

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

CRIMINAL JUSTICE COMMITTEE

Friday, December 10, 1999
Harvest Room, State Capitol
Bismarck, North Dakota

Representative John Mahoney, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives John Mahoney, Curtis E. Brekke, Ron Carlisle, Rachael Disrud, Bruce A. Eckre, Jon Martinson, Elwood Thorpe, John M. Warner; Senators Stanley W. Lyson, Wayne Stenehjem, Darlene Watne

Members absent: Representatives G. Jane Gunter, Gerald O. Sveen; Senator Carolyn Nelson

Others present: See attached appendix

It was moved by Senator Stenehjem, seconded by Senator Lyson, and carried on a voice vote that the minutes of the November 4, 1999, meeting be approved as distributed.

SEXUAL OFFENDER STUDY

Chairman Mahoney called on Ms. Jean Mullen, Assistant Attorney General, Attorney General's office, for comments concerning the state's civil commitment of sexual predators. Ms. Mullen said North Dakota's civil commitment of sexually dangerous predators law, which is codified as North Dakota Century Code (NDCC) Chapter 25-03.3, was passed in 1997. She said the law establishes a judicial procedure for the commitment of sexually dangerous predators which is similar to the procedure for the commitment of mentally ill individuals. She said for commitment to occur, the state's attorney, as petitioner, must show the individual has engaged in sexually predatory conduct and has a mental condition that makes the individual likely to engage in further acts of sexually predatory conduct, making the individual a danger to the physical or mental health or safety of others. She said the commitment is to the care, custody, and control of the executive director of the Department of Human Services for treatment in the least restrictive environment. She said the commitment continues until the individual is safe to be at large and has received the maximum benefit of treatment. She said a statute similar to the North Dakota law was challenged on substantive due process, double jeopardy, and ex post facto grounds in 1997 before the United States Supreme Court and was found to be constitutional. She said the North Dakota statute was reviewed by the North Dakota Supreme Court this year. The court, she said, addressed the issue of double jeopardy and found the statute constitutional.

Ms. Mullen said to date there have been five commitments using this law. As a result of these five cases, she said, the Attorney General's office has discovered some areas where minor adjustments could be made to the statute. She discussed the following areas of concern and made several recommendations including:

- Amend the definition of sexually dangerous individual in NDCC Section 25-03.3-01 to allow for civil commitment to the Developmental Center's sexual treatment center for mentally retarded individuals.
- Broaden the venue provisions under NDCC Section 25-03.3-02 to allow a commitment proceeding to be held in any appropriate county in which the respondent has had or intends to have a presence. The change is recommended as a result of venue issues that have arisen when an inmate who is due to be released and who has been referred by the Penitentiary states an intent to reside in a different county from the county in which the inmate resided at the time of entering the Penitentiary.
- Because of the lack of treatment facilities in small communities, amend the law to allow for the 72 hours of detention before the probable cause hearing under NDCC Section 25-03.3-08 and allow the detention at correctional facilities as well as treatment facilities.
- Address issues regarding open and closed proceedings under NDCC Sections 25-03.3-11 and 25-03.3-13.
- Increase the evaluation period under NDCC Section 25-03.3-13 from 30 days to 60 days because 30 days is not enough time to complete the required evaluations.
- Require the parties to submit experts' reports under NDCC Section 25-03.3-13 to each other.
- Address issues that have arisen as a result of commitments from plea bargains.
- A need to include more information in the referral letter the Penitentiary sends to state's attorneys for civil commitment of a prisoner who is about to be released.

- Provide for a transitional process not now in current law for releasing individuals back into the community.

Ms. Mullen submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Carlisle, Ms. Mullen said there is not a cure for a person who is determined to be a sexual predator; however, there are treatment programs. She said the programs involve intensive treatment and continuous followup after treatment. Once a person is committed, she said, the goal is to eventually transition that person back into the community.

In response to a question from Senator Stenehjem, Ms. Mullen said there are privacy issues to consider regarding whether the proceedings should be open or closed. Regarding the plea bargaining issue, she said, the intent of the original legislation was to use the statute to commit a person who could not be prosecuted or to commit a person after serving a sentence.

Chairman Mahoney called on Mr. Birch Burdick, State's Attorney, Cass County, for comments concerning the civil commitment statute. Mr. Burdick said the referral letter he receives from the Penitentiary does not include enough information. He said the letter should include an analysis of the inmate's behavior, record, treatment, and psychological evaluation. He said state's attorneys need more information to make a determination as to whether a commitment petition should be prepared.

In response to a question from Senator Watne, Ms. Elaine Little, Director, Department of Corrections and Rehabilitation, said before a letter of referral is sent to a state's attorney, the inmate being released goes through an evaluation process. If the evaluation indicates that the inmate meets certain criteria and reaches a certain point total, she said, the referral letter is sent. Ms. Mullen said the Penitentiary conducts a thorough evaluation; however, she would recommend the statute be amended to require the Penitentiary to include certain information in the referral letter.

In response to a question from Representative Carlisle, Ms. Mullen said only about 10 to 15 percent of the inmates incarcerated for sexual offenses would fall within the civil commitment statute. She said the remaining 85 to 90 percent do not have a mental disorder as is required for civil commitment under the statute.

Chairman Mahoney recessed the meeting for a tour of the State Penitentiary facilities and reconvened the meeting at 1:30 p.m.

Chairman Mahoney called on Mr. Robert Bennett, Assistant Attorney General, Attorney General's office, for comments concerning a memorandum prepared for the committee regarding sexual offense age differential statutes. Mr. Bennett said there appears to be no uniformity in how each state applies age differentials to the offense definitions, punishment or grading limits, and the application of affirmative defenses. He

said the information in the memorandum is a representative sample of the manner in which states have applied age differentials between a victim and a sexual offense defendant. A copy of Mr. Bennett's memorandum is on file in the Legislative Council office.

Chairman Mahoney called on Mr. Ladd Erickson, Assistant State's Attorney, Morton County, for comments concerning the sexual offender study. Mr. Erickson said he is working on a proposal to clarify the age differential lines. He said the proposal would essentially leave the lines in place but would include an affirmative defense that would apply to all NDCC Chapter 12.1-20 offenses.

Chairman Mahoney said state's attorneys are in the best position to look at the issues discussed by Mr. Erickson, and the committee would welcome any suggestions he and other state's attorneys may have regarding the statutes. Mr. Erickson said he would present his proposals to the committee at its next meeting.

In response to a question from Senator Stenehjem, Mr. Erickson said concerns have been raised regarding the state's indecent exposure statute. He said when the act is done as a sexual act and not as a prank, the penalty should be a Class B misdemeanor, and the offender should be required to register as a sexual offender.

CORRECTIONS SYSTEM STUDY

At the request of Chairman Mahoney, Senator Lyson presented information regarding the tour of the TransCor America, Inc., (TransCor) facilities in Nashville. Senator Lyson said he and Representatives Eckre, Disrud, and Mahoney toured the facilities. As a result of the escape of Mr. Kyle Bell, he said, TransCor has changed some of its training policies. He said TransCor has increased its training requirements from 40 hours to 80 hours. He said TransCor is planning to install alarms on the emergency hatches on the ceiling of its buses. He said the legislators were also told that black boxes have been ordered and will be used in certain situations. He said TransCor informed the legislators that TransCor offers "nonstop" or "direct" transporting of prisoners for \$1,500. He said the TransCor organization is a well-run company, but a company is only as good as its employees. When prisoners are transported, he said, the company does not designate certain places to stop for fuel but rather requires the driver to refuel when the fuel gauge reaches a certain point. He said the escape was the result of a number of broken company policies.

Representative Disrud said the person in charge of the transport was negligent in his duties.

Chairman Mahoney said the trip was worthwhile. He said the committee has a statutory duty to review the issues raised by the escape. He said TransCor assured the legislators the company, if necessary, will bear all liability and costs of defense for the state. He said TransCor said it would work with United States

Senator Byron Dorgan on his legislation regarding the regulation of interstate transportation of prisoners.

Chairman Mahoney said the internal review and report being prepared by the Governor's office would not be available until the week of December 20. He said he would like the issues related to Mr. Bell's escape to remain bipartisan and nonpolitical.

In response to a question from Senator Watne, Ms. Little said the \$50,000 reward offered for the return of Mr. Bell includes \$10,000 from TransCor and \$40,000 from the state. She said the \$40,000 would come out of the Department of Corrections and Rehabilitation's budget.

Senator Stenehjem said if the state does pay the reward, an attempt should be made to recover that amount from TransCor.

Representative Eckre said TransCor said it was a business decision to assume liability and pay for costs of prosecution.

At the request of Chairman Mahoney, Ms. Little presented a copy of the agreement between the state and TransCor for the transporting of Mr. Bell. A copy of the agreement is on file in the Legislative Council office. Ms. Little said the investigation is continuing, but there is nothing new to report. She said none of the tips received as a result of the *America's Most Wanted* television episode on Mr. Bell materialized. She said the Federal Bureau of Investigation is continuing to follow up on tips it receives.

In response to a question from Representative Warner, Ms. Little said it is not clear at this point as to which state could charge Mr. Bell with escape charges, but it would most likely be New Mexico.

In response to a question from Representative Disrud, Ms. Little said the state and local authorities and the media in New Mexico have been very responsive and cooperative.

In response to a question from Representative Mahoney, Ms. Little said the department is transporting its own prisoners since Mr. Bell's escape; however, she said it is very expensive for the department, and it requires the department to use its most well-trained officers. She said using the United States Marshal's Service to transport prisoners is another option.

In response to a question from Senator Stenehjem, Ms. Little said she would provide to the committee information on who was considered to have custody of Mr. Bell at the time of escape.

In response to a question from Representative Disrud, Ms. Little said the department has changed its policy regarding prisoner transporting attire, and it now only transports prisoners in orange jumpsuits.

In response to a question from Representative Mahoney, Ms. Little said the Wisconsin lead on Mr. Bell was never substantiated.

In response to a question from Senator Watne, Ms. Little said only high-profile case prisoners are given new names. She said the name change is done for security reasons.

At the request of Chairman Mahoney, committee counsel presented a memorandum entitled *Interstate Transporting of Prisoners - Statutes of Other States*. Committee counsel said three states--Colorado, Iowa, and Florida--have statutes regarding the interstate transporting of prisoners. She said the federal legislation on the topic introduced by Senator Dorgan has been referred to the Senate Committee on the Judiciary.

COMMITTEE DISCUSSION

Chairman Mahoney suggested the committee wait to proceed on the age differentials issue until Mr. Erickson has presented his proposal to the committee at its next meeting.

Senator Lyson said the committee should receive information on the assessment center in Jamestown and the problems that are occurring with persons being released from the center.

Chairman Mahoney said the State's Attorneys Association will be meeting January 19-21, 2000, and will be discussing the prisoner release issues at that meeting. He said Ms. Little will be attending that meeting and will be able to discuss this issue with the committee at its next meeting. He said the committee should also receive information from the state's attorneys and Ms. Little on the reasons for the state's decreasing crime rate but increasing prison population.

Chairman Mahoney said a letter has been sent to all individual state's attorneys as well as various law enforcement organizations on suggestions regarding the classification of criminal offenses. He said state's attorneys may want to discuss that issue at its January meeting.

It was moved by Senator Stenehjem, seconded by Representative Eckre, and carried on a voice vote that the meeting be adjourned.

Chairman Mahoney adjourned the meeting at 3:00 p.m.

Vonette J. Richter
Committee Counsel

ATTACH:1