

NEW MEXICO SENTENCING COMMISSION

November 30, 2007 MINUTES **NMSC FULL COMMISSION**

NM Educator's Federal Credit Union, Albuquerque, NM

Commission Members Present	Commission Members Absent	Others	NMSC Staff
Joe Caldwell, Chair			Michael Hall
	Billy Blackburn, Vice Chair (proxy to David Schmidt)	David Jablonski, Adult Probation & Parole Division	Tony Ortiz
Cindy Aragon	Left the meeting before it concluded and gave her proxy to April Land	Ella Frank, Adult Parole Board	Randall Cherry
John Bigelow			Julie Frenkle
Bob Cleavall			Linda Freeman
Inspector Scott Ford (for John Denko)			Nancy Gettings
Deb Pritchard (for Dorian Dotson)			Paul Guerin
Mark Donatelli			Dan Cathey
Ron Lucero (for Veronica Garcia)			Banyat Adipat
Steve Suttle (for Gary King)			
Gina Maestas			
Arthur Pepin			
Lynn Pickard			
John Pope			
Jerry Ritter			
April Land (for Suellyn Scarnecchia)			
David Schmidt			
Melissa Stephenson			
	Martin Suazo (proxy to John Bigelow)		
Angie Vachio	Left the meeting before it concluded and gave her proxy to David Schmidt		
Michael Vigil			
	Kent Waller (proxy to Inspector Scott Ford)		
Lemuel Martinez	Left the meeting before it concluded and gave his proxy to Inspector Scott Ford		
Jim Brewster (for Joe Williams)			

Welcome. Joe Caldwell, Chair, called the meeting to order at 9:35 a.m.

Approval of minutes from the August 3, 2007 meeting. The minutes were approved by consensus.

Staff Report

- **FY07 NMSC Audit.** Michael Hall reported that the New Mexico Sentencing Commission had a perfect audit for the fourth year in a row. He stated that this was the first year using the state's problematic Share Program. Although many agencies faced challenges with implementation of the new system, the NMSC had no audit findings or exceptions.
- **NMSC Budget Status.** Mr. Hall reported that the NMSC has spent exactly one third of its budget for the initial third of the fiscal year and that budget expenditures are on schedule.
- **Update on physical plant for the NMSC office.** Mr. Hall reported that the NMSC staff offices have been in jeopardy due to New Mexico Tech owning the building and UNM not wanting to continue to pay rent on the office space. Two weeks ago, the UNM Board of Regents voted to purchase the old architecture building for the Institute of Social Research (ISR), which includes the NMSC. The New Mexico Board of Finance approved money for building improvements at UNM, which could include improvements to the architecture the building. Mr. Hall will keep the NMSC members informed of further developments.
- **Summary of the NMSC presentation to the Courts, Corrections and Justice Committee on October 15, 2007.** Tony Ortiz reported that the NMSC made a two and a half hour presentation to the Courts, Corrections and Justice Committee on October 15, 2007. NMSC staff briefed the committee on the following topics:
 - A completed literature review regarding gender-specific probation and parole services. A published research study will be completed by June 2008. ;
 - A completed literature review regarding biased-based policing. A published research study will be completed by June 2008;
 - A summary sheet regarding adult probation and parole services in New Mexico (See HJM 61);
 - A summary sheet regarding programs that promote offender rehabilitation and recidivism reduction (See HM 68);
 - A report entitled "Estimated Number of Offenders in New Mexico Corrections Department Facilities in September 2007 Eligible for Controlled Release";
 - A report regarding the provision of diagnostic evaluations for state inmates in New Mexico;
 - A report entitled "Time Served in New Mexico Prisons in Fiscal Year 2007: Analysis of the Impact of Earned Meritorious Deductions"; and
 - A report entitled "A Workload Assessment Study for the New Mexico Trial Court Judiciary, New Mexico District Attorneys' Offices and New Mexico Public Defender Department".

During the Courts, Corrections and Justice Committee meeting, Mike Hall and Banyat Adipat set-up a laptop computer in the meeting room and demonstrated the Consolidated Offender Query (COQ) program.

- **Legislation endorsed by the Courts, Corrections and Justice Committee for the 2008 Legislative Session.** Tony Ortiz referred to a document entitled “Courts, Corrections and Justice Committee Legislation for Endorsement – 2007 Interim”. He noted that the document lists legislative proposals endorsed by the CCJ Committee that will be introduced during the 2008 session. In response to an inquiry by a Commission member, it was noted that the CCJ Committee’s list of endorsed bills does not include criminal justice legislation proposed by the Attorneys General’s Office or the Governor’s Office.
- **Criminal justice proposals from the Governor’s Office and the Attorney General’s Office.** Tony Ortiz summarized criminal justice legislation proposed by the Governor’s Office:
 - Criminal penalties for recruiting others to join a criminal street gang;
 - Enhancing the basic sentence for crimes committed in furtherance of criminal street gang activity;
 - Expanding definitions in the Antiterrorism Act and increasing penalties for acts of terrorism;
 - Increasing the enhancement of a basic sentence when a firearm is used in the commission of a noncapital felony;
 - Increasing penalties for three or more batteries or aggravated batteries against certain household members; and
 - Changing the name of the “domestic violence offender treatment fund” to the “domestic violence offender treatment or intervention fund”.

Next, Tony Ortiz referred to a document listing criminal justice legislation proposed by the Attorney General’s Office. Steve Suttle provided additional information regarding the Attorney General’s proposals, which include the following:

- Allowing consecutive sentences for felony-murder and the underlying felony;
- Prohibiting tampering with an ignition interlock device;
- Including felony DWI’s in the habitual offender statute;
- Removing lack of consent as an element in certain sex offenses;
- Including insurance fraud as a predicate offense under the Racketeering Act;
- Allowing aggregation of false insurance claims to determine the penalty;
- Creating a criminal statute to address human trafficking;
- Proposed revisions to the Family Violence Protection Act;
- Enacting a uniform law proposal regarding Interstate Enforcement of Domestic Violence Protection Orders;
- Excluding the use of polygraph tests for certain victims of sex offenses; and
- Providing for HIV testing of alleged sex offenders.

- **NMSC reports responsive to HJM 61 and HM 68.** Tony Ortiz summarized the contents of reports responsive to HJM 61 (Adult Probation and Parole Services in New Mexico) and HM 68 (Programs that Promote Offender Rehabilitation and Recidivism Reduction). Dan Cathey explained the respective methodologies employed to produce the reports. Specific to the HM 68 report, Mr. Cathey explained that he relied extensively upon a meta-analysis of programs and services published by the State of Washington Institute for Public Policy in 2006. During the ensuing discussion, a commission member questioned whether the HM 68 report was truly responsive.

MOTION: A motion was made to reject the HM 68 report. Following a discussion among commission members and staff, the motion was withdrawn.

MOTION: A motion was made that the NMSC does not have to formally approve every research report developed and published by NMSC staff. Staff shall perform the research to the best of their abilities. The motion passed by a vote of 20-1.

- **Use of proxies for NMSC meetings and committee meetings.** Tony Ortiz reported that the use of voting proxies was called into question during the Sentencing Reform Committee meeting on November 2, 2007. The following issues were discussed:
 - whether authority exists for the use of voting proxies during NMSC meetings and committee meetings;
 - whether the NMSC is a "recommending" agency only and not a policy-making entity; and
 - whether NMSC staff should be directed to develop a written proxy policy.

MOTION: A motion was made to direct NMSC staff to perform research and develop a written proxy policy for NMSC meetings and committee meetings. The written policy shall set forth procedures for notifying NMSC staff that an individual wants to assign her proxy to another member. Following development of the policy, NMSC staff shall ensure that the written policy is published on the NMSC web site.

MOTION TO TABLE: A motion was made to table the initial motion and to seek an opinion on the use of proxies from the New Mexico Attorney General's Office. The tabling motion failed by a vote of 5-14.

The initial motion was then acted upon and passed by a vote of 17-5.

Report from the Sentencing Reform Committee. John Bigelow, Chair, reported that the committee last met on November 2, 2007. The committee is continuing to work on development of sentencing principles based upon the LEAA document.

A sub-committee of the SRC has been formed to study double jeopardy issues. Lynn Pickard is the sub-committee chair and the members include John Bigelow, John Pope,

Joe Arite, Angie Vachio and Steve Suttle. The sub-committee will develop recommendations for the consideration of the Sentencing Reform Committee.

During the 2008 interim, the committee will continue work on the ideas embodied in HB 296 (2007), which required that an appropriation accompany legislation that increases criminal penalties. Chairman Bigelow noted that the upcoming legislative session is a "short", 30-day session and that concerns regarding HB 296 raised by the executive branch and some legislators will need to be addressed during the 2008 interim.

Next, Chairman Bigelow summarized the committee's deliberations regarding possible revisions to New Mexico's sentencing statutes in light of *Blakely v. Washington* (U.S. Supreme Court), *Cunningham v. California* (U.S. Supreme Court), *State v. King* (NM Court of Appeals) and *State v. Frawley* (NM Supreme Court). He noted that there have been many "zigs and zags" in the post-*Blakely* line of cases (state and federal) that have analyzed an upward departure from a defendant's basic sentence. However, it now seems settled that Section 31-18-15.1 NMSA 1978 is facially unconstitutional (See *State v. Frawley*, (filed October 25, 2007) (NM Supreme Court)). The Sentencing Reform Committee discussed three possible remedies.

First, the SRC discussed the approach that was taken in HB 694 (2005). HB 694 was developed by the New Mexico Sentencing Commission in the immediate aftermath of *Blakely v. Washington* (U.S. Supreme Court)(2004). HB 694 required a finding by a jury beyond a reasonable doubt of any aggravating circumstances surrounding the offense or concerning the offender in order to impose an elevated sentence. HB 694 also provided that the judge, subsequent to a jury finding of an aggravating circumstance, has discretion whether to alter the basic sentence. If the judge determined to alter the basic sentence, she is required to issue a brief statement of reasons for the alteration and incorporate that statement in the record of the case. In 2005, HB 694 passed the House, but stalled in the Senate.

A second approach discussed by the SRC authorizes a judge to impose a determinate sentence within an indeterminate range. Proposed by Steve Suttle of the New Mexico Attorney General's Office, this approach would require the repeal of Section 31-18-15.1 NMSA 1978 and amendments to Section 31-18-15 NMSA 1978 to create sentencing ranges.

A third option discussed by the SRC would be to take no action in the aftermath of *State v. Frawley*. The consequence of taking no action would be that there would no longer be a statutory mechanism for upward departure of an offender's sentence based upon an aggravating circumstance.

The SRC ultimately adopted a motion to recommend to the New Mexico Sentencing Commission that the commission consider and adopt one of three possible approaches in the aftermath of *State v. Frawley*: 1) HB 694; 2) Steve Suttle's proposal; or 3) take no action.

Following Chairman Bigelow's report, there was an extensive discussion among the commission members regarding whether to adopt one of the three proposals presented by the SRC or to consider a fourth option, the repeal of Section 31-18-15.1 NMSA 1978.

MOTION: A motion was made that the NMSC not endorse any of these approaches during the upcoming 30-day session and to make it known to the legislature during the 2008 session that the Sentencing Commission will develop a proposal for the 60-day session in 2009. The NMSC recognizes that there is an unconstitutional statute on the books, but the NMSC would like to study the impact of the respective approaches in a thoughtful manner. The motion passed by a vote of 16-4.

Report from the Data Committee and the Justice Information Sharing Council. Gina Maestas, Chair of the Data Committee and Michael Hall, Chair of JISC reported that both committees had a joint meeting on October 23, 2007. The only action item was a Data Committee vote to have the New Mexico Judiciary take over responsibility for ongoing maintenance of the Charge Code Table developed by the NMSC.

Next, Mr. Hall reported on a study regarding diagnostic evaluations for state inmates prepared in collaboration with the New Mexico Corrections Department. The study was requested by the Legislative Finance Committee. Mr. Hall stated that the expense of performing the diagnostic evaluations in the field or at county detention facilities would be almost identical to the current cost of performing them all in Los Lunas. Mr. Hall will deliver his report to Charles Salle at the Legislative Finance Committee.

Report from Sex Offender Management Board. Randall Cherry reported on the following topics for the SOMB:

(1) The sex offender treatment program in Hobbs, New Mexico has been discontinued and will relocate to Santa Fe. The Department of Corrections has contracted for 114 beds at the Santa Fe County Detention Center, which will be used as treatment beds. The Department believes that the program will be in operation by the end of December 2007.

(2) The SOMB has decided to delay presenting the proposed Standards and Guidelines for the Supervision of Sex Offenders on Probation and Parole to the New Mexico Sentencing Commission for reconsideration. SOMB staff will work with the SOMB members to attempt to find compromise language regarding when a convicted sex offender can have unsupervised contact with the offender's own child.

(3) The SOMB has completed its position paper on residency restrictions. The SOMB concluded that it is not in the best interests of New Mexico citizens to impose distance limitations on where convicted sex offenders can reside in this state. A copy of the position paper is included in the Commission member's files.

(4) Some members of the legislature have expressed concern that the use of Global Position Satellite Tracking (GPS) devices for every convicted sex offender released after July 1, 2007 may be prohibitively expensive and may not be the most effective use of

resources. Mr. Cherry stated that the New Mexico Probation and Parole Division estimates that the Corrections Department releases approximately 200 sex offenders every year. However, this year the actual release numbers appear to be closer to 100 sex offenders.

(5) The SOMB has reviewed the issue of whether it is feasible and appropriate to include a conviction for Aggravated Stalking of a child under the age of 16 as a registration offense under the Sex Offender Registration and Notification Act. The SOMB concluded that it is feasible, but did not reach a conclusion on whether it is appropriate. Concerns expressed by members included:

(1) whether broadening the range of offenses might dilute the original purpose of SORNA, *i.e.*, to warn the public regarding dangerous sex offenders;

(2) unless carefully crafted, the law might include juveniles involved in dating quarrels or other relatively innocent circumstances;

(3) while stalking is clearly a serious matter, it would be imprudent, without further research, to conclude that the level of danger and risk of re-offense attendant to stalking is sufficient to justify the risks raised in issues (1) and (2); and

(4) the upcoming legislative session is 30 days and it seems unlikely that legislation on this issue will be introduced.

Chairman Caldwell instructed Mr. Cherry to communicate the SOMB's concerns to the Legislative Council Service. Moreover, Chairman Caldwell asked that, during the 2008 interim, the SOMB re-visit the issue of whether it is appropriate to include a conviction for Aggravated Stalking of a child under the age of 16 as a registration offense under SORNA. If the SOMB is unable to find consensus on this issue, Chairman Caldwell directed that the SOMB should put the matter to a vote and develop a position in time for the 60-day session in 2009.

Report from the Juvenile Committee. Bob Cleavall, Chair, reported that the Juvenile Committee will have one more meeting prior to the 2008 legislative session. The committee will meet on December 14, 2007 in Albuquerque. During that meeting, the Juvenile Committee will review legislative proposals regarding juvenile justice issues that will be introduced during the session.

Chairman Cleavall also reported that the Juvenile Committee has had an ongoing review and discussion of the following subjects:

1) mandatory parole for juveniles who receive one-year commitments;

2) "mixing" of juvenile offenders with 18, 19 and 20 year old offenders in detention facilities. He noted that nearly 50% of the residents at the Youth Diagnostic and Detention Center (YDDC) in Albuquerque are 18-20 years of age;

3) ongoing developments with regard to the federal Adam Walsh Act. The act sets forth registration requirements for certain juvenile sex offenders. A handful of states, including Ohio, have requested a compliance review from the U.S. Department of Justice. The Juvenile Committee (and the SOMB) will monitor the outcome of those compliance reviews and gauge the effect, if any, on the state of New Mexico's sex offender laws.

Finally, Chairman Cleavall reported that during a Juvenile Committee meeting held on November 16, 2007, Representative Tom Swisstack addressed the committee. Representative Swisstack also serves as Co-Chair of the Juvenile Justice Commission (JJC). He summarized recommendations that will be included in a report that the JJC will publish prior to the legislative session. Representative Swisstack noted that the report will include specific recommendations to “regionalize” juvenile justice services in New Mexico.

Report from the Legislative Committee. Martin Suazo, Chair, was unable to attend the meeting. Mike Hall reported that the Legislative Committee will again hold its meetings in the conference room at the Administrative Office of the Courts. The initial meeting will be on Tuesday, January 22, 2008 at 10:00 a.m.

Plan for next meeting. The next NMSC meeting will be held on Friday, March 28, 2008 at 9:30 a.m. The NMSC will convene in Albuquerque at the New Mexico Educator’s Federal Credit Union Training Center.

Adjourn. Chairman Caldwell adjourned the meeting at 12:30 p.m.