on the parties to agree with the BCCJRC to such a plan. A subsequent order extended the deadline for 90 days. The BCCJRC is not a party to the McClendon litigation, but is working with the county and plaintiffs toward such an agreement. Along with the county, which has direct membership on the BCCJRC, two attorneys for McClendon plaintiffs and plaintiff-intervenors (Kirtan Khalsa and Peter Cubra) have attended BCCJRC

meetings. Members of the BCCJRC participated in drafting an emergency release order to take effect if the MDC population is not reduced to or below 1,950.

Participants in the criminal justice system in Bernalillo County, who are the members of the BCCJRC, faced the choice to revise the system in ways that significantly reduced the MDC population or have the county construct additional detention space and/or release inmates under federal order. One practice in place to relieve MDC overcrowding is for the county to transfer excess inmates out of the county. In 2013 the county budgeted \$11.4 million for out-of-county transfers expected in FY 2014. Either constructing new jail space or transferring inmates out of the county imposed extraordinary costs on Bernalillo County. Changes needed in the criminal justice system required the committed determination of all BCCJRC members.

## **II. BCCJRC Activities, Progress, and Planned Reforms**

The BCCJRC first met on June 26, 2013 and has met monthly since December 2013. Consultants met separately with each member and with the full Commission. The issues and challenges today were not different from those identified more than 15 years ago. Too many defendants were being held for too long in pretrial detention, often as the result of inability to post a money bond. Cases took too long to reach resolution by guilty plea (more than 95% of cases) or trial. Discovery was not exchanged with sufficient speed. The practice of indicting every felony by grand jury added unnecessary delay. Continuances were granted in criminal cases at about double the national average rate. It was not unusual for cases to be resolved much more than eighteen months after the alleged date of the crime.

The above statements are documented by an impressive catalogue of studies from different sources dating back to the previous century. The more contemporary studies are posted on the [nmcourts.gov](http://nmcourts.gov) website under the tab for the BCCJRC. A few include: *Felony Caseflow Management in Bernalillo County, New Mexico*, November 2009 (Steelman, Griller, Farina, Macoubre, National Center for State Courts); *Length of Stay in Detention Facilities: A Profile of Seven*

*New Mexico Counties*, August 2012 (Freeman, New Mexico Sentencing Commission); *Estimating the Potential Impact of Better Criminal Caseflow Management on the Jail Population in Bernalillo County, New Mexico*, January 25, 2013 (Steelman, Kiem, NCSC); *A Call for the Truth: Findings and Recommendations on Ending the Jail Crowding and Ensuing Lawsuit in Bernalillo County, New Mexico*, January 20, 2014 (Kalmanoff, Delarosa, Institute for Law and Public Policy). These and other reports amply demonstrated that even if the jail capacity could accommodate more detainees, criminal case processing in Bernalillo County needed significant reform.

At the highest, in October 2013 Bernalillo County paid for out-of-county housing for 707 detainees at a cost of more than \$1 million for the month. Although the “design capacity” at MDC is 2,236, that includes hospital treatment beds and other space not available to house the general population, resulting in the federal order’s cap of 1,950. The population in 2013 averaged 2,418. Measures taken since the beginning of 2014 as a result of activities by members of the BCCJRC have contributed to reduced inmates detained under county control.

- On October 30, 2014, the population at MDC (including 67 out-of-county transfers) was 1,947.
- This is the first time since July 2003 the MDC population dropped below 1,950.
- On October 30, 2014, out-of-county transfers were down 17.9% from the October 2013 number.
- On October 30, 2014, the total MDC population was down 24.7% from October 2013.
- Bernalillo County reports that “since the implantation of court initiatives starting in March 2014 the County has saved \$5 million in OOC [out-of-county] shipping costs”<sup>1</sup>

---

<sup>1</sup> All data from Bernalillo County MDC Monthly Report, October 2014, issued November 10, 2014.

## Changes Implemented To Date

The Commission has focused on practices that can be changed. With the great assistance of the county-funded core working group headed by Lisa Simpson and Kelly Bradford, the Commission has done the following to date:

- The district and metropolitan courts executed MOUs presumptively granting good time sentence reductions for time served at MDC post-adjudication
- Bernalillo County funded a robust expansion of pretrial services at the district court
- a process to require early review of bond for defendants in pretrial detention is in place
- use of CCP (community placement; ankle bracelets, and other non-MDC alternatives) has been expanded from an average of less than 100 to more than 350 with a capacity for up to 500
- MDC now provides a printed copy of pretrial conditions to defendants upon MDC release
- a process to schedule early hearings for defendants arrested on FTA (failure-to-appear) warrants is in place
- judges are using a validated risk assessment instrument (RAI) in district court at arraignment with the goal of using the RAI at first appearance
- judges are adjusting pretrial practices to reduce or eliminate money bond in as many cases as possible with reliance on pretrial monitoring to reduce the risk to the community and increase the likelihood defendants will appear for scheduled court events
- the District Attorney is gradually transitioning to information and preliminary hearing for non-violent felonies; after implementing this as a pilot for some community crime cases, about 25% of those presented at preliminary hearing have resolved and the court has eliminated two days of grand jury panels
- expedite probation violation cases from 20 days after arrest instead of 40 days from the filing of the revocation, as well as 7-day hearings for technical violations

Other measures have been agreed to and are expected to be implemented in the next month or two months. These include:

- expand use of RAI in metropolitan court for setting pretrial release conditions
- expand early plea program especially for non-violent drug and property crimes
- automated electronic reminders to defendants for court appearances
- practices to improve address accuracy for notices
- expand mental health services both as an alternative to arrest and as an alternative to MDC incarceration; a transitional housing program funded by Bernalillo County and the City of Albuquerque will have a capacity of 100 participants beginning January 2015
- resolve misdemeanor cases at first appearance for in-custody defendants by assigning an ADA to these proceedings (previously there was no ADA at misdemeanor first appearances although the PD, defendant, and court are present)
- dismiss (nolle prosequi) cases at felony first appearance for cases that will not be indicted in 10 days

At the end of Fiscal Year 2014, the population at the Metropolitan Detention Center, including inmates housed out-of-county and in the Community Custody Program (CCP) (both of these categories are persons not actually housed at MDC) showed a decrease of 14% from June 2013 (population 2,852) to June 2014 (population 2,448). The MDC end-of-year report lists initiatives implemented with the support of the BCCJRC from January 2014 through July 2014. The report, issued September 15, 2014, states that these initiatives:

impact the MDC population in a number of ways: the use of CCP, the timeliness of hearings, length of stay, the number of bookings, and the number of releases. It is difficult to estimate precisely when and to what extent a given court initiative has had or will have an impact due to the many contributing factors to population changes and the

limitations of data sources. However, the drop in population has coincided with implementation of these initiatives.

The MDC report for October 2014 (attached to this report) shows the decreased population trend continues. The total MDC custody count in October 2014 averaged 24.7% lower than in October 2013. Inmates moved out of Bernalillo County to be housed in other New Mexico and Texas counties peaked in October 2013 at 707. On October 31, 2014, the county housed just 67 inmates out-of-county (none in Texas) and the average number for October 2014 was just 128.

Data is difficult to assess for a number of reasons, but data reviewed in the MDC reports and in reporting on BCCJRC initiatives demonstrates the success in reducing the MDC population of actions such as pretrial services, preliminary hearings, and speedier probation violation hearings. Reports by Mike Gallagher in the *Albuquerque Journal* published on September 21, 2014, November 7, 2014, and November 13, 2014, highlighted some of the progress made to date, actions to comply with the requirements of the McClendon litigation to include the 1950 population limit, and the Supreme Court's issuance of changes to rules governing case management (discussed next).

### Case Management Changes To Be Implemented

One remaining important step to achieve the goals of the BCCJRC is to adhere to time limits on case processing that have real consequences. Unless parties within the system expect there to be consequences for not preparing cases for earlier disposition, nothing will change. The Supreme Court issued new pilot rules, known as the Case Management Order (CMO), by order of November 6, 2014, to be implemented February 2, 2015, at the Second Judicial District Court. The CMO is expected to be the means to alter expectations and create a culture that achieves speedy resolution of most criminal matters in Bernalillo County. The CMO will build on the efforts that have already contributed to a reduction in the MDC and out-of-county detainees.

The CMO is intended to achieve the HB 608 goal of “identifying changes that will improve each member’s agency or organization's ability to carry out its

duties in the criminal justice system and ensuring that criminal justice is indeed just.” First proposed in December 2013, various CMO proposals were the subject of meetings between the New Mexico Supreme Court and members of the BCCJRC on June 19 and July 29, in addition to numerous meetings with BCCJRC members separately.

Under the CMO, three judges will be appointed to clear a backlog of felony cases that have been on the criminal dockets for many months and in some cases many years. Seven judges will be assigned to work under the new CMO rules with strict time deadlines for prosecutors and defense attorneys to exchange discovery, identify witnesses, obtain laboratory reports of testing of evidence, and file motions needed to prepare a case for trial or a plea agreement. The goal is to impose definite timelines in criminal cases to avoid delays and enforce fair processes and speedy trial deadlines required by the New Mexico Constitution.

In summary, the CMO requires cases be assigned to one of three tracks for resolution between 6 months and 1 year, imposes strict discovery and pretrial deadlines, requires plea agreements be reached not less than 10 days before a scheduled trial, and shares responsibility for compliance with time deadlines among all the criminal judges of the court. The CMO presents challenges to the court, prosecutors, and defense attorneys to change criminal justice case processing. The transition is expected to be difficult. The end result will benefit those charged with a crime by resolving cases within one year of the charges being filed, will benefit prosecutors and defense attorneys through known deadlines and expectations to which the court will adhere, and will benefit Bernalillo County through reduced costs for detaining inmates who now wait years in some cases for their charges to be resolved.

### **III. Legislative Action Required in the 2015 Legislative Session to Achieve the Goals Established for the BCCJRC by the Legislature**

The Legislature gave the BCCJRC the responsibility to reform criminal justice in Bernalillo County. Much has been achieved. The funding for those efforts has been born largely by Bernalillo County, with many hours of dedicated work by

judges and staff at the courts as well as the Office of the Bernalillo County District Attorney, the Law Office of the Public Defender for Bernalillo County, and all members of the BCCJRC. Many hours of further effort will be required of the parties in the criminal justice system. In addition, decades of challenges that have left this system with large backlogs of old cases, an inefficient method of processing cases, and an unreasonably large jail population will require the dedication of some additional resources not available within the existing resources of these entities.

Bernalillo County has supported efforts that can arguably be recognized as state obligations in a state court system where the state funds the courts, prosecution of all cases and defense of most cases. Additional work is needed to refine what resources would be most effective to advance the reform of criminal justice in Bernalillo County as required by HB 608. At present, here are a few:

#### Second Judicial District Court

Additional resources at the court would assist in implementation of the CMO to be issued by the Supreme Court. An estimate of the cost of these resources is \$745,000 as follows:

- 2 pro tempore judges (one for new calendar judges and one for the special calendar under the CMO), to hold hearings on matters such as status conferences, settlement conferences, discovery disputes, etc., and to preside over some arraignments; \$180,000.
- 2 staff attorneys (one for new calendar judges and one for special calendar judges under the CMO) to draft orders on dispositional matters, such as speedy trial motions, *Foulenfont* motions, motions to dismiss, etc., and to help in the track assignment/scheduling order process; \$150,000.
- 1 paralegal for judges in the CMO new calendar to help with scheduling issues, ensuring all hearings go forward, to operate as the calendaring "point person"; \$65,000.

- Funds to build out the courtroom at MDC to be used to hear probation violations and possibly arraignments at MDC, freeing up another courtroom for criminal judges at the courthouse (judges currently share 8 courtrooms between 10 judges); \$200,000.
- Funds for pro tem judges to increase the preliminary hearing program, as well as "cover" trials when all other criminal judges are otherwise engaged; \$150,000.

### Second Judicial District Attorney

The District Attorney anticipates increased caseloads for attorneys due to the Case Management Order (CMO) to be adopted by the Supreme Court for the Second Judicial District. To meet this need, the DA requests 8 additional Assistant District Attorneys and 8 paralegals, one each for each of the 8 adult felony Divisions in Bernalillo County: Community Crimes, Crimes Against Children, Domestic Violence, Felony DWI, Gang Violence, Grand Jury, Violent Crimes, and White Collar Crimes. This expansion request included salaries and benefits, as well as operating costs. The DA did not provide complete cost estimates, but my estimate is approximately \$970,000 for the new employees.

### Law Office of the Public Defender, Bernalillo County

The LOPD District Defender, Richard Pugh, indicates the need for additional staff to comply with the new CMO, especially investigators and legal support staff. A reasonable estimate for the PD is new funding at least equal that required for the DA, including authorization for new employees at a cost of \$970,000.

### County of Bernalillo

Bernalillo County supports appropriations and new employees to accomplish the new CMO. In addition, the County requests funding for several initiatives:

- The County pays for pro tem judges to handle the probation violation hearings and preliminary hearings. The state should fund additional pro tem judges through court budgets. The felony first appearance process also needs a funded pro tem judge.

- The majority of people in MDC have some degree of mental health issues. A big part of further reduction in the MDC population requires services for those individuals in an appropriate setting. The state should appropriate, or fund, through general behavioral health dollars or expanded Medicaid reimbursement, a crisis triage and stabilization center and supportive housing. The operation costs of the center would be about \$3 million and the costs for supportive housing would be about \$1.2 million for 75 units with a need for multiples of that.
- There is a need for a “data warehouse” to assist all stakeholders in working more effectively. At present the Bernalillo County criminal justice system frustrates efforts to rely on consistent data and there is no ability to run reports across systems so we are unable to get a complete picture of most issues. This might require a separate server and some IT work, with a preliminary cost estimate of \$100,000.
- Provide funds to the county, but preferably to the court, for an automated court date reminder system. Such reminders have demonstrably improved appearance rates for criminal defendants in many settings. A preliminary estimate of cost is \$25,000.
- More could be accomplished with pretrial services with additional funding. In many states, pretrial programs are state funded. One example is that many pretrial programs have dedicated staff to assist defendants in making calls or tracking down people that may be willing to post bonds for them. Just getting to the point of being able to do a risk assessment on everyone coming through the system is probably going to take additional resources. An appropriation of \$100,000 would provide more robust pretrial services.

LFC is asked to endorse legislation to provide the resources indicated above, at a total cost of **\$7,110,000**, as follows:

- \$745,000 Second Judicial District Court
- \$970,000 Bernalillo County District Attorney
- \$970,000 Bernalillo County Law Office of the Public Defender
- \$4,425,000 Bernalillo County.

Members of the BCCJRC have worked very hard to achieve reforms with improved processes, new approaches, and generous funding by Bernalillo County that cannot continue indefinitely into the future. Significant funding from the Legislature is crucial if the full purposes of HB 603 are to be achieved.

In addition to funding, the BCCJRC has discussed continuing the Commission or a similar entity when the BCCJRC expires on June 30, 2015. Many cities of the size of Albuquerque maintain a Criminal Justice Coordinating Council or similar body composed of members similar to the composition of the BCCJRC. Examples include the Criminal Justice Council of New Orleans and the Criminal Justice Advisory Council of Salt Lake County. Typical of the purpose of such Councils is the following statement of purpose for the Milwaukee Criminal Justice Council:

The purpose of the CJC is to function as an independent entity governed by key justice system leaders that is empowered to define broad justice system goals, monitor/analyze justice system performance, facilitate collaboration among justice system performance, provide technical assistance and research, and act as a conduit between the justice system and the larger community without impacting in any way the autonomy or decision-making authority of any criminal justice system agency.

Elected by Council members, the Chair of the Milwaukee CJC is the Chief Judge of the district court. Vice Chair is the First Assistant Public Defender. Similarly, the Chair elected by members of the Baltimore City Criminal Justice Coordinating Council is the Chief Judge. The Coordinating Council's purpose is:

The Criminal Justice Coordinating Council (CJCC) helps to identify, plan and coordinate solutions to issues facing the Baltimore City criminal justice system. In doing so, the Council fosters the participation of all stakeholders of the system while assisting the Judiciary and the member agencies in the planning and delivery of quality services.

The Legislature should extend the BCCJRC or create a similar commission as a permanent entity in Bernalillo County, directed by the members instead of continuing to have the AOC Director serve as Chair after June 30, 2015.

**The LFC is asked to vote to endorse legislation to make permanent the "Bernalillo County Justice Council" (BCJC) composed of members of the BCCJRC but with a Chair designated by majority vote of the BCJC, and to provide funding in FY 2016 of \$7,110,000, as detailed above.**