



**Minutes of the Meeting of the
Criminal Code Update Committee
10:00 a.m.,
July 15, 2021**

via Zoom

Committee Members Present	Committee Members Absent	Others Attending	NMSC Staff
Angela “Spence” Pacheco, Chair	Anita Mesa (BHSD)	Daniel Landsman (FAMM)	Linda Freeman
Kim Chavez Cook (LOPD)		Justice Edward Chavez (ret.) (NMSC Chair)	Douglas Carver
Jason Clack (AOC)		Kelly Mitchell (Robina)	
Bob Cleavall (NMSC)		Ellen Rabin (LFC)	
Mark Donatelli		Diane Sewell McCash	
Claire Harwell		Cynthia Pacheco (AOC)	
Brady Horn		Monica Ault (FFJC)	
Anne Kelly (AGO)		Ann Delpha (UNMSOL)	
April Land (UNMSOL)		Kat Sanchez (Bold Futures)	
Mike Lilley		Diana Grossen (?)	
Nina Safier		Barron Jones (ACLU)	
Dave Schmidt		Megan Dorsey	
Alisha Tafoya Lucero (NMCD)		Martha Becerra (LFC)	
Clint Wellborn (AODA)		Cindy Aragon (NMSC)	

I. Welcome. Angela Pacheco, Chair, called the meeting to order at 10:03 a.m.

II. Introductions. Members of the committee and guests introduced themselves.

III. Staff Report.

Linda Freeman, Executive Director of the New Mexico Sentencing Commission (NMSC), informed the committee that there had been a tremendous response to the criminal justice survey, with over 200 completed responses. She also informed the committee that a dedicated web page for the work of the committee was now up on the NMSC website.

IV. Examining Offense Categorization Schemes.

Kelly Mitchell, Executive Director, Robina Institute of Criminal Law and Criminal Justice, University of Minnesota Law School, presented a report, “Examining Offense Classification Schemes”. (The slides for the presentation and the full report are available on the committee’s website.) Ms. Mitchell told the committee that she had been asked to look into how other states classify their felonies and misdemeanors and examine how New Mexico fit in comparison, and the relationship between offense classification and sentencing.

Ms. Mitchell discussed how offense classifications are a policy statement by the Legislature about the relative severity of different offenses, creating a structure that ranks offenses and establishes broad sentencing parameters. She continued that while the continuum of offense classification ranges from infractions to capital crimes, most of the discussion occurs around misdemeanors and felonies.

Ms. Mitchell informed the committee that 16 states have a simple structure, with felonies defined by where someone is imprisoned (for instance, state prison) and the length of sentence; and misdemeanors generally being all other crimes, also defined by place of imprisonment (for instance, county jail), and a shorter length of sentence (usually under a year). She noted that even in states with simple structures, there is always something else that gives more direction to the courts, such as sentencing guidelines or structured sentencing.

Ms. Mitchell informed the committee that most states have misdemeanors classified in two or three classes, though states range from one to seven misdemeanor classifications. She noted that many states have set minimums or a range, but all state maximum sentences. There is a wide variation across states as to the maximum punishments in each classification, varying from fines and probation at the lower levels up to, generally, one year of imprisonment, though some structures have a maximum penalty of up to five years for a misdemeanor. The most common structures, three-class and two-class states, have similar penalties – in a three class structure, for Class A, one year; Class B, six months, and Class C, 30 days; in a two class structure, Class A, one year; and Class B, 30 or 90 days. Some states have special classifications for drug crimes or DWI. There are five states that have misdemeanors punishable by over one year – these misdemeanors encompass a range of offenses including certain weapons offenses, prostitution, property crimes, careless driving, simple assault, and drug possession. These states have maximum misdemeanor incarceration sentences from 18 months to five years.

Ms. Mitchell then moved to a discussion of felony offenses. She noted that there was more variation in classification structure for felonies, with some states building capital felonies into the classification structure, others separating them out. (For the purposes of this presentation, the penalty structure for the most serious offenses was coded as “capital” to facilitate comparisons.) While most states have four, five, or six classes of felonies, states range from three classes to ten. There is a wide variation in the maximum penalties at each level, though states with four felony classes have the most similar classification structures. For those states, a capital penalty would have a sentence of death, life without parole, or life with the option of parole; Class A felonies in these states generally have a sentence of 20 years, Class B 10 years, and Class C 5 years. Other than states with four classes of felony, there was wide variation in classification and penalty level. States with many more classification levels, such as nine or ten classes, have far more granularity, with no patterns or commonality.

New Mexico’s structure of criminal offenses, Ms. Mitchell informed the committee, is, on its surface, a simple structure, with petty misdemeanors having sentences of under six months, misdemeanors ranging from six months to under a year, and felonies over a year. Other factors, however, suggest that New Mexico has a mixed system. Felonies are subdivided into capital felonies and felonies of the first through fourth degrees. Unlike the classification structures in other states, there are no maximum sentences stated in the

definitions of these classes, and instead one must look to the sentencing provisions in state law to determine the appropriate penalties. Misdemeanors are not further subdivided.

Ms. Mitchell then discussed the distribution of sentencing authority. Usually a Legislature defines crimes, sets maximum penalties, and in certain cases dictates sentences (such as with mandatory minimums). Judges, at the other end, impose real time sentences, with input from the parties and victims. Then there are intermediary parties who translate maximum penalties into useable guidelines or parameters for sentencing. These intermediaries can again include the Legislature, who through offense classification define relative offense severity and broad sentencing patterns; or through structured sentencing create standard sentencing parameters that are more focused than offense classification, giving length of sentences. In addition, Sentencing Commissions can create sentencing guidelines, creating discrete sentencing recommendations that are more individualized than standard sentencing parameters, dictate disposition (such as prison or probation), and length of sentences, utilizing a variety of factors. Finally Parole Boards, through their releasing practices, set their own guidelines, though these can often change suddenly. New Mexico, Ms. Mitchell continued, principally has a mix of the two intermediary legislative roles.

Ms. Mitchell then discussed proportionality in New Mexico's sentencing scheme, noting that the basic sentences in some instances show disproportionality. While the basic felony sentencing scheme is proportional, with first degree felonies having 18-year sentences, second nine years, third three years, and fourth one and a half years, certain crimes – including ones with additional factors such as resulting in the death of a human, resulting in the death of a child, resulting in the exploitation of a child, a sexual offense against a child, or criminal aggravated sexual penetration – do not align with that basic scheme. Similarly, the habitual offender statute's alteration to the basic sentence introduces disproportionality when those same factors are involved. This raises the question of whether these crimes are classified in the right places given their linked factors.

Ms. Mitchell concluded her discussion with some initial thoughts on New Mexico's Criminal Code. She suggested that the state should consider revising crimes to include all of the elements of an offense, including the type of harm (for example, death) and the type of victim (for instance, a child). Then the state should think about revising felony classifications so that proportionality is maintained, basing classification of offenses on their relative severity, with crimes resulting in death being at a higher class than crimes involving great bodily harm, and crimes involving child victims at a higher class than crimes involving adult victims. Additionally, the state should consider revising structured sentencing provisions by removing provisions that are based on additional offense elements, which would now be incorporated into the offense definitions; and identifying circumstances when probation should be the presumptive sentence and add rules around that, which is common in criminal codes elsewhere in the country.

Members of the committee asked questions about and discussed severity being based on harm versus severity being based on *mens rea*; indeterminate sentences with the Parole Board determining release and good behavior reducing sentences; whether the Criminal Code as applied to adults could mirror what the state's Children's Code does and focus on the individual rather than the crime, reflecting the impact of trauma and other factors; how local laws, such as city or county ordinances, factor into these questions; and how sentencing is difficult in New Mexico as so many different statutes govern how sentencing works, and that it feels like New Mexico uses structured sentencing to do the work of how an offense should be defined.

V. Next Meeting. The committee scheduled its next meeting for 10:00 a.m., July 29, 2021. Chair Pacheco informed the committee that she has been discussing the parameters of the task of updating or revising the Criminal Code with committee members and legislators, and most of the focus of those conversations has been on sentencing. NMSC Deputy Director Douglas Carver noted that the committee's next meeting

would hear a report on results of the survey that was being distributed to criminal justice practitioners and other interested parties in the state, and the meeting following that was the one that would start to settle on questions of the scope of work for the committee. Members of the committee agreed that the survey responses would help to guide the possible scope of the committee's efforts. Members also expressed concern that this undertaking would take more than the year that seems allotted to it.

VIII. Adjourn. The meeting adjourned at 11:30 a.m.