

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

S-1-SC-40604

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs.

HEZEKIAH EAKER,

Defendant-Appellee.

DEFENDANT-APPELLEE'S ANSWER BRIEF

Direct Appeal from the Twelfth Judicial District Court

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STATEMENT REGARDING RECORD CITATIONS

The district court proceedings in this case were audio-recorded using For The Record (FTR) Software. FTR CDs were reviewed using The Record Player and are cited by date and timestamp in the form **[mm/dd/yy CD hour:minute:second]**. Citations to the Record Proper, a two-volume, continuously paginated record proper, are in the form **[vol. number RP page number]**. Citations to the State's brief in chief is in the form **[BIC]**.

STATEMENT OF COMPLIANCE

The body of this brief in chief does exceed the page limits (35 pages) set forth in Rule 12-318(F)(2) NMRA. As required by Rule 12-318(F)(3), counsel used Times New Roman, a proportionally-spaced type style, and the body of the brief contains 10,991 words and therefore does not exceed the 11,000-word limit. This brief was prepared using Microsoft Word, version 2016.

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NATURE OF THE CASE

Parole is generally understood to follow a term of incarceration in the New Mexico Corrections Department (NMCD). This understanding is based on our parole and sentencing statutes, and case law construing these statutes.

The issue in this State's appeal turns on whether this general understanding of parole applies to indeterminate, sex offender parole. At its core, it is a question of statutory interpretation. According to the State, it does not, because one word, "sentences", in the sex offender parole statute, NMSA 1978, § 31-21-10.1(A) (2007), means sex offender parole attaches to a qualifying sex offense conviction regardless if the defendant ever serves a prison term. This argument is inconsistent with our general understanding of parole and conflicts with many provisions of our parole and sentencing statutory scheme. The sex offender parole statute is undoubtedly unique insofar as it creates indeterminate parole terms. However, it does not vary from the general operation of parole, which requires that a defendant serve time in prison prior to being placed on parole.

The district court recognized this, and while this Court is not required to accord the lower court's legal conclusions great deference, it illustrates the correct application of statutory law to the facts of this case. Mr. Eaker demonstrated that he never served a day in prison for a qualifying sex offense, and thus, he never

should have been placed on sex offender parole. He respectfully asks this Court to affirm the district court's grant of habeas relief, discharging him from parole.

SUMMARY OF FACTS

The plea and conditional discharge

Mr. Eaker's case started on September 22, 2011, when he committed a sexual act with his sister. A few weeks later, he was charged with criminal sexual penetration in the third degree (CSP) and incest. **[1 RP 1-3]** He initially pled not guilty, but later admitted to both crimes in exchange for the State's decision to not contest a conditional discharge. **[See 11/29/2011 CD (arraignment); 7/23/2012 CD (plea hearing); 1 RP 34-38 (written plea agreement detailing Mr. Eaker pled no contest to the two charges)]** The State explained at the plea hearing that it did not oppose a conditional discharge because that is what the victim wanted.

[7/23/2012 CD 8:53:43-55:27] Specifically, the prosecutor stated

Judge, I think it's important for the court to understand that when this originally occurred, I had spent a great deal of time talking to the victim[] in regards to this. This is a familial situation and really she was the person that actually did a lot of the directing in how she requested that this be done. We again, talked to her on Friday. She did not wish to be here for this, but she does wish to have the conditional discharge. She was the one who actually, when I explained the different possibilities and how we could proceed on this, this was the possibility that she chose as the victim.

[Id.] As the prosecutor noted, the victim arrived at this decision because "she is very, very close to" Mr. Eaker, and "loves him very much." **[Id.]** While the district

court expressed understandable skepticism and hesitancy towards the conditional discharge, it ultimately respected the victim's wishes and placed Mr. Eaker on a conditional discharge. [*Id.* 8:50:00-51:56; 1 RP 42-46 (**Judgment and sentence placing Mr. Eaker on a conditional discharge**)] In arriving at this decision, the district court considered a letter from the victim. [8/13/2012 CD 8:39:44-41:24]

The district court sentenced Mr. Eaker to 5 years of probation for his conditional discharge. [1 RP 44-45] In addition, this initial judgment and sentence stated if Mr. Eaker was "imprisoned at any time pursuant to the above conviction (sic) in a facility designated by the Department of Corrections" he would serve 5-20 years of indeterminate parole.¹ [*Id.*]

The probation violation

Over a year later, in November 2013, the State sought to revoke Mr. Eaker probation based on allegations that he violated state law by resisting or evading law enforcement and testing positive for methamphetamine and alcohol. [1 RP 55-64, 66-75]

The parties then stipulated to an order for a forensic evaluation to determine Mr. Eaker's competency. [1 RP 96-97] Due to difficulties getting an evaluation done, including that the Law Offices of the Public Defender could not pay the

¹ The judgment and sentence also referenced the prospect of indeterminate probation of five to twenty years.

court-assigned evaluator, the evaluation took several months to complete. [1 RP 102 (first continuance of competency hearing because Mr. Eaker had not been evaluated); 5/4/14 CD 3:36:51-37:52 (counsel noted the evaluator sought payment which the LOPD could not afford)] Without objection, the State agreed with the continuances. [1 RP 102; 5/2/14 CD 3:34:50-38:55]; *see also* 1 RP 109 (a third stipulated continuance filed in July 2014)] After the psychologist's evaluation, performed by Dr. Barry Fields, the parties stipulated to competency. [1 RP 112]

There was another stipulated order for continuance, this time for the adjudicatory hearing on the probation violation allegations because Dr. Fields was not available to testify. [1 RP 113]

On November 3, 2014, the district court held an adjudicatory hearing on the probation violation and Mr. Eaker pled no-contest to the allegations. [1 RP 114-16] At the hearing, his defense counsel, a different attorney from previous matters, provided little argument and at one point stated he was "ignorant of the circumstances and have to decide what to say on [Mr. Eaker's] behalf." [11/3/14 CD 4:53:10-55:11] The district court's commitment order specified Mr. Eaker be held for the Sexual Offender Registration and Notification Act hearing and "[t]hen transport to Corrections." [1 RP 117] The district court did not file a written judgment and sentence.

A few days later the district court held a SORNA hearing. At the hearing, Mr. Eaker was represented by a different attorney, who argued Mr. Eaker received ineffective assistance of counsel because there was mitigation evidence in Dr. Fields' report which counsel asserted would have been helpful to the court in determining any punishment on the probation violation. This attorney noted she filed a motion to reconsider the court's revocation and sentence to NMCD in light of prior counsel's failure to use the report. [11/12/14 CD 8:31:34-35:43; *see also* 1 RP 120-21 (motion to reconsider revocation)]

The district court noted the State had not had time to respond to the motion to reconsider and Mr. Eaker's counsel asked to continue the SORNA hearing. The State objected to the continuance and asked the court to sign the SORNA document. The court explained it was hesitant to sign any SORNA documentation or sign and file the judgment and sentence revoking Mr. Eaker's probation in case it changed its mind about the earlier oral pronouncement. For this reason, the court granted another motion to continue. [11/12/14 CD 8:35:43-41:37]

Resolution of the motion to reconsider took some time because of two of the State's motions. The State filed a motion to exclude Dr. Fields' report and testimony for certain opinions not based on scientific principles or data and a motion to compel the raw data Dr. Fields used in drafting his report to form a rebuttal or submission to another psychologist for independent review. [1 RP 136-

39 (motion to exclude testimony and opinions of Dr. Fields), 1 RP 141 (motion to compel raw data)] In December 2014, the district court granted the motion to compel and otherwise continued the hearing on the motion to reconsider. **[12/12/14 CD 9:18:00-22:12]**

A series of continuances followed, all either agreed to by the State or because of the State's unavailability. **[3/31/15 CD (continued because Mr. Eaker was not present and Dr. Fields was not present to take his testimony and rule on the motion to exclude his report and opinions); see also 1 RP 156 (defense motion to continue filed in March 2015, which State agreed to) 1 RP 160 (defense motion to continue filed in May 2015, which the State agreed to), 1 RP 165 (State's motion to continue because of prosecutor's unavailability), 1 RP 168-69 (stipulated motion to continue because neither party was available)]**

Months later, in November 2015, the district court took up the State's motion to exclude. In the hearing, the State argued that many of Dr. Fields' opinions on sentencing were less based on scientific principles and instead policy preferences for sex offenders. The State acknowledged it did not get its own expert. **[11/19/15 CD 11:05:12-09:40]**

The district court granted the State's motion to exclude unless the defense could show how Dr. Fields' opinions were supported by training or experience or

some other scientific basis. Mr. Eaker's counsel noted that Dr. Fields was not available for this hearing and he had difficulty in getting the doctor to show up to the hearing. Over the State's objection, the district court granted another continuance to allow Dr. Fields to appear, in person or by telephone, to explain why his opinion was reliable as a qualified expert. The district court explained it could not fully consider Mr. Eaker's motion to reconsider sentence unless it knew whether it could properly consider Dr. Fields' opinions. The court also noted that there was no judgment and sentence and asked the parties to sign the judgment and sentence reflecting the oral sentence in November 2014. The court explained Mr. Eaker would also be transferred to NMCD. **[11/19/15 CD 11:22:06-28:33]**

The court also completed a notice of duty to register as a sex offender. **[1 RP 171-74]** After this November 2015 hearing, the court issued a commitment order specifying Mr. Eaker was to be transported "to Corrections when ready." **[1 RP 174]** This commitment order was followed by an order revoking probation, a judgment and sentence referring to the November 2014 adjudicatory hearing and specifying Mr. Eaker was sentenced to three years for each count, totaling six years of confinement, minus presentence confinement credit and probationary credit, in NMCD. **[1 RP 175-77]**

On December 30, 2015, the district court considered argument on the motion to reconsider. Mr. Eaker and the State agreed the district court could consider Dr.

Fields' report except for portions which made recommendations regarding sentencing or a conditional discharge. Counsel argued that Mr. Eaker should be placed back on probation, noting he had been in jail since he was arrested in late 2013. Ms. McKinley, Mr. Eaker's sister and the victim, addressed the court, explaining she had not been able to move on since Mr. Eaker was arrested, that every court hearing "is like opening another wound. He's my little brother. I love him." She concluded by stating she wanted him home, so they could "be a family again, and he can try and have a decent life." **[12/30/15 CD 11:16:50-17:41, 11:28:30-35:38]**

The State argued the district court should not give much weight to Dr. Fields' report, that Mr. Eaker was a danger to the community, and argued the court should specify a certain treatment program in Las Vegas. **[12/30/15 CD 11:35:38-46:22]** The court noted Mr. Eaker had three-and-a-half years of credit, between presentence confinement, probation, and time spent in jail. **[Id.]** Ultimately, the court sentenced Mr. Eaker to prison, but suspended one year so he could be paroled to a treatment program. **[12/30/15 CD 11:50:21-57:59]**

To reflect this amended sentence, the court issued an amended order revoking probation. **[1 RP 192-96]** In this amended judgment and sentence, the court provided the following sentence:

IT IS THE SENTENCE OF THE COURT that the defendant be incarcerated in the New Mexico Department of Corrections as follows:

Count 1: Criminal sexual penetration, for a period of three (3) years, followed by a term of parole not less than five (5) years and not in excess of twenty (20) years.

Count 2: Incest, for a period of three (3) years, followed by a term of parole of two (2) years.

That Counts 1 and 2 shall run consecutively, for a total period of incarceration of six (6) years, followed by the terms of parole specified above.

IT IS THE ORDER OF THE COURT that the last year of incarceration shall be converted to probation and treatment through the STOP program shall be recommended as a condition of parole, and the Order Revoking Probation entered on November 23, 2015, shall be amended as follows:

IT IS THE SENTENCE OF THE COURT that one (1) year of the total period of incarceration shall be suspended and the Defendant shall be incarcerated in the New Mexico Department of Corrections for a total period of (5) years, and that upon his release from incarceration, the Defendant be placed on probation for a period of one (1) year concurrent with the term of parole specified above, under the supervision of the Department of Corrections, Adult Probation and Parole Office, under the terms and conditions of a standard probation agreement...

[1 RP 194] This amended judgment and sentence did not specify a term of indeterminate probation. [*See id.* 192-96]

After the district court's order, NMCD took custody of Mr. Eaker. DOC considered Mr. Eaker's presentence confinement credit, probation credit, and time spent in jail awaiting adjudication on the probation violation to have met the three-year basic sentence for CSP. Thus, NMCD "began immediately running his five-to-twenty year parole term from the December 30 2015 start date." NMCD also

considered the incest sentence to run concurrently with the sex-offender parole term. **[2 RP 452 ¶ 10 (district court noted “As he [Mr. Eaker] had already been confined in county jail or on probation for over three years, he did not serve a single day of his Criminal Sexual Penetration in NMCD.”)]**

Mr. Eaker’s petition for a writ of habeas corpus and the district court’s order granting habeas relief

Mr. Eaker served his sentence for the incest charge in NMCD and returned home. In 2019, NMCD supervised Mr. Eaker as part of the indeterminate parole term. In early 2019, he violated his parole for possession of sexual exploitation of children material which later became the basis for the charge in D-1215-CR-2019-268. Because of this violation, authorities arrested him and placed him back in prison. **[2 RP 452-53 ¶¶ 10-12]**

Several years later, in December 2022, Mr. Eaker filed a pro se petition for writ of habeas corpus. **[1 RP 199-244]** In it, he raised two arguments. First, that the parole board’s failure to hold a timely duration review hearing pursuant to Section 31-21-10.1 violated his right to due process and constituted cruel and unusual punishment. **[1 RP 206-25]** Second, he raised an argument about earned

meritorious deductions, or “good time” credits, in a different case, D-1215-CR-2019-00268². **[1 RP 225-231]**

The Post-Conviction Habeas Unit of the LOPD reviewed the petition and determined it would be one “that a reasonable person with adequate means would be willing to bring at his own expense.” **[1 RP 246-50]** The district court agreed and appointed the LOPD to represent Mr. Eaker in his habeas petition. **[2 RP 251-52]**

In May 2023, Mr. Eaker, through habeas counsel, filed an amended petition, maintaining the due process issue, and adding two new issues³. First, that Mr. Eaker should never have been forced to serve indeterminate sex offender parole because he did not serve any part of his CSP sentence in DOC. **[2 RP 269-71]** Second, that Mr. Eaker be allowed to withdraw his plea because the district court failed to inform him prior to the plea that the CSP conviction would require an indeterminate parole term of 5-20 years if he was ever imprisoned in NMCD. **[2 RP 295-98 (citing among other cases, *State v. Romero*, 2023-NMSC-008)]**

² This case is currently before this Court on Mr. Eaker’s petition for writ of certiorari of the district court’s denial of presentence confinement credit. *See State v. Eaker*, S-1-SC-40308

³ Because the district court granted habeas relief on the attachment of parole issue before this Court, the district court did not decide the two remaining arguments, the plea withdrawal and the late duration review hearing. The question of the remedy for a late parole duration review hearing is currently before this Court. *See Aragon v. Martinez*, S-1-SC-39172, and *State v. Lusk*, S-1-SC-40112.

The State disputed each argument. As relevant to the issue here on appeal, the State argued that it did not matter that Mr. Eaker never served a day in NMCD for the CSP conviction because Section 31-21-10.1 only requires a defendant “to be *sentenced* to NMCD.” **[2 RP 402-07]**

The district court held two hearings on Mr. Eaker’s petition, allowing the parties to present argument in support of their positions. Ultimately, the district court agreed with Mr. Eaker, finding that he did not serve a day in prison for the CSP count and construing Section 31-21-10.1 to require that a defendant serve a day in a correctional facility, or prison, for indeterminate parole to attach. **[2 RP 452 ¶ 10, 454-57]**

In support of its conclusion, the court noted only the CSP conviction would allow for an indeterminate parole term; incest only allows for a two-year parole term. **[*Id.* 454 ¶ 17]** The court also cited other sentencing statutes, specifically NMSA 1978, Section 31-18-15(C) (2007, amended 2024), which specify that parole typically follows “the completion of any *actual* time of imprisonment,” and parole does not follow sentences served in jail or on probation. **[*Id.* 455 ¶ 21 (emphasis in court’s order), ¶ 22 (citing *State v. Brown*, 1999-NMSC-004, ¶¶ 10-12, 974 P.2d 136)]** Further, the court cited NMSA 1978, Section 33-2-19 (1990) for guidance in defining a “term of imprisonment,” as one that specifies punishment of a year or more after taking into account any presentence

confinement credit or time spent on probation. [*Id.* 455-56 ¶ 24] The district court acknowledged the State’s argument, but explained a construction of Section 31-21-10.1 that allowed for parole to attach to a fully suspended offense would lead to absurd results and if the Legislature intended such a construction it would have specified it. [*Id.* 456 ¶ 26] Accordingly, the court concluded because Mr. Eaker did not serve a day in prison for the CSP sentence, he “should not have been placed on a five to twenty parole period,” and the court discharged him from indeterminate parole⁴. [*Id.* 458]

ARGUMENT

I. Mr. Eaker did not serve a sentence in prison for the CSP conviction and thus he never should have been placed on indeterminate parole.

A. Standard of review.

As an appeal of an award of habeas relief, this case presents a mixed standard of review. “When reviewing the propriety of a lower court’s grant or denial of a writ of habeas corpus, the trial court’s findings of fact concerning the habeas petition are reviewed to determine if substantial evidence supports the trial

⁴ As a consequence of this order, the district court also ordered “that the New Mexico Department of Corrections SHALL recalculate the start date of his consecutive sentence in Case No. D-1215-CR-2019-00268 taking in to account the end date of [Mr. Eaker’s] two-year parole term associated with count two.” [2 RP 458]

court's findings.” *State v. Worley*, 2020-NMSC-021, ¶ 12 (internal quotation marks and citation omitted). Conclusions of law, however, are reviewed de novo. *Id.*

Here, most of the district court's findings of fact are not disputed by the parties. Specifically, that the court first sentenced Mr. Eaker in August 2012, and years later, after the court revoked his conditional discharge did the court sentence him to prison. **[2 RP 450 ¶¶ 3, 4, 8-10]** As relevant to the issues here, Mr. Eaker did not arrive at a correctional facility, or prison, until December 2015, which at that point he had already received over three years of credit towards his consecutive sentences. **[*Id.* ¶¶ 9-10 (this credit was composed of presentence confinement credit, probation credit, and time spent in jail awaiting adjudication of the probation violation)]** The State disputes the sequence in which the sentences ran, and as Mr. Eaker explains below, *see infra* Argument II, the district court correctly held he had already served the sentence for the CSP count when he arrived at NMCD. **[BIC 20-27; 2 RP 452 ¶ 10]**

While these factual findings are either undisputed or are supported by substantial evidence and owed deference by this Court, the legal question of whether Mr. Eaker had to serve time in prison for indeterminate, sex-offender parole to attach is a legal question. Specifically, a question of statutory interpretation and construction. *State v. Davis*, 2003-NMSC-022, ¶ 6, 134 N.M. 172; *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, 117 N.M. 346.

B. Statutory Interpretation and Construction.

“Our ultimate purpose in the interpretation of a statute is to ascertain and give effect to the intent of the Legislature.” *State v. Cleve*, 1999-NMSC-017, ¶ 8, 127 N.M. 240 (citation omitted). Generally, the first step is to consider the “plain language” or plain meaning of the statute. *Id.*; *Davis*, 2003-NMSC-022, ¶ 6; *see also State v. Rael*, 2024-NMSC-010, ¶¶ 39-40 (noting our courts “presume that a legislature says in a statute what it means and means in a statute what it says.” (internal quotation marks and citation omitted)). This Court has observed the following when it comes to consideration of plain meaning:

Under the plain meaning rule statutes are to be given effect as written without room for construction unless the language is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, in which case the statute is to be construed according to its obvious spirit or reason.

Davis, 2003-NMSC-022, ¶ 6; *Gallegos*, 1994-NMSC-023, ¶¶ 2-3 (noting our courts have historically recognized at least two categories of statutory interpretation, plain meaning on one hand, and “rejection-of-literal-language approach” on the other hand); *see also Rael*, 2024-NMSC-010, ¶ 41.

Still, plain meaning may not resolve a question of statutory interpretation when there can be reasonable difference of opinion about the plain meaning or its effect. As this Court stated in *Gallegos*:

But courts must exercise caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute,

apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute’s meaning....While—as in this case—one part of the statute may appear absolutely clear and certain to the point of mathematical precision, lurking in another part of the enactment, or even in the same section, or in the history and background of the legislation, or in an apparent conflict between the statutory wording and the overall legislative intent, there may be one or more provisions giving rise to genuine uncertainty as to what the legislature was trying to accomplish.

1994-NMSC-023, ¶ 23. In such situations, our courts consider the legislative intent which allows for other tools of statutory interpretation and construction. *Id.* (“it is part of the essence of judicial responsibility to search for and effectuate the legislative intent—the purpose or object—underlying the statute.”).

One such tool is construing the questioned part of a statute along with other similar or relevant statutes, or what is commonly referred to as the “*in pari materia*” construction. *See, e.g., State v. Torres*, 2022-NMSC-024, ¶¶ 35-40 (considering larceny of livestock statute along with the “comprehensive regulatory scheme,” composed of “livestock laws and relevant provisions of the Livestock Code” in a unit-of-prosecution claim); *see also* 2B Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Constr.* § 51:3 (7th ed., Nov. 2024) (“Statutes are *in pari materia*—pertain to the same subject matter—when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object.”). Relatedly, our courts will attempt to read statutes, or an act, in a way that promotes harmony, rather than conflict. *Britton v. Off. of Att’y*

Gen., 2019-NMCA-002, ¶ 28 (“Although appellate courts will not read into a statute language which is not there, we do read the act in its entirety and construe each part in connection with every other part in order to produce a harmonious whole.” (internal quotation marks, alteration, and citation omitted)).

C. Sex-offender parole under Section 31-21-10.1 does not differ from general parole in that a defendant must serve a prison term in order for parole to attach.

1. *The Legislature’s statutory scheme regarding the attachment of parole to a prison sentence.*

“[O]nly prison sentences, not jail sentences, can have a parole requirement.” *State v. Brown*, 1999-NMSC-004, ¶ 12, 126 N.M. 642; *see also State v. Thompson*, 2022-NMSC-023, ¶ 1 (“In every felony case in which a sentence of imprisonment is imposed, the defendant is required to serve a period of parole after that sentence.”). NMSA 1978, Section 31-21-10(D) (2009⁵, amended 2023) specifies parole follows “the sentence of imprisonment imposed by [a] court in an institution designated by the corrections department.” *See also id.* (“An inmate who was

⁵ Mr. Eaker cites to the 2009 version of Section 31-21-10 because that was the effective law at the time he was sentenced in 2012. Section 31-21-10 has subsequently been amended in 2023 and this year, 2025, but neither amendment has changed the relevant provisions discussed here. Specifically, the 2023 amendment made technical changes to Subsections E and G, and noted this general parole statute did not apply to a new parole statute governing parole for certain children sentenced as adults. *Compare* § 31-21-10(A), (E), (G) (2009) *with* § 31-21-10 (A), (E), (G) (2023). The 2025 amendment removes the costs and fees associated with parole. *Compare* § 31-21-10(G) (2009) *with* § 31-21-10 (2025).

convicted of a fourth degree felony and who has served the sentence of imprisonment imposed by the court in an institution designated by the corrections department shall be required to undergo a one-year period of parole.”). Section 31-21-10(E) also states that “[e]very person while on parole shall remain in the legal custody of the institution from which the person was released, but shall be subject to the orders of the board.” These provisions support the general understanding that parole attaches to a prison sentence, not a jail sentence or a period of probation. *See Brown*, 1999-NMSC-004, ¶ 12 (“As we discussed earlier, because Brown’s net habitual offender sentence was less than one year, the law did not require the court to sentence him to prison. Because the court sentenced Brown to jail and not to prison, parole was not authorized.”)

Other provisions also indicate that parole follows, or attaches to, a prison sentence, not a jail sentence or probation:

- “An inmate of an institution who was sentenced to life imprisonment becomes eligible for a parole hearing after the inmate has served thirty years of the sentence.” § 31-21-10(A);
- “An inmate of an institution who was sentenced to life imprisonment without possibility of release or parole is not eligible for parole and shall remain incarcerated for the entirety of the inmate’s natural life.” § 31-21-10(C);
- “The board shall furnish to each inmate as a prerequisite to release under its supervision a written statement of the conditions of parole that shall be accepted and agreed to by the inmate as evidenced by the inmate’s signature affixed to a duplicate copy to be retained in the files of the board. The board shall also require as a prerequisite

to release the submission and approval of a parole plan. If an inmate refuses to affix the inmate's signature to the written statement of the conditions of parole or does not have an approved parole plan, the inmate shall not be released and shall remain in the custody of the institution in which the inmate has served the inmate's sentence, excepting parole, until such time as the period of parole the inmate was required to serve, less meritorious deductions, if any, expires, at which time the inmate shall be released from that institution without parole, or until such time that the inmate evidences acceptance and agreement to the conditions of parole as required or receives approval for the inmate's parole plan or both. Time served from the date that an inmate refuses to accept and agree to the conditions of parole or fails to receive approval for the inmate's parole plan shall reduce the period, if any, to be served under parole at a later date." § 31-21-10(E).

These provisions reference terms like "inmate" and "institution." Institution is tied to the corrections department, and inmate is defined as an individual in a correctional facility. *See* NMSA 1978, § 31-21-5(B) (2023) (defining in the Probation and Parole Act: "'parole' means the release to the community of an inmate of an institution by decision of the board or by operation of law, subject to conditions imposed by the board and to its supervision"); § 31-21-5(C) (defining in the same Act: "'institution' means the state penitentiary and any other similar state institution hereinafter created").

This understanding of parole following a prison term is further supported by our general sentencing statute. Section 31-18-15 (2007) contains two provisions which indicate the Legislature only intended for parole to attach after a prison

term. First, the version of the statute in effect at the time of Mr. Eaker's sentencing in 2012, provided the following:

The court shall include in the judgment and sentence of each person convicted and sentenced to imprisonment in a corrections facility designated by the corrections department authority for a period of parole to be served in accordance with the provisions of Section 31-21-10 [] after the completion of any actual time of imprisonment The period of parole shall be deemed to be part of the sentence of the convicted person in addition to the basic sentence imposed pursuant to Subsection A of this section together with alterations, if any, pursuant to the provisions of the Criminal Sentencing Act.

§ 31-18-15 (C) (2007) (emphasis added). This provision specifies that parole follows the basic sentence of imprisonment. This intent is further supported by the 2019 amendment to Section 31-18-15(C) which specified parole “shall be imposed only for felony convictions wherein a person is sentenced to imprisonment of more than one year, unless the parties to a proceeding agree that a period of parole should be imposed.” § 31-18-15(C) (2019).

Second, when a court imposes “a sentence of imprisonment pursuant to” the aggravating circumstances statute, the firearm enhancement statute, or the habitual offender statute, and otherwise suspends or defers the basic sentence, the parole period is based off of “the degree of felony for the basic sentence for which the inmate was convicted.” § 31-18-15(D); *see also id.* (“For the purpose of designating a period of parole, a court shall not consider that the basic sentence of imprisonment was suspended or deferred and that the inmate served a period of

imprisonment pursuant to the provisions of the Criminal Sentencing Act.”).

Notably, neither subsection of Section 31-18-15 specifically excludes Section 31-21-10.1 from its language.

2. *The parole statute.*

The statute at issue here, § 31-21-10.1, specifies indeterminate parole terms depending on the qualifying sex offense. The statute, in relevant part, reads:

If the district court *sentences* a sex offender to a term of incarceration in a facility designated by the corrections department, the district court shall include a provision in the judgment and sentence that specifically requires the sex offender to serve an indeterminate period of supervised parole.

§ 31-21-10.1(A) (emphasis added); *see also* § 31-21-10.1(A)(1)-(2) (specifying 5-20 year indeterminate parole term for some crimes including third-degree CSP, and 5-life indeterminate parole for other sex offenses). Section 31-21-10.1 otherwise specifies the parole board’s responsibilities in determining an inmate’s “terms and conditions,” provides for duration review hearings at which the board should assess whether a parolee should stay on parole, and a procedure for alleged parole violations. Section 31-21-10.1, like Section 31-21-10, is part of the Probation and Parole Act. *See* NMSA 1978, § 31-21-3.

It is worth considering the Legislative backdrop of Section 31-21-10.1, which was enacted in 2003. *See* 2023 N.M. Laws, 1st Spec. Sess., ch. 1, § 9. The provisions of Sections 31-21-10 and 31-18-15 predate the enactment of Section 31-

21-10.1. *See* NMSA 1978, Section 31-21-10(C), (D)⁶ (1997); NMSA 1978, Section 31-18-15(C), (D) (1999, amended 2003). This matters because we presume that the Legislature was aware of existing statutes and case law in enacting Section 31-21-10.1. *State v. Montano*, 2024-NMSC-019, ¶ 9 (“[W]e assume that the Legislature was well informed of existing statutory and common law when the EMDA was enacted and subsequently amended.”); *see also State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, ¶ 4, 115 N.M. 573 (“We also presume that the legislature did not intend to enact a law inconsistent with existing law.”).

While we assume the Legislature was aware of this general operation of parole, that it follows a prison sentence, none of these provisions carve out explicit exceptions for sex offender parole. In fact, the only blanket exception from the general parole authority and procedure statute, Section 31-21-10, states: “The provisions of this section shall apply to all inmates except geriatric, permanently incapacitated and terminally ill inmates eligible for the medical and geriatric parole program as provided by the Parole Board Act.” § 31-21-10(H) (2009). If the Legislature intended, as the State suggests, to exempt sex offenders from the general operation of parole then the Legislature would have said so. *See State v.*

⁶ These subsections were later re-lettered with the 2009 amendment to Section 31-21-10. *See* 2009 N.M. Laws, ch. 11, § 4. Subsection C was subsequently changed to Subsection D, and accordingly, Subsection D became Subsection E. *Compare* § 31-21-10(C), (D) (1997) *with* § 31-21-10(D), (E) (2009).

Trujillo, 2009-NMSC-012, ¶ 11, 146 N.M. 14 (“We will not read into a statute any words that are not there, particularly when the statute is complete and makes sense as written.”). Finally, the sex-offender parole statute contains a similar carve out for “geriatric, permanently incapacitated, and terminally ill inmates.” § 31-21-10.1(H).

3. *The State’s plain meaning argument leads to contradiction with other statutes.*

This litigation stems from the use of the word “sentences” in Section 31-21-10.1(A): “If the district court sentences a sex offender to a term of incarceration in a facility designated by the corrections department, the district court shall include a provision in the judgment and sentence that specifically requires the sex offender to serve an indeterminate period of supervised parole.” It is this word that the State claims does not require a defendant to actually serve a term in prison for indeterminate parole to attach. **[BIC 12-16]**

However, this argument fails to account for an implication of Section 31-21-10.1(A)’s plain language. Specifically, the statute specifies “the district court sentences a sex offender to a term of incarceration in a facility designated by the corrections department.” This language implies that indeterminate parole follows “a term of incarceration” in prison. How else would a district court sentence a defendant to “a term of incarceration in a facility designated by the corrections department,” unless the defendant serves a sentence in prison? The State fails to

offer a reading of this statute or our sentencing and parole statutes that answers this question.

Instead, the State argues that the general rule that parole only follows a prison term does not apply to sex offenders because Section 31-21-10.1 is different. **[BIC 11-19]** First, the State argues Section 31-18-15 does not apply to sex offenders because the statute only specifically mentions Section 31-21-10 (the general parole statute). **[BIC 11-12]** While this is true, it is also true that Section 31-18-15(C) does not explicitly exclude Section 31-21-10.1 (the sex-offender parole statute) from the general statement that a court specifies a defendant's parole term when sentencing a defendant to prison. In fact, Section 31-21-10.1 states as much. *Compare* § 31-18-15(C) ("If a period of parole is imposed, the court shall include in the judgment and sentence of each person convicted and sentenced to imprisonment in a corrections facility designated by the corrections department authority for a period of parole to be served in accordance with the provisions of [Section 31-21-10] after the completion of any actual time of imprisonment") *with* § 31-21-10.1(A) ("If the district court sentences a sex offender to a term of incarceration in a facility designated by the corrections department, the district court shall include a provision in the judgment and sentence that specifically requires the sex offender to serve an indeterminate period of supervised parole").

Similarly, Section 31-18-15(D) recognizes that parole follows a prison term. This provision is unique because it acknowledges that when a basic sentence is suspended or deferred but a defendant otherwise serves a “sentence of imprisonment” pursuant to aggravating circumstances, a firearm enhancement statute, or a habitual offender enhancement, then parole is based off the “degree of felony for the basic sentence.” *Id.* (citing NMSA 1978, Section 31-18-15.1 (2009), NMSA 1978, Section 31-18-16 (1993, amended 2020, 2022), and NMSA 1978, Section 31-18-17 (2003)). Mr. Eaker acknowledges that like Subsection C, Subsection D of Section 31-18-15 does not specifically reference the sex offender parole statute. But a harmonious reading of Section 31-18-15, Section 31-21-10, and 31-21-10.1, supports a reading that sex-offender parole follows a prison term for a qualifying sex offense.

This leads to one of the biggest obstacles to the State’s argument on Section 31-18-15, that it does not specifically exclude Section 31-21-10.1 from its discussion of parole. In neither subsection discussed here did the Legislature specify that Section 31-21-10.1 is exempt. Instead, the State argues the omission of reference to Section 31-21-10.1 in Section 31-18-15 means the Legislature must have excluded Section 31-21-10.1. The State cites no authority for this proposition and if the Legislature meant as much, then it would have said so either at its enactment of Section 31-21-10.1 or its multiple amendments of Section 31-18-15,

one of which occurred during the enactment of Section 31-21-10.1. *See* § 31-21-10.1 (2003, amended 2007); § 31-18-15 (2003, amended 2005, 2007, 2016, 2019, 2022, 2024).

Moreover, the Legislature has demonstrated its ability to specifically exclude Section 31-21-10.1 from the scope of other statutory provisions. Section 31-21-10(D) provides the best example of the Legislature’s intent to differentiate sex-offender parole from regular parole. Section 31-21-10(D) states:

Except for certain sex offenders as provided in Section 31-21-10.1[], an inmate who was convicted of a first, second or third degree felony and who has served the sentence of imprisonment imposed by the court in an institution designated by the corrections department shall be required to undergo a two-year period of parole.

The State takes the first clause of Section 31-21-10(D) to mean that the general parole statute does not apply to sex offenders and indeterminate parole. **[BIC 12-14]**

In support of this argument, the State again points to the present tense use of “sentences” in Section 31-21-10.1(A) rather than the “has served” language in Section 31-21-10(D). **[BIC 13-14]** However, an alternative, and reasonable reading of Section 31-21-10(D) is that Section 31-21-10.1 is exempted insofar as Section 31-21-10.1 specifies a different duration of parole. There are two reasons for this reading.

First, Subsection D of Section 31-21-10 only discusses the duration of parole that attaches to first-, second-, third-, and fourth-degree felonies. The statute does not discuss conditions or any other aspect of parole and the parole board's supervision. Moreover, Section 31-21-10(D) only exempts "certain sex offenders," presumably in reference to the list of qualifying offenses under Section 31-21-10.1(I). While Section 31-21-10(D) does not define "sex offenders", it is fair to assume that non-qualifying sex offenses would otherwise receive a parole term according to the degree of felony associated with the non-qualifying sex offense. That is what the district court did here. **[1 RP 194 (two-year parole term of incest, a third-degree felony)]**

Second, Section 31-21-10 does not exempt or exclude Section 31-21-10.1 or sex offenders generally from its provisions. As noted earlier, Section 31-21-10(H) specifies this general parole statute applies to "all inmates except geriatric, permanently incapacitated and terminally ill inmates eligible for the medical and geriatric parole program." If the Legislature truly intended for parole to attach at sentencing as the State suggests, **[BIC 14-16]**, and not after a prison term is served, then it would have said so and exempted qualifying sex-offenses from Section 31-21-10 altogether.

Further, the State's argument fails to account for a related provision of Section 31-21-10 which does not specifically exclude Section 31-21-10.1.

Subsection E of Section 31-21-10 states that “Every person while on parole shall remain in the legal custody of the institution from which the person was released, but shall be subject to the orders of the board.” If, as the State suggests, parole attaches at sentencing, then how does NMCD or one of its institutions obtain “legal custody” of a sex offender? Does the suspension or deferment of a qualifying sex-offense sentence give NMCD custody of a defendant? The State’s argument does not answer these questions and it is not clear that a sentencing court could provide the mechanism by which NMCD obtains custody of an individual without the offender first serving a term in prison. This is why the preferable reading of Section 31-21-10.1(A)’s language “[i]f the district court sentences a sex offender to a term of incarceration in a facility designated by the corrections department,” means that indeterminate parole attaches, like all other parole, after a defendant serves a prison term.

The State’s literal construction of Section 31-21-10.1(A) would also conflict with a related provision of our sentencing statutes. NMSA 1978, Section 33-2-19 (1990) provides guidance to courts and NMCD regarding who may be confined in a correctional facility. Section 33-2-19 states:

Convicts sentenced to the corrections department for life or any term for which they may be confined in a corrections facility All persons convicted of any crime where the punishment is imprisonment for a term of one year or more, after accounting for any period of the sentence being suspended or deferred and any credit for presentence

confinement, shall be imprisoned in a corrections facility, unless otherwise provided by law, and judgments shall be issued accordingly.

This provision not only reinforces the general understanding that a prison term has to at least be a term of one year, but provides insight into what the Legislature meant in Section 31-21-10.1(A) when it stated a district court “sentences a sex offender *to a term of incarceration in a facility designated by the corrections department.*” As used in Section 31-21-10.1(A), “term of incarceration in a facility designated by the corrections department,” has to mean a prison term “of one year or more, after accounting for any period of the sentence being suspended or deferred and any credit for presentence confinement.” *See* § 33-2-19. But, the State contends that Section 31-21-10.1(A) allows for parole to attach to “a fully suspended sentence” like Mr. Eaker’s. **[BIC 17-19]** The State’s argument conflicts with Section 33-2-19.

The State’s reasoning means that a suspended or deferred sentence, even one where a defendant never serves a day in prison, would require sex-offender parole if the conviction is a qualifying sex offense. This construction would distort Section 31-21-10.1(A)’s “term of incarceration” in a NMCD facility to mean something other than at least a year-long term in an NMCD facility. Aside from the concern that it is not clear how a district court sentences someone to a term of incarceration in a NMCD facility without imposing a prison sentence, the State’s argument on this point conflicts with the plain language of Section 33-2-19. It is

worth considering that Section 33-2-19 existed at the time Section 31-21-10.1 was enacted, and like the other provisions discussed above, we assume the Legislature was aware of this statute when it created indeterminate, sex-offender parole. Absent Legislative intent to the contrary, this Court should read these statutes harmoniously.

Furthermore, the statute cited by the State in support of a suspended or deferred sentence triggering parole does not provide the textual support the State suggests. The State cites NMSA 1978, Section 31-20-3(B) (1985) to argue that if a “sentence were to NMCD, there is nothing contrary in the law to preclude the imposition of a parole term for sex offenders, under Section 31-21-10.1.” **[BIC 18]** However, this is a misreading of the statute. Section 31-20-3(B) provides the following:

Upon entry of a judgment of conviction of any crime not constituting a capital or first degree felony, any court having jurisdiction when it is satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may sentence the defendant and enter an order suspending in whole or in part the execution of the sentence

This language does not allow for a sentence “to a term of incarceration in a facility designated by the corrections department,” as required by Section 31-21-10.1(A). Instead, it provides for the suspension or deferral of a sentence, allowing a court to use its discretion to determine whether to place a defendant on probation instead of imprisonment. The State appears to assume that a district court could nominally

sentence a defendant to “a term of incarceration” in NMCD but otherwise suspend the sentence under Section 31-20-3(B). Such an assumption would conflict with Section 33-2-19.

But, it is, again, unclear how such a sentence would achieve the requirement that a court “sentences a sex offender to a term of incarceration in a facility designated by the corrections department.” *See State v. Clah*, 1997-NMCA-091, ¶ 19, 124 N.M. 6 (noting a sentencing court has four basic options after entry of a conviction: “(1) sentence the defendant, executing the sentence by committing him to jail or prison[]; (2) defer imposition of sentence []; (3) sentence the defendant and suspend in whole or in part execution of the sentence []; or (4) commit the defendant to a period of diagnosis prior to sentencing []”). Nothing in Section 31-20-3(B) provides for a sentence to NMCD despite the suspension or deferment of a sentence. In fact, such a reading of Section 31-20-3(B) would conflict with the general probation statute which notes probation is triggered by a court deferring or suspending a “sentence of imprisonment” that is otherwise authorized. *See* NMSA 1978, Section 31-20-5(A) (2003). The State’s reading would also conflict with NMSA 1978, Section 31-20-2(A) (1993), which specifies that sentences of “imprisonment for a term of one year or more shall be imprisoned in a corrections facility designated by the corrections department.”

It is true that a court could both suspend some portion of a qualifying sex offense and otherwise impose a prison term which would allow for both indeterminate, sex-offender probation and indeterminate, sex-offender parole. *See* NMSA 1978, § 31-20-5.2(A) (2003); § 31-21-10.1(A). But that is not what happened here.

Finally, the State's argument also necessarily implies that time spent on probation would be credited against the parole term. For the State's argument to work, a suspended sentence for a qualifying sex offender would necessarily mean an offender would have to serve indeterminate, sex-offender probation along with the proposed parole term suggested by the State. However, there is no provision in Section 31-21-10.1 or in any probation and parole statute that allows for probation credit to apply to parole credit. Moreover, such a principle conflicts with this Court's decision in *Brown* which held that time spent on probation does not apply to parole.

In *Brown*, the defendant claimed time spent in probation should apply to his parole term. 1999-NMSC-004, ¶¶ 5, 11-12. The defendant was sentenced to a suspended sentence, with the remainder to be served in jail. *Id.* ¶¶ 2-5. The defendant violated his probation and the court sentenced him to eighteen months in prison. *Id.* ¶ 5. The defendant cited NMSA 1978, Section 31-20-5(B) (1985) in support of his argument. *Id.* ¶¶ 11-12. However, that statute only specifies that the

time spent on a parole term which runs concurrently with a probation term, is credited towards the probation term. *See id.*; *see also* § 31-20-5(B)(1) (2003) (“the period of probation shall be served subsequent to any required period of parole, with the time served on parole credited as time served on the period of probation”). This Court observed that parole does not attach to a defendant’s sentence unless the defendant serves time in prison. *Brown*, 1999-NMSC-004, ¶ 12 (“It is true that Section 31-20-5(B) (1985) authorizes the time served on parole to be credited as time served on probation. However, only prison sentences, not jail sentences, can have a parole requirement.”).

4. *A harmonious reading of our parole statutes requires a construction that sex offender parole only attaches when a defendant serves a prison term.*

As our cases recognize, we endeavor to construe statutes and their provisions in a harmonious manner. *Thompson*, 2022-NMSC-023, ¶ 17 (“Statutes are enacted as a whole, and consequently each section or part should be construed in connection with every other part or section, giving effect to each, and each provision is to be reconciled in a manner that is consistent and sensible so as to produce a harmonious whole.” (internal quotation marks and citation omitted)); *State ex rel. Kline v. Blackhurst*, 1988-NMSC-015, ¶ 12, 106 N.M. 732 (“Although we cannot add a requirement that is not provided for in the statute, and cannot read into it language that is not there, we do read the act in its entirety

and construe each part in connection with every other part to produce a harmonious whole”).

It is against this backdrop that Mr. Eaker provides his construction of the statute. Specifically, that indeterminate, sex-offender parole attaches to a sex offender’s sentence after the offender has served a prison term which the district court provided for in a judgment and sentence. This is a reasonable reading of Section 31-21-10.1(A) which gives meaning to the Legislature’s word choice and harmonizes it with the general understanding of parole and when it attaches.

This reading is also consistent with the general rule that parole cannot attach to a jail sentence, *see Brown*, 1999-NMSC-004, ¶ 12, and Section 31-21-10(E)’s statement that “[e]very person while on parole shall remain in the legal custody of the institution from which the person was released.” Under Mr. Eaker’s construction of Section 31-21-10.1, a sex offender would start serving indeterminate parole after serving a prison sentence and would fall within the custody of the institution in which the offender completed their prison sentence. This construction does not conflict with the general parole statute, Section 31-21-10, while also observing Section 31-21-10.1’s additional and specific provisions that only apply to certain sex offenders. *See Schnedar*, 1993-NMSC-033, ¶ 4 (noting “two statutes covering the same subject matter should be harmonized and

construed together when possible, [] in a way that facilitates their operation and the achievement of their goals” (citations omitted)).

Finally, rejection of the State’s argument does not defeat the purpose and policies furthered by Section 31-21-10.1 and the Legislature’s statutes governing sex offenders. Section 31-21-10.1 and the sex-offender probation statute, § 31-20-5.2, evince an intent to provide greater supervision and treatment of individuals convicted of certain qualifying sex offenses. One way that this intent is furthered is through indeterminate probation and parole terms. This intent and purpose is not frustrated by holding that indeterminate, sex-offender parole only attaches to a prison term for a qualifying sex offense. When a sentencing court does not sentence a defendant to a prison term for a qualifying sex offense then the court must necessarily suspend or defer the imposition of a sentence, thereby placing a defendant on indeterminate, sex-offender probation. *See* § 31-20-5.2(A), (F). In most situations, offenders would serve the same indeterminate supervision period, five to twenty years, with a basic sentence that a court could still impose upon violation⁷. In this way, the unique and heightened supervision of sex offenders is still accomplished; albeit through probation supervision rather than parole

⁷ If a sex-offender probationer violates before the basic sentence is completed on probation, then a district court’s imposition of a prison term would result in an indeterminate, parole term to be served after the basic sentence.

supervision. Affirming the district court here does not frustrate the Legislature's intent regarding the increased supervision and treatment of sex offenders.

II. The district court ordered the CSP to run first, then the incest charge.

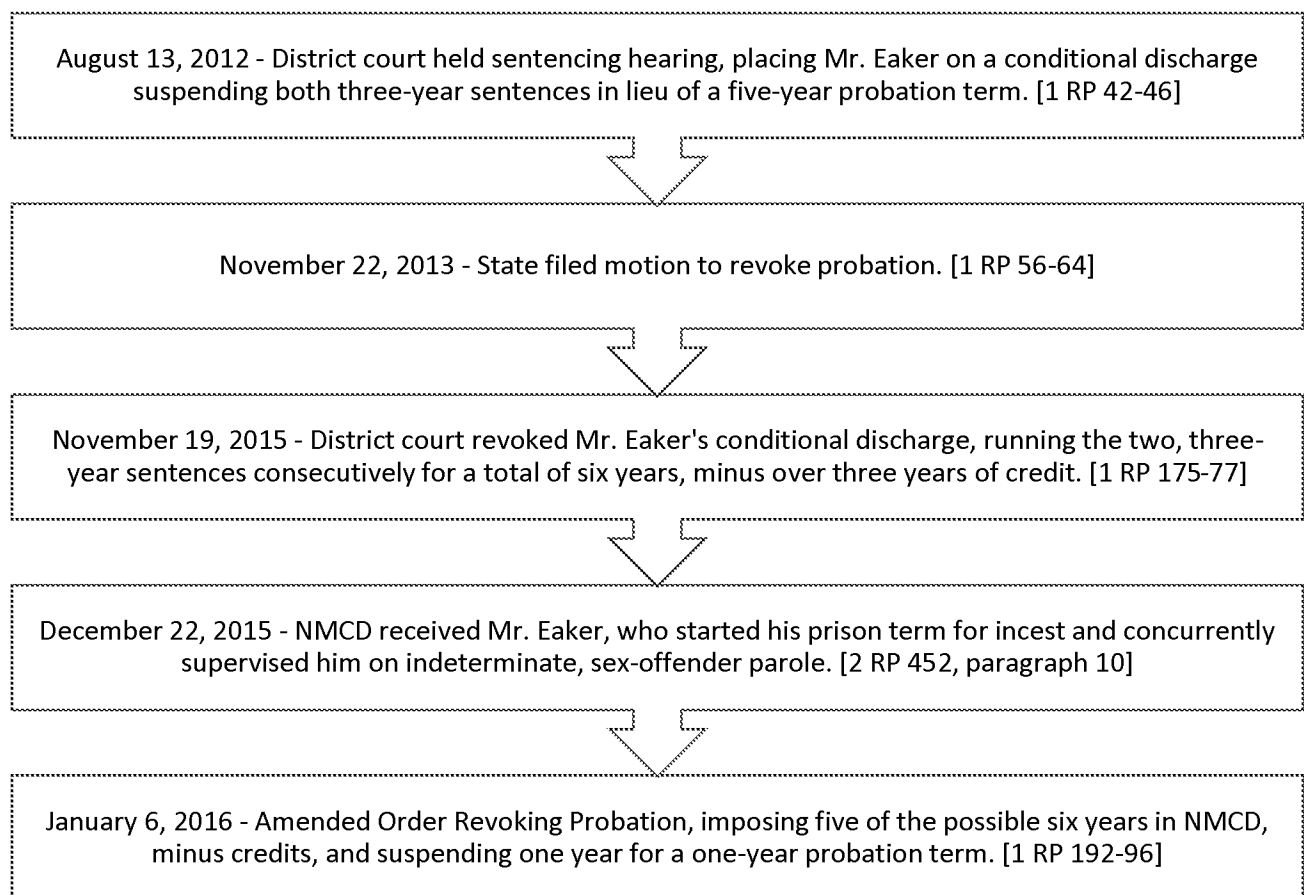
With this statutory construction in mind, Mr. Eaker turns to applying these principles to the facts of his case. Doing so also requires consideration of the proper interpretation of his judgment and sentence after the revocation of his conditional discharge. This Court reviews interpretation of a judgment and sentence de novo. *State v. Yazzie*, 2018-NMCA-001, ¶ 9 (citing *Brown*, 1999-NMSC-004, ¶ 8). As the State asserts, if the sentence for the CSP count, the qualifying sex offense in this case, ran after the sentence for the incest count, then Mr. Eaker served a prison term for that offense and Section 31-21-10.1(A), indeterminate parole attached. **[BIC 20-27]** However, the State's argument fails to account for the district court's suspension of one year in lieu of a one-year probation term.

Ultimately, the argument before this Court can be considered one of competing interpretations of the district court's January 2016 amended judgment and sentence. **[1 RP 192-96]** On one hand, the State argues that the sentence for Count 1, or the CSP sentence ran last because this would effectuate the district court's intent to sentence Mr. Eaker to indeterminate sex offender parole. On the other hand, as Mr. Eaker explains below, the incest sentence, or sentence for Count

2, ran last because the district court only suspended one year of the aggregate sentence and ordered Mr. Eaker to a one-year probation term.

A. The amended judgment and sentence.

To aid this Court in considering the sequence of the two, three-year sentences, Mr. Eaker offers the following visual diagram of the lower court's sentencing:



What this timeline shows are reasoned decisions by the district court throughout the pendency of this case. The final judgment and sentence filed in January 2016, amended the November 2015 order revoking probation by sentencing Mr. Eaker to

five years in NMCD. **[1 RP 193-94]** In doing this, the court sentenced Mr. Eaker to three years for the CSP charge to be followed by indeterminate parole, and three years for the incest charge followed by a two-year parole term. **[Id.]** The court also ordered the sentences to run consecutively. **[Id.]** By only sentencing Mr. Eaker to five years in prison, the court suspended only one year. **[Id. (“IT IS THE SENTENCE OF THE COURT that one (1) year of the total period of incarceration shall be suspended and ... the Defendant be placed on probation for a period of one (1) year concurrent with the term of parole specified above...under the terms and conditions of a standard probation agreement” (italics added))]** In suspending this one year, the court did not order indeterminate, sex-offender probation that would otherwise be required by Section 31-20-5.2(A). **[1 RP 44 (district court knew suspension of the CSP sentence would require indeterminate probation)]**

B. The district court’s suspension of one year demonstrates an intent for Count 2 to run last.

While Mr. Eaker acknowledges that the district court did not explicitly specify the sequence of the sentences, he points out that the district court’s decision to suspend only one year indicated an intent for the incest sentence to run after the CSP sentence. This intent is demonstrated by the fact that the district court reconsidered its November 2015 sentence. In the November 2015 judgment and sentence, the district court sentenced Mr. Eaker to the NMCD for a period of three

years for the CSP, Count 1, to be followed by indeterminate parole, then for three years for the incest, Count 2, to be followed by a two-year parole term. **[1 RP 175-76]** The court stated “Counts 1 and 2 shall run consecutively, for a total period of incarceration of six (6) years, followed by the terms of parole specified.” **[Id.]** The court also recognized that Mr. Eaker received credits totaling over three years. **[Id.]**

The State does not dispute that this credit must have satisfied one of the two charges. Either the sentence for the CSP count or the sentence for the incest count had been served at the time the district court sentenced Mr. Eaker to NMCD. *State v. Lovato*, 2007-NMCA-049, ¶ 6, 141 N.M. 508 (noting “once a sentence has been served, a defendant’s punishment for the crime has come to an end”). By the time Mr. Eaker arrived at NMCD he only had one prison term to serve; either he had to serve part⁸ of the three-year term for CSP or part of the three-year term for incest. While the November 2015 judgment and sentence did not specify whether Count 1 (CSP) or Count 2 (incest) ran first, the amended January 2016 provided clarity.

In the January 2016 amended judgment and sentence, the district court reiterated “Counts 1 and 2 shall run consecutively,” but suspended one year of the total six-year sentence, in favor of one year of probation “under the terms and

⁸ Mr. Eaker states “part” because as the district court observed in the amended judgment and sentence, Mr. Eaker had accrued about 3 years and 140 days of credit towards the aggregate six-year sentence. Thus, at least one sentence would have been completed and a portion of the other, three years minus 140 days, remained. **[1 RP 195]**

conditions of a standard probation agreement.” **[1 RP 192-94]** The court did not suspend one year and then order indeterminate probation. Mr. Eaker notes this because if, as the State suggests, Count 1 or the CSP sentence ran after the incest and thus was the only sentence to be served in NMCD, then any suspended year of that sentence would have required placement on indeterminate, sex-offender probation. The sex-offender probation statute, § 31-20-5.2(A), mandates:

When a district court defers imposition of a sentence for a sex offender, or suspends all or any portion of a sentence for a sex offender, the district court shall include a provision in the judgment and sentence that specifically requires the sex offender to serve an indeterminate period of supervised probation for a period of not less than five years and not in excess of twenty years[.]

This is not discretionary. If a court suspends a portion of a qualifying sex offense, like CSP (3rd degree), then indeterminate probation must be included in a judgment and sentence. § 31-20-5.2(A), (F). But, the district court did not order an indeterminate probationary term. Instead, it ordered “Defendant be placed on probation for a period of one (1) year concurrent with the term of parole specified above.” **[1 RP 194]** As further evidence of its intent that it suspended one-year of the incest sentence, the court specified this probation would be supervised by NMCD “under the terms and conditions of a standard probation agreement.” **[Id.]** Sex offender probation, in contrast, specifies unique and more onerous terms and conditions. § 31-20-5.2(C).

As acknowledged above, interpretation of a judgment and sentence is de novo. This Court can therefore interpret the judgment and sentence in a way that fulfills the intent of the sentencing court. The State claims that the mere order in which sentences are listed “is insignificant,” but the State does not explain how the district court could have meant to run Count 1, or the CSP sentence, after the incest sentence and only suspend one year in lieu of one year of probation. **[BIC 20-27]** Nevertheless, the State argues this Court should construe the CSP sentence as being served last because a parole term must be served after the basic sentence. In support the State relies on *State v. Utley*, 2008-NMCA-080, 144 N.M. 275. However, *Utley* is distinguishable from the facts of this case.

In *Utley*, the district court sentenced the defendant to NMCD for a ten-year term. 2008-NMCA-080, ¶ 2. The sentence consisted of a third-degree felony (voluntary manslaughter), enhanced by the firearm enhancement statute, for a total of seven years, and two fourth-degree felonies, each eighteen months. *Id.* All sentences were to run consecutive, and the district court also specified a two-year parole term to follow the sentences. *Id.* The district court wanted to sentence the defendant to a two-year parole term to require her to complete “an intensive in-patient treatment program during her parole period.” *Id.* The defendant disputed the two-year parole term and claimed the district court could only impose a one-

year term. *Id.* ¶ 3. The district court disagreed and maintained the two-year parole term. *Id.*

The Court of Appeals affirmed the district court. First, the Court noted that our case law prohibits the stacking of parole terms and requires that parole follow the basic sentence of imprisonment. *Utley*, 2008-NMCA-080, ¶¶ 5-8 (citing *Brock v. Sullivan*, 1987-NMSC-013, 105 N.M. 412 and *Gillespie v. State*, 1988-NMSC-068, 107 N.M. 455). Second, the Court also recognized the purpose of parole under our statutes and that the district court's desire for the defendant to complete an inpatient treatment program was consistent with this statutory purpose. *Utley*, 2008-NMCA-080, ¶¶ 8-9 (noting the defendant's construction of her sentence was absurd because if the district court ran the sentences concurrent, instead of consecutive, then a two-year parole term would attach). Third, the Court recognized neither the plea agreement nor the judgment and sentence specified the order in which the sentences would run, and that the plea agreement allowed the district court discretion in sentencing the defendant. *Id.* ¶ 10. Because there was no evidence suggesting a particular order or sequence of the three felonies, the Court affirmed the district court's order and stated the third-degree felony ran last. *Id.* ("In the absence of the district court placing the sentences in a particular order, we will presume that the sentence was correct and that the third degree felony will be served last.").

There are two notable differences between Mr. Eaker's sentence and the *Utley* defendant's sentence. First, unlike the *Utley* district court, the district court here did not sentence Mr. Eaker directly to NMCD at initial sentencing. Instead, the district court first granted a conditional discharge and then after Mr. Eaker acquired over three years of credit, did the court impose a basic sentence for the incest count. This matters because if the district court had sentenced Mr. Eaker to NMCD back in August 2012, then a judgment and sentence specifying indeterminate, sex-offender parole, would undoubtedly have attached. But, that's not what happened here. And second, unlike the *Utley* case, this case does contain evidence indicating the district court used its discretion to order the incest count would be served last. As explained above, when the district court issued the amended judgment and sentence, it only suspended one-year for a one-year probation term. This suspension did not result in an indeterminate, sex-offender probation term, and serves as evidence of the district court's decision to order the incest count to run after the CSP count. In *Utley*, the district court's sentencing indicated the third-degree felony would run last based on the court's language ordering the defendant to a two-year parole term, including an inpatient treatment program, which could not have attached to either of the fourth-degree felonies.

Separately, the State argues that the district court's intent for Mr. Eaker to serve sex offender parole requires this Court to interpret the amended judgment

and sentence to allow for the CSP charge to run after the incest charge. **[BIC 25-27 (noting the court recommended Mr. Eaker be placed into a sex offender treatment program)]** However, aside from *Utley*, this State offers no authority for this interpretation. Moreover, the State does not explain how this interpretation squares with the court's explicit order of one year of probation. It is true that the district court viewed the conditional discharge as "a disaster," **[11/3/14 CD 5:00:53-02:29]**, but it appears the district court mistakenly believed⁹ it had the authority to sentence Mr. Eaker to indeterminate parole without him having served any portion of the CSP sentence in prison. No case has specifically answered whether sex offender parole, like general parole, only follows a prison term. Mr. Eaker has provided an argument in support of this rule, but the district court did not have the privilege of a published case saying as much at the time of sentencing in January 2016.

Moreover, the final sentencing hearing demonstrates the district court did not intend for the CSP sentence to run last. In that hearing, the district court adopted the State's suggestion to suspend one year and recommend Mr. Eaker be

⁹ It is also possible that the district court did not realize it was sentencing Mr. Eaker to a parole term without Mr. Eaker first serving a term in prison. This could be explained by the fact that the November 2015 judgment and sentence seems to be based on the adjudication of the probation revocation in November 2014, and thus the district court assumed it was indeed sentencing Mr. Eaker to a term of incarceration in a NMCD facility.

paroled into a sex offender treatment program. [12/30/15 CD 11:52:23-57:59] The court stated

I'm going to convert the last year to probation. Suspend one year of the sixth, which leaves him about 18 months still to do in corrections...By converting to probation, I think I can properly insert a strong recommendation to corrections that when he is paroled that he be considered for admission to the STOP program, if appropriate that he be enrolled in that program as a condition of parole.

[*Id.* 11:56:06-57:59] Nothing in this statement or the hearing suggested the district court intended for indeterminate probation to apply. The district court could have done so and its decision to not do that indicates it determined the sentence for Count 2, the incest charge, run last.

CONCLUSION

For the reasons provided above, Mr. Eaker respectfully asks this Court to affirm the district court's grant of habeas relief. The district court correctly concluded that Mr. Eaker did not serve a prison term for an offense that warranted indeterminate, sex-offender parole, and thus the court appropriately discharged him from parole in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was e-filed in the Odyssey File & Serve system and thereby electronically served on opposing counsel at the New Mexico Department of Justice this 22nd day of May, 2025.

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