

**GOVERNING NEW MEXICO LAW  
REGARDING S.O. PROBATION AND PAROLE REVIEW HEARINGS**

Individuals in New Mexico under sex offender enhanced probation and/or parole supervision have constitutional due process rights under both the federal and the New Mexico Constitutions. Those rights include the procedural due process rights to notice, a hearing, the right to present evidence, the right to confront evidence against them, an independent finder of fact, and a written statement by the factfinders as to the evidence relied upon. *Morrissey v. Brewer*, 408 U.S. 471, 490–91 (1972). *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973).

These due process safeguards were adopted by the New Mexico Supreme Court to the probation and parole supervision context as early as 1982. *State v. Vigil*, 1982-NMCA-058, 643 P.2d 618, and more recently reexamined and by the New Mexico Supreme Court in *State v. Guthrie*. *Guthrie* reiterates that the U.S. Supreme Court detailed six components of due process that are applicable to people on post-conviction supervision by the government:

- (a) written notice of the claimed violations of (probation or) parole;
- (b) disclosure to the (probationer or) parolee of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a ‘neutral and detached’ hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
- (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking (probation or) parole.

*State v. Guthrie*, 2011-NMSC-014, ¶¶ 10-16, 257 P.3d 904, 908–10.

In addition to the constitutionally mandated due process rights, the New Mexico legislature created concrete and mandatory procedural due process rights for individuals ordered to serve enhanced and indeterminate terms of sex offender probation or parole. Both of the governing statutes for supervision of sex offenders placed on indeterminate terms of supervision mandate periodic review hearings.

There is a statutory right to legal counsel for sex offender supervision review hearings. (in Court for Probation Review and with Parole Board for Parole review). If an S.O. cannot afford a lawyer, a public defender attorney must be appointed.

The statute governing mandatory probation review hearings states:

B. A district court **shall** review the terms and conditions of a sex offender's supervised probation at two and one-half year intervals. When a sex offender has served the initial five years of supervised probation, the district court shall also review the duration of the sex offender's supervised probation at **two and one-half year intervals**. When a sex offender has served the initial five years of supervised probation, at each review hearing the state shall bear the burden of proving to a reasonable certainty that the sex offender should remain on probation.

NMSA 1978 § 31-20-5.2 (emphasis added).

The statute governing mandatory parole review hearings states:

C. When a sex offender has served the initial five years of supervised parole, and at two and one-half year intervals thereafter, **the board shall review the duration of the sex offender's supervised parole**. At each review hearing, **the attorney general shall bear the burden of proving by clear and convincing evidence that the sex offender should remain on parole**. (5 years calculated as the total/aggregate time on parole.)

NMSA 1978 § 31-21-10.1(emphasis added).

At the mandatory review hearings, the government, via the county prosecuting authority or the Attorney General's office is required to prove by clear and convincing evidence that the supervised individual should remain on probation or parole. See NMSA 1978, § 31-21-10.1(C), and NMSA 1978 § 31-20-5.2.

Lastly, the governing parole statutes require that the Parole Board notify the chief public defender of the scheduled parole hearing.

Compliance with NMSA 1978 § 31-20-5.2 and § 31-21-10.1 is mandated by the legislature and the statute's requirements for **timely review hearings are not optional**.

**Expiration of Jurisdiction?** It is also arguable that failure to hold a timely supervision review hearing as required by these statutes effectively allows the term of supervision to expire, requiring discharge of a probationer or parolee from supervision. When a statute requires action to continue jurisdiction and that action is not taken, jurisdiction expires as a matter of law. *State v. Lara*, 2000-NMCA-073, 9 P.3d 74. See also, *State v. Travarez*, 1983-NMCA-003, ¶ 4, 657 P.2d 636, 638, citing *State v. Mabry*, 1981-NMSC-067, 630 P.2d 269

---