2019 HOUSE JUDICIARY

HB 1185

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1185
1/21/2019
31151

☐ Subcommittee
☐ Conference Committee

Committee Clerk: DeLores D. Shimek by Marjorie Conley

Explanation or reason for introduction of bill/resolution:

Relating to reduction of felonies to misdemeanors by operation of law; and to provide a penalty.

Minutes: Attachments 1 ,2, 3

Chairman K. Koppelman: Opened the hearing on HB 1185.

Rep. Kading: Introduced the bill. (Attachment #1) stopped 4:00

Rep. Jones: Do you know what the time frame is on some of those pending charges?

Rep. Kading: These petitions can hang out there forever.

Ken Sorenson, Special Ass't Attorney General, ND DOCR: (Attachment #2) Went through his testimony. (5:35-22:15)

Travis Finck, Deputy Director of the Commission on Legal Counsel for Indigents: (Attachment #3) (23:24 - 27:00)

Vice Chairman Karls: Why would a prisoner get this petition for revocation of probation?

Travis Finck: If someone is on probation and they commit a new offense and then they get caught in a traffic stop. That is a new charge and it is also grounds for revocation of the old charge, so what might happen is they would charge them for the new traffic stop, the new possession of a controlled substance, they could be sentenced to the DOCR rehabilitation and meanwhile they could have a petition for revocation going on at the same time. They are different case numbers but they are happening at the same time because of the same event. Violation of a new criminal law and a violation of their condition of probation.

Vice Chairman Karls: Is this a get out of jail free card?

Travis Finck: No, the judge would have their full sentencing discretion. It is letting the defendant know what they are up against. It also provides the court a better picture of what is going on with this individual.

Ken Sorenson: The petition of revocation of probation is a lot of times more severe than facing the initial sentencing. We want to get those resolved so that this person knows if he is going to prison or going to get out.

No oppostion or Neutral testimony.

Closed.

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1185
1/22/2019
31210

☐ Subcommittee
☐ Conference Committee

Committee Clerk: DeLores D. Shimek by Marjorie Conley

Explanation or reason for introduction of bill/resolution:

Relating to reduction of felonies to misdemeanors by operation of law; and to provide a penalty.

Minutes:

Chairman Koppelman: Opened the meeting on HB 1185.

Rep. Roers-Jones made a motion to Do Pass and **Rep. Vetter** seconded motion on HB 1185.

Roll Call Vote Yes 14 No 0 Absent 0

Rep. Vetter is the **Carrier.**

Date: 1-22-19
Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HB1185

House **Judiciary** Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☑ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Rep. Roers Jones Seconded By Rep. Vetter

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman	✓		Rep. Buffalo	✓	
Vice Chairman Karls	✓		Rep. Karla Rose Hanson	✓	
Rep. Becker	✓				
Rep. Terry Jones	✓				
Rep. Magrum	✓				
Rep. McWilliams	✓				
Rep. B. Paulson	✓				
Rep. Paur	✓				
Rep. Roers Jones	✓				
Rep. Satrom	✓				
Rep. Simons	✓				
Rep. Vetter	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Vetter

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1185: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1185 was placed on the Eleventh order on the calendar.

2019 SENATE JUDICIARY

HB 1185

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1185
3/4/2019
#33091 (20:15)

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to create and enact a new subsection to section 12.1-32-07 of the North Dakota Century Code, relating to petitions for revocation of probation; to amend and reenact subsection 9 of section 12.1-32-02 of the North Dakota Century Code, relating to reduction of felonies to misdemeanors by operation of law; and to provide a penalty.

Minutes: 2 Attachments

Chair Larson opens the hearing on HB 1185. Senator Osland was absent.

Tom Kading, District 45 Representative, testifies in favor

Representative Kading: This bill requires the Department of Corrections to notify a prisoner in custody of any untried petitions for revocation and further requires that the jurisdiction with such petition must bring that petition forward within 90 days or let it go. Secondly the bill changes the time period as to the length of sentence for reducing a felony to a misdemeanor. Current law contains provisions which require that if a prisoner has pending charges, the defendant may request a disposition on the charges prior to being released. North Dakota Century Code 29-33 is the Uniform mandatory disposition of detainers act which covers in-trust state charges; whereas 29-34 outlines the inter-state agreement for inter-state charges. Some of the logic behind this bill is to ensure an inmate can restart their life upon being released rather than having a pending petition out there. It's good policy, but there is a loophole. There is no requirement for a jurisdiction to make a final disposition on a petition like there is with a charge. A petition for revocation never goes away unless it is dismissed by a court. This means such petition could be hanging out there for years. I was informed as of this morning that there are 70 petitions sitting out there on defendants currently in prison. This bill primarily creates a framework for notifying and finalizing outstanding petitions for revocation for prison inmates. The DOC must notify upon request the prison. The petition must then be brought within 90 days; if it's not brought, then it is dismissed with prejudice. There are two exceptions to this. One is if there is a continuance for good cause. Secondly if the defendant had escaped from custody. A petition for revocation on probation is when someone has a charge, violates probation on another thing, goes to prison for the first charge,

still has a petition for revocation on probation on the other charge, goes to prison and that petition is never taken care of. The one year change to 360 days on the first page is a change put in place to comply with federal law rule such that deportation is not triggered if a felony is reduced to a misdemeanor.

Chair Larson: The reason for that change was to make it less than the one year so that that would not require jail time; otherwise it would be required.

Representative Kading: There is additional testimony to address that. When someone gets out of prison only to have the sheriff pick them up, it makes it very difficult to transition back to society. The individual may have job lined up, a deposit on an apartment and have a plan. Getting picked up will likely result in the loss of that job and perhaps the deposit. For all of these reasons, I would urge a do pass out of committee.

(6:10) Ken Sorenson, Special Assistant Attorney General for the ND DOCR, testifies in favor (see attachment #1)

(15:30) Travis Finck, Deputy Director of the Commission on Legal Counsel for Indigents, testifies in favor (see attachment #2)

Senator Myrdal: Motions for a Do Pass.
Vice Chairman Dwyer: Seconds.

Senator Bakke: If someone is in prison, go on probation and come out with an outstanding warrant on them, is that just then dismissed?

Finck: The warrant is not dismissed; they're separate cases. For example, an individual gets arrested on a new charge of theft of property. That individual may already be on probation for a matter. One of the conditions of probation is that you cannot violate any new criminal law violations, so that person on the new charge is sentenced to prison. While they're in prison, the probation officer files a petition to revoke, or before they even go to prison. If a warrant is issued for that petition for revocation, a defendant who is now in custody in the DOCR has no way to force along that petition for revocation. If this bill were to pass, the DOCR would notify them and let them know that they have a warrant for petition for revocation of probation. The defendant could then request that that be tried, then that would have to be taken care of while he's in prison. Essentially that defendant would be brought in front of the judge and would face resentencing; it doesn't mean that they would be entitled to concurrent time. They could still be given consecutive time, but at least they know. This is just allowing them to know.

A Roll Call Vote was Taken: 5 yeas, 0 nays, 1 absent. Motion carries.

Vice Chairman Dwyer will carry the bill.

Date:3/4/2019
Roll Call Vote: 1

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1185

Senate **Judiciary** Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Senator Myrdal Seconded By Vice Chairman Dwyer

Senators	Yes	No	Senators	Yes	No
Chair Larson	X		Senator Bakke	X	
Vice Chair Dwyer	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Osland	AB				

Total (Yes) 5 No 0

Absent 1

Floor Assignment Vice Chairman Dwyer

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1185: Judiciary Committee (Sen. D. Larson, Chairman) recommends **DO PASS** (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1185 was placed on the Fourteenth order on the calendar.

2019 TESTIMONY

HB 1185

#1
HB 1185
1-21-19
Pg 1

Mr. Chairman and members of the committee, I am Representative Tom Kading from Fargo.

Before you is House Bill 1185. HB 1185 is a bill that requires the Department of Corrections to notify prisoners in custody of any untried petitions for revocation and further requires that the jurisdiction with such petition must decide to bring the petition within 90 days or let it go. Secondly the bill changes the time period as to the length of a sentence for reducing a felony to a misdemeanor.

Final Disposition on Petitions

Current law contains provisions which require that if a prisoner has pending charges the defendant may request a disposition on the charges prior to being released from custody. NDCC 29-33 is the Uniform Mandatory Disposition of Detainers Act which cover intrastate charges and NDCC 29-34 outlines an interstate agreement regarding such charges. Some of the logic behind this law is to ensure an inmate can restart their life upon being released rather than have pending charges hanging out there.

In my opinion, this is good policy. Yet, there is what one might consider a loophole. There is no requirement for a jurisdiction to make a final disposition on petitions for revocation of probation.

A petition for revocation never goes away unless it is dismissed by the court. This means such petition may have occurred 25 years ago or more. My understanding is there is about 100 petitions sitting out there on defendants currently.

Bill

What this bill primarily does is create a framework for notify and finalizing outstanding petitions for revocation on prison inmates. The Department of Corrections must notify an inmate upon request of outstanding petitions. The petition then must be brought within 90 days. If not brought it is then dismissed with prejudice. Two exceptions to this include a continuance for good cause or if the defendant escapes from custody.

The one year change to 360 days on the first page is a change put in place to comply with federal rule such that a deportation is not triggered even if a felony is reduced to a misdemeanor. Patrick Bohn will provide further technical information on this change.

Conclusion

When someone gets out of prison, only to have a sheriff there to pick them up, it makes it very difficult to transition back into society. That individual may have had a job lined up, a deposit on an apartment, and a plan. Getting picked up will likely result in the loss of the job, potentially losing the apartment deposit, and generally throwing a wrench into reentry. For all of these reasons, please give this bill a Do Pass.

Thank you

#2
HB1185
1-21-19
PJL

HOUSE BILL 1185
HOUSE JUDICIARY COMMITTEE
JANUARY 21, 2019

TO: Kim Koppelman, Chair, House Judiciary Committee, and Members of the House Judiciary Committee.

Ken Sorenson, Special Assistant Attorney General, submits this written testimony on behalf of the North Dakota Department of Corrections and Rehabilitation (ND DOCR) in support of House Bill 1185.

House Bill 1185 includes an amendment to Subsection 9 of N.D.C.C. 12.1-32-02 to provide clarity to this subsection, and to also to replace the term "one year" with 360 days to provide consistency with two other statutes in state law.

House Bill 1185 also creates a new subsection to N.D.C.C. Section 12.1-32-07 to provide a process for disposition of outstanding warrants and petitions for revocation of offenders who are in state custody.

AMENDMENTS TO SUBSECTION 9 OF SECTION 12.1-32-02

Replacement of "one year" with "three hundred sixty days"

In 2017, the Legislature amended Subsection 5 of N.D.C.C. Section 12.1-32-01 and changed the maximum penalty of imprisonment for a class A misdemeanor offense from one year to three hundred sixty days. The current language in Subsection 9 of Section 12.1-32-02 that a one-year sentence is a class A misdemeanor is in conflict with the change made in 2017.

Because the one-year maximum sentence for a class A misdemeanor has been replaced with a three hundred and sixty-day maximum sentence, a sentence to one year under the current language of subsection 9 of section 12.1-32-02 in effect may not operate to reduce the offense to a class A misdemeanor because the one-year sentence is longer than the maximum penalty available for a class A misdemeanor.

Replacement of "successful completion of the term of imprisonment and a term of probation imposed as part of the sentence"

Historically, an offender could not be sentenced to the North Dakota State Farm on a sentence of more than one year. If the offender was sentenced to the North Dakota State Farm for a sentence of no more than one year for a felony offense, N.D.C.C. Section 12-51-07, which has long been repealed, provided until 1981, in part, that "[a] person committed to the state farm shall not be

deemed to have been convicted of a felony, but shall be deemed to have been convicted of a misdemeanor."

In 1981, this part of section 12-51-07 was removed and a new subsection to N.D.C.C. Section 12.1-32-02 was added:

> "A person convicted of a felony who is sentenced to imprisonment for not more than one year shall be deemed to have been convicted of a misdemeanor upon successful completion of the term of imprisonment."

House Bill 1085, 47th Legislative Assembly.

Since 1981, this felony to misdemeanor language in section 12.1-32-02 has been amended a number of times, and most recently in 2009 to its present form. 2009 N.D. Sess. Laws, ch. 135, § 1. The North Dakota Supreme Court considered the current language in Subsection 9 of Section 12.1-32-02 in the case State of North Dakota v. Rath, 2017 ND 213, 901 N.W.2d 51, a case in which the defendant Rath pled guilty to a class C felony offense of perjury. He was sentenced to one year of imprisonment, with all but three days suspended, subject to three years of supervised probation. His probation was later revoked, but the trial court stated it would not take away the misdemeanor disposition, but in proceedings to clarify the sentence, the court stated Rath was not entitled to the benefit of a misdemeanor sentence. The Supreme Court considered the case to be "an appropriate case to exercise our discretionary supervisory jurisdiction" and ordered the clerk of the Burleigh County District Court to change the disposition of the case from a felony offense to a misdemeanor offense under Subsection 9 of Section 12.1-32-02. The court concluded that this subsection was ambiguous as applied to the facts and circumstances in the case and under the rule of lenity, must be construed in favor of defendant Rath.

The proposed amendment to subsection 9 of section 12.1-32-02 removes the language the North Dakota Supreme Court found was ambiguous in Rath and provides an unambiguous basis for determining whether a felony offense will become a misdemeanor offense – unless there is an order from the sentencing court to revoke probation, the offense will be deemed to be a misdemeanor offense.

New Subsection to Section 12.1-32-07 for Disposition of Petitions for Revocation of Probation

North Dakota law presently provides two mechanisms for offenders in the custody of the ND DOCR to take care of an untried criminal complaint, indictment, or information.

N.D.C.C. Chapter 29 -33, the Uniform Mandatory Disposition of Detainers Act, was enacted in 1971 and allows offenders in state custody to request the final disposition of an untried indictment, information, or complaint pending against the offender in the state of North Dakota. This chapter requires the ND DOCR to inform each offender, in writing, of any untried indictment, information, or complaint against the offender of which the ND DOCR has notice, and of the offender's right to request final disposition of the case. If the offender makes a request for final disposition in conformity with the requirements of N.D.C.C. Chapter 29-33, the prosecutor and the applicable court are required to bring the case to trial within 90 days, unless the court continues the matter; otherwise, the case must be dismissed with prejudice.

N.D.C.C. Chapter 29-34 is the Interstate Agreement on Detainers (IAD). The IAD is a congressionally approved, and state enacted, interstate compact entered into by all states except Louisiana and Mississippi, and also by the United States Government and the District of Columbia. North Dakota joined the compact in 1971. The IAD allows offenders in state custody to request disposition of an untried complaint, indictment, or information in another state for which the other state has lodged a detainer, which is a request or notice filed by a criminal agency, including a prosecutor, from one state, to the state having custody of the offender, to either hold the offender for the other agency, or notify the other agency of the release date of the offender. The process for an offender to request disposition of a detainer from another state under the IAD is somewhat more extensive than for the disposition of intrastate detainers, but at the same time, it is a frequent process for the IAD member states with consistent and uniform procedures. If an offender requests disposition of an untried complaint, indictment, or information under the IAD, the state that lodged the detainer must bring the prisoner to trial within 180 days from the date the offender makes the request. The IAD also allows prosecutors from other states to request disposition of cases. This process parallels the extradition process and requires judicial involvement.

The purpose of the Uniform Mandatory Disposition of Detainers Act and the IAD is to encourage and resolve the disposition of outstanding criminal charges in another jurisdiction, either within the state of North Dakota or outside the state.

The United States Supreme Court stated "[the IAD] is based on a legislative finding that "charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation." Carchman v. Nash, 473 U.S. 716, 719-720 (1985). The Supreme Court looked to the Council of State Government's explanation for the IAD:

> "The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody, which bars him from treatment such as trustyships, moderations of custody and opportunity for transfer to farms and work camps. In many jurisdictions he is not eligible for parole; there is little hope for his release after an optimum period of training and treatment, when he is ready for return to society with an excellent possibility that he will not offend again. Instead, he often becomes embittered with continued institutionalization and the objective of the correctional system is defeated." Council of State Governments, Suggested State Legislation, Program for 1957, p. 74 (1956).

Carchman v. Nash, 473 U.S. at 720.

What the CSG recognized in 1956, and acknowledged by the Supreme Court in 1985, still rings true. An outstanding warrant, complaint, indictment, or information, whether from within the state or outside the state, will negatively impact an incarcerated offender's classification and custody level, housing assignment, institutional employment and programming opportunities, the timing of treatment, work release, and parole opportunity. It will also create uncertainty for the offender upon release because the warrant will appear in the law enforcement data bases and the offender may be arrested on the outstanding criminal charges.

The reason for the proposed amendment to Section 12.1-32-07 is that the same mechanisms that exist under the Uniform Mandatory Disposition of Detainers Act and the IAD are not available when there is an outstanding petition for revocation of probation and the offender is in state custody. These two acts only apply to an untried complaint, indictment, or information, and do not apply to probation cases because there has been a resolution of the criminal charges.

Because there has already been resolution of criminal charges, an offender who is in state custody but is subject to an outstanding warrant for a petition for

revocation of remedy does not have available the same process and protections of the Uniform Mandatory Disposition of Detainers Act or the IAD and will therefore face the same problems and uncertainties addressed by these two acts.

These problems are not hypothetical or merely possible, they are real. The following are three cases, out of many, in which incarcerated offenders facing petitions for revocation experienced the same problems described by the Council of State Governments:

Individual #1 - John Doe (a pseudonym): Mr. Doe came in on a parole violation to NDSP on 6/5/18. His warrants/detainers were checked while he was going through the four-week orientation process. According to Odyssey, an order to apprehend warrant for probation revocation was issued on 7/20/18. Mr. Doe's case manager started the release planning process at 120 days prior to Mr. Doe's release date. On 11/27/18, Mr. Doe's case manager solidified where Mr. Doe would release to on his upcoming release date of 12/19/18. The case manager had been working on getting transportation in place. On 11/28/18, legal records did a search to verify there were no outstanding warrants or detainers. This is a typical search done approximately 30 days, more or less, prior to an individual's release. A warrant for probation revocation was found. This interrupted the release planning process as it was unknown what would happen with the petition for revocation. Not only was the release planning interrupted, but this caused anxiety and stress for Mr. Doe, who had been continuing to work on obtaining skills to be successful in the community. He had planned on being home and now he wasn't sure if he was going to get to go home now, in two years, or be sentenced to another 20 years in prison.

Individual #2 - Sean Doe (a pseudonym): Mr. Doe came into NDSP on 11/1/2017. He was transferred to minimum custody housing at MRCC on 2/1/18. Mr. Doe was reviewed by the Parole Board and granted parole for 08/16/18. His case manager had already completed finding a place for Mr. Doe to live upon release. They were now working on obtaining transportation to the approved residence. On 07/16/18, a records check was completed by DOCR legal records. An extraditable warrant from Grand Forks County for a petition for revocation of probation was found at this time. Mr. Doe was notified by ND DOCR at this time of his warrant. Because this was a felony warrant, Mr. Doe was removed from minimum custody and transported to NDSP as a medium override custody level. Mr. Doe now had to start working with a new case manager for his release plan. It was hard to work out the details for obtaining a ride because it was unknown how long Mr. Doe would have to wait in a county

jail to be heard on his petition for revocation. According to Odyssey, the petition for revocation of probation was filed on 1/4/18. The Order to Apprehend was issued on 01/05/2018. The Order to Apprehend warrant was not served by the county on Mr. Doe until 08/16/2018.

Individual #3 - Jack Doe (a pseudonym): Mr. Doe arrived at NDSP on 3/5/18. As of January 18, 2019, he is still at NDSP as a medium override. He scores out at classification as a 2-point minimum custody resident, however because of the extraditable probation violation felony detainer, he must stay at a more secure housing location and is an automatic override. The petition for revocation on his case was filed on 12/12/17. The order to apprehend warrant was issued on 12/15/2017. Mr. Doe was notified of this warrant when DOCR legal records completed a records check while he was still housed in orientation. At this time, the warrant had not been served on Mr. Doe by the county from which the warrant was issued. Because of the warrant, Mr. Doe cannot be moved to a lower secure facility for which he would otherwise be appropriate based on all other factors. Mr. Doe will be reviewed by the September 2019 parole board.

As of the afternoon of Friday, January 18, 2019, there is a total of 36 individuals in ND DOCR custody facing a total of 61 petitions for revocation throughout the state, with each of the individuals facing the problems with classification and custody level, housing assignment, institutional employment and programming opportunities, the timing of treatment, work release, and parole opportunity, and the uncertainty of their future.

CONCLUSION

Therefore, the ND DOCR respectfully requests favorable consideration and passage of House Bill 1185.

#3
HB1185
1-21-19
TF

House Bill 1185
House Judiciary
Testimony of Travis W. Finck
Deputy Director N. D. Comm. On Legal Counsel for Indigents
January 21, 2019

Chairman Koppelman, members of the House Judiciary, my name is Travis Finck, I am the Deputy Director of the Commission on Legal Counsel for Indigents, and on behalf of the commission, I rise in support of House Bill 1185 as it pertains to the disposition of probation revocations in a manner like that of untried indictments.

HB 1185 simply provides defendants who have warrants on probation revocation matters who are in custody the same protections and rights to compel the state to act upon the warrants in the same manner as a similarly situated defendant with an untried indictment. ND Cent Code section 29-33-01, is the codification of the Uniform Mandatory Disposition on Detainer's Act. The act provides an incarcerated defendant, a person who is imprisoned in a penal or correctional institution of the state, may request final disposition of an untried indictment. In 1985, the U.S. Supreme Court in Carchmer v. Nash, 473 U.S. 716 (1985), held the term untried indictment, information or complaint does not include probation revocations; effectively eliminating the right of a defendant facing revocation the right to force an untried indictment. This created a gap in rights of defendants.

This bill seeks to solve the existing gap a person sentenced to prison faces. If an individual has a warrant for a new crime, he can request disposition of the matter activating time constraints. If the same individual has a warrant for a revocation of probation, they have no rights under current North Dakota law. The reasons the state adopted the Uniform Disposition on Detainer's Act are equally applicable to probation revocations. This bill fits soundly within the state's efforts for criminal justice reform and just makes good fiscal sense.

#3
HB 1185
1-21-19
1 of 2

Mr. Chairman, members of the committee, for all the reasons stated herein, I respectfully request a DO PASS recommendation.

Respectfully submitted:

Travis W. Finck, Deputy Director
N.D. Commission on Legal Counsel
(701) 845-8632, tfinck@nd.gov

#1
HB1185
3·4·19

HOUSE BILL 1185
SENATE JUDICIARY COMMITTEE
MARCH 4, 2019

TO: Diane Larson, Chair, Senate Judiciary Committee, and Members of the Senate Judiciary Committee.

Ken Sorenson, Special Assistant Attorney General for the North Dakota Department of Corrections and Rehabilitation (ND DOCR), submits this written testimony on behalf of the ND DOCR in support of House Bill 1185.

House Bill 1185 includes an amendment to Subsection 9 of N.D.C.C. 12.1-32-02 to provide clarity to this subsection, and to also to replace the term "one year" with 360 days to provide consistency with two other statutes in state law.

House Bill 1185 also creates a new subsection to N.D.C.C. Section 12.1-32-07 to provide a process for disposition of outstanding warrants and petitions for revocation of offenders who are in state custody.

AMENDMENTS TO SUBSECTION 9 OF SECTION 12.1-32-02

Replacement of "one year" with "three hundred sixty days"

In 2017, the Legislature amended Subsection 5 of N.D.C.C. Section 12.1-32-01 and changed the maximum penalty of imprisonment for a class A misdemeanor offense from one year to three hundred sixty days. The current language in Subsection 9 of Section 12.1-32-02 that a one-year sentence is a class A misdemeanor is in conflict with the change made in 2017.

Because the one-year maximum sentence for a class A misdemeanor has been replaced with a three hundred and sixty-day maximum sentence, a sentence to one year under the current language of subsection 9 of section 12.1-32-02 in effect may not operate to reduce the offense to a class A misdemeanor because the one-year sentence is longer than the maximum penalty available for a class A misdemeanor.

Replacement of "successful completion of the term of imprisonment and a term of probation imposed as part of the sentence"

Historically, an offender could not be sentenced to the North Dakota State Farm on a sentence of more than one year. If the offender was sentenced to the North Dakota State Farm for a sentence of no more than one year for a felony offense, N.D.C.C. Section 12-51-07, which has long been repealed, provided until 1981, in part, that "[a] person committed to the state farm shall not be

deemed to have been convicted of a felony, but shall be deemed to have been convicted of a misdemeanor."

In 1981, this part of section 12-51-07 was removed and a new subsection to N.D.C.C. Section 12.1-32-02 was added:

> "A person convicted of a felony who is sentenced to imprisonment for not more than one year shall be deemed to have been convicted of a misdemeanor upon successful completion of the term of imprisonment."

House Bill 1085, 47th Legislative Assembly.

Since 1981, this felony to misdemeanor language in section 12.1-32-02 has been amended a number of times, and most recently in 2009 to its present form. 2009 N.D. Sess. Laws, ch. 135, § 1. The North Dakota Supreme Court considered the current language in Subsection 9 of Section 12.1-32-02 in the case State of North Dakota v. Rath, 2017 ND 213, 901 N.W.2d 51, a case in which the defendant Rath pled guilty to a class C felony offense of perjury. He was sentenced to one year of imprisonment, with all but three days suspended, subject to three years of supervised probation. His probation was later revoked, but the trial court stated it would not take away the misdemeanor disposition, but in proceedings to clarify the sentence, the court stated Rath was not entitled to the benefit of a misdemeanor sentence. The Supreme Court considered the case to be "an appropriate case to exercise our discretionary supervisory jurisdiction" and ordered the clerk of the Burleigh County District Court to change the disposition of the case from a felony offense to a misdemeanor offense under Subsection 9 of Section 12.1-32-02. The court concluded that this subsection was ambiguous as applied to the facts and circumstances in the case and under the rule of lenity, must be construed in favor of defendant Rath.

The proposed amendment to subsection 9 of section 12.1-32-02 removes the language the North Dakota Supreme Court found was ambiguous in Rath and provides an unambiguous basis for determining whether a felony offense will become a misdemeanor offense – unless there is an order from the sentencing court to revoke probation, the offense will be deemed to be a misdemeanor offense.

New Subsection to Section 12.1-32-07 for Disposition of Petitions for Revocation of Probation

North Dakota law presently provides two mechanisms for offenders in the custody of the ND DOCR to take care of an untried criminal complaint, indictment, or information.

N.D.C.C. Chapter 29 -33, the Uniform Mandatory Disposition of Detainers Act, was enacted in 1971 and allows offenders in state custody to request the final disposition of an untried indictment, information, or complaint pending against the offender in the state of North Dakota. This chapter requires the ND DOCR to inform each offender, in writing, of any untried indictment, information, or complaint against the offender of which the ND DOCR has notice, and of the offender's right to request final disposition of the case. If the offender makes a request for final disposition in conformity with the requirements of N.D.C.C. Chapter 29-33, the prosecutor and the applicable court are required to bring the case to trial within 90 days, unless the court continues the matter; otherwise, the case must be dismissed with prejudice.

N.D.C.C. Chapter 29-34 is the Interstate Agreement on Detainers (IAD). The IAD is a congressionally approved, and state enacted, interstate compact entered into by all states except Louisiana and Mississippi, and also by the United States Government and the District of Columbia. North Dakota joined the compact in 1971. The IAD allows offenders in state custody to request disposition of an untried complaint, indictment, or information in another state for which the other state has lodged a detainer, which is a request or notice filed by a criminal agency, including a prosecutor, from one state, to the state having custody of the offender, to either hold the offender for the other agency, or notify the other agency of the release date of the offender. The process for an offender to request disposition of a detainer from another state under the IAD is somewhat more extensive than for the disposition of intrastate detainers, but at the same time, it is a frequent process for the IAD member states with consistent and uniform procedures. If an offender requests disposition of an untried complaint, indictment, or information under the IAD, the state that lodged the detainer must bring the prisoner to trial within 180 days from the date the offender makes the request. The IAD also allows prosecutors from other states to request disposition of cases. This process parallels the extradition process and requires judicial involvement.

The purpose of the Uniform Mandatory Disposition of Detainers Act and the IAD is to encourage and resolve the disposition of outstanding criminal charges in another jurisdiction, either within the state of North Dakota or outside the state.

The United States Supreme Court stated "[the IAD] is based on a legislative finding that "charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation." Carchman v. Nash, 473 U.S. 716, 719-720 (1985). The Supreme Court looked to the Council of State Government's explanation for the IAD:

> "The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody, which bars him from treatment such as trustyships, moderations of custody and opportunity for transfer to farms and work camps. In many jurisdictions he is not eligible for parole; there is little hope for his release after an optimum period of training and treatment, when he is ready for return to society with an excellent possibility that he will not offend again. Instead, he often becomes embittered with continued institutionalization and the objective of the correctional system is defeated." Council of State Governments, Suggested State Legislation, Program for 1957, p. 74 (1956).

Carchman v. Nash, 473 U.S. at 720.

What the CSG recognized in 1956, and acknowledged by the Supreme Court in 1985, still rings true. An outstanding warrant, complaint, indictment, or information, whether from within the state or outside the state, will negatively impact an incarcerated offender's classification and custody level, housing assignment, institutional employment and programming opportunities, the timing of treatment, work release, and parole opportunity. It will also create uncertainty for the offender upon release because the warrant will appear in the law enforcement data bases and the offender may be arrested on the outstanding criminal charges.

The reason for the proposed amendment to Section 12.1-32-07 is that the same mechanisms that exist under the Uniform Mandatory Disposition of Detainers Act and the IAD are not available when there is an outstanding petition for revocation of probation and the offender is in state custody. These two acts only apply to an untried complaint, indictment, or information, and do not apply to probation cases because there has been a resolution of the criminal charges.

Because there has already been resolution of criminal charges, an offender who is in state custody but is subject to an outstanding warrant for a petition for

revocation of remedy does not have available the same process and protections of the Uniform Mandatory Disposition of Detainers Act or the IAD and will therefore face the same problems and uncertainties addressed by these two acts.

These problems are not hypothetical or merely possible, they are real. The following are three cases, out of many, in which incarcerated offenders facing petitions for revocation experienced the same problems described by the Council of State Governments:

Individual #1 - John Doe (a pseudonym): Mr. Doe came in on a parole violation to NDSP on 6/5/18. His warrants/detainers were checked while he was going through the four-week orientation process. According to Odyssey, an order to apprehend warrant for probation revocation was issued on 7/20/18. Mr. Doe's case manager started the release planning process at 120 days prior to Mr. Doe's release date. On 11/27/18, Mr. Doe's case manager solidified where Mr. Doe would release to on his upcoming release date of 12/19/18. The case manager had been working on getting transportation in place. On 11/28/18, legal records did a search to verify there were no outstanding warrants or detainers. This is a typical search done approximately 30 days, more or less, prior to an individual's release. A warrant for probation revocation was found. This interrupted the release planning process as it was unknown what would happen with the petition for revocation. Not only was the release planning interrupted, but this caused anxiety and stress for Mr. Doe, who had been continuing to work on obtaining skills to be successful in the community. He had planned on being home and now he wasn't sure if he was going to get to go home now, in two years, or be sentenced to another 20 years in prison.

Individual #2 - Sean Doe (a pseudonym): Mr. Doe came into NDSP on 11/1/2017. He was transferred to minimum custody housing at MRCC on 2/1/18. Mr. Doe was reviewed by the Parole Board and granted parole for 08/16/18. His case manager had already completed finding a place for Mr. Doe to live upon release. They were now working on obtaining transportation to the approved residence. On 07/16/18, a records check was completed by DOCR legal records. An extraditable warrant from Grand Forks County for a petition for revocation of probation was found at this time. Mr. Doe was notified by ND DOCR at this time of his warrant. Because this was a felony warrant, Mr. Doe was removed from minimum custody and transported to NDSP as a medium override custody level. Mr. Doe now had to start working with a new case manager for his release plan. It was hard to work out the details for obtaining a ride because it was unknown how long Mr. Doe would have to wait in a county

jail to be heard on his petition for revocation. According to Odyssey, the petition for revocation of probation was filed on 1/4/18. The Order to Apprehend was issued on 01/05/2018. The Order to Apprehend warrant was not served by the county on Mr. Doe until 08/16/2018.

Individual #3 - Jack Doe (a pseudonym): Mr. Doe arrived at NDSP on 3/5/18. As of January 18, 2019, he is still at NDSP as a medium override. He scores out at classification as a 2-point minimum custody resident, however because of the extraditable probation violation felony detainer, he must stay at a more secure housing location and is an automatic override. The petition for revocation on his case was filed on 12/12/17. The order to apprehend warrant was issued on 12/15/2017. Mr. Doe was notified of this warrant when DOCR legal records completed a records check while he was still housed in orientation. At this time, the warrant had not been served on Mr. Doe by the county from which the warrant was issued. Because of the warrant, Mr. Doe cannot be moved to a lower secure facility for which he would otherwise be appropriate based on all other factors. Mr. Doe will be reviewed by the September 2019 parole board.

As of the afternoon of Friday, March 1, 2019, there is a total of 45 individuals in ND DOCR custody facing a total of 70 petitions for revocation throughout the state, with each of the individuals facing the problems with classification and custody level, housing assignment, institutional employment and programming opportunities, the timing of treatment, work release, and parole opportunity, and the uncertainty of their future.

CONCLUSION

Therefore, the ND DOCR respectfully requests favorable consideration and passage of House Bill 1185.

#2
HB 1185
3-4-19

Engrossed House Bill 1185
Senate Judiciary
Testimony of Travis W. Finck
Deputy Director N. D. Comm. On Legal Counsel for Indigents
March 4, 2019

Madam Chair Larson, members of the Senate Judiciary Committee, my name is Travis Finck, I am the Deputy Director of the Commission on Legal Counsel for Indigents, and on behalf of the commission, I rise in support of House Bill 1185 as it pertains to the disposition of probation revocations in a manner like that of untried indictments.

HB 1185 simply provides defendants who have warrants for a probation revocation matter who are in custody the same protections and right to compel the state to act upon the warrants in the same manner as a similarly situated defendant with an untried indictment. North Dakota Century Code 29-33-01 is the codification of the Uniform Disposition on Detainer's Act. The Act provides an incarcerated defendant, which is defined as an individual imprisoned in a penal or correction institution of the state, may request final disposition of an untried indictment. In the 1985 case of Carchmer v. Nash, the U.S. Supreme Court determined the term "untried indictment, information or complaint" in the Uniform Act did not include probation revocations. This holding effectively eliminated the right of a defendant facing revocation while imprisoned the right to see timely resolution of the matter. This created a gap in rights of the accused.

This bill seeks to solve the existing gap of a person sentenced to prison. If an individual has a warrant for "new charge", they can request disposition of the matter. If the same individual has a warrant for a probation revocation, they have no similar right to request disposition. The reasons our State adopted the Uniform Disposition on Detainers Act are equally application to applying the rights to probation revocations. This bill also continues to support our State's efforts to reform criminal justice and furthermore makes fiscal sense.

#2
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Madam Chair, members of the committee, for all the reasons stated herein, I respectfully request a DO PASS recommendation.

Respectfully submitted:

Travis W. Finck, Deputy Director
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