



**Minutes of the Meeting of the
New Mexico Sentencing Commission
10:00 a.m.
May 19, 2021**

via Zoom

| Members Present | Members Absent | Others Attending | NMSC Staff Present |
|------------------------------------|---------------------------------|--------------------------------------|---------------------------|
| Hon. Edward Chavez (ret'd.), Chair | Cindy Aragon (State Bar) | Kim Chavez Cook (LOPD) | Linda Freeman |
| Bob Cleavall, Vice Chair | Hon. Daniel A. Bryant (DMCJA) | Michael Stout | Douglas Carver |
| Marit Andrews (for PED) | Hon. John Chavez | Kelly Mitchell (Robina Institute) | |
| Bennett Baur (LOPD) | Nina Safier (Governor) | Scott England (UNM SOL) | |
| Sheriff Mark Cage (House Minority) | Hon. Fred T. Van Soelen (DMCJA) | Yvonne Kahn | |
| Jason Clack (for NM SCt) | | Cynthia Pacheco (AOC) | |
| Jim Cowan (for CYFD) | | Ellen Rabin (LFC) | |
| Ann Delpha (for UNM SOL) | | Matt Garcia (Office of the Governor) | |
| Mark Donatelli (Speaker) | | Martha Becerra (LFC) | |
| Capt. David Funes (NM Counties) | | Karen Cann (NMCD) | |
| Jason Greenlee (for DPS) | | Melanie Martinez (NMCD) | |
| Claire Harwell (Governor) | | Prof. Leo Romero (UNM SOL) | |
| Brady Horn (for NM SCt) | | Rep. Gail Chasey | |
| Anne Kelly (AGO) | | Rep. Antonio Maestas | |
| Michael Lilley (Pro Tem) | | Ashley Nellis (Sentencing Project) | |
| Angela "Spence" Pacheco (Speaker) | | Cisco McSorley (Parole Board) | |

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| David Schmidt (Pro Tem) | | Jonathan Ibarra (LOPD) | |
| Martin Suazo (Pro Tem) | | Jason Rael (LOPD) | |
| Alisha Tafoya Lucero (NMCD) | | (unknown phone number) | |
| Clint Wellborn (NMDAA) | | | |
| Ron West (Senate Minority) | | | |
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I. Welcome and Introductions. The meeting began at 10:03 a.m. Chair Justice Edward Chavez (retd.) welcomed members, guests, and staff to the meeting.

II. Approval of minutes for the April 15, 2021 meeting. The minutes of the meeting were approved by unanimous vote.

III. Staff Report.

Linda Freeman, Executive Director, New Mexico Sentencing Commission (NMSC), informed the Commission that it had been a busy month. The series of webinars on criminal justice matters relating to the crime reduction grants have been continuing. She informed the Commission that the process had begun to hire more staff for the NMSC, both to fill vacancies and to help with the Criminal Code update. She also noted that meetings to work on the Commission’s strategic plan would be held soon. Additionally, she informed the Commission that applications had been solicited for the next round of crime reduction grants; five have been received and will be reviewed at the upcoming meeting of the Grants Committee. One of the applications was from a new Judicial District, which indicated that outreach efforts were working.

Chair Chavez informed the Commission that he had been speaking with the Administrative Office of the Courts about the DataXchange platform to ensure that it fulfills the needs of the Commission.

IV. Criminal Code Revision and Trends in US Criminal Sentencing.

Chair Chavez informed the Commission that the principal purpose of the meeting was to discuss how the Commission was going to manage the task given to it by Rep. Gail Chasey and the Legislature with a \$500,000 appropriation to rewrite or update the Criminal Code and related statutes. He said that it was important that the task took a bipartisan approach.

Executive Director Freeman introduced Kelly Mitchell, Executive Director, Robina Institute of Law and Justice, University of Minnesota, informing the Commission that the Robina Institute was working with Commission staff to explore topics such as what the felony and misdemeanor framework was in other states, which states had something equivalent to a high misdemeanor, and what the best practices for sentencing were nationally.

Ms. Mitchell thanked the Commission for inviting the Robina Institute to help in its work. She informed the Commission that the Robina Institute performed research in the areas of sentencing, parole, and probation, conducting comparative work across states. Rather than having a pre-set list of recommendations that they feel a state should adopt, the Institute looks at what is working and what is not, and where gaps might be.

V. Revision of the Criminal Code in the 1980s.

Prof. Leo Romero, University of New Mexico School of Law (UNMSOL), discussed the efforts he undertook to reform the Criminal Code in the 1980s. The Legislature's Criminal Justice Committee wanted the reform as there was concern that new statutes enacted since the last compilation of the Criminal Code in 1963 had created problems with the courts, prosecutors, and public defenders. Additionally, many criminal laws had been passed without much thought to other sentencing provisions, particularly whether other statutes dealing with similar harms were aligned. As a result, there was no consistency or proper gradation in punishments. In addition, while the 1963 Criminal Code compilation had looked at the Modern Penal Code and picked up some of its provisions, it had neglected others. A particular lacuna was *mens rea* – for example, definitions for intentional, negligence, or recklessness. Prof. Romero informed the Commission that part of his aim in the reform effort he led was to adopt the Modern Penal Code framework to incorporate mental states.

Prof. Romero was contacted by Clay Buchanan, then the head of the Legislative Council Service, to oversee the effort. It was a small committee of prosecutors, defense lawyers, and judges. Each provision of the Code revision had a commentary explaining why there was a revision or why there was no revision, with reference to other statutes. The committee met bi-weekly, and he approved all of the drafts and commentaries. They addressed every section of the Criminal Code. In the end, neither the Attorney General, nor the District Attorneys Association, nor the Law Office of the Public Defender (LOPD) endorsed the committee's final product. The resistance centered on the fact that they all knew the Criminal Code and how to work with it, and a new Code would probably mean additional litigation. Prof. Romero felt that there was a tremendous amount of litigation already to decide on the meaning of ambiguous provisions in the present Code, and that a new Code would ultimately reduce the need for litigation. Additionally, the courts were not invested in the reform effort.

For this present effort, Prof. Romero suggested that the Commission might want to conduct a survey of prosecutors, public defenders, attorneys with the Office of the Attorney General (AGO), and judges to see whether they felt that there were problems with the present Criminal Code. In particular, the appellate divisions of the AGO and the LOPD would see issues that regularly were raised and could be addressed legislatively. He stressed the need to get people behind the effort from the beginning, adding that it was helpful that the Commission already represented all of the major constituencies concerned with in the criminal justice system. He emphasized that there would need to be strong support in terms of people who would be in the trenches drafting legislation and presenting on the policy issues that were raised. For instance, during the Code revision he oversaw, one of the biggest debates was on the question of self-defense, particularly concerning the use of deadly force in the defense of property and how the retreat doctrine should apply. He noted that if there was one issue on which people do not agree, the whole effort could be torpedoed, which is why it is critical to address compromises before anything is introduced in a Legislative Session.

Members of the Committee asked questions about and discussed the size of Prof. Romero's committee (there were 12 to 15 members), and how one might obtain a copy of Prof. Romero's recommendations.

VI. Legislative Perspective on Criminal Code Revision.

Rep. Chasey discussed the origins of the proposal to rewrite the Criminal Code, which had its roots in the interim Criminal Justice Reform Subcommittee (CJRS) formed in 2013 with four Representatives and four Senators, evenly split in membership between the Republican Party and the Democratic Party. CJRS heard presentations from Texas and North Dakota about criminal justice reform work done in those states. Key to

these reforms was that it was important to lock up people who were a danger to the community, but to treat non-dangerous individuals in a different way. The advice from both states was to package the reforms in one legislative vehicle, where the compromises were worked out in advance, rather than try to introduce reform measures piecemeal. The constant pressure in the Legislature, Rep. Chasey continued, was to make criminal laws tougher, despite ample research showing that this does not work as a deterrent to crime nor does it make communities safer. Rep. Chasey pointed out that the Legislature does not have the capacity or expertise to rewrite the Criminal Code, so she is glad that the Commission can undertake the task.

Rep. Antonio Maestas noted that CJRS represented the first time the minority party was able to chair a committee, which underlined its bipartisan nature. He hoped that a Criminal Code revision would prioritize violent crime over non-violent crime. The NMSC was well-positioned to do the work, he said, and could build on reform the Legislature had already accomplished. He suggested looking at whether more tiers for crimes were needed, for example in the homicide statutes, and that the state should consider moving away from special penalties and have all crimes in a dedicated tier. Other areas worth examining were DWI homicide; child pornography laws, especially possession versus manufacture; mandatory time; firearm enhancements; and crimes that are in statutes outside of the Criminal Code, such as reckless and careless driving and crimes involving livestock or gambling. Additionally, a *mens rea* component is needed for all crimes. He also suggested that a reform effort examine good time credit, especially the separate tiers for serious violent offenses. He noted the importance of Executive Branch leadership in this effort, especially as New Mexico has a citizen legislature; and the importance for the revision effort to have a cross-section of the criminal justice system, as the NMSC has.

Prof. Scott England, UNMSOL, discussed his experience working as a staff attorney for the Illinois Criminal Code Rewrite and Reform Commission. Similar to the effort led by Prof. Romero in New Mexico, two volumes of a rewritten criminal code were produced, with case references and commentary, but the final product was never considered by the Illinois Legislature. In Illinois's case, the Legislature was not engaged in the process. He recommended using a Legislature-backed process, with clear guidelines regarding the scope of work. He also recommended identifying political obstacles early and developing strategies to address those concerns, and engaging stakeholders throughout the process. He opined that the NMSC was the perfect home for this project. He also discussed the New Mexico Criminal Code in general. In 2000, Northwestern University conducted a survey of criminal codes in the various states, and New Mexico's ranked 41st. The code New Mexico drafted in the late 1950s/early 1960s had access to the work being done with the Model Penal Code, but did not avail itself of that work. Of particular note is that the general provisions of the New Mexico Criminal Code are particularly lacking in substance, for example missing causation, culpability, justifications, excuses, duress, entrapment, or a general justification of self defense, defense of others, or defense of property. If these items are not part of the Criminal Code, these doctrines will be developed by the courts. In addition to these problems with the general provisions, there are problems with various offenses themselves and the ways they are graded, with inconsistencies, redundancies, and ambiguities. He concluded that he was glad the NMSC was undertaking this work, and he hoped that in the end New Mexico would be seen as a leader in criminal justice reform in the country.

Matt Garcia, General Counsel for the Governor, informed the Commission that the Governor was interested in this effort, and that in particular the Governor would like to see that the Criminal Code did not penalize things like addiction, and that it would address gun issues. He hopes that someone from the Governor's office will be involved in the effort as it moves forward.

Members of the Commission asked questions about and discussed whether traffic offenses should be removed from criminal processes, as is done in other states; allocation of resources in the criminal justice and behavioral health systems in support of reform; the involvement of the Legislative Finance Committee; involvement of legislators in the effort; the importance of behavioral health services to address recidivism;

the need for bi-partisan support, and broad stakeholder support, for the reform effort; the need to fund the courts properly; and the need to address fines and fees issues, but also the need to hold agency budgets harmless.

VII. Public Comment.

A member of the public discussed the need for broad support for reform, and how the NMSC would go about achieving consensus on what areas needed reform.

VIII. Next meeting.

The committee will next meet sometime later this summer.

IX. Adjourn. The meeting adjourned at 11:41 a.m.