

**MINUTES
of the
FIFTH MEETING
of the
COURTS, CORRECTIONS AND JUSTICE COMMITTEE**

**October 20-22, 2008
Room 307, State Capitol
Santa Fe**

The fifth meeting of the Courts, Corrections and Justice Committee was called to order by Senator Cisco McSorley, co-chair, at approximately 10:25 a.m. on Monday, October 22, 2008, in Room 307 of the State Capitol in Santa Fe, New Mexico.

Present

Sen. Cisco McSorley, Co-Chair
Rep. Al Park, Co-Chair
Rep. Thomas A. Anderson
Rep. Joseph Cervantes
Rep. Gail Chasey
Rep. Antonio "Moe" Maestas
Sen. Richard C. Martinez
Sen. Lidio G. Rainaldi
Rep. William "Bill" R. Rehm
Rep. Peter Wirth
Rep. Eric A. Youngberg (Oct. 21-22)

Absent

Sen. Rod Adair
Sen. Clinton D. Harden, Jr.
Sen. Carroll H. Leavell

Advisory

Rep. Elias Barela (Oct. 20-21)
Rep. Daniel R. Foley (Oct. 21)
Sen. Linda M. Lopez (Oct. 20)
Rep. W. Ken Martinez (Oct. 20-21)
Rep. Jane E. Powdrell-Culbert
Rep. Sheryl Williams Stapleton
Rep. Mimi Stewart

Sen. Kent L. Cravens
Sen. Mary Jane M. Garcia
Sen. John T.L. Grubestic
Sen. Gay G. Kernan
Sen. William H. Payne
Sen. John C. Ryan
Sen. Michael S. Sanchez

Guest Legislators

Rep. Ernest H. Chavez
Rep. Roberto "Bobby" J. Gonzales (Oct. 20)
Rep. James Roger Madalena (Oct. 20)
Rep. Rick Miera (Oct. 20)
Rep. Gloria C. Vaughn (Oct. 20-21)

(Attendance dates are noted for members not present for the entire meeting.)

Staff

Maha Khoury
Aldis Philipbar

Guests

The guest list is in the original meeting file.

Monday, October 20**Understanding Sex Crimes and Disorders for Policymakers**

Fred S. Berlin, M.D., Ph.D., director, National Institute for the Study, Prevention and Treatment of Sexual Trauma, and associate professor, Johns Hopkins University School of Medicine, said that sex offenders tend to be considered one homogeneous group. He said that he approaches the issue from a mental health standpoint, but the law defines individuals as sex offenders because they behaved in a certain way. He said the first question to ask is: "Is there a psychological disorder present?" and the second question is: "Is that disorder affecting sexual behavior?". Dr. Berlin said that some non-sexually disordered offenders commit sex offenses, but they are not any more likely to recidivate than other criminals who committed non-sexual offenses. He said that the mentally retarded also sometimes commit sex offenses. There is a limited availability of appropriate sex partners for the mentally retarded due to their mental age. He said that they are not pedophiles, but they need help for the safety of communities. He said that very few recidivate. Dr. Berlin said that zoning issues sometimes make situations worse by adding stress and making it harder for sex offenders to participate in the community.

Dr. Berlin then focused on how people differ sexually. He said that people differ in their sexual behavior, partners, intensity and attitudes about their own desires. Behaviors include transvestism, exhibitionism, sexual masochism and sexual sadism. People can be attracted to the opposite sex (heterosexual), same sex (homosexual), animals (zoophilia), dead bodies (necrophelia) and children (pedophilia). He said that not everyone who commits a sex act against a child is a pedophile. Pedophiles are sexually attracted to pre-pubescent children. Pedophiles can be divided into different groups by gender attraction (male, female or both), whether the pedophile is exclusively attracted to children or is attracted to both children and adults. He added that exclusive homosexual pedophilia does not equal gay because the individual is not attracted to adult males. However, he stressed that other personality traits (kindness, cruelty, etc.) cannot be determined with a sex offense label and must be evaluated separately.

Dr. Berlin addressed the development of pedophilia and distinguished personal character, mental disorders and sexual urges. He emphasized that it is not a voluntary choice; however, it is the responsibility of people with this affliction to control their urges, and they need community support. He said that sexual abuse, especially of males, is a contributing factor. However, he stressed that a majority of children go on to lead productive lives.

Dr. Berlin then discussed treatment options. He said that treatment must be a collaborative effort and that group therapy, including therapeutic confrontation, therapeutic support and relapse prevention, is important. He said that not enough is known about the biology of pedophilia to cure it; however, enough is known about the intensity of sexual desire that is driven by testosterone. He emphasized that it is not necessary or effective to put a person through unnecessary surgery (e.g., removal of testes) when a monthly injection can lower testosterone levels. Dr. Berlin said that legislation should allow access to medication for those who need it and want it, but it should not be mandatory.

Dr. Berlin then answered questions from the committee.

Juvenile Sex Offenders: An Overview of Offense Patterns, Re-Offense Rates and Risk Issues

Michael Caldwell, Ph.D., University of Wisconsin at Madison, said that juvenile recidivism rates do not seem to rise with time. He said that whatever drives adult sex offenders is different than what drives juvenile sex offenders. Dr. Caldwell said that juvenile sex offenders have low adult sexual recidivism rates that are similar to non-sex offending delinquents. He said that juvenile sex offenders respond well to treatment and that there is no evidence that registration laws reduce re-offending in juveniles. He added that there is some evidence that the Sex Offender Registration and Notification Act (SORNA) may target lower-risk juveniles and make communities less safe.

Dr. Caldwell answered questions from the committee.

The Federal Adam Walsh Child Protection and Safety Act: Issues and Perspectives

Randall Cherry, general counsel, Sex Offender Management Board, gave a brief review of the Adam Walsh Act, which creates a three-tier national sex offender registry operated by the FBI. He said that states do not have to adopt all three tiers, but New Mexico is largely compliant with the tier system. Mr. Cherry said that tribes must maintain registries or the responsibility falls to the state. He said that all New Mexico tribes have opted to have their own registry. Mr. Cherry added that the Adam Walsh Act shortens the community notification and registration time from 10 days to three days, but the notification can be web-based. The Adam Walsh Act also expands the required information to be included on the registration web site. There is also a retroactive component to the act that requires offenders convicted of any new crime to register for past sex crimes. Mr. Cherry said that the act requires any juvenile over 14 convicted of criminal sexual penetration to be registered for life, but the offender may appeal after 25 years if no new offense has been committed. Mr. Cherry added that the compliance date for the Adam Walsh Act is July 2009, that states can seek extensions and that, currently, no states are in compliance.

David Schmidt, director, New Mexico Council on Crime and Delinquency, and chair-elect, National Coalition on Juvenile Justice, said that the Adam Walsh Act mandates that children be treated as small adults and it is offense-based rather than offender- or risk-based. Mr. Schmidt said that juveniles are not fully developed until age 25 and that there is a lack of intent in juvenile sex offenders. He said that they are very amenable to treatment. He noted that there are enormous collateral consequences associated with registering juvenile sex offenders (e.g., lack of employment, education, etc.) and enormous costs associated with the implementation of the registry. Mr. Schmidt cited Virginia, saying that the state estimates implementation will cost \$12 million. He said that some counties in New Mexico have only one sheriff who will have to handle everything. He added that there is an ethical issue associated with retroactivity, especially with regards to plea bargains. He said that judges will not find juveniles guilty to avoid registration (e.g., rape becomes battery), but then the juvenile will not be eligible for treatment. Mr. Schmidt urged the state to request more time and not do anything with the Adam Walsh Act this year. He said that the act needs another year of study, and he urged the attorney general to issue a legal opinion on all aspects of the Adam Walsh Act, especially the retroactivity portion.

John Wheeler, crime policy advisor to the governor, said that the executive is exploring compliance with the Adam Walsh Act. He said that the first goal should be to prevent victimization, and he reminded the committee that for every juvenile offender, there is a victim. He said that the focus should be on protecting the victim. Mr. Wheeler said that the Adam Walsh Act does not create criminals because the crime was already committed. He said that the New Mexico Children's Code has been heralded as a national model, but that some have said that the Adam Walsh Act is not in compliance with the Children's Code. Mr. Wheeler suggested that perhaps the Children's Code should be changed. He also said that he is aware of the burden on the system, but that maybe the system should be geared in that direction. The state has an interest in helping the offender, but also in helping the victim. He said that New Mexico will seek an extension, but that the state will have to show an attempt to comply.

The panel then answered questions from the committee.

New Mexico Corrections Department's Policies on Sex Offender Supervision; Update on GPS Monitoring

Charlene Knipfing, director, Probation and Parole Division, New Mexico Corrections Department (NMCD), said that the Probation and Parole Division walks a fine line between public safety and rehabilitating sex offenders. Gary Carson, region manager, District II Special Programs, Probation and Parole Division, NMCD, said that the NMCD is bound by state statutes and SORNA. Mr. Carson discussed the containment model used with sex offender supervision, which includes motivational interviewing. He said that a lot of field work is done, but that the NMCD has limited funding to carry out the types of programs discussed by Dr. Berlin. Mr. Carson added that the NMCD has a behavioral contract, and it discusses areas that need to be worked on with the offender. He said that the NMCD also monitors residency restrictions and uses state-of-the-art techniques in supervision. Jeremiah Anibabo said that the NMCD is currently mandated to provide real-time GPS monitoring on all sex offenders paroled after 1995.

He said that active GPS monitoring costs \$8.00 to \$10.00 per day per offender, and passive monitoring costs \$4.00 to \$5.00 per day per offender. Mr. Anibabo said that GPS monitoring restricts the offender's ability to make contact with the victim and helps with compliance. He added that the community is supportive of the program. Ms. Knipfing reiterated that the Probation and Parole Division's biggest challenge is to provide public safety while reintegrating sex offenders into the community. She said that the division has a 25 percent officer turnover rate, and that it is forced to err on the side of caution.

Issues with NMCD's Supervision of Sex Offenders

Kraig Vandenberg, director, special programs, Fifth Judicial District Attorney's Office, said that he has no problem with the Probation and Parole Division's policies, but that there needs to be some kind of classification system. He said that the Probation and Parole Division classifies all sex offenders as predators, and that he hopes to present the human aspect of sex offenders. He said that there are a number of people seeking direction about treatment for their friends or family members who are sex offenders and that there has been some confusion as to who initiates the two-and-a-half-year and five-year reviews: the NMCD or the lawyer for the sex offender. Mr. Vandenberg said that supervision levels changed drastically after May and that the concerned parties contacted the NMCD, but were never given any guidance. Mr. Vandenberg then read two letters that he had received from concerned individuals. He also said that the NMCD has a risk/needs assessment that should be applied. In response, Ms. Knipfing said that risk/needs assessments for sex offenders with previous offenses are only performed in Albuquerque at a cost of \$1,500 each. She said that the NMCD does not have the funding to provide those assessments to everyone, but that it would be beneficial. Mr. Vandenberg added that current law says the court can make special exceptions upon sentencing. Mr. Cherry clarified that the two-and-a-half-year and five-year reviews determine whether supervision should continue.

Nancy Hewitt, Public Defender Department, discussed some problems that have come up in the Second Judicial District. She said that probation officers were told that children had to be removed from the homes of individuals with previous sex offenses, even though they are not currently on probation for that offense. She gave examples of problems and confusion over policies.

Ms. Hewitt and Mr. Vandenberg then answered questions from the committee.

Proposed Legislation: Require Persons Convicted of Aggravated Stalking of a Person Under 16 to Register as Sex Offenders (Bill Draft #1)

Representative Jimmie C. Hall introduced James and Betsy Gilman, whose daughter was the inspiration for the bill. Mr. Gilman said that their 13 year-old daughter was working at their law firm when their security guard began stalking her. Their daughter, now 18, has suffered psychological trauma and has continuing issues. He said that aggravated stalkers are sex offenders who are under the radar or who have not yet evolved into more serious criminals. He said that they have a big impact on their victims. In their case, Judge Blackmer sentenced the stalker to four years of probation. He said that by fashioning appropriate sanctions, society's

needs can be met, whether they are rehabilitation, punishment, etc. Mr. Gilman said that stalking offenders should have limited access to society, especially to their victims, and that it is possible to keep these predicate acts from evolving into more serious criminal offenses. Mrs. Gilman explained that Judge Blackmer chose probation because it guaranteed that the courts would have jurisdiction over the offender for four years, whereas with jail time, the offender could be out after one year.

Mr. Cherry said that the biggest concern of the New Mexico Sentencing Commission (NMSC) is the large net that this bill casts to catch a very small population. Mr. Cherry said that this is more of a sanctioning issue than a registry issue, and that he is concerned with diluting the registry.

Dr. Berlin added that there are no studies of how many stalkers go on to commit sex offenses, but sexual offenders often stalk prior to committing crimes to establish victims' patterns.

The panel then answered questions from the committee.

Public Comment

Ana Gabrielitis, attorney, Juvenile Division, Public Defender Department, said that she was there as a member of the public to discourage the legislature from adopting the registration requirements for juveniles in the Adam Walsh Act. Melissa Hill, New Mexico Criminal Defense Lawyers, encouraged a move from offense-based registration to risk-based registration.

There being no further business, the committee recessed at 4:45 p.m.

Tuesday, October 21

Uniform Law Commission: Proposed Legislation (Bill Drafts #2-7)

John P. Burton, uniform law commissioner, walked the committee through the Uniform Law Commission bill drafts. One draft makes some technical amendments to the Uniform Revised Limited Partnership Act and another clarifies the application of an advance health-care directive in the Jonathan Spradling Uniform Anatomical Gift Act. A third bill makes technical amendments to the Uniform Commercial Code and the Uniform Residential Mortgage Satisfaction Act to provide mechanisms for title companies to give notice to lenders asking for release by a certain date. Mr. Burton said that amendments to the Uniform Assignment of Rents Act cleans up an old technicality in real estate law, which he called the most outdated law on the books, and the Uniform Money Services Act amendments deal with money laundering issues unique to non-banking and non-depository institutions.

Enforcement of the Dee Johnson Clean Indoor Air Act

Nathan Bush, government relations director, New Mexico Cancer Society, discussed how a cigar bar is defined under the act and said that the act is not being enforced in Albuquerque and that there has been no training on enforcement. He said that the Department of Health (DOH) is

currently considering four applications for cigar bars, but the cancer society does not consider any to be actual cigar bars. He added that no applications for cigar bar status have been turned down.

Pete Dinelli, chief public safety officer, City of Albuquerque, said that he takes exception to the statement that the city has not been enforcing the act. Mr. Dinelli gave examples of citations issued, but also said that officers cannot determine whether 10 percent of sales is from cigars because they are not auditors. He said that Albuquerque has a city ordinance that reflects the state law. Mr. Dinelli said that enforcement is difficult because the law requires the fire marshal and police to enforce the law, not the Department of Environment or the DOH. He said that under the law, personnel can only issue citations. Mr. Dinelli said that the law says nothing as to whether the city has the authority to close the establishment.

Robert Ortega, fire chief, City of Albuquerque, said that the fire department has taken a proactive approach. He said that, originally, eight bars wanted cigar bar status, but after meeting with the owner to discuss the requirements, four backed out. He said that the fire department will continue to be proactive. Andrew Chavez, fire marshal, City of Albuquerque, said that the fire department has had some difficulties in that the statute imposes an unfunded mandate because many bars operate after hours and the fire department has to use overtime for enforcement. However, he said the fire department is working to remedy the situation. Mr. Chavez said the fire department has followed up on every complaint and that it is actively enforcing the law and ordinance.

Mr. Dinelli said that fire marshals are often met with hostility from business owners and that citations are often viewed like traffic tickets. He said that more is needed than what is in the law for adequate enforcement. He called it a matter of practicality.

Jessica Sutton, deputy secretary, DOH, said that a cigar bar certification is not the equivalent of a license and that the DOH is not the enforcer of the act. She discussed the requirements for certification and said that the DOH has only granted an application to imbibe. Ms. Sutton added that nowhere in the statute does it specify that the DOH should be issuing certifications.

The panel then answered questions from the committee.

Repeal Employment of Women Statutes (Bill Draft #8)

Whitney Warner, vice chair, Workplace Issues Committee, Association of Commerce and Industry of New Mexico, requested a repeal of the employment of women statutes located in Article 5 of Chapter 50 of the NMSA 1978. She said that the statutes are grossly outdated, place stringent limitations on the number of hours women can work in specified types of employment and run afoul of the constitution. She said that though the statutes are not enforceable, the continued presence of the statutes on the books has been unfortunately overlooked and should be remedied by repeal.

New Mexico Sentencing Commission:

*** Report on Senate Memorial 47 (2008)**

*** Proposed Sentencing Legislation (Bill Draft #9)**

*** Gender-Specific Probation and Parole**

Tony Ortiz, deputy director, NMSC, said that the proposed bill would remedy a statute that was made unconstitutional by supreme court decisions. The bill would require a finding by a jury before a sentence can be enhanced due to aggravating circumstances surrounding the offense or offender. He said that the judge would still have final say in the enhanced sentence that could be up to an extra one-third of the original sentence. Mr. Ortiz noted that the attorney general suggests extending the range of sentences and allowing a judge more discretion. However, Mr. Ortiz said that Tennessee found that, over time, longer sentences were being imposed on low-level crimes.

Linda Freeman, research scientist, NMSC, conducted a survey on gender-specific probation and parole issues. She emphasized that the NMSC tried to be as independent from the NMCD as possible. Ms. Freeman said that the NMSC sent out 2,500 surveys and had an 84.5 percent delivery rate. It had a 25 percent response rate, which was similar across the region. She said the NMSC found that the top needs among the women who responded were managing stress, improving relationships and assistance in finding a job. It also found that most women under the current system were supervised by female officers, and they had positive responses about their probation officers.

Mike Hall, executive director, NMSC, discussed SM 47, which requires the NMSC to measure the fiscal impact of criminal justice legislation. He said that the NMSC devised a budget to see how much it would cost to do analysis on all bills. Mr. Hall said it would need a recurring sum of around \$176,000 to provide fiscal impact reports for all criminal justice legislation.

The panel then answered questions from the committee.

Recommended Changes for Adult Guardianship (Bill Drafts #10-11)

Greg McKinzie, president, New Mexico Guardianship Association, defined "guardianship" as having control over another person's health and "conservatorship" as having control over another person's money. He said that guardians and conservators are supposed to file annual reports with the court, but there is no evidence that the court actually reviews the reports, which can lead to embezzlement and abuse. Mr. McKinzie said a task force was created to come up with short- and long-term recommendations to solve the lack of monitoring problem, and the hope is to develop a process in Albuquerque that can be used statewide. He said that his organization is revising the annual report form and that the first guardianship report is now due in 90 days. Jim Jackson, executive director, Protection and Advocacy, said that his organization is proposing to change the term "ward" to "protected person" in the statutes.

Pat Putnam, executive director, Developmental Disabilities Planning Council, said that many families do not even know they are supposed to file annual reports. He said they receive

no training upon becoming a guardian. He requested a recurring appropriation of \$148,700 for two staffers to provide training and field questions and a one-time appropriation of \$200,000 to develop a web site so families can access information.

Legislative Proposals from the Attorney General (Bill Drafts #12-26)

Gary King, attorney general, went over the bill drafts and answered questions on the bills from the committee. He said that draft 12 gives the Attorney General's Office primary jurisdiction to prosecute corruption charges against statewide public officials. Draft 13 limits contributions by persons and political committees to candidates and political committees, and draft 14 prohibits public employers from retaliating against public employees. Attorney General King said that draft 15 creates an independent ethics commission to issue ethical opinions and refer any ethical concerns to the appropriate agency. Draft 16 includes local governments in the Governmental Conduct Act, and draft 17 includes judges elected on a non-statewide basis under the Voter Action Act. Draft 18 prohibits a former legislator from taking a position as a lobbyist for one year after the end of the term for which the legislator was elected or appointed, and draft 19 prohibits the consumption of alcohol by minors. Draft 20 prohibits driving under the influence of a combination of alcohol and drugs, draft 21 prohibits the manufacture, sale and distribution of malt beverages containing stimulants and draft 22 provides that a felony DUI conviction shall be used in the same manner as any other felony when sentencing a habitual offender. Attorney General King then went over some of the changes in the Family Violence Protection Act in draft 23 and the uniform law in draft 24 allowing registration and enforcement of foreign domestic violence protection orders. Draft 25 requires the district attorney to petition for an HIV test on a person charged with or convicted of certain sex offenses upon the request of the victim, and draft 26 prohibits the intimidation of or retaliation against a judge. Attorney General King also said that he will propose other bills not yet drafted, including two human trafficking bills, legislation to regulate alcohol advertising near youth areas and sentencing legislation.

On a motion made, seconded and unanimously approved, the minutes of the August 4-6 and the August 27-28 meetings were adopted.

There being no further business, the committee recessed at 5:15 p.m.

Wednesday, October 22

Report from the Judiciary:

***Unified Budget**

***Allocation of Resources**

***Proposed Legislation (Bill Drafts #27-38)**

Edward L. Chavez, chief justice, New Mexico Supreme Court, said that when there is an economic downturn, crime goes up and the work of the judiciary increases. He said that the judiciary does not have the luxury of turning people away, but justice does get delayed. Chief Justice Chavez added that he realizes this is a difficult time, but hopes the legislature can find a way to help.

Leo Romero, dean, University of New Mexico School of Law, encouraged a four percent increase in salaries of all permanent judicial employees and an additional .5 percent increase if executive branch employees receive an increase of at least four percent. He noted that the judiciary received only a 2.4 percent increase last year and the executive branch received 2.9 percent. Dean Romero also suggested the adoption of the Judicial Compensation Commission's recommendation to raise salaries of justices and judges.

James J. Wechsler, judge, New Mexico Court of Appeals, reviewed the budget with the committee. He noted the effectiveness of drug courts and the success the judiciary has had with mental health courts. He said that the judiciary would be requesting funding for drug and mental health courts and for additional judgeships. Judge Wechsler also presented the committee with a chart of performance measures requested by the legislature as part of court funding.

Arthur Pepin, director, Administrative Office of the Courts (AOC), discussed the judiciary's statewide initiatives and reviewed bill drafts #27-38 with the committee. He said that draft 27 would appropriate a little less than \$4 million for 10 judges and related staff. Draft 28 would fund and expand drug courts, and draft 29 would fund and expand mental health courts. Mr. Pepin said draft 30 would clean up language for access and supervised visitation programs, and draft 31 would reduce the number of times the jury database is updated to twice a year. Draft 32 authorizes fees for e-filing services, draft 33 requires that judges and justices appointed by the Judicial Nominating Commission serve at least one year before running for office and draft 34 makes an appropriation to the Sixth Judicial District to implement and support juvenile and adult restorative justice services. Draft 35 makes an appropriation to the Eleventh Judicial District Court for a pretrial services program, and draft 36 makes an appropriation to provide judges with comprehensive background information about criminal defendants posting or responding to criminal summonses in Bernalillo County. He said that draft 37 increases protection for judges by providing for a substitute address, and draft 38 exempts building and security plans, video camera security footage and personal identifying information from public inspection.

Chief Justice Chavez added that the judiciary has tried to pare down the budget. He said he understands what is going on with the economy, but that justice should not be rationed.

A discussion ensued between committee members and members of the panel.

Funding for Civil Legal Services (Bill Draft #39)

Stuart Bluestone, executive director, New Mexico Legal Aid, said that there is a need for continued and increased funding for legal services for the poor. He said that the poor need help more than ever due to the economy. Mr. Bluestone introduced two guests who had received Legal Aid services.

John Arango, chair, Civil Legal Services Commission, said the supreme court appointed the Access to Justice Commission to make plans to deliver legal services to the poor. He said that about 17,000 people are turned away from Legal Aid each year due to a lack of resources. Mr. Arango said that the typical services performed by Legal Aid are short, such as a letter to the opposing party. He said that the infrastructure is paid for by other entities so appropriations go directly to services, and he added that the money from other sources has been relatively flat for the past 10 years. He said that the commission has been helping in foreclosure cases and that its goal is to have an office in every district.

Bill Strouse, executive director, New Mexico Legal Aid, said that it was able to open an office in Socorro and it is providing services in Otero County. He said that this is the first time that Legal Aid has been fully staffed and that the big difference has been the appropriation from the legislature to make salaries more attractive. Mr. Strouse added that the demand for services is going up all the time.

Mr. Arango discussed a new supreme court rule requiring lawyers to use interest-bearing trust accounts. The interest earned goes to civil legal services. He said it is estimated that interest will provide at least \$1 million a year in funding, but an additional \$4 million is still needed.

Public Comment

Liz McGrath, Pegasus Legal Services for Children, said that there is a huge effort being made to improve and expand civil legal services.

There being no further business, the committee adjourned at 12:30 p.m.