

2019 HOUSE JUDICIARY COMMITTEE

HB 1252

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1252
1/22/2019
31213

- Subcommittee
 Conference Committee

Committee Clerk: DeLores D. Shimek by Marjorie Conley

Explanation or reason for introduction of bill/resolution:

Relating to contact with victims, the definition of victim, and restitution.

Minutes:

1, 2, 3

Vice Chairman Karls: Opened the hearing on HB 1252.

Rep. Louser: Introduced the bill: This bill allows the judiciary as part of the sentencing to order no contact to the victim. (Attachment #1) Stopped 2:46.

Doug Mattson, Citizen: I urge a do pass on this bill. Read his testimony. (Attachment #2) stopped 12:10.

Chairman K. Koppelman: On Section 2 how many of the Constitutional Provisions of Marcy's Law can operate.

Doug Mattson: I don't know. Discussion on Measure 6 that was passed in 1980.

Representative Jones: Why are we trying to make it so we can define the restitution things that they have to pay without considering the ability to pay?

Doug Mattson: I am thinking that this is three-fold right now 1. In terms of restitution 2. The one person who chose not to be a part of that criminal action is the victim, they are an involuntary participant 3. The ability to pay

Chairman K. Koppelman: On the ability to pay, if there are no funds, is there a bankruptcy proceeding?

Doug Mattson: We do not have a debtor's prison.

Representative Jones: If the people think coming out of prison, there is no way to get on top of the debt; maybe there is some way they can work with that and be successful in their life.

Doug Mattson: We cannot take hope away from them. We need that balancing going on.

Rep. Roers Jones: Discussed restitution. When we have restitution that applies to the people who may be involved, how far can that be taken of a true definition of what full restitution is?

Doug Mattson: In determining restitution the state needs to get that figure together. There is a cutoff date in determining restitution.

Rep. Roers Jones: My concern is about that the excessive client clause was really intended to limit the fines to those that are removed to house under this sort of action.

Aaron Birst, Association of Counties: (Attachment #3) stopped 31:00
On Marcy's Law it is consistent with what the Supreme Court is trying to do. We have many debtors that cannot pay. Most judges and prosecutors try to do their best.

Chairman K. Koppelman: If there are amendments would you work with the bill sponsor?

Opposition:

Closed hearing on HB1252.

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1252
2/5/2019
32227

- Subcommittee
 Conference Committee

Committee Clerk: DeLores D. Shimek by Donna Whetham

Explanation or reason for introduction of bill/resolution:

Relating to contact with victims, the definition of victim, and restitution

Minutes:

Attachment 1

Chairman Koppelman: Opened the meeting on HB 1252. This is the one that dealt with the Marsy's with respect with victims and clarified that a court can issue a no contact order.

Rep. Vetter: I have in my notes we may want to add an amendment in light of the Strom decision.

Rep. Hanson: I also have a note for a potential amendment to add the word natural before person on page 4 line 1.

Chairman K. Koppelman: On page 4 natural is being struck from the current code. I wonder why Legislative council didn't say individual instead of person.

Representative Simons: That is indeed what is happening here, the word natural comes from common law, that is old school as in sovereign.

Chairman K. Koppelman: I think the intent or at least the effect of this language in the bill it would be person, therefore it could individual but it could be other things.

Vice Chairman Karls: In Aaron Birst's testimony he referenced the prosecutor and the States Attorneys and letter from Rozanna Larson, something about restitution balanced with ability to pay.

Chairman K. Koppelman: Rozanna Larson sent an email sent on 1-22-19. In support of HB 1252. (See Attachment 1).

Rep. McWilliams: I was looking at Section 2 subsection we overstruck b and c. Why would we want to do that?

Chairman K. Koppelman: I think it was because of the conflict with Marsy's law which is constitutional now. The bill really does two things, it does the no contact order provision and

it also cleans up potential conflicts that attorneys have found with the constitutional language in Marsy's law is.

Rep. Simons: on Page 1 line 9 every person convicted of an offense who is sentenced by the court must be sentenced to one or a combination? Is this telling judges what to do. This is current law. We should scratch that. It would be the opportunity to do it.

Chairman K. Koppelman: It gives the judge the authority to sentence a lot of options.

Rep. Paur: On the top of page 1, a victim means a natural person, in page 2 on line 17-19 victim is defined as a natural person who has suffered harm. It goes back to what they crossed out. So if we remove all the overstrike there we would be back to the other definition exactly.

Chairman K. Koppelman: The constitution does not include the word natural and Section 3 of HB 1252 removes the word natural and I think maybe it was Legislative council that just did that.

Rep. Hanson: Section 2 on page 2 lines 27-29, it removes the consideration of a person not being able to pay restitution, why would we allow reparations without considering their level to pay? Would the members want to amend the bill to remove the strike out on 27-29?

Chairman K. Koppelman: The reason the bill sponsor had that in the bill there was a desire to keep with the constitutional language. There is nothing in Marsy's law that allows the court to consider ability to pay. It just says full restitution and that is a problem. Do we wish the courts to have the latitude to consider ability to pay?

Rep. Paur: We have a States Attorney and a District judge recommending we pass this with no suggestions. I make a motion for a Do Pass on HB 1252.

Rep. Karls: Seconded.

Chairman K. Koppelman: Any discussion?

Rep. Simons: On line 9 is there any interest at all to amend that. The written law to simply say may be. We have done this a lot by giving the judges more power and I just hate telling as judge what he can do.

Chairman K. Koppelman: Any further discussion? Seeing none.

Roll call vote: Yes 14 No 0 Absent 0.

Rep. Satrom: Will carry the bill.

Hearing closed.

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. HB 1252**

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. Paur Seconded By Rep. Karls

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

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Satrom

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

REPORT OF STANDING COMMITTEE

HB 1252: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **DO PASS**
(14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1252 was placed on the
Eleventh order on the calendar.

2019 SENATE JUDICIARY

HB 1252

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1252
3/19/2019
#33914 (7:50)

- 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 12.1-34-02 of the North Dakota Century Code, relating to rights of victims; and to amend and reenact subsection 1 of section 12.1-32-02, subsection 1 of section 12.1-32-08, and subsection 10 of section 12.1-34-01 of the North Dakota Century Code, relating to contact with victims, the definition of victim, and restitution.

Minutes:

1 Attachment

Chair Larson opens the hearing on HB 1252.

Scott Louser, District 5 Representative, testifies in favor (see attachment #1)

Representative Louser: This concept was brought to my attention by a couple of district judges in Minot, one of which is my sister. It was a former Representative Doug Mattson who brought this to our attention initially. Did anyone know that a judge cannot prescribe a no contact order when someone is incarcerated? The judges have the ability to say prior to a trial, no contact with the victim. They also have the ability as part of probation after incarceration to say no contact on the victim, but the law is silent while they're incarcerated. There was a case in State vs. Wilder that was appealed to the Supreme Court. I have the comments made by the Supreme Court suggesting that the legislature authorizes the court to order no contact in other similar situations but did not authorize the court to order no contact as part of a sentence of imprisonment. What that means essentially, if we were to use a gross sexual imposition, the victim could be contacted by the perpetrator while they're in prison. It doesn't make any sense, but the law is silent. Lines 16 through 19 on page 2 would allow that as part of the sentence if the court deemed it appropriate.

The other part of the language in this bill is the conflict with Marsy's law. The century code allows for the ability to pay restitutions in Marsy's law, which is in the constitution, prescribes full restitution, so we have a conflict and that should be removed. While this was being debated in the House, a case was being heard in State vs. Strom which was the restitution for a victim of a criminal act. District courts must not consider the defendant's ability to pay under the century code. The constitution requires full restitution to be awarded to the

victim for all losses sustained. Those are the two parts of the bill, very simple. The House considered some amendments, but ultimately the committee found that this was appropriately worded as it was introduced. It passed in committee and on the floor unanimously, and there wasn't any opposing testimony.

Senator Bakke: What was the proposed amendment?

Representative Louser: There was discussion on how wording in the full restitution should be applied in the law as opposed to left up to the courts to decide what full restitution means. It was felt that the courts have that discretion to determine full restitution, and that was not going to be further defined. That discussion never turned into an amendment.

(5) Aaron Birst, Association of Counties, testifies in favor

Birst: We didn't believe that courts couldn't order a no contact while somebody's in prison; it seemed natural that if the court could do it pre-charge and as a condition of probation, that they could do it as part of incarceration. Unfortunately, the ND Supreme Court disagreed and says that needs to be statutory. At the Department of Corrections or any jail you can use email and phones, so you can still harass someone even if you physically don't see them, so we are suggesting that that could be a part of any type of incarceration order. This bill is greatly needed. With Marsy's law, of course we've struggled with that for a long period of time, these are what I would consider more technical changes to try to blend Marsy's law into our current statutory framework. Under Marsy's law, which is constitutional, that will trump that statutes. Marsy's law requires that the victim gets paid before anybody else, and so as condition of probation and the other changes you see here, we are suggesting that those victims get made whole before anybody else.

Chair Larson closes the hearing on HB 1252.

Senator Myrdal: Motions for a Do Pass.

Vice Chairman Dwyer: Seconds.

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

Vice Chairman Dwyer will carry the bill.

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1252**

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 1252: Judiciary Committee (Sen. D. Larson, Chairman) recommends **DO PASS** (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1252 was placed on the Fourteenth order on the calendar.

2019 TESTIMONY

HB 1252

#1
#B1252
1/22/19
#1

House Judiciary Committee, presented by Representative Scott Louser

Information on HB 1252

State v Wilder 2018 ND 93, 909 N.W.2d 684

paragraph 19:

The State has not cited and we are not aware of any statutory provisions that explicitly authorize a sentencing court to order no contact during a term of imprisonment as part of the offender's sentence. "Statutes should be read in relation to other statutes involving the same or similar subject matter in an attempt to discern legislative intent." *Kroschel v. Levi*, 2015 ND 185, ¶18, 866 N.W.2d 109. Section 12.1-31.2-02, N.D.C.C., authorizes the court to order no contact when a defendant is released from custody before arraignment or trial. Section 12.1-32-07(2), N.D.C.C., authorizes the court to order conditions of probation and states, "The conditions of probation must be such as the court in its discretion deems reasonably necessary to ensure that the defendant will lead a law-abiding life or to assist the defendant to do so." This Court has held a district court may order a probation condition prohibiting the defendant from entering a specific location when the condition would assist the defendant in leading a law-abiding life. See *Aune*, 2002 ND 176, ¶10, 653 N.W.2d 53; *State v. Sahr*, 470 N.W.2d 185, 194 (N.D. 1991). The legislature authorized the court to order no contact in other similar situations, but did not authorize the court to order no contact as part of a sentence of imprisonment. Sentencing statutes are "strictly construed against the government or parties seeking to impose them and in favor of persons on whom they are sought to be imposed." *State v. Sheldon*, 312 N.W.2d 367, 369 (N.D. 1981). In the absence of statutory language authorizing a court to order no contact as part of a prison sentence, we conclude the legislature did not intend to give the court that authority.

Saying: no contact can be ordered as part of pretrial (bail orders for example) and post judgment (condition of probation for example) but is silent as to ability to order no contact during term of imprisonment.

HB 1252

#2
HB 1252
1-22-19
page 1

Chairman Koppleman, and Members of the Judiciary Committee,

My name is Doug Mattson, while I am a District Judge, I am appearing in front of you today as a citizen. More to the point: I am not speaking on behalf of the Supreme Court or the Judicial Conference's Legislative Committee.

I urge the Committee support a "Do Pass" recommendation on HB 1252. HB 1252 is *something* of a two-fer in regard to dealing with victims.

The first section of HB 1252 is meant for the Legislature to establish authority so a sentencing judge may prohibit an incarcerated individual from contacting their victim while incarcerated. This issue came about in the recent murder case where the sentencing judge specifically prohibited a defendant, who was convicted of murdering his ex-wife, from contacting their children while incarcerated and prior to them turning 18 years of age. So yes, this was a case where the deceased was the mother of the children common to the deceased and the defendant. The sentencing judge prohibited the defendant from having contact with his children until they turned 18 years of age and then they each could decide if they wanted to have contact.

With no statutory authority to order the "no contact" provision, the sentencing judge relied upon Article 1

Section 25 of the North Dakota Constitution. However, the Supreme Court ruled that Article 1 Section 25 of the State Constitution was not triggered since there was no request from a victim for the “no contact” provision.

In reaching its decision, the Supreme Court’s noted the lack of specific state statute authorizing a sentencing judge to impose the “no contact” provision as a part of a defendant’s prison sentence. With there being no request from a victim for the “no contact” provision in the Criminal Judgment, the Supreme Court stated the sentencing judge did not have the authority to invoke Article 1, Section 25 of the North Dakota Constitution to prohibit contact is a part of the sentence.

So in this first section of HB 1252, the Legislature is requested to establish the authority for a sentencing judge to prohibit an incarcerated defendant from having contact with their victim while serving their sentence of incarceration.

With the courts already having authority to prohibit a defendant from having contact with the victim as a part of a condition for bail bond, and also as a term of probation, this first section of HB 1252 merely removes the donut hole situation in present law.

As to the second section of HB 1252 as drafted, the Legislature is asked to remove a part of the “ability to pay” language in 12.1-32-08(1)(b) and (c) since there is a conflict with Article I, Section 25 of the North Dakota Constitution.

The 2016 constitutional amendment creating Article I, Section 25, (1)(n) provides that victims have the right to full and timely restitution in every case from each offender for all losses suffered by the victim is result of the criminal or delinquent conduct. This is not consistent with the “ability to pay” language in the existing NDCC section 12.1 -32 -08 (1)(b) and (c).

And wouldn't you know it: after HB 1252 was drafted, the Supreme Court issued an opinion in ***State vs. Strom***, 2019 ND 9.

In Paragraph 9 of the ***Strom*** decision, the majority states that “[t]o clearly state the scope of decision, it is necessary to articulate what we do not decide here. In this matter, we examine only an award of restitution and not a contempt hearing or probation revocation for non-payment, and thus we limit consideration of ability to pay only in the context of setting the amount of restitution.... In short, a district court may not consider a defendant's ability to pay in determining the amount of restitution awarded to a victim.” 2019 ND 9, ¶9.

While the **Strom** case is subject to possible rehearing since the mandate has yet to be issued, the majority of the Supreme Court did not rule that “ability to pay” could not be considered when it comes to a contempt hearing or probation revocation for non-payment.

Rather, a majority of the Supreme Court appears to limit consideration of a defendant’s ability to pay in the context of setting the total amount of restitution.

So in the area of enforcing an order to pay restitution, an amendment to Section 2 of HB 1252 may well be in order. This Committee may want to task committee staff to review the **Strom** decision in more detail in an effort to bring the statute in question, 12.1-32-08 (1), in line with Article I, Section 25 of the State Constitution and this recent Supreme Court ruling.

Finally, the definition of “victim” in Section 3 of HB 1252 appears to be meant to amend NDCC 12.1-34-01 (10) so to track subsection 4 of Article I, Section 25 of the State Constitution. Yet, subsection 4 of Article I, Section 25 does not have the word “natural” prior to person as does Section 3 of HB 1252. This Committee may want to review that inconsistency.

Aaron Birst

#3
HB 1252
1-22-19
page 1

From: Roza Larson <Roza.Larson@co.ward.nd.us>
Sent: Tuesday, January 22, 2019 7:23 AM
To: Aaron Birst
Subject: HB 1252

January 22, 2019

Mr. Birst,

This is to express my support in HB 1252, specifically allowing the court to order convicted "no-contact" with their victims while incarcerated. First, procedurally this only makes sense. The Court, as a condition of bond and as a condition of probation can order defendants to have no contact with the victims of their crimes. It seems nonsensical that a defendant can have contact with them while incarcerated.

It may seem on the surface that victims are "protected" from defendants when they are incarcerated. However, one has to remember that contact can take many forms. It is not just face-to-face contact, but through letters, 3rd person, and electronically. (ie: phone, email etc.). No-contact orders are not put in place simply for the physical protection of victims, but also to assist in keeping defendants from having the ability to continue to emotionally and psychologically abuse their victims. The purpose of the no-contact also serves to keep defendants from intimidating their victims. This type of contact, intimidation and abuse of victims can and has occurred while the defendant is incarcerated.

Here in Ward County we had an issue many years ago wherein a no-contact order was a condition of bond. The defendant, while still in jail, contacted his victim via phone. We charged the defendant for the violation. The Court found that because the defendant had not "exercised his right to bond," (ie was still in jail), it was not a violation of the bond order. The "fix" to that was that we changed the language of the Bond Orders to apply regardless of being held or bonded out.

More recently, after a jury convicted a man for murdering his child's mother, the court ordered no-contact with the children as part of the judgement. (The defendant was sentence to life without parole). The Supreme Court overturned that condition of the judgment because the court did not have the authority.

It would be my request that Courts have the authority, as part of criminal judgments, to issue no-contact orders. The defendant's rights could and can be protected on this issue, as at sentencing the defendant has the opportunity to argue for the Court to not include the no-contact order. Further the Court needs to make findings for its sentences, those could include the necessity of no-contact provisions.

Rozanna C. Larson
Ward County State's Attorney
Ward County Courthouse
Minot, ND 58701

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#1 HB 1252
2/5/19

Aaron Birst

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Rozanna C. Larson
Ward County State's Attorney
Ward County Courthouse
Minot, ND 58701

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NORTH DAKOTA HOUSE OF REPRESENTATIVES

STATE CAPITOL
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Representative Scott Louser

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COMMITTEES:
Government and Veterans Affairs
Industry, Business and Labor

1
HB 1252
3.19.19

State v Wilder 2018 ND 93, 909 N.W.2d 684

paragraph 19:

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