

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

CRIMINAL JUSTICE COMMITTEE

Thursday, March 2, 2000
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, G. Jane Gunter, Jon Martinson, Gerald O. Sveen, Elwood Thorpe, John M. Warner; Senators Stanley W. Lyson, Wayne Stenehjem, Darlene Watne

Member absent: Senator Carolyn Nelson

Others present: See attached appendix

It was moved by Senator Stenehjem, seconded by Representative Eckre, and carried on a voice vote that the minutes of the December 10, 1999, meeting be approved.

CORRECTIONAL SYSTEM STUDY

Kyle Bell Investigation

Chairman Mahoney called on Mr. William G. Goetz, Chief of Staff, Governor's office, for testimony concerning the findings of the internal review of the Kyle Bell investigation. Mr. Goetz said a very thorough investigation was conducted regarding the matters relating to the Kyle Bell escape. He said the sources of information used in the investigation included the Department of Corrections and Rehabilitation (DOCR), the National Institute of Corrections, the Burleigh County Sheriff's office, TransCor America, Inc. (TransCor), the Risk Management Division of the Office of Management and Budget, the James River Correctional Center, the Cass County Sheriff's office, and the Morton County Sheriff's office. He said according to the findings of the investigation, a combination of violations of existing policies, complacency, and carelessness on the part of TransCor employees were the direct cause of Mr. Bell's escape on October 13, 1999. He said the investigation also found that secondary causes of the escape were inadequate measures taken by TransCor to ensure compliance with policies and against complacency and carelessness and the lack of a formal contract between DOCR and TransCor to ensure proper communications. He said the existing policies and procedures of DOCR and TransCor are adequate, but opportunities for improvement present themselves as a result of the escape. He said it appears Mr. Bell did most likely have some type of key and paper clips hidden in the heel of his shoe. He said a prisoner on the TransCor

bus stated the key and clips were under the insole in a hole dug into the heel of his shoe. He said Mr. Bell demonstrated a particular interest in having his shoes returned to him while incarcerated prior to his last trip with TransCor.

Mr. Goetz said according to the findings of the investigation, DOCR's policies, rules, and regulations were not found to be lacking. He said in 1996 DOCR began using private prisoner transport companies, principally TransCor, based on research that identified TransCor as being professional, experienced, and the largest of all prisoner transport companies. He said correctional authorities in other states have identified TransCor as the best in the field. He said no fault was found with DOCR's investigation or findings. He said there appears to have been some communication failures between DOCR and TransCor. Specifically, he said, TransCor policy dictates all inmates transported by them are treated as escape risks. He said TransCor policy states that prisoners specifically designated as escape risks by the agency of origin will have black boxes placed over the handcuffs, which preclude unauthorized unlocking, and that prisoners will be transported from point of origin to destination directly. Without the "escape risk" designation, he said, TransCor transports the prisoner in the most cost-effective way, which is often circuitous.

Regarding TransCor, Mr. Goetz said the policies are in place, or in a couple of instances practices are taught in training by TransCor that, if followed, would have precluded Mr. Bell's escape. He said according to the findings of the investigation, the TransCor policies not followed and findings were:

1. The *Standard Operating Procedures* manual setting forth policy for transport of prisoners called for a five-person crew, but a four-person "emergency staffing" crew is permitted. A four-person crew was authorized by a Nashville headquarters supervisor for this trip because one scheduled crew member was unavailable. It is nearly impossible for all posts to be manned continually on a long transport with a four-person crew.
2. Policy dictates that "without exception" a female crew member be present when female prisoners are aboard a transport bus. There were female prisoners on board at all

- times on this trip, but there was never a female crew member. This has nothing to do with Mr. Bell's escape but does demonstrate noncompliance with policy.
3. Procedures to awaken guards when the bus was stopped were not followed.
 4. Prisoner headcounts, which are required by policy on every stop, were not performed on three occasions after Mr. Bell escaped.
 5. Policy requires the use of interconnecting chains linking prisoners by twos be in place and training indicates that high-risk prisoners should be linked to low-risk prisoners. No interlinking chains were used at any time on this trip.
 6. Policy requires that the rear guard must "never leave the post until properly relieved by another agent who is to assume the post." In this case, there was no rear guard posted for several hours both before and after Mr. Bell's escape.
 7. The policy states "constant vigilance during movement of prisoners from vehicles and facilities is mandatory." In this case, there was a period of time when no awake crew member was aboard, and it was then that Mr. Bell escaped.

Mr. Goetz said DOCR has implemented a number of policy changes as a result of the Kyle Bell escape. He said the new policies require that all prisoners must be transported in orange jumpsuits and tennis shoes. He said prisoners are no longer allowed to wear their own shoes. He said DOCR will conduct the highest level search before prisoners leave the Penitentiary, and no personal items, such as clothes, shoes, or medication, will be permitted on the prisoner. He said DOCR will provide the transport company with full written documentation of the prisoner's history, crimes, and escape attempts. He said DOCR will use a formal written contract for the transporting of prisoners. He said there is a need for a "sallyport" for prisoner transfers, and the parking lot situation at the Penitentiary is not conducive to prisoner transports.

Finally, Mr. Goetz addressed the notification protocol in the case of an out-of-state prisoner escape. He said the notification should include the warden or director of DOCR, the Governor's office, the sister state authorities (where the escape occurs), the Highway Patrol, the Bureau of Criminal Investigation (BCI), local authorities, and the media. Mr. Goetz provided a written summary of the investigation and a copy of the full report, which are on file in the Legislative Council office.

In response to a question from Senator Stenehjem, Mr. Goetz said the investigation and review were conducted by W.T. Butcher and Associates and Mr. Winston E. Satron. He said Mr. Bell was not interviewed for this report, and Mr. Bell is not

being prosecuted for the escape. He said he did not know where Mr. Bell is now being held.

In response to a question from Senator Stenehjem, Mr. Robert Harms, Counsel, Governor's office, said according to a recent Attorney General's opinion, the whereabouts of prisoners is confidential information. A copy of the Attorney General's opinion was provided to the committee.

In response to a question from Senator Watne, Mr. Goetz said the costs of recovering Mr. Bell have been determined to be \$102,000, which includes the \$50,000 reward. He said the list of costs have been presented to TransCor, and as of last week, TransCor is continuing to discuss a settlement. He said TransCor is disputing the amount of some of the expenses.

In response to a question from Representative Carlisle, Mr. Goetz said he does not want to minimize any agency's role in the recovery of Mr. Bell. He said there was total involvement of all agencies. He said the agencies involved worked together on a daily basis--night and day--until Mr. Bell was caught. He said the agencies worked toward a common goal and the goal was accomplished.

In response to a question from Representative Mahoney, Mr. Goetz said when an escape occurs, the highest office, the Governor's office, should be notified first. He said there was never any intention to circumvent BCI. He said judgment was being exercised in notifying agencies. He said it was determined there was no need to involve BCI or the United States Marshals Service until the morning following the escape.

In response to a question from Representative Carlisle, Mr. Goetz said Cass County officials were involved in the investigation.

In response to a question from Representative Sveen, Mr. Goetz said TransCor carries a \$50 million liability insurance policy. He said prisoner transports are now being performed by DOCR staff.

In response to a question from Senator Stenehjem, Mr. Goetz said the United States Marshals Service has a "hold harmless" policy for the transporting of prisoners which means the state would be liable for costs related to a prisoner escape. He said the state is insured for these types of transfers.

Revocation Center

Chairman Mahoney called on Ms. Elaine Little, Director, Department of Corrections and Rehabilitation, for testimony concerning the DOCR Revocation Center. Ms. Little said the Revocation Center program was presented to the 1999 Legislative Assembly as one of the programs DOCR would implement as "an alternative to incarceration." She said DOCR presented a program of "alternatives to incarceration" at a cost of \$2 million compared to a cost of \$4.8 million to house the number of inmates that would be diverted from prison by the "alternatives to incarceration" programs. She said the Revocation

Center program was presented as an intense 60-day alcohol and drug treatment and cognitive restructuring program for primarily nonviolent, first-time probation revoked offenders and for some first-time offenders. She said the program is being jointly provided by DOCR, the State Hospital, and the Stutsman County Correction Center and is housed at the Stutsman County Correction Center. She said the goals of the program are to reduce an offender's risk to the community and to reduce the prison reincarceration rate. The program design, she said, is to address not only the offender's addiction problem but also to help change the offender's criminal way of thinking through cognitive restructuring programming.

Ms. Little said during 1999, 113 offenders successfully completed the program. Of the 113 who were successfully discharged from the program to the community, 82.3 percent remain successful in the community and 17.7 percent have been returned to prison for not complying with release conditions. She said during 1999 the program saved 6,512 prison days, which translated into a reduction of 70 prison beds needed by the fourth quarter of 1999. She said the program has been very effective in both cost-savings and reduced incarceration rates of offenders.

Ms. Little said a number of concerns have arisen regarding the program. She said DOCR met with the State's Attorneys Association at their annual meeting in January. She said the meeting was a good exchange of information, and a working group was formed to continue the communication between the department and the state's attorneys. She said the issue of whether the Revocation Center was being used for offenders beyond legislative authorization was discussed. She said the state's attorneys believed the program was approved only for offenders who were about to have their probation revoked, not for offenders who were sentenced to prison. She said DOCR did discuss with the House Appropriations subcommittee the criteria for which offenders would be eligible for the program. She said the criteria included offenders who were sentenced to prison for the first time as well as probation revoked offenders.

Ms. Little also said the criteria for Revocation Center eligibility was discussed. She said state's attorneys were most concerned about offenders who had multiple felonies on their records or who had minimum mandatory drug sentences. She said DOCR acknowledges there were a few offenders selected to participate in the program who were seen as poor choices by the state's attorneys. To resolve the issue, she said a better exchange of information with judges and state's attorneys would help alleviate this concern.

Another concern, Ms. Little said, was notice to state's attorneys of offenders being placed into the program was not being provided. Ms. Little said DOCR now contacts both the state's attorney and the judge involved in an offender's case before placing the offender in the program. She said if a residential

burglary is involved, DOCR will make a victim contact before considering the offender for placement in the program. She also said DOCR staff will now also notify the state's attorney of their decision when DOCR has placed an offender in the Revocation Center.

Ms. Little also discussed a concern for a need to focus more on punishment. She said it was a primary concern of the state's attorneys that offenders were only spending 90 to 120 days in prison before being released into the community. She said the state's attorneys did not believe this to be adequate punishment, especially in some cases when other offenders sentenced to jail at the local level with lesser offenses serve more time in the county jail than a Revocation Center participant spends in prison. To resolve this concern, she said, DOCR is making some changes on a case-by-case basis. He said most offenders will be placed in the Stutsman County Correction Center for 30 days before beginning the program. She said this will give the department the opportunity to begin the cognitive programming before the offender begins the program and will make the cognitive programming available at the local level. She said in cases in which there is an assessed need, offenders will be transitioned to half-way houses from the Revocation Center prior to being placed back into their homes.

Ms. Little said the issue of minimum mandatory sentences being subverted by DOCR and the Parole Board was also raised. She said state's attorneys were concerned about minimum mandatory sentenced drug cases that had been approved by the Parole Board for participation in the program. These cases, she said, which otherwise met the criteria for participation in the program, were flagged by DOCR for the Parole Board's consideration. To address these concerns, she said, DOCR has changed its procedure. She said cases that are minimum mandatory sentences will be reviewed by the Parole Board only when the cases would normally come before the board. Ms. Little submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Stenehjem, Ms. Little said the criteria for eligibility for the Revocation Center program has not changed from what was presented to the legislative committees. She said the name "Revocation Center" may be misleading because the participants include first-time offenders as well as those whose probation has been revoked.

In response to a question from Representative Mahoney, Ms. Little said Mr. Bruce Romanick, Burleigh County Assistant State's Attorney, is the DOCR contact person.

In response to a question from Representative Sveen, Ms. Little said there is a mandatory sentence of at least eight months for certain drug offenses. She said by statute all offenders are sentenced to the custody of DOCR, and the department then makes

the decision as to where the offender should be placed.

In response to a question from Representative Warner, Ms. Little said offenders who complete the program usually return to the supervision of their probation officers. She said probation officers have indicated positive changes in offenders who have completed the program.

In response to a question from Senator Lyson, Ms. Little said every parole violation is reported to the Parole Board. She said if the relapse is because of an addiction problem, the probation officer will make the decision as to whether that person can stay in the community. She also said probation officers are authorized to decide whether the person should be ordered into treatment or if parole should be revoked.

In response to a question from Representative Carlisle, Ms. Little said it is possible that a person will serve considerably less time in the Revocation Center program than the person would if sentenced to the Penitentiary.

In response to a question from Senator Watne, Ms. Little said cognitive programming is a form of treatment designed to change one's criminal way of thinking.

In response to a question from Representative Sveen, Ms. Little said the program is housed at the Stutsman County Correction Center. She said this location was chosen because of its close proximity to the State Hospital.

In response to a question from Representative Disrud, Ms. Little said although it is too early in the program to provide data on the long-term effects of the cognitive programming, it appears there are fewer violations by persons who have gone through the program than those who have not had the programming.

In response to a question from Representative Thorpe, Ms. Little said the goals of the program are to reduce the number of prison beds and to save money. She said to achieve those goals, the result will be earlier release than under traditional incarceration.

In response to a question from Representative Warner, Ms. Little said the programming is done in a group setting, and anyone can be trained to provide cognitive programming. She said funding to expand the use of cognitive programming to county and tribal jails would be helpful.

In response to a question from Representative Sveen, Ms. Little said all offenders are in the Revocation Center program for at least 90 days.

In response to a question from Senator Lyson, Ms. Little said the program has a 30-bed capacity. She said Penitentiary inmates receive alcohol and drug addiction treatment before their release.

In response to a question from Representative Mahoney, Ms. Little said there are two evaluators who make the determination as to who qualifies for the program. She said the recidivism rate for inmates leaving the Penitentiary is 20 to 25 percent. She said

the program will need at least three years before accurate recidivism rates can be compiled for the Revocation Center program.

In response to a question from Representative Warner, Ms. Little said the age of the persons in the program tends to be from 20 to 30 years old.

Chairman Mahoney called on Mr. Bruce Romanick, Burleigh County Assistant State's Attorney, for comments regarding the Revocation Center program. Mr. Romanick said the State's Attorneys Association does not disagree with the program, but there are concerns among the state's attorneys when an offender receives a two- or three-year sentence and is back on the streets after completing a 90-day program at the Revocation Center. He said cases have arisen where one offender cooperates with state's attorneys in order to get a six-month sentence while the offender who does not cooperate may receive a two-year sentence but then is released after 90 days in the Revocation Center program.

In response to a question from Representative Mahoney, Mr. Romanick said offenders must be seen by the Parole Board within the first six months of incarceration.

In response to a question from Representative Carlisle, Mr. Romanick said a person is sentenced based on the severity of the crime and that person should serve at least the majority of that sentence in prison. He said he was aware of a person who was convicted of eight felonies, was ordered to serve two years in prison, and ended up spending about 90 days at the Revocation Center.

In response to a question from Senator Watne, Mr. Romanick said perhaps offenders could serve 50 percent of their sentences at the Penitentiary and then be allowed to participate in the Revocation Center program.

Senator Stenehjem said there are concerns about the Revocation Center program among state's attorneys and judges. He said DOCR should work with the state's attorneys and judges to address the concerns or the Legislative Assembly would look at the program again and make changes. He said the program does not appear to be working as the Legislative Assembly had intended.

SEXUAL OFFENDER STUDY

Sexual Offense Statutes

Chairman Mahoney called on Mr. Ladd Erickson, Morton County Assistant State's Attorney, for the presentation of proposed legislation to change some of the state's sex crime statutes. Mr. Erickson provided to the committee a draft of proposed legislative changes to the statutes. A copy of Mr. Erickson's proposals are on file in the Legislative Council office.

Mr. Erickson said the proposed amendments to North Dakota Century Code (NDCC) Section 12.1-20-04 are intended to address the problem of criminal street gangs using or mandating a sexual

relationship between gang members and gang prospects. He said the amendment would create a Class B felony for any gang member who participates in this initiation process. Mr. Erickson also proposed amendments to the indecent exposure law, Section 12.1-20-12.1. He said the proposed amendments are intended to split the prosecution of these offenses into disorderly conduct for the situation in which a person exposes himself or herself in a prank situation, such as "mooning" someone, or for public urination, and the situation in which a person exposes himself or herself for sexual gratification. He said the current statute is grossly inadequate to deal with sexually deviant exhibitionism. He said under the proposed changes, a conviction for indecent exposure would require registration as a sex offender. Mr. Erickson also said the state's unlawful cohabitation and adultery statutes should be repealed.

Mr. Erickson said the proposed amendments to NDCC Section 12.1-20-05, the state's corruption of a minor statute, and Section 12.1-20-07, the sexual assault statute, are intended to address one of the main purposes of the interim study--consensual sexual relationships between young people. He said the amendments are intended to decriminalize consensual sexual relationships between, for example, 17-year-olds and 18-year-olds. He said the proposed amendments are intended to clarify legal inconsistencies in the law and are not intended nor should they be interpreted as condoning sexual relationships outside marriage or between young persons.

Mr. Erickson also said North Dakota does not have a statute that protects children from the exposure created by the Internet. He said there was a recent situation in North Dakota which involved a 16-year-old girl who was lured to Tennessee to have sex with an adult. He said if the luring reaches the point that physical contact is made and sexual acts occur, the sex crime statutes can be used. He said, however, it has become a national problem when adults hunt children over the Internet and lure them to locations for sexual relations. He said a statute similar to the one he is proposing has been found to be constitutional and is endorsed by free speech advocates as well as child advocacy groups.

Mr. Erickson introduced to the committee Ms. Erin Amiot, a law student from Michigan State University. He said Ms. Amiot is doing an externship in the Morton County State's Attorney's office and has conducted research on the Internet-luring statutes around the country. Ms. Amiot said 17 Internet-luring statutes have been declared unconstitutional. She said the statute being proposed is based on a similar New York statute, which has been upheld. She said it appears from case law the conversations in "chat rooms" are considered protected speech while "e-mail" and "private chat room" conversations are not.

Finally, Mr. Erickson said he proposes a statute of limitations for rape. He said the proposal is intended to expand the statute of limitations for forcible gross sexual imposition cases. He said the current statute of limitations is three years. This proposal, he said, would expand the statute of limitations to seven years, similar to the statute of limitations for child sexual molestation cases. Mr. Erickson provided written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Watne, Mr. Erickson said the changes he proposes to the indecent exposure statute are intended to address sexually deviant behavior. He said other behavior, such as pranks, can be prosecuted under other statutes.

In response to a question from Representative Mahoney, Mr. Erickson said because of the ramifications of the Wetterling Act, it is important to decriminalize the sexual relationships between 17-year-olds and 18-year-olds. He said the Act requires sex offender registration for this type of offense. He said this type of case is not necessarily a big prosecutorial issue, but there are federal money ramifications.

In response to a question from Senator Watne, Mr. Erickson said he proposed a seven-year statute of limitations because it would then be the same as the child sexual abuse repressed memory statute.

In response to a question from Representative Sveen, Mr. Erickson said the first felony sexual offense conviction requires a 10-year registration requirement while a second conviction requires a lifetime registration requirement. He said in the case of a misdemeanor sexual offense, registration may be ordered at the judge's discretion.

In response to a question from Senator Stenehjem, Mr. Erickson said some state's attorneys feel the statute of limitations for rape should be eliminated completely.

In response to a question from Representative Mahoney, Mr. Erickson said he has reviewed his proposals with other state's attorneys.

Civil Commitment of Sexual Predators Law

Chairman Mahoney called on Ms. Jean Mullen, Assistant Attorney General, Attorney General's office, for testimony regarding the status of proposed changes to the state's civil commitment of sexual predators law. Ms. Mullen said a study group has been formed to review the changes that were proposed to the committee at its December 10, 1999, meeting. She said the group is composed of several attorneys from the Attorney General's office, representatives of the State Hospital, and several state's attorneys. She said she has also discussed the proposals with the Prisons Division Mental Health Unit, the Department of Human Services, and the Committee on Protection and Advocacy.

Regarding the proposed change to exclude an individual with mental retardation from the definition of

"sexually dangerous individual," Ms. Mullen said the superintendent of the Developmental Center has indicated there is an existing sexual offender treatment program for mentally retarded individuals which would accommodate individuals committed as a result of the amendment. Ms. Mullen reviewed the status of other areas for which changes have been proposed, including venue, detention, closed proceeding, the evaluation period, expert's reports, commitments from plea bargains, Penitentiary referrals, transitional placement or conditional release, and Attorney General notification. Regarding whether the proceeding should be open or closed, she said the study group has agreed the approach to the commitment hearing should be consistent. She said it was agreed that, because of the sensitive nature of the information released during a commitment hearing, it would be appropriate to require the hearings themselves to be closed and the records be sealed. She said, however, the results of the proceedings, to the extent that the individual is committed, should not be confidential.

Ms. Mullen said issues resulting from concerns over commitments from plea bargains would be handled without legislation. She said the study group agreed the first approach to resolving this issue should be to further educate state's attorneys and judges on the civil commitment statute. She said a draft protocol that emphasizes criminal prosecution as a primary goal has been prepared and, when final, will be distributed to state's attorneys. Ms. Mullen submitted written testimony regarding the status of the proposals, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Mahoney, Ms. Mullen said the detention of individuals under the civil commitment statute is at correctional facilities.

In response to a question from Representative Disrud, Ms. Mullen said the statute could be extended to juveniles. However, many juveniles, because of their age, would not meet the criteria in the statute for the proper mental disorder. She said juveniles are more likely to be sent to the Youth Correctional Center than to go through the civil commitment procedures.

In response to a question from Senator Stenehjem, Mr. Jonathan Byers, Assistant Attorney General, Attorney General's office, said a person who is civilly committed under the statute is only required to register as a sex offender if the person had a previous sexual offense conviction.

Ms. Mullen said she would work with the Legislative Council staff to draft these proposals into bill draft form for the next meeting of the committee.

COMMITTEE DISCUSSION

Representative Carlisle said the committee should receive information from DOCR regarding its policies on the transporting of prisoners, including the reasons

for the transfers, the number and frequency of the transfers, and the exchanging of prisoners between facilities. Representative Carlisle also said the committee should receive information on "cyber stalking" laws in other states. He said this may be an issue to be added to the proposal on the Internet luring of minors.

It was moved by Senator Stenehjem, seconded by Senator Lyson, and carried on a voice vote that the Legislative Council staff be requested to prepare a bill draft that requires certain information regarding inmate's records to be open records, including the identity of the inmate, the inmate's location and crimes, and the inmate's projected date of release.

Senator Stenehjem also said the committee should receive information on the publishing of public information regarding inmates on the state's web site.

Chairman Mahoney said the notification process protocol of a prisoner escape is an administrative issue best handled by policy. He said legislative involvement is not needed. He said the Governor's task force handled the situation well and that DOCR was not at fault. He said whether a private company should be used for the transporting of prisoners is not an issue within the scope of the committee's assignments.

Representative Warner said the committee should receive information regarding the effectiveness of rewards.

Representative Carlisle said the Penitentiary parking lot situation should be reviewed during the next legislative session.

Chairman Mahoney requested that the proposals of Mr. Erickson be drafted in bill draft form for the next meeting.

It was moved by Senator Watne, seconded by Senator Stenehjem, and carried on a voice vote that the committee send a letter of commendation to Mr. Bill Broer, Director, Bureau of Criminal Investigation, for his service to the state and for his assistance to the Criminal Justice Committee.

Chairman Mahoney said he and committee counsel would work on the letter to Mr. Broer.

Chairman Mahoney said the next meeting of the committee would be held in Jamestown in early June.

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

Chairman Mahoney adjourned the meeting at 2:15 p.m.

Vonette J. Richter
Committee Counsel

ATTACH:1