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Criminal Law - Home Alone: Why House Arrest Doesn't Qualify for Presentence Confinement Credit in New Mexico - State v. Fellhauer

Ben Feuchter

CRIMINAL LAW—Home Alone: Why House Arrest Doesn't Qualify for Presentence Confinement Credit in New Mexico—*State v. Fellhauer*

I. INTRODUCTION

In *State v. Fellhauer*,[1] the New Mexico Court of Appeals held that house arrest does not constitute "official confinement" within the meaning of the New Mexico presentence confinement credit statute.[2] Consequently, persons under house arrest are not entitled to presentence confinement credit.[3] This is a case of first impression in New Mexico.

Despite its innocuous appearance, the decision in *Fellhauer* may have a significant deleterious consequence. Specifically, the chronic and potentially illegal overcrowding at the Bernalillo County Detention Center may be further exacerbated by the decision, causing convicted criminals to spend more time actually incarcerated in that facility.[4]

This Note will discuss the factual and procedural history of *Fellhauer*, the development of presentence confinement credit law in New Mexico, the current state of that law in New Mexico and other jurisdictions, the rationale of the court of appeals in deciding the case, and the implications of that decision.

II. STATEMENT OF THE CASE[5]

Frank Fellhauer (defendant) was indicted on six counts of first degree criminal sexual penetration[6] and three counts of third degree criminal sexual contact of a minor.[7] He was arrested on a bench warrant and incarcerated on May 20, 1992. Bail was set at $50,000, but the defendant was unable to raise the money or post a bond. Consequently, he remained in the custody of the Bernalillo County Detention Center (BCDC) until August 5, 1992, at which time the district court entered an order releasing him to the custody of a relative. This release order placed the defendant under house arrest, forbade him from leaving Bernalillo County, and obligated him to notify his attorney of his whereabouts and any change in his home or work address. Additionally, the order subjected the defendant to random checking of his residence and general supervision by Bernalillo County Pretrial Services and denied him any contact with children.

On October 30, 1992, the defendant entered a plea of no contest to two counts of attempted first-degree criminal sexual penetration and three counts of third-

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1. 123 N.M. 476, 943 P.2d 123 (Ct. App.), *cert. denied*, 123 N.M. 446, 942 P.2d 189 (1997).
2. *See* N.M. STAT. ANN. § 31-20-12 (Repl. Pamp. 1994).
3. *See Fellhauer*, 123 N.M. at 481, 943 P.2d at 128.
4. Briefly stated, the Bernalillo County Detention Center (BCDC) is under a federal order to correct overcrowding by keeping its inmate population under 643, and will face fines and liability for civil rights violations if it exceeds this limit. *See* discussion *infra* Part VI. The *Fellhauer* rule is likely to result in prisoners serving longer sentences at BCDC, thereby increasing the inmate population and exacerbating the overcrowding.
5. Unless otherwise indicated, the facts contained in this section are paraphrased from *Fellhauer*, 123 N.M. at 477, 943 P.2d at 124.
6. Fellhauer was charged with violating N.M. STAT. ANN. § 30-9-11(A) (1994 Repl. Pamp. & Supp. 1997). *See Fellhauer*, 123 N.M. at 477, 943 P.2d at 124.
7. *See Fellhauer*, 123 N.M. at 477, 943 P.2d at 124. Third degree criminal sexual contact of a minor is proscribed by N.M. STAT. ANN. § 30-9-13(A) (Repl. Pamp. 1994).

degree criminal sexual contact of a minor. The court sentenced him to a term of nine years and granted him a presentence confinement credit of seventy-eight days, representing the time he spent in BCDC prior to his release to house arrest.

On June 16, 1995, the defendant filed a *pro se* motion seeking to correct the judgment to allow him presentence confinement credit for the time he spent under house arrest. Following a non-evidentiary hearing, at which the defendant was represented by a public defender, the district court denied his motion on two grounds.[8] First, the district court noted that the confinement was at a private home and not at a place controlled by the State through correctional officers, and thus was not sufficiently jail-like to warrant granting presentence confinement credit.[9] Second, the district court interpreted its August 1992 order literally, noting that it was an order of release and not of confinement or custody.[10]

The defendant appealed the denial of his motion to the New Mexico Court of Appeals.[11] In an opinion delivered on June 4, 1997, the court of appeals upheld the decision of the district court and denied the defendant presentence confinement credit for the time he spent under house arrest.[12] The defendant applied to the New Mexico Supreme Court for a writ of certiorari on June 24, 1997.[13] The writ was denied on July 24, 1997.[14]

III. BACKGROUND

This section will examine the presentence confinement credit law of New Mexico and other jurisdictions, including federal law. Following this examination is a brief discussion of how New Mexico presentence confinement credit law comports with that of other jurisdictions and the interplay between New Mexico law and the law of other jurisdictions.

A. New Mexico Presentence Confinement Credit Law Before Fellhauer

Presentence confinement credit law is largely undeveloped in New Mexico, with a single statute and a handful of cases constituting the body of information available on the subject. The New Mexico presentence confinement credit statute (PCC statute) states that "[a] person held in official confinement on suspicion or charges of the commission of a felony shall, upon conviction of that or a lesser included offense, be given credit for the period spent in presentence confinement against any sentence finally imposed for that offense."[15] This statute has remained unaltered since its inception in 1967[16] and contains no definition of its key operational term

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8. *See Fellhauer*, 123 N.M. at 477, 943 P.2d at 124.
9. *See id.*
10. *See id.*
11. *See* Defendant-Appellant's Brief in Chief at 1, State v. Fellhauer, 123 N.M. 476, 943 P.2d 123 (Ct. App.) (No. 16,773), *cert. denied*, 123 N.M. 446, 942 P.2d 189 (1997).
12. *See Fellhauer*, 123 N.M. at 477, 943 P.2d at 123.
13. *See* Defendant-Appellant's Brief in Chief at 1, *Fellhauer*, 123 N.M. 476, 943 P.2d 123 (Ct. App. 1997) (No. 16,773).
14. *See* State v. Fellhauer, 123 N.M. 446, 942 P.2d 189 (1997) (table).
15. N.M. STAT. ANN. § 31-20-12 (Repl. Pamp. 1994).
16. The presentence confinement credit law was codified originally as N.M. STAT. ANN. § 40A-29-25 (Repl. Vol. 1972) prior to the 1978 recompilation.

"official confinement." This deficiency has created the bulk of litigation about the statute and was the focus of the court's analysis in *Fellhauer*.[17]

State v. LaBadie[18] was the first case about the meaning of "official confinement" as it appears in the PCC statute. In *LaBadie*, the New Mexico Court of Appeals addressed the question of whether a defendant was in "official confinement" and thus eligible for presentence confinement credit under the PCC statute, for time spent in a state psychiatric hospital where he had been committed after being found incompetent to stand trial.[19] Relying almost solely on the facts of the case, the *LaBadie* court determined that the defendant was under "official confinement" within the meaning of the PCC statute, because he was continually under maximum security conditions and was to be held by the psychiatric hospital until the hospital received a written order from the court.[20] This decision had the practical effect of expanding the scope of "official confinement" within the PCC statute beyond the four walls of a prison or other traditional correctional institution.[21]

The next significant New Mexico case discussing the meaning of "official confinement" was *State v. Watchman*,[22] where the defendant asserted that he was entitled to presentence confinement credit for time spent in a traditional medical hospital recuperating from injuries sustained during a crash of a vehicle he was operating while intoxicated.[23] The defendant argued that a blood sample was taken from him by police officers while he was unconscious, which is impermissible unless the defendant is under arrest.[24] The defendant asserted that if he was under arrest, he should be granted presentence confinement credit.[25] The court of appeals remanded the case for lack of an adequate factual record, but indicated that it would have accepted such a situation as "official confinement" if the defendant had been under arrest and the hospital had a duty to call the police if the defendant left the hospital.[26] This decision had the practical effect of reinforcing the *LaBadie* decision.[27]

A third decision that merits a brief discussion is *State v. Howard*.[28] In *Howard*, the New Mexico Court of Appeals determined that the purpose behind the PCC statute was "to give some relief to persons who, because of an inability to obtain

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17. This Note does not mean to suggest that the other presentence confinement cases are unworthy of discussion. They are simply irrelevant to the question of what constitutes "official confinement," which is the focus of *Fellhauer*. Two cases that do not discuss "official confinement" are worth mentioning, however. In *State v. Baca*, 87 N.M. 495, 496, 535 P.2d 1346, 1347 (Ct. App. 1975), the court of appeals held that presentence confinement credit is to be given against any sentence, regardless of length. In *State v. Ramzy*, 98 N.M. 436, 437, 649 P.2d 504, 505 (Ct. App. 1982), the court of appeals held that the language of the PCC statute was mandatory.

18. 87 N.M. 391, 534 P.2d 483 (Ct. App. 1975).

19. *See id.* at 392, 534 P.2d at 484.

20. *See id.* at 392-93, 534 P.2d at 484-85.

21. *See* State v. Fellhauer, 123 N.M. 476, 479, 943 P.2d 123, 126, (Ct. App.), *cert. denied*, 123 N.M. 446, 942 P.2d 189 (1997).

22. 111 N.M. 727, 809 P.2d 641 (Ct. App.), *overruled on other grounds by* State v. Hosteen, 122 N.M. 228, 923 P.2d 595 (Ct. App. 1996).

23. *See id.* at 734, 809 P.2d at 648.

24. *See id.*

25. *See id.*

26. *See id.* at 735, 809 P.2d at 649.

27. *See* State v. Fellhauer, 123 N.M. 476, 479, 943 P.2d 123, 126 (Ct. App.), *cert. denied*, 123 N.M. 446, 942 P.2d 189 (1997).

28. 108 N.M. 560, 775 P.2d 762 (Ct. App. 1989).

bail, are held in custody."[29] Although this determination was based solely on an analysis contained in a Massachusetts case,[30] it has remained unchallenged.

B. Presentence Confinement Credit Law in Other Jurisdictions

The law of presentence confinement credit in other jurisdictions is widely varied, but appears to follow three general patterns. In the first pattern group (Group One) are jurisdictions that explicitly require detention in a prison or jail facility as a precursor to granting presentence confinement credit. The second group of jurisdictions (Group Two) is at the other end of the spectrum. In Group Two, house arrest and other non-penal forms of confinement such as drug and alcohol treatment centers are recognized as "official confinement" for the purposes of granting presentence confinement credit, provided there are sufficient restrictions on the prisoner's liberty. The third group of jurisdictions (Group Three) falls somewhere in between, neither explicitly requiring detention in a jail or prison facility, nor allowing house arrest to qualify as "official confinement" for presentence confinement credit.

Group One is composed of four states[31] and the federal penal system. Michigan has an explicit correctional facility detention requirement set forth in its presentence confinement credit statute.[32] In *People v. Scott*,[33] the Michigan Court of Appeals determined that a defendant in a drug rehabilitation program was not entitled to presentence confinement credit because he was not "in jail" as required by Michigan's presentence confinement credit statute.[34] Arizona has made the same explicit correctional facility detention requirement determination in case law. In *State v. Reynolds*,[35] the Supreme Court of Arizona determined that the language of its presentence confinement credit statute[36] required that official confinement be defined as "incarceration in a jail or prison and not merely . . . the substantial restraint of freedom which is commensurate with an arrest or detention."[37] Idaho also adopted this same position in *State v. Climer*,[38] when the Idaho Court of Appeals explicitly stated that official confinement or "incarceration means to confine in a prison or jail."[39] Florida follows a similar rule, exemplified in *Shmuel v. State*,[40] where the court refused to grant presentence confinement credit to a

29. *Id.* at 562, 775 P.2d at 764.

30. *See* Commonwealth v. Carter, 411 N.E.2d 184 (Mass. App. Ct. 1980). One might question the appropriateness of using Massachusetts case law for guidance on the meaning of New Mexico's PCC statute, because the Massachusetts PCC statute contains entirely different language than the New Mexico PCC statute. Specifically, the Massachusetts statute provides that "the court, in imposing a sentence . . . shall order that the prisoner be deemed to have served a portion of such sentence . . . in confinement . . . awaiting and during trial." MASS. GEN. LAWS ANN. ch. 279, § 33A (West 1997).

31. These four states are Michigan, Arizona, Idaho, and Florida.

32. *See* MICH. COMP. LAWS ANN. § 769.11b (West 1996).

33. 548 N.W.2d 678 (Mich. Ct. App. 1996).

34. *See id.* at 680. *See also* MICH. COMP. LAWS ANN. § 769.11b (West 1996).

35. 823 P.2d 681 (Ariz. 1992) (en banc).

36. *See* ARIZ. REV. STAT. ANN. § 13-709(B) (West 1989). The statute provides that "[a]ll time spent in custody . . . until the prisoner is sentenced . . . shall be credited against the term of imprisonment[.]" *Id.*

37. *Reynolds*, 823 P.2d at 683.

38. 896 P.2d 346 (Idaho Ct. App. 1995).

39. *Id.* at 349.

40. 691 So.2d 1149 (Fla. Dist. Ct. App. 1997).

defendant for his stay in a private psychiatric hospital, but granted him credit for time spent in a state hospital that served as the medical ward for the county jail.[41] The federal penal system is another example of a prison-only jurisdiction, where presentence confinement is granted only to persons under control of the Bureau of Prisons.[42]

Group Two consists of six states.[43] These states focus more on the restrictions of a prisoner's liberty than the place of confinement for granting presentence confinement credit.[44] New Jersey espoused this position in *State v. Reyes*,[45] where the New Jersey Superior Court, Appellate Division, held that in order to secure presentence confinement credit, a detainee needs to show that his confinement was so restrictive as to be "substantially equivalent to custody in a jail or in a state hospital."[46] Maryland utilized this same principle in *Dedo v. State*,[47] when the court held that a defendant placed in house arrest under the custody of the warden of a county detention center, and subject to an escape charge for violation of the terms of his house arrest, was in the constructive custody of the state and thus entitled to presentence confinement credit.[48] Wyoming took a similar approach in *Yellowbear v. State*,[49] where the Wyoming Supreme Court declared that persons in residential alcohol treatment facilities are entitled to presentence confinement credit if their freedom of movement and freedom from search are restricted, and they are charged with felony escape if they leave the facility.[50] Vermont granted presentence confinement credit in *In re McPhee*[51] to a defendant who spent time in a residential alcohol treatment facility.[52] The court reasoned that he was in official custody because his freedom had been restricted and he was subject to reimprisonment if he left the facility without permission.[53] Nevada utilized this same principle in *Grant v. State*,[54] when it determined that some residential drug treatment programs restrain the liberty of a patient so much that residence in such a program is equivalent to

41. *See id.* at 1150.

42. *See, e.g.*, Reno v. Koray, 515 U.S. 50 (1995) (holding that federal detainee, not directly under control of Bureau of Prisons, was not entitled to presentence confinement credit).

43. These states are New Jersey, Maryland, Wyoming, Vermont, Nevada, and Alaska.

44. The author of this Note is tempted to label Group Two as the "majority rule." However, this would be unwise for three reasons. First, only thirteen states (excluding New Mexico) and the federal government have decided the question of what constitutes official confinement for the purposes of granting presentence confinement credit. Group Two contains only six of these states, which is not a numerical majority. It could easily be said that non-Group Two approaches constitute a majority. Second, as alternatives to conventional correctional facility detention are explored by more states, and more rulings on this issue are consequently made, Group Two could quickly find itself in the minority. Third, labeling Group Two as a majority diminishes the importance of the approach followed by the five jurisdictions in Group One.

45. 504 A.2d 43 (N.J. Super. Ct. App. Div.), *cert. denied*, 511 A.2d 671 (1986).

46. *Id.* at 52. The holding of *Reyes* was subsequently modified by New Jersey's Comprehensive Drug Reform Act of 1986, which provided that a defendant in a residential drug treatment program was entitled to presentence confinement credit. *See* N.J. STAT. ANN. § 2C:35-14(d) (West 1987).

47. 680 A.2d 464 (Md. Ct. App. 1996).

48. *See id.* at 468-70.

49. 874 P.2d 241 (Wyo. 1994).

50. *See id.* at 245-46.

51. 442 A.2d 1285 (Vt. 1982).

52. *See id.* at 1287-88.

53. *See id.* at 1287.

54. 659 P.2d 878 (Nev. 1983).

incarceration in a jail.[55] Alaska follows the rule that defendants in alcohol treatment programs qualify for presentence confinement credit if they are subjected to substantial restraints on their freedom of movement and behavior, which is exemplified in *Nygren v. State*.[56]

Group Three contains three states[57] that do not explicitly require detention in a prison facility to grant presentence confinement credit, but do not recognize house arrest as official confinement. California indicated in *People v. Reinertson*[58] that "'custody' is to be broadly defined . . . [, but] the concept of custody generally connotes a facility rather than a home. It includes some aspect of regulation of behavior . . . [and] supervision in a structured life style."[59] Illinois addressed this issue in the context of house arrest as a condition of being released on bond in *People v. Ramos*,[60] where the court held that house arrest was not sufficient to warrant presentence confinement credit.[61] Most notably, the *Ramos* court held that "[h]ome confinement, though restrictive, differs in several important respects from confinement in a jail or prison. [For example,] [a]n offender who is detained at home is not subject to the regimentation of penal institutions and . . . enjoys unrestricted freedom of activity, movement, and association."[62] However, the *Ramos* court noted that presentence confinement credit had been granted previously for confinement in non-penal institutions.[63] Wisconsin followed the same principle in *State v. Pettis*[64] when it held that a defendant under house detention was not entitled to presentence confinement credit because he was not locked in his house or otherwise physically confined, and was not subject to the control of an institution or a state officer of that institution.[65]

C. Interplay Between New Mexico and Other Jurisdictions

Prior to the decision in *Fellhauer*, it appears that the New Mexico presentence confinement credit law would have been classified in Group Two by default. New Mexico law could not be placed in Group One, which requires detention in an actual penal facility, because *State v. LaBadie*[66] definitively stated that the New Mexico PCC statute does not require a prisoner to be detained in an official correctional facility to be held in "official confinement" within the meaning of the

55. *See id.* at 879.
56. 658 P.2d 141 (Alaska Ct. App. 1983).
57. These states are California, Illinois, and Wisconsin.
58. 223 Cal. Rptr. 670 (Ct. App. 1986).
59. *Id.* at 674.
60. 561 N.E.2d 643 (Ill. 1990).
61. *See id.* at 648.
62. *Id.* at 647.
63. *See id.* at 648.
64. 441 N.W.2d 247 (Wis. Ct. App. 1989).
65. *See id.* at 249. In fact, Wisconsin's determination of whether a person in a non-penal institution is in official confinement for the purposes of granting presentence confinement credit may be as simple as determining whether the defendant is locked in at night. *See id.*
66. 87 N.M. 391, 534 P.2d 483 (Ct. App. 1975).

PCC statute.[67] It also could not have been placed in Group Three, because the question of house arrest qualifying as "official confinement" had never been addressed and explicitly declined. Therefore, Group Two seemed to be the most appropriate classification, because house arrest as "official confinement" was still an open issue.

As a caveat, however, it should be noted that any attempt to interpret the New Mexico PCC statute by comparison with other jurisdictions' PCC statutes will encounter difficulty, because a majority of the PCC statutes of other jurisdictions contain language markedly different from that in the New Mexico PCC statute. For example, the Arizona PCC statute provides that "[a]ll time spent in custody . . . until the prisoner is sentenced . . . shall be credited against the term of imprisonment[.]"[68] In marked contrast, the New Mexico PCC statute provides that "[a] person held in official confinement . . . shall . . . be given credit for the period spent in presentence confinement against any sentence finally imposed[.]"[69]

IV. RATIONALE

In determining whether house arrest constitutes "official confinement" for the purpose of granting presentence credit, the *Fellhauer* court first examined existing New Mexico presentence confinement credit statutes. Then, the court examined the case law of New Mexico and other jurisdictions, and promulgated a new presentence confinement credit test, which it applied to the facts at hand. This decisionmaking procedure will be examined in more detail in this section.

The court in *Fellhauer* began its analysis by attempting to interpret the New Mexico PCC statute,[70] which provides that "[a] person held in official confinement on suspicion or charges of the commission of a felony shall, upon conviction of that or a lesser included offense, be given credit for the period spent in presentence confinement against any sentence finally imposed for that offense."[71] The major obstacle the court had to overcome was finding a definition for "official confinement," which is the key phrase that triggers the operation of the statute and the granting of presentence confinement credit.[72]

By examining the meaning of "official confinement," the *Fellhauer* court found that there was no plain meaning of this phrase.[73] The court was also unable to find guidance in legislative history, because there was "precious little in . . . the circumstances surrounding [the statute's] enactment, from which [the court] can draw any definitive conclusion as to how . . . the statute should be applied to factual circumstances such as those [as the court had before it]."[74] However, the *Fellhauer* court did have two sources of possible definitions for "official confinement." One

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67. *See id.* at 393, 534 P.2d at 485. *See also* State v. Watchman, 111 N.M. 727, 734, 809 P.2d 641, 648 (Ct. App.), *overruled on other grounds by* State v. Hosteen, 122 N.M. 228, 923 P.2d 595 (Ct. App. 1996).

68. ARIZ. REV. STAT. ANN. § 13-709(B) (West 1989).

69. N.M. STAT. ANN. § 31-20-12 (Repl. Pamp. 1994).

70. *See id.*

71. *Id.*

72. *See* State v. Fellhauer, 123 N.M. 476, 478, 943 P.2d 123, 125 (Ct. App.), *cert. denied*, 123 N.M. 446, 942 P.2d 189 (1997).

73. *See id.*

74. *Id.* The New Mexico legislature typically does not maintain a record of legislative history of statutes.

was other New Mexico statutes containing similar language and the other was New Mexico case law interpreting the PCC statute.[75]

Prior to delving into a full-scale statutory examination, the *Fellhauer* court indicated that it considered "official confinement" to be closely related, if not functionally equivalent, to the term "lawful custody or confinement."[76] The term "official confinement" is used primarily in the New Mexico escape statutes[77] and is defined in the definitions section of the New Mexico criminal statutes[78] as "the holding of any person pursuant to lawful authority, including, without limitation, actual or constructive custody of prisoners temporarily outside a penal institution, reformatory, jail, prison farm, or ranch . . . ."[79] The *Fellhauer* court was persuaded that this definition meant that a person could be in "official confinement" outside of a jail or other institution controlled by police or correctional officers.[80] However, the court indicated that none of these statutory provisions contained any specific guidance about the degree of limitation of freedom necessary to find that a person is in "official confinement" even though not in prison or jail.[81] Consequently, they were of little help in answering the question before the court.

The *Fellhauer* court then moved on to examine New Mexico case law to aid in its interpretation of the statute. With very little New Mexico case law on the issue, this was necessarily a short analysis, beginning with *State v. LaBadie*.[82] The *Fellhauer* court recognized that *LaBadie* effectively dispelled the notion that confinement in an official penal facility was necessary to meet the definition of "official confinement," which was reinforced by the *Fellhauer* court's analysis of *State v. Watchman*.[83] These two cases, while somewhat illuminating, did not provide any "specific guidance" for the *Fellhauer* court in determining the meaning of "official confinement."[84]

An analysis of a third case, *State v. Howard*,[85] enabled the *Fellhauer* court to determine the purpose of the PCC statute, which was to "give some relief to persons who, because of an inability to obtain bail, are held in custody."[86] Because the defendant in *Fellhauer* was not in jail following his release, the court noted that the purpose of the PCC statute would be served by granting presentence confinement credit only if the conditions of a defendant's release were sufficiently onerous to be analogous to those encountered during confinement in an actual penal facility.[87]

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75. *See id.* at 478, 943 P.2d at 125.

76. *See id.*

77. *See* N.M. STAT. ANN. §§ 30-22-7 to -19 (Repl. Pamp. 1994 & Supp. 1997); N.M. STAT. ANN. § 33-2-46 (Repl. Pamp. 1994).

78. *See* N.M. STAT. ANN. § 30-1-12(H) (Repl. Pamp. 1994).

79. *Id.*

80. *See* State v. Fellhauer, 123 N.M. 476, 478, 943 P.2d 123, 125, (Ct. App.), *cert. denied*, 123, N.M. 446, 942 P.2d 189 (1997).

81. *See id.* at 478-79, 943 P.2d at 125-26.

82. 87 N.M. 391, 534 P.2d 483 (Ct. App. 1975).

83. 111 N.M. 727, 809 P.2d 641 (Ct. App.), *overruled on other grounds by* State v. Hosteen, 122 N.M. 228, 923 P.2d 595 (Ct. App. 1996).

84. *See Fellhauer*, 123 N.M. at 479, 943 P.2d at 126.

85. 108 N.M. 560, 775 P.2d 762 (Ct. App.), *cert. denied*, 108 N.M. 433, 733 P.2d 1240 (1989).

86. *Fellhauer*, 123 N.M. at 479, 943 P.2d at 126 (quoting State v. Howard, 108 N.M. 560, 562, 775 P.2d 762, 764 (Ct. App. 1989)).

87. *See id.*

This convinced the *Fellhauer* court to roughly define the term "official confinement" in the PCC statute as any detention sufficiently restrictive of a prisoner's liberties.[88]

Instead of immediately examining the defendant's house arrest conditions to see if they met this rough definition of "official confinement," the *Fellhauer* court next undertook an analysis of presentence confinement credit law from other jurisdictions. The first cases the court looked at were *State v. Climer*,[89] *People v. Ramos*,[90] *State v. Reynolds*,[91] *State v. Pettis*,[92] and *People v. Reinertson*.[93] The *Fellhauer* court summarized these cases as determining that house arrest was generally not as restrictive as confinement in a penal facility and thus did not qualify as "official confinement" for the purposes of granting presentence confinement credit.[94] Specifically, the *Fellhauer* court was persuaded to adopt this viewpoint because prisoners under house arrest are not "subject to the [same] regimentation of penal institutions . . . , enjoy[] unrestricted freedom of activity, movement, and association[,]. . .[and do] not suffer the same surveillance and lack of privacy [found in penal institutions]."[95]

Next, the *Fellhauer* court examined a second set of cases, *Dedo v. State*,[96] *Yellowbear v. State*,[97] *Nygren v. State*,[98] *Grant v. State*,[99] *State v. Reyes*,[100] and *In re McPhee*.[101] These six cases illustrate the approach of the Group Two jurisdictions, in which courts examine the restrictions on a prisoner's liberty to determine if "official confinement" exists. All six were explained away as instances where the house arrest in question imposed conditions sufficiently onerous to qualify as "official confinement."[102] However, the *Fellhauer* court noted that three of these cases, *Dedo*, *Yellowbear*, and *Reyes*, imposed a felony escape charge on prisoners in non-penal facilities, and concluded that such an escape charge was an onerous condition within the meaning of "official confinement."[103]

The *Fellhauer* court then turned its attention to *Reno v. Koray*,[104] and quickly concluded that because *Koray* was based so heavily on a separate set of federal statutes, it would be of little help in interpreting New Mexico law.[105] Nevertheless, the court determined that *Koray* was somewhat useful, because it indicated that the

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88. *See id.*
89. 896 P.2d 346 (Idaho Ct. App. 1995).
90. 561 N.E.2d 643 (Ill. 1990).
91. 823 P.2d 681 (Ariz. 1992).
92. 441 N.W.2d 247 (Wis. Ct. App. 1989).
93. 223 Cal. Rptr. 670 (Ct. App. 1986).
94. *See* State v. Fellhauer, 123 N.M. 476, 479, 943 P.2d 123, 126 (Ct. App.), *cert. denied*, 123 N.M. 446, 942 P.2d 189 (1997).
95. *Id.* at 480, 943 P.2d at 127 (quoting People v. Ramos, 561 N.E.2d, 643, 647 (Ill. 1990)).
96. 680 A.2d 464 (Md. Ct. App. 1996).
97. 874 P.2d 241 (Wyo. 1994).
98. 658 P.2d 141 (Alaska Ct. App. 1983).
99. 659 P.2d 878 (Nev. 1983).
100. 504 A.2d 43 (N.J. Super. Ct. App. Div. 1986).
101. 442 A.2d 1285 (Vt. 1982).
102. *See* State v. Fellhauer, 123 N.M. 476, 480, 943 P.2d 123, 127 (Ct. App.), *cert. denied*, 123 N.M. 446, 942 P.2d 189 (1997).
103. *See id.*
104. 515 U.S. 50 (1995).
105. *See Fellhauer*, 123 N.M. at 480, 943 P.2d at 127.

Supreme Court felt that the identity of a prisoner's custodian was "significant as a measure of the restrictions placed on the defendant's liberty and movement."[106] However, the *Fellhauer* court was reluctant to adopt a bright-line test regarding the identity of the custodian, because it would preclude New Mexico courts from their traditional pursuit of inquiries into the specific facts of the case for determination of official confinement.[107]

Thus armed with several key principles from its analysis, the *Fellhauer* court was prepared to make a ruling on the fate of the defendant. The court held that detention "outside a jail, prison or other adult or juvenile correctional facility"[108] qualifies as "official confinement" within the meaning of the PCC statute,

> when (1) a court has entered an order releasing the defendant from a facility but has imposed limitations on the defendant's freedom of movement, OR the defendant is in the actual or constructive custody of state or local law enforcement or correctional officers; and (2) the defendant is punishable for a crime of escape if there is an unauthorized departure from the place of confinement or other non-compliance with the court's order.[109]

The court then determined that the particular conditions of the defendant's house arrest did not bring him within the ambit of "official confinement" as defined by the new test.[110] First, the *Fellhauer* court noted that the defendant was not in the actual or constructive custody of law enforcement officers.[111] Second, and according to the court, "more telling," was the fact that the defendant was not subject to a charge of escape if he violated the terms of his house arrest.[112] Although the *Fellhauer* court admitted that the defendant's release could have been conditioned on the penalty of such a charge under the New Mexico escape statutes,[113] the court was careful to note that the presence of such a penalty by itself was not enough to warrant a finding of "official confinement."[114]

The *Fellhauer* court never reached the question of whether it considered the restrictions on the defendant's liberty sufficient to warrant a finding of "official confinement." This seemingly crucial step was avoided because the defendant in *Fellhauer* was not subject to an escape charge, which is an absolute requirement for a finding of "official confinement" under the new test that the *Fellhauer* court promulgated. Thus, the *Fellhauer* approach allows subsequent courts to avoid individualized factual analysis of whether conditions are sufficiently onerous to constitute official confinement if the defendant's release is not conditioned on formal escape charges.

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106. *See id.* (citing Reno v. Koray, 515 U.S. 50, 62-64 (1995)).
107. *See id.* at 481, 943 P.2d at 128.
108. *Id.*
109. *Id.*
110. *See id.*
111. *See id.*
112. *See id.*
113. *See* N.M. STAT. ANN. §§ 30-22-7 to -19 (Repl. Pamp. 1994 & Supp. 1997); N.M. STAT. ANN. § 33-2-46 (Repl. Pamp. 1994). These statutes generally provide for varying degrees of felony charges for escape from different penal confinement settings.
114. *See* State v. Fellhauer, 123 N.M. 476, 481, 943 P.2d 123, 128 (Ct. App.), *cert. denied*, 123 N.M. 446, 942 P.2d 189 (1997).

V. ANALYSIS

In contrast to the above section, which detailed how the *Fellhauer* court reached a decision, this section will examine why the *Fellhauer* court reached that decision. The first step of this discussion will be an examination of the reasons behind the particular construction the court chose for the new presentence confinement credit rule. Following this, the new test itself will be critiqued, which will reveal it to be unworkable[115] and inadequately reflective of the potential restrictions on a prisoner's liberty that may indicate "official confinement" within the meaning of the PCC statute.

In constructing the new *Fellhauer* presentence confinement credit rule, the New Mexico Court of Appeals had two concerns. First, the court was confronted with a conflict between the desire to maintain and follow existing New Mexico jurisprudence concerning presentence confinement credit and the powerful influence of tests adopted by other jurisdictions with more fully developed presentence confinement credit law.[116] In particular, the New Mexico tradition of allowing courts to engage in factual inquiries in a particular case was at odds with the seductive, bright-line reasoning of the Group One jurisdictions, which determined "official confinement" based upon the identity of a prisoner's custodian.[117]

To resolve this conflict, the court developed a compromise between the two approaches, which is reflected in the first clause of the test.[118] The initial subsection of the clause allows a court to engage in a factual inquiry and determine whether the restrictions placed on a prisoner's liberty are sufficient to warrant a finding that he was officially confined. This reflects the traditional New Mexico approach. The second subsection of the first clause allows a court to bypass this factual examination and make a finding of official confinement if the custodian is a correctional officer,[119] reflecting the Group One approach.

A second concern of the court in fashioning the *Fellhauer* rule was what to do with the jurisdictions that employed a felony escape charge analysis in determining "official confinement."[120] The court apparently determined that this was an important and relevant factor in the inquiry, and incorporated it into the second clause of the *Fellhauer* test, which makes an escape charge a requirement of a finding of "official confinement."[121] Thus, the court established a bright-line test for determining whether or not a prisoner is entitled to presentence confinement credit.

As constructed, the *Fellhauer* rule allows a prisoner to demonstrate that he was under "official confinement" for purposes of the PCC statute, first, by showing either the existence of a sufficient restriction on his personal liberties or that he was

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115. For the purposes of this discussion, "unworkable" is not used in the traditional sense. It is used for lack of a better adjective to describe the rule's emphasis on the presence of an escape charge in a defendant's release order, at the expense of the traditional, fact-based inquiry that the rule was designed to protect.

116. *See Fellhauer*, 123 N.M. at 481, 943 P.2d at 128.

117. *See* Part III.B. *supra* for a discussion on the presentence confinement credit policy of Group One jurisdictions.

118. *See Fellhauer*, 123 N.M. at 481, 943 P.2d at 128.

119. *See id.*

120. *See id.* at 480, 943 P.2d at 127.

121. *See id.* at 481, 943 P.2d at 128.

in the custody of a correction official. Second, he must show that he was punishable with a charge of escape for violation of the terms of his incarceration. It is difficult to find much fault with the court's analysis. At first glance, this rule appears to be an astute attempt to reconcile the judicial approaches to presentence confinement credit law among the various jurisdictions.

However sage the court's reasoning in adopting the *Fellhauer* rule, the rule is essentially flawed, which becomes apparent upon closer inspection. The rule, while attractive, is simply unworkable because it does not allow New Mexico courts the flexibility to pursue case-specific inquiries into the circumstances of the confinement. It does not adequately consider the number of potential restrictions on a prisoner's liberty that might sufficiently indicate "official confinement" within the meaning of the PCC statute. Instead, it relies on whether the judge ordering confinement has the foresight to include in the order a potential escape charge for violating the terms of confinement.

The essential difficulty of the *Fellhauer* rule stems from the escape charge provision. As constructed, the second clause treats the potential of an escape charge as a separate, overriding element of the test rather than a factor to be considered in evaluating the restraint on a prisoner's liberty. If there is no potential charge of escape for violation of the terms of the release, the defendant is not in "official confinement," and consequently not entitled to presentence confinement credit.[122] In devising this rule, the *Fellhauer* court failed to give adequate weight to the fact that in the jurisdictions in which an escape charge clause was important to a court's presentence confinement credit inquiry, the presence of such a clause was not a determinative element, but rather one of a number of restrictions on a prisoner's liberty.[123] To put it more plainly, in those jurisdictions, the presence of an escape charge clause was only evidence that increased the likelihood that presentence confinement credit was warranted.

The *Fellhauer* court was certainly entitled to treat the possibility of an escape charge however it chose. But, in construing it as a separate and overriding element, the court created a rule that essentially subsumes any additional inquiry into the restrictions on a prisoner's liberty. To demonstrate this proposition and show how the rule is superfluous, it is helpful to attempt to apply the rule to a hypothetical situation involving Prisoner X.

The first subsection of the first clause would require Prisoner X to demonstrate that there were sufficient restrictions on her liberty to warrant presentence confinement credit or to show that she was in the custody of a penal official. It will be assumed that she is under non-penal detention, and can demonstrate sufficient restrictions. Prisoner X must then overcome the separate hurdle of showing that an escape charge provision in her release order operated as an additional restriction of

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122. *See id.*

123. *See, e.g.*, Dedo v. State, 680 A.2d 464, 469 (Md. Ct. App. 1996) (recognizing potential felony escape charge for violation of terms of house arrest as a restriction on a prisoner's liberty); State v. Reyes, 504 A.2d 43, 52 (N.J. Super. Ct. App. Div. 1986) (deeming potential felony escape charge for violation of terms of release as a restriction on a prisoner's liberty); Yellowbear v. State, 874 P.2d 241, 246 (Wyo. 1994) (recognizing potential felony escape charge for noncompliance with terms of residential alcohol treatment program as a restriction on participant's liberty).

her liberty, even though she has already demonstrated that her liberty was sufficiently restricted to constitute "official confinement." The second clause thus necessarily imposes a bright-line test on whether she was officially confined, meaning that any other restrictions on her liberty, examined under the first clause, are essentially irrelevant. Any factually based inquiry into the conditions of her confinement is thus meaningless. This is precisely what the court was seeking to avoid with the *Fellhauer* rule, when it stated that it was trying to preserve a New Mexico court's ability to make a determination about presentence confinement credit based on the facts of the case.[124]

By itself, this logical inconsistency does not show that the rule is superfluous, but rather that it does not accurately reflect what the court was trying to accomplish. However, when coupled with the fact that New Mexico law allows, but does not require, non-penal confinement orders to carry such an escape charge provision,[125] it becomes apparent that the conditions of the rule cannot be satisfied. Defendants are placed in the position of trying to prove sufficient restrictions on their liberty to earn presentence confinement credit, and then necessarily failing on the escape charge clause. Accordingly, no person confined outside a penal facility will ever be entitled to presentence confinement credit, unless a law is enacted to require escape charge provisions to be attached to non-penal confinement orders, or judges have the independent foresight to put potential escape charges in the release orders.

Even if such a law is enacted, and escape charge provisions are included in non-penal release orders, the *Fellhauer* rule would still be flawed, because it does not take into account many restrictions on a defendant's liberty that may be relevant to an inquiry regarding "official confinement." As worded, the *Fellhauer* rule would allow a court to examine only restrictions on the defendant's freedom of movement.[126] While this is certainly one restriction on a defendant's liberty, it is by no means the only one. For example, other relevant restrictions might include impingement upon the defendant's freedom of association, freedom from state supervision, and freedom of activity, or perhaps an imposition of a certain regimented lifestyle on the defendant. All of these factors were considered by the opinions of other jurisdictions studied by the *Fellhauer* court,[127] and all were apparently influential, as evidenced by the court's quotation of these factors in *People v. Ramos*.[128]

Precisely why the *Fellhauer* rule was worded to explicitly include only freedom of movement is unclear. The court certainly seemed to be persuaded, especially by the law of other jurisdictions, that freedom of movement was not the only measure of the restrictions on a defendant's liberty. The court may have meant the term "freedom of movement" to mean more than actual locomotion from point A to point B, but the rule as worded leaves this open to debate.[129] Regardless of the reasons for

124. *See Fellhauer*, 123 N.M. at 481, 943 P.2d at 128.
125. *See id. See also* N.M. CRIM. FORMS 9-302 and 9-303 (1997).
126. *See Fellhauer*, 123 N.M. at 481, 943 P.2d at 128.
127. *See id.* at 479-80, 943 P.2d at 126-27.
128. 561 N.E.2d 643 (Ill. 1990).
129. In a personal interview, Judge Bustamante indicated that he felt that courts applying the *Fellhauer* rule would construe "freedom of movement" in a broad sense, and that he certainly intended it to have a meaning

this construction, the rule may have the unfortunate effect of unduly narrowing a court's focus during its inquiry into the restrictions on a defendant's liberty.

In sum, it appears that the New Mexico Court of Appeals has produced a rule for defining official confinement that is superfluous, because the test it created in *Fellhauer* can never be met by any defendant incarcerated outside of a penal institution. Moreover, even if existing law were changed to require an escape charge provision in a release order, making the *Fellhauer* rule more workable, the rule instructs courts to inquire too narrowly into the potential restrictions on a defendant's liberty in determining whether he was officially confined.

VI. IMPLICATIONS

Regardless of how the *Fellhauer* rule works in practice, it is likely to give rise to a serious and problematic consequence. It has the potential of exacerbating potentially illegal overcrowding at the Bernalillo County Detention Center (BCDC). Before turning to the potential effect of *Fellhauer* on BCDC overcrowding, it is helpful to begin with a brief factual history of the overcrowding at that facility.

BCDC is the primary detention facility for housing both accused and convicted criminal offenders within Bernalillo County.[130] BCDC is owned by the county of Bernalillo but operated by the City of Albuquerque. In 1994, BCDC inmates filed a class action lawsuit against the city, alleging that gross overcrowding at BCDC violated their constitutional rights.[131] At the time the lawsuit was filed, the average daily population of BCDC was 1000 inmates, a staggering figure when one realizes that the facility was originally designed to house a maximum of 550 prisoners.[132] In October 1996, the lawsuit was settled by an agreement that contained a provision capping the BCDC inmate population at 700 and providing for a series of gradual cap reductions.[133] A federal court judge approved this settlement, giving it the force of a judicial order.[134]

Since then, Albuquerque has struggled with inadequate facilities and finances to meet these population caps through various methods, including the construction of an additional correctional facility and a temporary tent city for inmates.[135] Additionally, in a politically suicidal move, Albuquerque released prisoners before the terms of their sentences ended or without sentencing at all.[136]

The practical effect of the *Fellhauer* decision will not make the city's job any easier. Prisoners under house arrest will not receive credit against their sentences, and, consequently, will spend more time incarcerated in BCDC. As an example, a

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beyond physical movement. Interview with Michael Bustamante, Judge for the New Mexico Court of Appeals, in Albuquerque, N.M. (Oct. 21, 1997). However, this cannot be discerned simply from reading the *Fellhauer* opinion, and it may not have been the intent of either Judge Bosson or Judge Armijo.

130. *See* Dennis Domrzalski, *Settlement Caps Jail Population at 700*, ALBUQ. TRIB., Oct. 30, 1996, at A3.

131. *See id.*

132. *See id.*

133. *See Jail Expects to Meet Inmate Limit*, ALBUQ. J., June 3, 1997, at C2. On June 1, 1997, the population cap dropped to 643. *See id.*

134. *See* Domrzalski, *supra* note 130.

135. *See* Tim Archuleta & Dennis Domrzalski, *Let Inmates Live in Tents, City Suggests*, ALBUQ. TRIB., Mar. 22, 1996, at A1.

136. *See* Frank Zoretich & Rory McClannahan, *Judge Orders City Jail Tent Dismantled*, ALBUQ. J., Mar. 25, 1996, at A1.

criminal who spends three months under house arrest waiting for her trial and receives a sentence of eight months in BCDC will actually spend eight months there instead of five. Even if parole is factored in, the actual time of incarceration will be significantly longer. Because the influx of new prisoners is not likely to slow, BCDC will find itself with a glut of inmates that will threaten its compliance with the population caps. This leaves Albuquerque with three no-win options: building new, expensive facilities; enraging the public by releasing criminals early; or doing nothing and facing more lawsuits for constitutional rights violations.

VII. CONCLUSION

In *Fellhauer*, the New Mexico Court of Appeals promulgated a rule for determining "official confinement" for the purposes of granting presentence confinement credit.[137] Although the rule reflects a compromise between the traditional fact-finding inquiries of New Mexico courts and the bright-line tests adopted by other jurisdictions, it is superfluous and may unduly restrict a court's inquiry into the particular facts of any given confinement.

Even though these deficiencies are correctable through subsequent litigation, the passage of new legislation, and modification of release order rules, the immediate likely effect of the *Fellhauer* decision will be an exacerbation of the overcrowding at the Bernalillo County Detention Center. This, in turn, will create a substantial financial burden for Albuquerque. Other New Mexico cities that currently struggle with the same problem of overcrowding will face similar difficulties.

BEN FEUCHTER

137. *See* State v. Fellhauer, 123 N.M. 476, 481, 943 P.2d 123, 128 (Ct. App.), *cert. denied*, 123 N.M. 446, 942 P.2d 189 (1997).