

Bjornson, John D.

From: Larson, Meredith H.
Sent: Monday, April 28, 2014 9:52 AM
To: Bjornson, John D.
Cc: aaron.birst@ndaco.org
Subject: Summary of NDSAA comments regarding proposed legislation

Chairman Carlisle and Commission Members,

I apologize for my absence today. My youngest son is sick and I have to be home with him.

I have circulated the proposed legislation to the North Dakota State's Attorneys Association. I will summarize the comments below.

15.0040.03000 (Length and termination of probation)

Length: Generally the group has concerns about limiting the length of probation on felonies to three years. Some of the concerns include that the length of probation is often a term contemplated in a plea agreement and negotiations. Often times, for a cooperating co-defendant, it is a tool used in lieu of jail time- in other words, an alternative to incarceration. Limiting the length of supervised probation to 3 years in a felony is counterintuitive to that. Further, the maximum sentence of incarceration is 5 years on a Class C Felony and many posit that the maximum term of supervised probation should be consistent with that. There are many cases in which three years is simply not enough time for a defendant to be on probation, ie. serious drug offenses where offender is repeatedly attempting to successfully complete treatment, cases where large amounts of restitution are ordered, or cases in which a defendant agreed to the lengthy term of probation in lieu of being incarcerated.

Early termination: NDSAA membership is expressing concerns about the language permitting NDDOC to terminate probation early without input from the prosecutor or court prior to doing so. Often times a prosecutor has additional investigative information about a defendant that NDDOC may not be aware of that could be relevant to determining whether early termination is appropriate. Further, the statute does not address whether NDDOC is required then to notify and obtain input from a victim prior to early termination. It is crucial that a prosecutor be given an opportunity to determine whether a victim is in favor of a sentence modification. Often times these are cases where an offender is on probation for violent offenses and certainly a victim should be able to provide input as to the appropriateness of early termination. Further, it should be noted that there is already a mechanism for early termination of probation. Currently, a probation officer would simply contact the prosecutor and make a motion/petition for early termination of probation. This is done with the Court's approval and allows for a victim to have input as well as the State. This is the favored process by NDSAA.

15.0033.02000 (Minimum mandatory deviations)

It sounded like most of NDSAA was not in favor of this bill. There are questions as to how this affects all the new DUI legislation? One of the prosecutors suggested at minimum, a pre-sentence investigation should be required before deviating from a minimum mandatory sentence. There are many opinions on the advantages and disadvantages of minimum mandatory sentences, but I will not go into that.

A specific comment I have is that 2(c) does not conform to our statutory language on sexual offenses. It states that subsection 1 does not apply if the Defendant committed an offense that involved any sexual contact against a minor, *other than an offense involving sexual conduct in which the victim was at least fifteen years old and the offender was not more than three years older than the victim and the sexual conduct was consensual.* Essentially it is stating that the deviation from minimum mandatories as proposed in subsection one does not apply if the offense involves sexual conduct against a minor. However, a Court could deviate even if the crime involved sexual contact with a minor *IF the victim was at least fifteen years old and the offender was not more than three years older than the victim and the sexual conduct*

was consensual. The portion I italicized is the portion that concerns me. I don't believe it is necessary to even include that language. It isn't a crime to have sexual contact with an individual who is 15 or older IF the actor is not three years older than the victim. Furthermore, we do not have a statute that defines "consensual or non-consensual" sex. In fact, we don't even have a crime prohibiting non-consensual sex. That is not part of our sexual offenses- we have prohibitions on sexual offense by force, but that does not equate to "non-consensual" per NDSC (see State v. Vantreece). Therefore, it is not an offense to have sexual conduct with a person (not a victim) who is 15 years old if an actor (not an offender) is less than 3 years older than that person. See N.D.C.C. 12.1-20-01(3).

One last specific comment regarding this bill is under 2(b) it should state: "The Defendant intentionally used a firearm or *dangerous weapon*..." "Dangerous weapon" should be included.

Again, thank you for allowing the input of NDSAA and my apologies for not being able to deliver them personally.

Meredith Larson
Assistant State's Attorney Grand Forks County
President of NDSAA