

NEW MEXICO SENTENCING COMMISSION

April 29, 2009
DRAFT MINUTES
NMSC FULL COMMISSION

NM Educator’s Federal Credit Union
 41 Pan American Hwy NE
 Albuquerque, NM

Commission Members Present	Commission Members Absent	Others	NMSC Staff
John Bigelow, Chair		Judy Arciniaco, OptumHealth NM	Michael Hall
Cindy Aragon			Tony Ortiz
Billy Blackburn			Randall Cherry
Bob Cleavall			Linda Freeman
Hugh Dangler			Nancy Gettings
Inspector Scott Ford (for John Denko)			LaDonna LaRan
Debra Pritchard (for Dorian Dotson)			Margie Lueras
Mark Donatelli			
	Dr. Veronica Garcia		
Mary Helen Baber (for Gary King)	Kent Waller		
Gina Maestas	(Victim’s advocate to be appointed)		
Lemuel Martinez			
Arthur Pepin			
John Pope			
Jerry Ritter			
April Land (for Suellyn Scarnecchia)			
David Schmidt			
Martin Suazo			
Angie Vachio			
Michael Vigil (COA)			
Michael Vigil			
Jim Brewster (for Joe Williams)			

Welcome. Chairman Bigelow called the meeting to order at 9:35 a.m. A quorum was established. Martin Suazo moved, and Michael Vigil seconded, that the agenda be amended to move the NMSC designation policy to be the first order of business under Item III, Staff Report. The motion carried unanimously. Billy Blackburn moved, and Jim Brewster seconded, that an agenda item regarding Continued Employment of the NMSC Executive Director be added to the agenda as an emergency matter. The motion carried unanimously.

Approval of minutes for the January 14, 2009 meeting.

MOTION: Martin Suazo moved, and Gina Maestas seconded, that the minutes of the January 14, 2009 NMSC meeting be approved as written. The motion carried unanimously.

Continued employment of the NMSC Executive Director. Michael Hall addressed the Commission, stating that he has served as Executive Director of the New Mexico Sentencing Commission for the past seven years. While Mr. Hall does not wish to leave the Commission staff, he asked the Commission for permission to resign as Executive Director and to assume the role of Deputy Director of the Commission. Additionally, Mr. Hall requested that the Commission consider appointing Tony Ortiz as Executive Director, citing Mr. Ortiz's unique qualifications to assume the Executive Directorship of the Commission.

MOTION: Gina Maestas moved, and Martin Suazo seconded, that the Commission accept the resignation of Michael Hall as the Executive Director of the New Mexico Sentencing Commission effective June 30, 2009; that Tony Ortiz be appointed as Executive Director of the New Mexico Sentencing Commission effective July 1, 2009; and that Michael Hall be appointed Deputy Director of the New Mexico Sentencing Commission effective July 1, 2009. Gina Maestas and Martin Suazo accepted a friendly amendment to the motion by April Land that the Commission note Tony Ortiz's unique qualifications, given his experience with both the New Mexico Sentencing Commission and with the New Mexico State Legislature, and his extensive experience in dealing with complex legal, ethical and legislative issues. The motion carried unanimously.

MOTION: David Schmidt moved, and Hugh Dangler seconded, that in light of the previous vote on the Executive Directorship and Deputy Directorship, that the Commission delegate full authority to the NMSC Executive Committee to accomplish the hiring of the Executive Director and Deputy Director positions. The motion carried unanimously.

Staff Report.

NMSC designation policy. Tony Ortiz reported on HB 678 (2009), which passed the House of Representatives during the recent Legislative session. The bill proposed changes to the Open Meetings Act to address the Sentencing Commission's use of a designation policy.

MOTION: Martin Suazo moved, and Artie Pepin seconded, that the Commission adopt the following designation policy:

“During a meeting, a vote by a member of the New Mexico Sentencing Commission or by the member’s authorized designee shall be cast personally by the member or designee. A member shall not cast a vote for or on behalf of another member by proxy or other means unless expressly authorized by law.”

The Commission heard the following discussion:

- A member’s designee is able under the enabling legislation of the Commission to designate another person to attend meetings in the member designee’s absence.
- No other New Mexico commissions or boards are operating under the designation policy currently being used by the NMSC.
- The Attorney General’s position is that the Commission’s current designation policy jeopardizes the validity of its decisions.
- Most of the Commissions decisions are recommendations in nature, and those decisions do not set policy.
- The quality of debate, strength of conviction and the level of camaraderie of the Commission membership does not lend itself to designating a person outside of the Commission who is unaware of the issues and the continuing debate regarding ongoing issues.
- It is difficult to brief someone fully on all the issues the Commission discusses so that the person designated can participate fully in the discussions.
- The existing Commission designation policy does not violate the Open Meetings Act, and the proposed amendment to the Open Meetings Act does not ensure compliance with the Act. Additionally, there are New Mexico statutes that allow proxy voting.

Upon calling the question, the motion failed on an 8 to 9 vote.

Update regarding NMSC FY09 and FY10 budgets. Michael Hall reported the Commission is working hard to make its budget for FY09. The FY10 base budget is \$754,000, which is a reduction in budget from the FY09 budget of \$850,000. The Executive Committee discussed this issue and has directed that the Commission maintain its expenditures at a flat rate for the first three months of the 2010 fiscal year, review the budget quarterly and take whatever action is necessary to meet its budget obligations. In the meantime, the Commission has reduced the amount of money available to researchers to ensure compliance with the FY10 budget. The

Sentencing Commission is partnering with the Institute for Social Research on grant applications as a means to enhance its FY10 budget.

MOTION: Martin Suazo moved, and Billy Blackburn seconded, that the Commission support the Executive Committee's recommendation to maintain expenditures at a flat rate for the first quarter of the 2010 fiscal year and that the Commission review and make any necessary adjustments on a quarterly basis. The motion carried unanimously.

Update on the Governor's Prison Reform Task Force and Reentry Council Initiatives.

Chairman Bigelow reported the Governor's Prison Reform Task Force report resulted in significant actions by the Correction Department, including the creation of a new Reform and Reentry Division. A Deputy Secretary position and a Bureau Chief were created and staffed. These new positions are dedicated to fulfilling as many of the Task Force's recommendations as possible. A Reentry Council Executive Committee has been created, along with a steering committee, to advise the Corrections Department on reform and reentry issues.

Additionally, the Governor re-created the Prison Reform Task Force by executive order issued a directive that the Task Force research and recommend to the Governor how to get communities involved in reform and reentry efforts.

Update regarding NMSC research. Tony Ortiz reported NMSC staff is gearing up to perform annual updates to the Workload Measurement Study and the Earned Meritorious Deductions Study. Staff has completed a research study regarding de novo appeals in DWI cases. Staff has also completed a study regarding bias based policing. Staff has been asked to present the biased based policing study at a NAACP conference in June of this year.

Staff will continue to work on research projects it is required to complete, regardless of budget constraints. Additionally, staff is working with 16 rural counties to apply for money to develop a case management system that will allow a consolidated query to locate inmates in rural detention facilities. Staff also plans to develop an adult lookup for treatment providers and vendors similar to the one already developed for juveniles.

Report from the Legislative Committee. Martin Suazo reported the Legislative Committee met five times during the legislative session, with near perfect attendance at each meeting. Not only was there a quorum of the Legislative Committee members at each of the five meetings, but there was also a quorum of the full Commission at each of those meetings. The Commission congratulated Mr. Sauzo and the Legislative Committee for the outstanding job it did during the legislative session.

Report from the Sentencing Reform Committee. Artie Pepin summarized significant criminal justice legislation that was enacted during the session. He also noted several measures that did not pass or that were vetoed by the Governor:

House Judiciary Committee Substitute for House Bill 31 (Chapter 261, Laws 2009) and Senate Judiciary Committee Substitute for Senate Bill 26 (Chapter 253, Laws 2009) are identical bills that make changes to the statutes regarding motor vehicle theft. New criminal offenses are created for embezzlement of a motor vehicle and fraudulently obtaining a motor vehicle. Increased penalties are provided for second convictions (3rd degree felony) and third and subsequent convictions (2nd degree felony) for the offense of unlawful taking of a motor vehicle. Several existing motor vehicle statutes (unlawful taking of a motor vehicle, receiving or transferring stolen motor vehicles, injuring or tampering with a motor vehicle, altering or changing engine numbers) are removed from the Motor Vehicle Code and recompiled in the Criminal Code. Finally, all of the aforementioned motor vehicle offenses are added to the list of predicate offenses set forth in the Racketeering Act.

House Judiciary Committee Substitute for House Bill 117 (Chapter 259, Laws 2009) amends the criminal child abuse statute to provide that evidence which demonstrates a child has been knowingly or intentionally exposed to the use of methamphetamine shall be deemed prima facie evidence of abuse of the child.

House Bill 208 (Chapter 163, Laws 2009), developed by the NM Sentencing Commission, provides for a jury determination of aggravating circumstances. When a prosecutor seeks an increase to the basic sentence, a separate presentation of evidence regarding alleged aggravating circumstances shall be made to a jury. If there is a jury finding beyond a reasonable doubt of aggravating circumstances, the judge then has discretion to increase the offender's sentence by up to one-third of the basic sentence.

House Judiciary Committee Substitute for House Bill 279 (Chapter 95, Laws 2009) provides that in cases of alleged identity theft, a law enforcement officer shall make a written report on forms provided by the New Mexico Attorney General's Office. A copy of the police report shall be filed with the Attorney General. The Attorney General's office, in cooperation with the Department of Public Safety and Motor Vehicle Division, shall issue "identity theft passports" to victims of identity theft. The Attorney General's Office is also required to maintain a database of identity theft victims and may provide access to that database to other criminal justice agencies. A specific statute of limitations is established for identity theft cases, providing that cases may be prosecuted up to five years from the time the alleged crime was discovered. Finally, HB 279 establishes procedures for an identity theft victim to expunge her name and other personal identifying information from law enforcement and court records.

House Bill 285 (Chapter 11, Laws 2009) abolishes the death penalty and replaces it with a sentence of life without the possibility of release or parole. For capital felony crimes committed on or after July 1, 2009, if a jury finds beyond a reasonable doubt that one or more aggravating circumstances exist, the defendant shall be sentenced to life imprisonment without the possibility of release or parole. If the jury does not find that one or more aggravating circumstances exist, the defendant shall be sentenced to life imprisonment and is eligible for a parole hearing after serving thirty years.

House Judiciary Committee Substitute for House Bill 428 (Chapter 177, Laws 2009) establishes the Prohibition of Profiling Practices Act. The act prohibits the use of profiling practices by law enforcement officers while investigating suspected criminal activity. Law enforcement agencies are required to maintain written policies and procedures to eliminate profiling practices and provide appropriate training to officers. The New Mexico Attorney General's Office is directed to establish procedures for receiving and maintaining a record of complaints that allege profiling by a law enforcement officer or law enforcement agency. Additionally, the Attorney General may investigate allegations of profiling and may publish a report of the Attorney General's findings regarding alleged violations of the Prohibition of Profiling Practices Act.

House Bill 484 (Chapter 133, Laws 2009) eliminates the right to a jury trial in magistrate courts for penalty assessment misdemeanors or for offenses that do not prescribe incarceration as a penalty.

House Memorial 26 requests that the New Mexico Sentencing Commission collaborate with the public defender department, the district attorneys and the administrative office of the courts to develop a process for notifying defendants of the collateral consequences of criminal charges and identify remedies to employment barriers for convicted felons.

House Memorial 101 asks all state agencies to examine ways in which they can promote hiring of ex-offenders so that they more successfully reintegrate into their community. Additionally, state agencies are encouraged to reduce barriers to employing ex-offenders in public sector jobs.

House Memorial 115 requests that the Children, Youth and Families Department convene a working group to craft policy recommendations for the appropriate detention of youth eighteen to twenty-one years of age in local juvenile detention facilities or adult jails.

Senate Bill 4 (Chapter 255, Laws 2009) creates two new criminal offenses within the existing Crimes Against Household Members Act. The new offenses are "criminal damage to the property of a household member" and "deprivation of the property of a household member". Whoever commits criminal damage to the property of a household member is guilty of a misdemeanor, except that when the damage to the household member's interest in the property amounts to more than one thousand dollars (\$1,000), the offender is guilty of a fourth degree felony. Whoever commits deprivation of the property of a household member is guilty of a misdemeanor.

Senate Bill 5 (Chapter 24, Laws 2009) amends the DNA Identification Act to require the collection of DNA samples from adults incarcerated in New Mexico who have been convicted of a felony offense pursuant to federal law, military law or the law of another state.

Senate Bill 7 (Vetoed) provides district court judges with authority to conduct post-adjudication hearings for “serious youthful offenders” (15-18 years of age and charged with first degree murder) to determine an offender’s amenability to treatment. Depending on the outcome of the amenability hearing, a “serious youthful offender” could receive a juvenile referral or an adult sentence.

Senate Bill 142 (Chapter 56, Laws 2009) increases the age of a child victim from under age 9 to under age 13 for the crime of aggravated criminal sexual penetration. The offense of aggravated criminal sexual penetration includes the elements of “with an intent to kill or with a depraved mind regardless of human life”.

Senate Judiciary Committee Substitute for Senate Bill 166 (Chapter 21, Laws 2009) rewrites the elements for the crime of stalking as follows: “Stalking consists of knowingly pursuing a pattern of conduct, without lawful authority, directed at a specific individual when the person intends that the pattern of conduct would place the individual in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint of the individual or another individual.” “Pattern of conduct” is defined in the bill. The penalties for stalking were not changed by SB 166.

Senate Judiciary Committee Substitute for Senate Bill 275 (Chapter 254, Laws 2009) sets forth a list of requirements for reinstatement of an offender’s driver’s license, when the person’s license was revoked for a DWI conviction or pursuant to the Implied Consent Act. In order to have his license reinstated, the person shall: 1) pay the license reinstatement fee of \$75.00; 2) complete the license revocation period; 3) satisfy any court-ordered ignition interlock requirements; and 4) have a minimum of six-months of driving with an ignition interlock license with no attempts to circumvent or tamper with the ignition interlock device.

Senate Bill 423 (Chapter 73, Laws 2009) provides that an adult or juvenile correctional facility, detention center or local jail shall use the least restrictive means necessary when an inmate is in the second or third trimester of pregnancy. No restraints of any kind shall be used on an inmate who in labor, delivering her baby or recuperating from the delivery unless there are compelling grounds to believe that the inmate presents a risk of harm to herself or others or is a flight risk.

Senate Judiciary Committee Substitute for Senate Bill 649 (Vetoed) sets forth procedures for expunging arrest records and public records of a person: 1) who is a victim of identity theft or a wrongful arrest, indictment or charge; 2) released without a conviction; or 3) convicted after no more than one incident involving a misdemeanor or violation of a municipal ordinance and who has no other convictions after completion of the sentence. Following a conviction for a misdemeanor, a person may petition to expunge the records if no other charge or proceeding has occurred for a period of five years. Following a conviction for an offense involving domestic violence or abuse, a person may petition to expunge the records if no other charge or proceeding has occurred for a period of ten years. The bill expressly states that a person may not petition to expunge records involving a conviction for a

crime against minors or children, a sex offense or a DWI offense.

Next, Mr. Pepin reported that the Sentencing Reform Committee met last week to discuss its agenda for the 2009 interim. The Committee will work with the Governor's Prison Reform Task Force. Also, the committee will monitor the work of a Task Force convened by the Traffic Safety Bureau to study the effectiveness of ignition interlock requirements. The Committee will also work to identify ways to reduce employment barriers for ex-offenders. Additionally, the Committee plans to study the drug court model and pre-prosecution diversion programs. Finally, the committee will ask the Attorney General's Office for a briefing on the *Bort Jones* case regarding grand jury proceedings.

Report from the Sex Offender Management Board. Randall Cherry reported Jim Brewster is in the process of being designated to attend NMSC meetings in the absence of Judge Michael Vigil, chair of SOMB. SOMB has completed a review of the Sex Offender Treatment Program based in Las Vegas, NM and Mr. Cherry gave an overview of that report. In the upcoming year, SOMB plans to address:

- deregistration from the sex offender registry,
- real time electronic monitoring for sex offenders,
- the elements of the offense of second degree criminal sexual penetration,
- finalizing adult treatment standards,
- working with CYFD on juvenile supervision guidelines,
- "sexting," or the transmittal of suggestive photographs by text messaging,
- possible revisions to the enabling legislation for the Sex Offender Management Board,
- federal Adam Walsh requirements,
- the New Mexico Corrections Department's sex offender treatment programs.

Angie Vachio requested that the SOMB revisit the issue of family reunification for sex offenders. Mark Donatelli requested that the SOMB review the statute which gives the Parole Board authority to impose conditions of release.

Report from the Juvenile Committee. Bob Cleavall summarized significant juvenile justice legislation that was enacted during the session. He also noted several measures that did not pass or that were vetoed by the Governor:

Senate Bill 7 (Vetoed) provides district court judges with authority to conduct post-adjudication hearings for “serious youthful offenders” (15-18 years of age and charged with first degree murder) to determine an offender’s amenability to treatment. Depending on the outcome of the amenability hearing, a “serious youthful offender” could receive a juvenile referral or an adult sentence.

Senate Bill 142 (Chapter 56, Laws 2009) increases the age of a child victim from under age 9 to under age 13 for the crime of aggravated criminal sexual penetration. The offense of aggravated criminal sexual penetration includes the elements of “with an intent to kill or with a depraved mind regardless of human life”.

Senate Bill 248 (Chapter 239, Laws 2009) is the omnibus bill that revises several articles of the Children’s Code, including articles regarding: 1) delinquency; 2) abuse and neglect; 3) families in need of court ordered services; 4) juvenile parole; and 5) adoption. (The Children, Youth and Families Department has published an excellent section-by-section summary of SB 248).

Senate Bill 423 (Chapter 73, Laws 2009) provides that an adult or juvenile correctional facility, detention center or local jail shall use the least restrictive means necessary when an inmate is in the second or third trimester of pregnancy. No restraints of any kind shall be used on an inmate who in labor, delivering her baby or recuperating from the delivery unless there are compelling grounds to believe that the inmate presents a risk of harm to herself or others or is a flight risk.

House Judiciary Committee Substitute for House Bill 117 (Chapter 259, Laws 2009) amends the criminal child abuse statute to provide that evidence which demonstrates a child has been knowingly or intentionally exposed to the use of methamphetamine shall be deemed prima facie evidence of abuse of the child.

HB 700 (Chapter 244, Laws 2009) amends the Motor Vehicle Code to add a \$1.00 fee to penalty assessment misdemeanors to provide a revenue stream for a juvenile adjudication fund. It appears that money in the fund is to be used to fund the operations of teen courts throughout the state.

House Memorial 13 requests that the children, youth and families department convene a task force to develop a sustainable plan for a continuum of gender-responsive services and programs for girls in the juvenile justice system.

House Memorial 115 requests that the Children, Youth and Families Department convene a working group to craft policy recommendations for the appropriate detention of youth eighteen to twenty-one years of age in local juvenile detention facilities or adult jails.

Next, Mr. Cleavall reported that the Juvenile Committee was active during the session on proposed legislation regarding juvenile justice issues, including revisions to the Children’s Code set forth in SB 248. Due to budget constraints, the Juvenile Committee plans to reduce its travel in 2009 and will instead focus on programming in facilities. Additionally, the committee will schedule a presentation with representatives from OptumHealth NM regarding behavioral health services for juveniles.

Report from the Data Committee and Justice Information Sharing Council. Gina Maestas reported the Data Committee has no outstanding issues and has not met since the last full Commission meeting. Michael Hall reported the consolidated offender query has experienced a substantial increase in hits during the past year. Staff has added a weapons alert to the query. The emergency protective order rollout for the consolidated offender query is nearing completion. The process of victim notification by a district attorney's office is now completely automated. JISC also continues to work with several agencies on the process of automating protective orders. JISC is also working with the Secretary of State's Office and providing that office with access to the COQ to assist with restoration of voter's rights for ex-offenders.

Plan for next meeting. The next meeting of the New Mexico Sentencing Commission will be held during the end of August 2009. Notice of the meeting will be sent to the members when the date, time and location are confirmed.