

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

CRIMINAL JUSTICE COMMITTEE

Thursday, September 16, 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, G. Jane Gunter, Gerald O. Sveen, Elwood Thorpe; Senators Stanley W. Lyson, Carolyn Nelson, Wayne Stenehjem

Members absent: Representatives Jon Martinson, John M. Warner; Senator Darlene Watne

Others present: See attached appendix

Chairman Mahoney announced he had appointed Representative Bruce Eckre to serve as vice chairman of the committee.

Chairman Mahoney called on Mr. Jay E. Buringrud, Assistant Director, Legislative Council, to review the supplementary rules of operation and procedure.

CORRECTIONAL SYSTEM STUDY

At the request of Chairman Mahoney, committee counsel presented a memorandum entitled *Correctional System Study - Background Memorandum*.

Chairman Mahoney called on Ms. Elaine Little, Director, Department of Corrections and Rehabilitation. Ms. Little said as of June 30, 1999, the average daily inmate population was 923; there had been 362 new arrivals and 372 releases; and the inmate count was 932. She said the largest increases in inmates in recent years have been in the area of drug offenders. She said there are currently 172 inmates who have been sentenced for the delivery, manufacture, or intent to deliver or manufacture of drugs, and 37 inmates have been sentenced for simple possession of drugs. She said the average sentence length for all inmates, as of June 30, 1999, is 39 months. She said about 50 percent of the inmates are serving a sentence of less than five years and 50 percent are serving a sentence longer than five years. She said minimum mandatory sentences and the 85 percent truth-in-sentencing requirement have had an impact on the number of persons incarcerated and the average length of incarceration. She said 23 to 24 percent of the inmate population is serving some type of mandatory sentence. Ms. Little provided written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Mahoney, Ms. Little said although most judges are not in favor of mandatory minimum sentencing and would prefer to have more discretion in sentencing, the judges have been sensitive to the legislative intent and are sentencing accordingly.

In response to a question from Representative Carlisle, Ms. Little said the state has received around \$100,000 in federal money for implementing the provisions of the federal crime bill regarding truth in sentencing. In addition, she said, the state has received more than \$1.5 million from the federal crime bill for construction of prison facilities. She said those funds made the renovation of the James River Correctional Center possible.

In response to a question from Representative Sveen, Ms. Little said rather than imposing mandatory minimum sentences, sentencing decisions should be made by the judge.

Chairman Mahoney suggested that the committee hear from judges throughout the state on mandatory sentencing.

In response to a question from Representative Eckre, Ms. Little said there is a provision in the law that permits a judge to refrain from sentencing a first-time drug offender if certain criteria are met and the judge goes on record as to why the offender should not be sentenced.

In response to a question from Representative Sveen, Ms. Little said the prison facilities are at full capacity with an additional 15 inmates being housed in county jails. She said there is an interstate compact that provides for cooperation between North Dakota and other states for the exchange of prisoners. She said the exchanges are often done for inmate safety reasons.

In response to a question from Representative Carlisle, Ms. Little said a prisoner from another state may not be accepted if the prisoner is in poor health or if the prisoner has a history of behavioral problems. She said there has been an increase for the past several years of prisoners with gang affiliation. She said 50 to 60 prisoners have some gang affiliation.

Ms. Little said attempts are made to place low-risk inmates in the community and use the prison beds for the high-risk inmates.

In response to a question from Representative Sveen, Ms. Little said the Revocation Center, which began in January 1999, reviews every inmate and is working well. She said any inmate who is not participating as they should is taken out of the program and returned to the Penitentiary. She said the participants in the program have a recidivism rate of 13 percent, which is considered very low.

In response to a question from Representative Carlisle, Ms. Little said most drug offenders are not considered violent offenders, although a person addicted to methamphetamines potentially can be very dangerous. She said there is about a 30 percent probation revocation rate. She said the majority of parolees return to their home communities after being released.

In response to a question from Representative Sveen, Ms. Little said the department's goal is to stabilize the prison population and not to expand beyond the 5th and 6th floor projects that are currently under way at the James River Correctional Center.

In response to a question from Representative Mahoney, Ms. Little said a random drug testing of over 800 inmates resulted in only seven inmates testing positive. She said the biggest contraband at the prison facilities is tobacco.

SEXUAL OFFENDER STUDY

At the request of Chairman Mahoney, committee counsel reviewed a background memorandum entitled *Sexual Offenses, Sentencing, and Treatment Statutes - Background Memorandum*. Chairman Mahoney called on Mr. Robert Bennett, Attorney General's office, for comments regarding the study. Mr. Bennett said the current criminal code was adopted in 1973 and is based on the federal criminal code. He said many of the sex crimes which are contained in North Dakota Century Code Chapter 12.1-20 are interrelated. He said the age of the victim often determines the crime and penalty. He said many of the crimes in that chapter are classified as crimes because the victim is under age 18, but the penalty is more harsh when the victim is under age 15. He said in those cases, the lack of knowledge of the victim's age is not a defense. He also said consent and conduct are important elements of many of the sexual offenses. He said the sexual offense statutes are not intended to legislate morals but rather are intended to establish a strong public policy against certain types of sexual behavior.

Mr. Bennett said problems arise in enforcing the sexual offender statutes when both parties are minors or when the two parties to the sexual act are "close" to a certain age. He said in some cases, "15" does not mean "15," but rather may be "14 1/2," depending on the judge and the circumstances. He said there is often a problem as to where to draw the line and that judges may blur those lines. He said one of the

options for addressing the problems relating to sexual offenses and minors may be to do nothing. He said the current laws have been effective and new laws are being passed as they are needed or when new situations arise. Another option, he said, may be to set new age limits or age differentials. He said in some states, instead of using an actual age, the statutes look at the difference in ages between the two parties, such as "more than three years." A third option, he said, may be to establish new sentencing or case diversion statutes. As a fourth option, he said, the crimes and penalties could be adjusted depending on the parties' ages.

In response to a question from Representative Mahoney, Mr. Bennett said state's attorneys are concerned about predatory conduct among minors. He said the courts and state's attorneys are usually not as concerned about the 17- and 19-year-old girlfriend/boyfriend situation as they are about a 19- or 20-year-old having sexual contact with a 12- or 13-year-old. He said the legislation from the past several legislative sessions has revolved around the 15- to 18-year-olds.

Chairman Mahoney called on Mr. Jonathan Byers, Attorney General's office, for comments concerning sexual offender statutes. Mr. Byers said the 1999 Legislative Assembly enacted a law that would allow judges some discretion in exempting certain persons from the sexual offender registration requirement. He said the United States Department of Justice has informed the Attorney General's office that as a result of this exemption, North Dakota is not in compliance with the federal Wetterling law. He said under that law, a state may not permit any sexual offender to be exempt from registration. He said some alternatives to the current law may be to use age differentials instead of actual ages. He said under this option, certain behavior would no longer be classified as criminal, thus obviating the need for prosecution or registration. He said the deadline for compliance with the Wetterling law was September 1997 and North Dakota received a two-year "good-faith" exemption at that time. He said in June 1999 the Attorney General's office was notified that the exemption had expired and that the state was not in compliance. He said no states are in compliance at this time.

In response to a question from Representative Mahoney, Mr. Byers said the state is at risk of losing up to 10 percent of its federal funds if it fails to comply with the Wetterling law. He said that amounts to about \$200,000 for North Dakota.

Chairman Mahoney called on Ms. Andrea Martin, North Dakota Council on Abused Women's Services (NDCAWS) and the Coalition Against Sexual Assault in North Dakota. Ms. Martin said the Criminal Justice System Monitoring Project, a three-year study funded by the Otto Bremer Foundation, was conducted by the NDCAWS. She said the primary goal of the project was to systematically document the decisions of law

enforcement, prosecutors, and court outcomes as victims and violent offenders moved through the criminal justice system. She said the study was looking for trends in our justice system regarding the disposition of violent criminal cases in North Dakota. She said of the 20 domestic violence and sexual assault crisis centers throughout the state, 12 agencies participated in gathering data from 1994 through 1997. She said a total of 3,158 cases were followed from the time a report was made to law enforcement through the time of sentencing. Of those cases, she said, 123 were sexual offenses. She said the study included demographics of victims and offenders. She said the information collected included whether weapons were used, whether alcohol was a factor, whether the victims sustained an injury as a result of the crimes, the location of the crimes, and the relationships between the victims and the offenders. She said she would be willing to make copies of the studies available to the committee. Ms. Martin submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Eckre, Ms. Martin said her organization may have recommendations regarding legislation to make to the committee. She said her organization is primarily funded by public funds.

CRIMINAL OFFENSES CLASSIFICATION STUDY

At the request of Chairman Mahoney, committee counsel presented a memorandum entitled *Classification of Criminal Offenses Study - Background Memorandum*.

Chairman Mahoney called on Mr. Bennett for comments concerning the criminal offenses classification study. Mr. Bennett said because state's attorneys frequently deal with criminal offense statutes, the State's Attorneys Association should be actively involved in this study and could be used as a resource. He said there are changes in criminal statutes every session. He said some of those changes are based on federal changes, court decisions, and on high-publicity cases.

Chairman Mahoney requested that Mr. Bennett contact the State's Attorneys Association and request that each state's attorney be contacted to recommend any law changes.

Mr. Bennett said North Dakota Century Code Section 39-21-46(2) is one statute the committee should consider reviewing. He said the current law, which deals with motor carrier safety, makes a

violation of the section an infraction, which is a criminal offense. He said problems have arisen when citations are issued for violations of the offense and offenders are asked to sign a Rule 43 document which states that the person agrees to plead guilty and to forfeit bond. He said the problem is that law enforcement officers are essentially providing legal advice and asking persons to waive their constitutional rights. He said there may be liability on the part of the officer for violating the person's civil rights. He said a solution to the problem would be to make the offense a noncriminal traffic offense with a fine of around \$100. He said this would decriminalize the offense, but violators could still be cited for violations.

In response to a question from Representative Eckre, Mr. Bennett said other states have similar noncriminal penalties for this offense. He said under North Dakota law, a law enforcement officer is not permitted to collect money.

Representative Mahoney said an infraction carries a penalty of up to \$500, but as jail time may not be imposed, the offender does not have a right to a jury trial or a court-appointed lawyer. He said noncriminal traffic offenses are civil and do not carry the same constitutional rights as a criminal offense.

Senator Lyson said the Rule 43 documents are also used when serving arrest warrants for nonsufficient funds checks.

Chairman Mahoney said the committee should seek recommendations from state's attorneys and from the North Dakota Peace Officers Association, and a copy of the background memorandum should be sent to both.

COMMITTEE DISCUSSION

The committee recommended involving the judiciary, the Trial Lawyers Association, the North Dakota Peace Officers Association, and the State's Attorneys Association in all three studies. The committee also discussed the possibility of touring the Penitentiary, the Missouri River Correctional Center, and the James River Correctional Center at a future meeting.

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

Vonette J. Richter
Committee Counsel

ATTACH:1