



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-40604

STATE OF NEW MEXICO,

Respondent-Appellant,

v.

HEZEKIAH EAKER,

Petitioner-Appellee.

STATE OF NEW MEXICO'S BRIEF IN CHIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
SUMMARY OF PROCEEDINGS	1
INTRODUCTION	1
PROCEDURAL BACKGROUND	3
A. Pre-habeas proceedings.....	3
B. Habeas corpus proceeding.....	7
C. Habeas corpus hearing	9
D. The habeas court’s decision	10
ARGUMENT	10
I. The habeas court’s interpretation of the law was in error.	11
A. Section 31-18-15(C) does not apply to sex offenders.....	11
B. The difference between Sections 31-21-10 and 31-21-10.1: if a sex offender is sentenced to NMCD an indefinite parole term is required.....	12
C. <i>State v. Brown</i> does not support the habeas court’s decision ..	16
D. The habeas court’s hypothetical concerns are not dispositive and cannot trump the statute: Eaker was convicted and sentenced following revocation of conditional discharge.	17
II. In the alternative, Eaker’s served time at NMCD should be attributed to the CSP sentence.	20
A. The habeas court erred by presuming the CSP sentence was served first.....	20
1. In the absence of sentence sequence, the listed order of convictions in a judgment and sentence is irrelevant.....	21
2. The CSP term should have properly been served <i>after</i> , <i>not before</i> the Incest term.....	23
III. The State preserved its claims.....	27
CONCLUSION.....	28

Citations to the record proper are in the form [RP]. Citations to the audio transcript of proceedings are the form [Date CD Hour:Minute:Second]. Recordings were prepared using For The Record software.

TABLE OF AUTHORITIES

NEW MEXICO CASES

<i>Brock v. Sullivan</i> , 1987-NMSC-013	26
<i>Lukens v. Franco</i> , 2019-NMSC-002	11
<i>Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't</i> , 2013-NMSC-013	15
<i>State v. Alingog</i> , 1993-NMCA-124	28
<i>State ex rel. Stratton v. Serna</i> , 1989-NMSC-062, 109 N.M. 1	14
<i>State v. Barela</i> , 2021-NMSC-001	15
<i>State v. Brown</i> , 1999-NMSC-004, 126 N.M. 642	8,11,16-17,21
<i>State v. Fairbanks</i> , 2004-NMCA-005	19
<i>State v. Montano</i> , 2024-NMSC-019	19
<i>State v. Romero</i> , A-1-CA-27050, (N.M. Ct. App. Feb. 17, 2009)	22
<i>State v. Sublett</i> , 1968-NMCA-001, 78 N.M. 655	15
<i>State v. Utley</i> , 2008-NMCA-080, 144 N.M. 275	22-25

STATE STATUTES AND RULES

NMSA 1978, § 30-10-3	3
NMSA 1978, § 31-21-10	10-16,24
NMSA 1978, § 31-21-10.1	1-3,8-20,27
NMSA 1978, § 31-18-15	8,11-12
NMSA 1978 § 31-20-3	18
NMRA Rule 12-321	27-28

FEDERAL STATUTES

34 USC § 10651	9
----------------------	---

REFERENCES

Justia Legal Dictionary https://dictionary.justia.com	14
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SUMMARY OF PROCEEDINGS

I. Introduction

Hezekiah Eaker raped his sister. He was charged with third degree Criminal Sexual Penetration (CSP) and Incest, the latter of which is not a sex offense for purposes of the sex offender parole statute. Part of his CSP sentence, in accord with the Legislature's intention to provide lengthy supervision of sex offenders, would include an indeterminate parole term of five-to-twenty years under NMSA 1978, § 31-21-10.1 (2011).

The sentencing court grudgingly granted Eaker a conditional discharge because the victim, his sister, advocated for it. At his plea hearing, Eaker was cautioned by the court that if he were to violate probation and become incarcerated, he would have to serve an indeterminate parole period of five-to-twenty years.

Eaker's conditional discharge was revoked after he was caught using drugs and alcohol and masturbating outside a neighbor's window. He was accordingly sentenced to the New Mexico Department of Corrections (NMCD).

Eaker immediately moved for modification of his sentence, but due to multiple re-sets, the hearing did not occur until almost fourteen months later.

Eventually, his sentence was amended to five years of incarceration at NMCD. He was additionally sentenced to two years parole for Incest, and a five-to-twenty-year indeterminate parole term to follow the basic CSP sentence, under Section 31-21-10.1.

Due to the various delays, by the time Eaker finally made it to NMCD, he had accrued more than three years of credit for time served. He filed a Petition for Writ of Habeas Corpus, which was taken up by the LOPD. Eaker's Amended Petition was granted upon one of three claims, the source of this appeal.

Despite the plain language of Section 31-21-10.1 the legislative intent behind sex offender supervision, and Eaker's obvious need for the same, the habeas court discharged his sex offender parole. The court was largely persuaded by its own misreading of the sentencing order and thus found that Eaker "did not serve a single day of his Criminal Sexual Penetration sentence in NMCD." The court's conclusion and resulting decision is in error for two reasons.

One, the plain language in Section 31-21-10.1 requires that a sex offender need only be *sentenced* to NMCD for the requisite parole term to attach. Two, although the terms for CSP and Incest were sentenced consecutively, the sentencing court did not specify the order they should be served. The habeas court's inference that the CSP sentence was served first was in error.

II. Procedural Background

A. Pre-habeas proceedings

On October 4, 2011, Eaker was indicted by Grand Jury for Third Degree CSP "by the use of force, coercion or credible threats of force or violence or when the defendant knew or had reason to know that the victim suffered from a condition which made her incapable of giving consent...contrary to Section 30-9-11(F), NMSA 1978." [RP 1] Because the victim was his sister, he was also charged with Incest, contrary to NMSA 1978, § 30-10-3 (1963). [*Id.*]

On July 24, 2012, Eaker pled no contest to those charges, and the State did not oppose a conditional discharge. [*Id.* 34-38] At the plea hearing, the court expressed reluctance to a conditional discharge due to the nature of the crimes. [07/23/2012 CD 8:37:59-8:38:47] The State explained that the victim had played a large part in directing the case and had advocated for a

conditional discharge. [*Id.* 8:53:52-8:55:15] The court accepted the plea and set a sentencing hearing.

At the August 13, 2012 sentencing hearing, the court commented that Eaker did “not deserve” to be released on conditional discharge, but would grant it only because the victim wanted that outcome. The court warned that this was an opportunity for Eaker to take steps to ensure nothing like this happened again and that a violation would likely result in his incarceration. [08/13/2012 CD 8:59:05-9:00:04] The court further advised that incarceration would result in a five-to-twenty-year parole term. [*Id.* 9:00:30-9:00:45] Eaker was granted a conditional discharge on August 14, 2012. [RP 42-47]

At a November 3, 2014, hearing, Eaker pled no contest to violating his probation. Eaker did not deny allegations that he had used drugs and alcohol and resisted or evaded an officer after having been observed masturbating in a field across from a neighbor’s window. [11/03/2014 CD 4:28:45-4:30:00]

The sentencing court found Eaker had violated probation and revoked conditional discharge. The court expressed “grave concerns about community safety” adding there was a “substantial possibility of future sex offenses.” [*Id.* 5:01-28-5:03:17] Eaker was notified of duty to register as a sex offender [*id.* 171-173] and ordered to be transported to NMCD. [*Id.* 174] His

probation was revoked by order, and he was committed to the penitentiary on November 23, 2014. [*Id.* 175]

Meanwhile, on November 10, 2014, Eaker requested modification of his sentence in a Motion for Reconsideration. [*Id.* 120] Then followed a long series of delays.¹ The reconsideration hearing was continued four times, with three continuances requested by the defense. [*Id.* 156, 160, 178, 11/19/2015 CD 11:25:19] Eaker's Motion for Reconsideration was finally heard almost fourteen months after filing. [RP 188-190]

At Eaker's request, on January 14, 2014, the sentencing court ordered a competency evaluation [*id.* 96-97] and a hearing was set for March 17, 2014. [*Id.* 98] That hearing was reset five times. [*Id.* 103, 104, 107, 110, 111]

Eaker's representation changed approximately seven times, which added to the delays. [*Id.* 23, 85, 99, 119, 124, 125, 152]. For example, at the May 2, 2014 competency hearing, defense counsel, "unsure of the nature of the hearing," was unable to proceed because, due to defense errors, the competency evaluation had not been performed. [05/02/2012 CD 3:35:17-

¹ Many of the delays are catalogued in the State's November 10, 2014 Response to the Motion for Reconsideration. [*Id.* 120-121] However, Eaker's multiple continuance requests on the Motion to Reconsider hearing followed the State's Response.

3:36:18] Defense counsel admitted the delays were defense's fault. [*Id.* 3:40:10-3:40:17] That attorney later moved the court to withdraw for "inability to provide competent representation." [RP 133]

The parties eventually stipulated that Eaker was competent on September 3, 2014. [*Id.* 112]

On January 19, 2016, after Eaker was held in Otero County jail pending resolution of his Motion to Reconsider, the Court issued an Amended Order Revoking Probation. [*Id.* 192-196] The court noted that "[o]n November 4, 2014 [Eaker] was committed to the Otero County Detention Center," and that he was to be incarcerated at New Mexico Department of Corrections for five years including for Count 1, CSP, to be followed by an indefinite parole term of five-to-twenty years. He was ordered to register as sex offender, and his parole conditioned upon Sex Offender Training (SOTP).

The sentences for CSP and Incest were ordered to run consecutively, but the court was silent as to the order in which they would run. [*Id.*] Eaker was given presentence credit from August 13, 2012 to December 30, 2015, for a total of 3 years, one hundred eighty-three (183) days. [*Id.* 195]

Eaker finally arrived at NMCD on December 22, 2015, and his good time figuring sheet was filled to indicate he had served his three-year

sentence for CSP. NMDC began running his five-to-twenty parole term on December 30, 2015. [*Id.* 322-324] As discussed below, the designation of the CSP sentence as having been served first, and therefore completed, was evidently in error by an NMCD records clerk, and not by order of any court.

Eaker's parole was revoked on May 15, 2019. [*Id.* 234] He was convicted of Sexual Exploitation of Children (Possession) on July 27, 2021. [*Id.* 237] He is currently incarcerated on that sentence.

B. Habeas corpus proceeding

On December 5, 2022, Eaker filed a *pro se* Petition for Writ of Habeas Corpus. [*Id.* 199-231] He requested discharge from supervision due to the Parole Board's alleged failure to timely hold a review hearing, and 30 days of good time he argued had been improperly withheld. [*Id.*] He did not raise the CSP parole issue.

After having been appointed habeas counsel following pre-appointment review, on May 11, 2023, Eaker filed an Amended Petition for Writ of Habeas Corpus (Petition). [*Id.* 261-299] Pertinent to this appeal, he first requested the Court to "amend the order revoking his conditional discharge to remove the indeterminate parole requirement because he did not serve a term of 'actual' imprisonment [for] Criminal Sexual Penetration."

[*Id.* 298] Eaker additionally reiterated his *pro se* arguments for discharge for an untimely parole review hearing and requested to withdraw his plea.²

In the Petition, Eaker argued that because he did not serve any of his sentence for CSP in an NMCD correctional facility, an indeterminate parole term was not authorized by law. [*Id.* 269] He cited NMSA 1978, Section 31-18-15(C) (2011) for the proposition that parole may only be imposed "after the completion of any actual time of imprisonment" in a NMCD corrections facility; Section 31-21-10.1(A), asserting—not incorrectly—that statute “reserve[s] parole for sex offenders who have been sentenced to a term of incarceration in a facility designated by the corrections department”; and *State v. Brown*, 1999-NMSC-004, ¶¶ 10-12, 126 N.M. 642, which held that felony defendants who have served their time in county jails do not get parole time credited during the following term of probation.

The State filed a Response to the Petition on December 15, 2023. [RP 379-398] It argued that according to the plain language of Section 31-21-10.1(A)(1), which specifically governs parole for sex offenders, Eaker needed only to be *sentenced* to NMCD for his parole term to attach. [*Id.* 382]

² Because it was the first argument upon which the habeas court granted the Petition, the State will limit the remainder of the recitation of proceedings and argument to that issue.

The State also argued that a “correctional facility” as defined by 34 USC § 10651(l)(1)(a) and some case law, need not necessarily imply prison as opposed to a jail. [*Id.* 386] The State later abandoned that argument in hearing, conceding that “correctional facility” as referenced in New Mexico statutes means NMCD. [03/14/2024 CD 10:04:14-41-10:04:45]

C. Habeas corpus hearing

Oral argument was held on March 14, 2024. In his recitation of the underlying facts, Eaker noted that when he finally arrived at NMCD, following a failed conditional discharge and over two years of delays, NMCD immediately started running his indeterminate parole term of five-to-twenty years, associated with the CSP conviction. He further stated, erroneously, that in accord with the sentencing order (the Amended Order Revoking Probation) the sex offense term was to be served prior to the Incest term. [*Id.* 9:42:44-9:43:03] Eaker argued that because he never spent a day in NMCD for the CSP conviction he cannot serve parole for the same. [*Id.* 9:44:42-9:44:50]

The State argued that, under the plain language of Section 31-21-10.1, the indeterminate parole portion of a sex offender’s sentence attaches as soon as the offender is sentenced to NMCD. Because Eaker was sentenced to

NMCD for a third degree CSP conviction, he was required to serve such a parole term. [*Id.* 10:02:26-10:02:50] The court rejected the State’s argument, stating such argument “flies in the face” of the provisions of Section 31-21-10(E), because that subsection discusses the requirement for a parole plan, which the court appeared to believe negates the possibility of parole following a suspended sentence. [*Id.* 10:14:16-10:15:53]

D. The habeas court’s decision

The court recognized that Eaker’s conditional discharged was initially revoked on November 19, 2015; he was then ordered into NMCD custody; and the sentencing court amended the sentence to five years of incarceration and an indeterminate parole term from five-to-twenty years as part of the sentence for CSP. [RP 453] Nonetheless, it found that “[b]ecause Mr. Eaker’s three-year sentence for Criminal Sexual Penetration did not include an actual term of imprisonment in an NMCD facility,” the statute did not authorize the imposition of an indeterminate parole term. [*Id.* 457]

ARGUMENT

The habeas court erred by discharging Eaker from parole for two reasons. First, because Eaker’s CSP conviction resulted in a sentence to NMCD, Section 31-21-10.1 requires that he serve the concomitant parole

term, regardless of where he actually served the time. Second, the court erroneously misread the sentencing order and assumed Eaker served the CSP term before the Incest term and thereby timed out his CSP sentence prior to arriving at NMCD. This Court reviews a district court's decision to grant habeas relief *de novo*. *Lukens v. Franco*, 2019-NMSC-002, ¶ 15.

I. The habeas court's interpretation of the law was in error.

In concluding that Eaker should be discharged from parole for the CSP conviction, The habeas court relied in part on:

- NMSA 1978, Section 31-18-15(C) (2011) ("parole may only be imposed "after the completion of any actual time of imprisonment" in a NMCD corrections facility.");
- NMSA 1978, Section 31-21-10.1(A) (2011) (reserving parole for sex offenders who have been sentenced to "a term of incarceration in a facility designated by the corrections department") *cf* NMSA 1978, Section 31-21-10(D) (2011); and
- *State v. Brown*, 1999-NMSC-004, ¶¶10-12..."[O]nly prison sentences, not jail sentences, can have a parole requirement."

[RP 455] The Court's conclusion is not supported by the cited law.

A. Section 31-18-15(C) does not apply to sex offenders.

Section 31-18-15(C) references only Section 31-21-10, which governs parole terms and conditions for *non*-sex offenders. It explicitly excludes

Section 31-21-10.1, which governs parole terms and conditions for sex offenders (both discussed below). Section 31-18-15(C) states in pertinent part:

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 NMSA 1978 after the completion of any actual time of imprisonment[.]

Thus, Section 31-18-15(C) does not apply to sex offenders like Eaker who are sentenced to a mandatory period of indeterminate sex offender parole under Section 31-21-10.1.

B. The difference between Sections 31-21-10 and 31-21-10.1: if a sex offender is sentenced to NMCD an indefinite parole term is required.

Section 31-21-10 generally governs parole authority and procedure, listing, for example, what factors the parole board must consider when placing offenders on parole. Subsection D governs parole terms and conditions and carves out exception for sex offenders. The Legislature designated a separate statute for parole terms and conditions for sex offenders: Section 31-21-10.1. Thus, the terms and conditions of parole in Section 31-21-10(D) do not apply to sex offenders. 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.

(Emphasis added). Thus, Section 31-21-10 (D) requires that:

- 1) a non-sex offender inmate,
- 2) who was convicted of a 1st, 2nd, or 3rd degree felony, and
- 3) has already served his sentence in NMCD,
- 4) is required to serve two years of parole.

Section 31-21-10.1, on the other hand, states:

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 for a period of [] not less than five years and not in excess of twenty years for the offense of ... criminal sexual penetration in the third degree[.]

Thus, Section 31-21-10.1(A) requires that:

- 1) a sex offender,
- 2) who is sentenced to NMCD,
- 3) is required to serve an indeterminate parole term.

The two statutes read side-by-side demonstrate the crucial operative difference between them: for parole to attach to non-sex offenders, Section 31-21-10(D) explicitly requires that an inmate “has served” the sentence at

NMCD. Note the past-tense construction, looking backward at what has already occurred, namely, time served. In contrast, for parole to attach to sex offenders, Section 31-21-10.1(A) requires only that the district court “sentences” them, in the present tense.

The distinction is further illuminated by the term “inmate” in Section 31-21-10(D), versus “sex offender” in Section 31-21-10.1. A “sex offender” is, at the time of sentencing, a pre-incarcerated convict. An “inmate,” however, is an incarcerated prisoner. See Section 31-21-10.1(I)(2) (“‘sex offender’ means a person who is convicted of, pleads guilty to or pleads nolo contendere to...criminal sexual penetration in the first, second or third degree”); *cf.* Justia Legal Dictionary <https://dictionary.justia.com> (defining “inmate” as “[a]n individual who is kept under official custody in a facility such as a prison[.]”)

Such terminological differences must be construed as intentional and interpreted literally. *See State ex rel. Stratton v. Serna*, 1989-NMSC-062, ¶¶ 6, 109 N.M. 1 (“Statutory language should be interpreted literally”).

If the Legislature intended, as the habeas court found, to require sex offenders to *have served* their sentence in NMCD for the mandatory indeterminate parole term to attach, the language of Section 31-21-10.1(A)

would mimic that in Section 31-21-10(D), rather than explicitly differ from it. See *Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2013-NMSC-013, ¶ 36 (“[W]hen the Legislature includes a particular word in one portion of a statute and omits it from another portion of that statute, such omission is presumed to be intentional.” (internal quotation marks and citation omitted)); *State v. Sublett*, 1968-NMCA-001, ¶ 10, 78 N.M. 655 (“We must assume that the [L]egislature means just what the words it uses mean, and that it chose its words advisedly to express its meaning, until the contrary clearly appears.” (internal citations omitted)); *State v. Barela*, 2021-NMSC-001, ¶¶ 12-13 (stating that the Legislature could have specified a different result had it intended one other than that required by the clear language of a statute).

The patent differences between Sections 31-21-10(D) and 31-21-10.1(A)(1) prove that Legislature intended that parole attach to non-sex offenders after they have served the imposed sentence at NMCD, and that parole attaches to sex offenders at the time of sentencing.

The habeas court concluded that “Section 31-21-10.1(A) explicitly states that sex offender parole is only applicable to sex offenders sentenced to ‘a term of incarceration in a facility designated by the corrections

department.” [RP 456 (emphasis added, internal quotation marks original)] The State agrees with the court’s recitation of the statutory language. However, the habeas court stripped *the sentencing, itself*, of its parole-triggering function by placing the opening quotation marks on the wrong side of the word “sentenced.” The plain language of Section 31-21-10.1(A) *does* require the sentencing of a sex offender to NMCD as a precondition to an indeterminate term of parole; it *does not* require that an inmate actually serve such a sentence in NMCD, as does Section 31-21-10(D).

C. *State v. Brown* does not support the habeas court’s decision.

The Court cited *Brown*, 1999-NMSC-004, for the proposition that convictions that result in a year or more term of imprisonment must be served at corrections facility. The State does not contest this proposition, either. However, it does not support the court’s conclusion that Eaker should be discharged from parole. [RP 455]

For one, the defendant in *Brown* was not a sex offender and the case was decided four years before the Legislature enacted Section 31-21-10.1. Therefore, the specificity of Section 31-21-10.1(A)(1) to sex offenders negates *Brown*’s applicability to Eaker’s case. Furthermore, to the extent the court relied on *Brown*, the case merely reiterates the principle in NMSA

1978, Section 33-2-19 (2011). [RP 455] The *Brown* Court, citing Section 33-2-19 (1990), stated that, “[a]ll 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 must be issued accordingly.” *Brown*, 1999-NMSC-004 ¶ 10.

The State does not disagree; Eaker was properly sentenced to NMCD because his convictions resulted in an imprisonment sentence of over a year. The very fact of such sentencing, however, requires that Eaker serve an indeterminate period of parole under Section 31-21-10.1.

D. The habeas court’s hypothetical concerns are not dispositive and cannot trump the statute: Eaker was convicted and sentenced following revocation of conditional discharge.

In reaching its conclusion that Eaker’s CSP parole term was not legally imposed, the court reasoned that the State’s interpretation of Section 31-21-10.1 could lead to “absurd results.” The court stated, “the State claims that a defendant who was convicted as a ‘sex offender’ as defined by §31-21-10.1(1) NMSA, and who receives a fully suspended sentence, must necessarily be placed on parole pursuant to § 31-21-10.1(A) NMSA.” [RP 455]

As discussed, in hearing, the State argued that parole attaches to sex offenders when they are sentenced to NMCD. [3/14/2024 CD 10:02:26-10:02:50] The court then posed a hypothetical question: whether a sex offender with a fully suspended sentence would still be required to serve parole under Section 31-21-10.1. The State answered affirmatively. *Id.* 10:13:00-10:14:09]

As to deferred or suspended sentences, NMSA 1978 § 31-20-3 (1985) allows a court, “[u]pon entry of a judgment of conviction of any crime not constituting a capital or first degree felony,” to either, “A. enter an order deferring the imposition of sentence,” in which case there would be no sentence to trigger the parole term under Section 31-21-10.1; or “B. sentence the defendant and enter an order suspending in whole or in part the execution of the sentence[.]” *Id.* Because subsection B involves a sentence, if that 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. Therefore, the plain language of Section 31-21-10.1, which requires parole to attach at the time of sentencing to NMCD, would apply in the case of a fully suspended sentence for a sex offense like Eaker’s.

And in light of the stringent sex offender supervision envisioned by the Probation and Parole Act, such result would not be absurd. “[I]t is not enough for a court to find a given outcome foolish under the plain meaning of a statute; instead, the court must be convinced that the result is so absurd that the legislature, not the court, could not have intended such a result.” *State v. Montano*, 2024-NMSC-019, ¶ 21 (internal quotation marks omitted).

The court’s hypothetical, however, is irrelevant in this case. Eaker’s sentence was not fully suspended; he was given a conditional discharge, and then adjudicated as guilty on November 19, 2014 when the conditional discharge was revoked. See *State v. Fairbanks*, 2004-NMCA-005, ¶ 10 (“a conditional discharge is different than a suspended or deferred sentence because there is no adjudication of guilt.” (citations omitted)) Upon his adjudication of guilt Eaker was sentenced to NMCD, at which point an indeterminate parole term attached to his CSP conviction under Section 31-21-10.1(A)(1).

Therefore, the decision below should be reversed and the CSP parole term reinstated.

II. In the alternative, Eaker's served time at NMCD should be attributed to the CSP sentence.

The habeas court wrongly concluded that Eaker served his entire CSP sentence before his delayed arrival at NMCD. If this Court does not find that the CPS parole term was triggered by the sentencing language in Section 31-21-10.1, it should attribute Eaker's time at NMCD toward the CPS sentence.

A. The habeas court erred by presuming the CSP sentence was served first.

The habeas court erroneously concluded that because "[Eaker] was credited with three years and 183 days of presentence and probation credit through December 30, 2015...[he] never served any incarceration in the Department of Corrections as to count one[, the CSP conviction]." [RP 454]

Eaker's arrival at NMCD was grievously delayed by his litigation tactics and errors, despite his timely commitment thereto. However, the court's conclusion that he therefore served his CSP sentence during the credited time before his delayed arrival is contrary to law. In the absence of specified service sequence by the sentencing court, the CSP term should have properly been served *after, not before* the Incest term.

1. In the absence of sentence sequence, the listed order of convictions in a judgment and sentence is irrelevant.

The habeas court's conclusion that Eaker did not serve any of his CSP sentence in NMCD was apparently due to a misinterpretation of the sentencing order.³ This Court is empowered to review and re-interpret the same. *See Brown*, 1999-NMSC-004, ¶ 8 ("To the extent that our analysis requires interpretation of the judgment and sentence, we review de novo the district court's interpretation and application of the sentencing law[.]") (internal quotation marks omitted).

The court critically misinterpreted the sentencing order when concluding, "[p]er the January 19, 2016 order revoking Mr. Eaker's conditional discharge, [he] was sentenced to three years of incarceration for Criminal Sexual Penetration, with an indeterminate parole term from five-to-twenty years, *to be followed by* three years of incarceration for Incest, with one year suspended on the condition of probation, and a parole term of two years." [RP 454 (emphasis added)]

The Order specifies that the counts were to run consecutively. [*Id.* 193-194] It further specifies that the entirety of the aggregate, five-year sentence

³ That NMCD made the same error is unfortunate but does not excuse the court's misreading of the sentencing order.

of imprisonment was to be served at NMCD, and that the imprisonment term for CSP must be followed by a five-to-twenty year term of parole. [*Id.*]

The Order, however, does not specify the sequence of the two sentences or otherwise indicate the CSP term was “*to be followed by*” the Incest term. The two counts and their sentences are listed as follows:

Count 1: Criminal sexual penetration, for a period of three (3) years, followed by a term of parole of 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.

[*Id.* 193-194] The original Order Revoking Probation is materially identical as to these portions. [*Id.* 175-177]

When not otherwise specified, the order in which sentences are listed on the sentencing order is insignificant. See *State v. Utley*, 2008-NMCA-080, ¶ 10, 144 N.M. 275 (holding that while the sentencing documents commonly “list[] the most serious crime first...the order [i]s ‘insignificant.’”). See also *State v. Romero*, A-1-CA-27050, mem. op. at *1 (N.M. Ct. App. Feb. 17, 2009) (nonprecedential), (“a district court may impose a two-year parole period following convictions of third and fourth degree felonies, regardless of the order of the crimes in the judgment and sentence.”)

Therefore, the presumption that Eaker served the CSP sentence before arriving at NMCD was erroneous.

2. The CSP term should have properly been served *after, not before* the Incest term.

The CSP sentence should be construed as sequenced last, thus including time Eaker spent at NMCD, for two reasons. First, the lengthy supervision associated with the parole term was intended by both the sentencing court in this case, and the Probation and Parole Act, more broadly. Second, the parole term must be served directly after the basic sentence. If served first, Eaker's three-year sentence for CSP ended before NMCD started running his parole term, and the break in between would have been impermissible.

The New Mexico Court of Appeals' decision in *Utley*, 2008-NMCA-080 is instructive in this case. There, as here, the defendant was convicted of multiple counts based on a plea agreement: in that case, a third degree felony and two fourth degree felonies. *Id.* ¶ 2. The district court ordered the sentences to be served consecutively for a total commitment of ten years, to be followed by a parole period of two years. *Id.* The sentence sequence was not specified. *Id.* ¶ 10. A one year parole period would have attached to the

fourth degree felonies, which were listed after the third degree felony on the sentencing order. *Id.* ¶ 7.

However, *Utley's* district court wanted the defendant, who had mental health and drug abuse issues, to participate in a treatment program during her parole period, to "better prepare herself for returning to society." The lower court thereby justified a two year parole period, which would attach to the third degree felony. *Id.* ¶ 2. The defendant appealed, claiming that only one year of parole was justified, based on the "last" of the counts as they appeared on the sentencing order. *Id.* ¶ 3.

The Court of Appeals affirmed the district court's imposition of the longer parole term, and its reasoning. *Id.* ¶¶ 9, 10. Although the third degree felony was listed first on the sentencing order, "the common practice is to list the most serious crime first but...the order is ultimately 'insignificant.' [The district court] relied on Section 31-21-10(C) as providing the authority to order the two-year parole period regardless of whether the third degree felony was listed first or last in its sentencing order." *Id.* ¶ 8.

The Court further noted that "the district court's position is supported by our reading of the legislative intent behind the Probation and Parole Act. The purpose of parole under the Act is to treat persons convicted of

crimes based on their individual needs when a period of institutional treatment is deemed essential in the light of the needs of public safety and their own welfare.” *Id.* ¶ 9 (citation and internal quotation marks omitted).

Following the reasoning in *Utley*, Eaker’s CSP term should be construed as coming last, and the concomitant parole term enforced. The counts’ listed positions on the sentencing order are irrelevant, and, as in *Utley*, the sentencing court was gravely—and reasonably—concerned with both Eaker’s rehabilitation and his threat to public safety.

The sentencing court expressed such concerns at least four times on the record. At the November 3, 2014 hearing, after Eaker violated probation, it stated that the community plan which had been in place since his conditional discharge had been “a disaster” and that it was “gravely concerned about community safety” because there was a “substantial possibility” that Eaker would commit a new sex offense in the future.

[11/3/2014 CD 5:01:35-5:02:05]

At the December 30, 2015 reconsideration hearing, the sentencing court stated that, while Eaker “had been given the benefit of the doubt” when granted a conditional discharge, he had violated probation conditions by use of alcohol and drugs, and had provided “evidence that he has the continual

potential for future sex crimes.” [12/30/2015 CD 11:53:05-11:53:28] And in the Amended Order Revoking Probation, the court ordered that Eaker enter and successfully complete the sex offender treatment program, [RP 195] and recommended that he “be paroled into the [sex offender treatment] program at the Las Vegas Behavioral Medical Center as a condition of parole.” [Id. 196]

Plainly, Eaker has proven to be precisely the type of candidate the Legislature had in mind when including the lengthy, mandatory sex offender supervision in the Probation and Parole Act.

And for that supervision to ensue, Eaker’s CSP term could and should have been sequenced last, not first; a sentence cannot be divided into fragments or served in installments, and the parole period is part of the sentence of a convicted person. *See Brock v. Sullivan*, 1987-NMSC-013, ¶¶ 10-11. Therefore, parole must directly follow the basic sentence. *Gillespie v. State*, 1988-NMSC-068, ¶ 2, 107 N.M. 455.

But if construed as running first, based on presentence incarceration credit of three years, 183 days, [RP 195] Eaker’s basic CSP term would have concluded well before NMCD began running his CSP parole term on December 30, 2015. Therefore, to fulfill the intentions of the sentencing

court and the Probation and Parole Act, the CSP sentence must be construed as following the Incest sentence.

The habeas court released Eaker from the longer parole period associated with the CSP count because, in part, it mistakenly inferred the sequence of the sentences based on the order they were listed on the sentencing order. This Court should not ratify that mistake by affirming Eaker's discharge from sex offender parole.

III. The State preserved its claims.

Below, the State mounted its first argument in briefing and hearing. Because the State argued that Section 31-21-10.1 triggers indeterminate parole for sex offenders at the time a sentence to NMCD is imposed, that issue was squarely before the court, and the State properly preserved its claims. See Rule 12-321(A) NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked.").

To the extent that this Court perceives a difference between the remaining arguments that the State raised below and advances now, Rule 12-321(B)(2)(c) excuses the preservation requirement because:

- (1) the new issue is purely legal and its resolution would not be aided by further fact development;

(2) the proper resolution of the issue is not in doubt;[]
(3) the issue is almost certain to arise in other cases; and, "most important,"
(4) declining to reach the issue would result in a "miscarriage of justice" by denying the public's "legitimate and significant interest in prosecuting suspected criminals." *State v. Alingog*, 1993-NMCA-124, ¶ 27.

CONCLUSION

For the foregoing reasons, the State requests that this Court reverse the habeas court's decision to discharge Eaker from his mandatory CSP parole term.

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STATEMENT OF COMPLIANCE

The body of this brief complies with the limitations of Rule 12-318(F)(3) NMRA because it contains 5,836 words as calculated by Microsoft Word 365.

CERTIFICATE OF SERVICE

I certify that, on March 17, 2025, I filed or caused to be filed a true and correct copy of the foregoing Brief in Chief electronically through the Odyssey E-File & Serve System, which caused opposing counsel to be served by electronic means.

/s/ Sarah M. Karni

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