New Mexico District Attorneys' Association

March 15, 2019

Honorable Michelle Lujan Grisham
Governor of the State of New Mexico
490 Old Santa Fe Trail, Room 400
Santa Fe, NM 87501

Re: House Bill 564 – Amended request to Veto

Dear Governor Lujan Grisham:

We are writing to express our concerns regarding House Bill 564, and we are respectfully requesting that you veto this bill. Plainly stated, this bill poses a significant public safety risk if signed into law. Moreover, this bill attacks both the judicial and executive branches' ability to work to rehabilitate criminal offenders, provide restitution to victims, and protect the public.

The following is a summary of the changes in the law that will occur if you sign House Bill 564 into law as well as the consequences of the changes in the law:

- **Mandatory reduction of time spent on supervised probation (Section 1):** Under HB 564, the majority of offenders will have their probation converted from supervised to unsupervised probation automatically as a matter of law.
    - **Judicial Impact:** Judges will no longer be able to fashion a probated sentence in a manner they deem is necessary to achieve the goals of rehabilitation and protection of the community. Judges already have the discretion to place a defendant on unsupervised probation for part or all of the suspended sentence. Judges carefully weigh the facts of the case, the impact on the defendant and victim, and the danger to the community when they attempt to fashion an appropriate length of time an offender should be supervised. HB 564 will undercut the judge's authority by automatically converting a portion of the probated sentence from supervised to unsupervised probation.

Executive Impact: Under current law, adult probation and parole has the authority to determine the appropriate level of supervision for an offender. Probation officers, who know the offenders best, utilize their sound judgement along with the guidance from the director of adult probation and parole to set the appropriate level of supervision for the offender. This important discretion allows probation officers to monitor the offender's rehabilitation as well

as protect the community. As part of the decision process in determining how frequently an offender should report, probation officers assess numerous factors including, but not limited to, the facts of the underlying crime(s), the offender's history under supervision, the offender's rehabilitative progress, including whether the offender has completed court ordered treatment programs, whether restitution has been paid to the victim as required under § 31-17-1, NMSA 1978, and whether court fees and fines have been collected. If a probationer is doing well, the probation officer has the discretion to put the offender on a limited reporting schedule to include telephone only reporting. Under this level of supervision, the offender is not required to have any in-person visits to the probation office. If the offender begins to slip with telephonic reporting, the probation officer can readjust the reporting requirements to achieve the goals of rehabilitation and protection of the community. HB 564 will arbitrarily strip probation officers of this discretion by converting the offender's probation to unsupervised probation. It is particularly troubling that the statute does not even contemplate the requirement that all restitution be paid to the victim.

- **Definition of absconding reduces the responsibilities of the offender and places an unreasonable burden on probation and parole (Section 3):** Under HB 564, absconding is defined as "a person under supervision deliberately makes the person's whereabouts unknown to the person's probation or parole officer or fails to report *for the purpose of avoiding supervision,* and reasonable efforts by the probation and parole officer to locate the person have been unsuccessful." Offenders are not entitled to probation or parole. These conditional liberties come with responsibilities. If an offender refuses to report to probation and parole as directed, the State does not have an opportunity to rehabilitate that offender. The amended language makes absconding a specific intent offense in which the State will be required to show that the person absconded for the purposes of avoiding supervision. What happens if the person fails to report for the purpose of providing a drug sample or because they had contact with law enforcement and do not want to be arrested? These offenders could argue they lacked the specific intent to abscond as required under the proposed definition of absconding. Such a definition alleviates the responsibility of the offender to participate in the rehabilitative process.
- **Parole factors for those serving a life sentence are eliminated (Section 5):** HB 564 amends §31-21-10, NMSA 1978 by eliminating the factors the parole board is required to consider when determining whether the board will grant a person who is serving a life sentence parole. By eliminating these factors, it opens up the statute to judicial interpretation of the legislative intent behind the amendment and strongly implies that the Legislature intended to eliminate these factors from the parole board's consideration. Among the factors being struck from §31-21-10, NMSA 1978 are: 1) the circumstances of the offense; 2) mitigating or aggravating circumstances, 3) whether a deadly weapon was used in the commission of the offense, and 4) whether the inmate is a habitual offender. These changes unnecessarily

make the statute vague which will undoubtedly lead to judicial challenges in the future. Given the ambiguity, appellate courts applying the rule of lenity could very conceivably rule that the amendment eliminates these crucial factors from the parole board's consideration. *See State v. Anaya*, 1997-NMSC-010, ¶ 32, 123 N.M. 14, 933 P.2d 223 (The rule of lenity requires that criminal statutes be interpreted in the defendant's favor when insurmountable ambiguity persists regarding the intended scope of the statute.) Such a decision would have a dramatic impact on community safety resulting in the release of some of New Mexico's most dangerous offenders.

- One of the greatest misconceptions floating around the Roundhouse this session was the idea that there were hundreds, if not thousands, of people serving life sentences for non-violent offenses. According to the corrections department, there are currently 424 people serving a life sentence. The overwhelming majority of these offenders are serving life as a result of a conviction for first degree murder. The other qualifying offenses for a life sentence are intentional abuse of a child resulting in death (child under age 12), subsequent violent sexual offense convictions under §31-18-25, NMSA 1978, and New Mexico's "three strikes" law under §31-18-23, NMSA. There are not any offenders currently serving life under the "three strikes" law. The list of the 424 people serving life is like reading a "Who's Who List" of New Mexico's most dangerous offenders. These crimes have devasted families and our communities across the State and HB 564 could make it more likely that they will walk our streets again. It will also limit the executive department's discretion to determine who should or should not be released. Included among the offenders serving life who could benefit from this amendment are:
  - **Darci Pierce**: In 1987, Pierce kidnapped and murdered Cindy Lyn Ray who was 8 months pregnant. Pierce, who had been faking a pregnancy, planned to steal a baby from a pregnant woman via c-section. Pierce saw Ray, forced her into a vehicle, drove her to a remote area, strangled her, then forcibly cut her stomach open with keys to get to the baby. Pierce bit the umbilical cord with her teeth to separate Ray from her infant and kidnapped her baby.
  - **Frank (Francisco) Martinez:** - On the night of August 26, 1993, the then 19-year-old Martinez along with John Paul Aguilar and Ronnie Jaramillo, drove a twelve-year-old child to a secluded area on Mount Taylor, near Grants, New Mexico. They told the child to remove her pants. She tried to escape by running up the dirt road, but Martinez ran after her, caught her, and walked her back to the car. The trio gang raped the child and then stabbed her multiple times in the back. When this action failed to kill her, Martinez took his belt, wrapped it around her neck, and stepped on her head, forcing her face into a puddle of water and mud in order to drown her. After she was dead, Martinez dragged her lifeless body off the road and into the woods where her body was set on fire. Martinez pleaded guilty to the crimes and

was sentenced to death. He appealed his death sentence and was subsequently converted to a life sentence.

- **Gabriel Avila:** In 2003, Avila raped and murdered 22-year-old Katie Sepich. Sepich was walking home from a party in Las Cruces when the defendant grabbed her, raped and murdered her outside her bedroom window. Avila dumped her body and attempted to burn it. Avila's DNA was found under Sepich's fingernails and on her body and was matched to him three years later in 2006.This case is the basis for **Katie's Law** legislation, also known as the Katie Sepich Enhanced DNA Collection Act of 2010, a proposed federal law to provide funding to states to implement minimum and enhanced DNA collection processes for felony arrests.

- **Restricting the ability of parole officers to arrest offenders who have violated the conditions of parole (Section 7)**: HB 564 differentiates between a "technical violation" and "non-technical violation." A "technical violation" is defined as "a violation of the conditions of probation or parole supervision other than arrest for a new felony or misdemeanor offense or absconding." Under Section 7 of HB 564, parole officers would no longer be able to arrest parole violators for "technical violations." Instead, the parole officer would be required to provide a notice to the parolee to appear before the parole board before the offender's parole could be revoked and the offender be placed back into custody. Under the definition of "technical violation," a parole officer would not be permitted to arrest an offender for very serious violations. Included among these violations are: a child sex offender who was found to have had unauthorized and unsupervised contact with a minor child; a violent criminal offender having contact with his victim; an offender who refuses to be subject to warrantless searches of his person or residence or provide drug/alcohol samples; and an offender who has failed to report for multiple appointments with his parole officer. Despite the seriousness of these types of violations, the offender could not be arrested under HB 564. Parole officers already have the ability to issue a summons to an offender for small, technical violations. Unfortunately, HB 564 will place the executive branch in the position of having to allow a potentially dangerous parolee who has violated his conditions remain loose where he poses a danger to the community and is now an even greater flight risk.
- **Limiting judicial discretion on probation violations (Section 8)**: This section has the same issues Section 7 has related to "technical violations" and the inability of the probation officer to arrest an offender for serious "technical violations." Additionally, HB 564 will strip trial court judges of their discretion when considering what sentence to impose when an offender violates probation. Probation has long been recognized "to be an act of clemency resting in the sound discretion of the trial court." *Ewing v. State*, 80 N.M. 558, 458 P.2d 810 (Ct.App.1969); *see also State v. Donaldson*, 1983-NMCA-064, ¶ 32, 100 N.M. 111, 666 P.2d 1258. "[I]n connection with its broad power to grant clemency and structure rehabilitation, the district court ha[s] the ongoing ability, through Defendant's conditions of probation, to

monitor Defendant's behavior to determine whether he continued to be capable of rehabilitation and suitable for clemency." *State v. Lopez*, 2006-NMCA-079, ¶ 7, 140 N.M. 1, 138 P.3d 534.

- **Restriction on considering underlying criminal conduct:** HB 564 directs the trial court judge to impose a sanction "commensurate with the seriousness of the [technical] violation *and not a punishment for the offense for which the probationer was placed on probation.*" Consequently, HB 564 will strip the trial court's ability to consider the underlying offense when sentencing an offender for committing a "technical violation." Such consideration is necessary in determining whether the offender is deserving of continued clemency from the court, and whether continued probation despite the offender's non-compliance is in the best interest of justice.
- **Additional concerns regarding ambiguity:** Section 8 of HB 564 also contains ambiguous language regarding the options available to a trial court judge when a "non-technical" violation of probation has been found. Under the proposed language, when a trial court makes a finding that an offender has committed a "non-technical" violation, the trial court judge "may continue or revoke the probation, impose detention for a fixed term up to ninety days, which shall be counted as time served under the sentence, or enter any other order as it sees fit." This language modifies the existing language of §31-21-15, NMSA 1978, which states upon a finding of any violation, the trial court can "revoke the probation and...require the probationer to serve the balance of the sentence imposed or any lesser sentence." This original language permitting imposition of the balance of the sentence still exists in HB 564, but it only appears after the section listing the options available to the trial court after a "technical violation" has been found. Given the removal of this language as an available option to the trial court upon a finding of a "non-technical" violation, ambiguity exists in the statute. Under the rule of lenity, this ambiguity could be interpreted in the defendant's favor. Such judicial interpretation would preclude the trial court from imposing the balance of the sentence for a defendant who absconded from supervision or committed a new criminal offense.

For the foregoing reasons, we are respectfully requesting that you exercise your authority under Article IV, Section 22 of the Constitution of the State of New Mexico and veto House Bill 564.

Respectfully submitted,

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