N.D.A.G. Letter to Marion (Aug. 1, 1988)

August 1, 1988

Mr. James L. Marion
Director
Department of Parole and Probation
P.O. Box 5521
Bismarck, ND 58502-5521

Dear Mr. Marion:

Thank you for your letter dated June 14, 1988. In that letter you asked four questions. I will deal with each of those questions in turn.

First, you have inquired as to whether a person who receives a deferred imposition of sentence is considered a convicted felon for the purposes of N.D.C.C. § 62.1-02-01.

For purposes of that section, a "conviction" is defined as a "determination by the jury or court that a person committed one of the above-mentioned crimes even though the court suspended or deferred imposition of sentence in accordance with sections 12-53-13 through 12-53-19, placed the defendant on probation, granted a conditional discharge in accordance with section 19-03.1-30, or the defendant's conviction has been reduced in accordance with subsection 9 of section 12.1-32-01." N.D.C.C. § 62.1-02-01. If the offender has entered a plea of guilty or been found guilty of an offense which was charged as a felony, that person will be subject to the prohibition against the owning, possessing, or controlling of firearms regardless of the sentence or punishment. That prohibition will continue for a period of five or ten years depending upon whether or not the underlying felony involved violence or intimidation. The same prohibition will apply to a deferred imposition for a class A misdemeanor involving violence or intimidation when that crime was committed while using or possessing a firearm or dangerous weapon.

You have also inquired whether the court should impose the standard conditions of probation regarding the defendant not owning or possessing firearms. A probation generally imposes a condition that an offender not violate the laws of this state. Possession of a firearm in violation of N.D.C.C. § 62.1-02-01 would subject an offender to criminal liability.

The wording of N.D.C.C. § 62.1-02-01, specifically subsections 1 and 2, may be susceptible to an interpretation that the five and ten year prohibition time limits will begin to run only at the expiration of the probation. As a result, I could foresee an argument by an offender that possession of a firearm during his or her probation, absent a condition of probation set by the court, would not be a violation of this statute.

Although I do not believe that the Legislature could have intended a result where a convicted felon could not possess a firearm for five or ten years after a probation has expired but allow that felon to own, possess, or control a firearm during the probation, I would think it advisable for a court to impose a condition of probation that a person who would otherwise fall within these statutory provisions not possess, own, or control a firearm during the period of probation. This procedure would avoid any ambiguity in the statutory language, be in keeping with the apparent legislative intent, and ensure that the offender would be aware of this restriction. In light of State v. Saavedra, 406 N.W. 2d 667 (N.D. 1987), such a condition of probation would be enforceable when set forth in the order granting probation.

You also ask whether the Parole Board is required under N.D.C.C. § 12-59-05 to consider a prisoner's case when that prisoner has been sentenced to the State Penitentiary but is serving that sentence in a county jail. It is my understanding that this has become a common procedure in some areas of the state, especially when an offender is granted work release privileges.

N.D.C.C. § 12.1-32-02(1)(c)(1) authorizes a court to sentence an offender to a state correctional facility, a regional correction center, a county jail, or in the State Farm if the offender is convicted of a felony or a class A misdemeanor.

I must assume from your letter that the offenders sentenced to the county jail have not been admitted to the State Penitentiary or State Farm.

N.D.C.C. § 12-59-05 specifically requires the Parole Board to consider a prisoner's parole. However, this section requires that this action be taken within one year after a prisoner's admission to the Penitentiary or within six months after the prisoner's admission to the State Farm. If a prisoner has not been admitted to the State Penitentiary or the State Farm, N.D.C.C. § 12-59-05 would not be invoked. The Legislature has determined that N.D.C.C. § 12-59-05 will be applicable only to inmates of the Penitentiary or State Farm. Any extension of Parole Board authority to those persons who are not inmates of those facilities must be accomplished by legislative action.

You have also inquired if an offender is entitled to consideration by the Parole Board under N.D.C.C. § 12-59-05 if the offender has been sentenced to the State Penitentiary but the court allows the offender to serve the sentence concurrently with another state sentence in that state's penitentiary. My response to this question is the same as that given regarding the service of sentence by offenders in a county jail. Unless the offender has been admitted to the State Penitentiary or State Farm, N.D.C.C. § 12-59-05 will not apply.

I have been advised that instances have occurred wherein a person incarcerated in another state has requested disposition of detainers filed by the state of North Dakota. That person would be transported to the county in which the offenses are to be tried, held in the county jail, and after conviction, sentenced for that offense with the sentence to run concurrently with the out-of-state sentence. After the sentence has been imposed, the

offender is then immediately returned to the out-of-state correctional facility where both the North Dakota and out-of-state sentences are served.

If the out-of-state sentence, for some reason, is reduced or expires or the offender receives parole from a parole board in that state, the offender might be returned to this state for service of the balance of the North Dakota sentence. Until such time as that offender is admitted to the State Penitentiary or State Farm in this state, the procedures set forth in N.D.C.C. § 12-59-05 will not apply. If, however, the offender has been admitted to the state correctional facilities and is later transferred to an out-of-state facility for service of a sentence concurrent with that of another state's sentence, Parole Board consideration may be required.

You have also inquired whether the prohibition against the possession or control of firearms in N.D.C.C. § 62.1-02-01 applies only to a felony offense committed by a person while using or possessing a firearm.

N.D.C.C. § 62.1-02-01 provides, in part:

> 62.1-02-01. Who not to possess firearms -- Penalty.
>
> 1. A person who has been convicted anywhere for a felony involving violence or intimidation, as defined in chapters 12.1-16 through 12.1-25, is prohibited from owning a firearm or having one in possession or under control for a period of ten years from the date of conviction or release from incarceration or probation, whichever is the latter.
>
> 2. A person who has been convicted of any felony not provided for in subsection 1 or has been convicted of a class A misdemeanor involving violence or intimidation and that crime was committed while using or possessing a firearm or dangerous weapon, as defined in chapters 12.1-16 through 12.1-25, is prohibited from owning a firearm or having one in possession or under control for a period of five years from the date of conviction or release from incarceration or probation, whichever is the latter.

N.D.C.C. § 62.1-02-01(1) prohibits the ownership, possession, or control of a firearm by a person who has been convicted of a felony involving violence or intimidation.

N.D.C.C. § 62.1-02-01(2)imposes the same firearm restriction on persons who have been convicted of any felony not provided for in subsection 1 or of a class A misdemeanor involving violence or intimidation and "that crime" was committed while using or possessing a firearm or dangerous weapon. The issue concerns the reference made by "that crime." Does the conditional phrase refer to felonies not provided for in subsection 1 or does it refer to class A misdemeanors involving violence or intimidation?

When the language of a statute is not clear and unambiguous, it is necessary to ascertain the true meaning of the statute. Rybnicek v. City of Mandan, 93 N.W.2d 650 (N.D. 1959). In determining a statute's meaning, one may consider, among other matters, the statute's legislative history. N.D.C.C. § 1-02-30. The statute must be construed to fulfill the intent of the Legislature. Larson v. Wells County Water Resource Board, 385 N.W.2d 485 (N.D. 1986).

The original bill draft of N.D.C.C. § 62.1-02-01(2) applied the firearm restriction to all class A misdemeanor convictions. At a meeting of the Interim Judiciary "B" Committee on April 25, 1984, a staff member of this office suggested that only some class A misdemeanor offenses, including those involving violence or intimidation, be subject to this restriction. As a result of this suggestion, this section was modified and subsequently adopted by the Legislature in the modified form thereby limiting the type of class A misdemeanor offenses subject to the firearm restriction.

Therefore, a person may not own, possess, or control a firearm if that person has been convicted of a class A misdemeanor involving violence or intimidation and this offense was committed while using or possessing a firearm or dangerous weapon. The requirement that the offense be committed while using or possessing a firearm or dangerous weapon does not apply to felony offenses under N.D.C.C. § 62.1-02-01(2).
You also ask whether the Parole Board has the authority to impose a minimum term of incarceration as required by N.D.C.C. 12.1-32-02.1 absent a provision for such a term in a judgment of conviction imposing sentence.

N.D.C.C. 12.1-32-02.1 provides:

> 12.1-32-02.1. Minimum prison terms for armed offenders. Notwithstanding any other provisions of this title, minimum terms of imprisonment shall be imposed upon an offender and served without benefit of parole when, in the course of committing an offense, he inflicts or attempts to inflict bodily injury upon another, or threatens or menaces another with imminent bodily injury with a dangerousweapon, an explosive, or a firearm. Such minimum penalties shall apply only when possession of a dangerous weapon, an explosive, or a firearm has been charged and admitted or found to be true in the manner provided by law, and shall be imposed as follows:
>
> 1. If the offense for which the offender is convicted is a class A or class B felony, the court shall impose a minimum sentence of four years' imprisonment.
>
> 2. If the offense for which the offender is convicted is a class C felony, the court shall impose a minimum sentence of two years' imprisonment.

This section applies even when being armed is an element of the offense for which the offender is convicted.

A determination applying this section imposing a minimum term of imprisonment is to be made only if:

1. When, in the course of committing an offense, the defendant inflicts or attempts to inflict bodily injury upon another or threatens or menaces another with imminent bodily injury with a dangerous weapon, an explosive, or a firearm; and

2. The possession of a dangerous weapon, explosive, or firearm has been charged and admitted or found to be true in the manner provided by law.

Possession of the weapon either must be an essential element of the charged offense or this act must be established by a special finding of the trier of fact. State v. Sheldon, 312 N.W.2d 367 (N.D. 1981).

If these determinations are made, N.D.C.C. § 12.1-32-02.1 specifically imprisonment requires that the minimum term of be "imposed."

The court, rather than the Parole Board, imposes sentence. N.D.C.C. ch. 12-59 does not grant the authority to the Parole Board to impose sentence. The authority of courts to impose a sentence after conviction of an offense may not be delegated by the court. State v. Nelson, 417 N.W.2d 814 (N.D. 1987).

N.D.C.C. § 12.1-32-02.1 specifically requires that the court impose the minimum term of imprisonment if the conditions for imposing that sentence set forth in that section are met. No authority is granted to the Parole Board in N.D.C.C. § 12.1-32-02.1 to impose a sentence.

Absent imposition of the minimum term of imprisonment pursuant to that section by the court, the offender will not be subject to the minimum term of imprisonment and the offender will be allowed the benefit of parole. If the offender should have been subject to the minimum term of imprisonment imposed by N.D.C.C. § 12.1-32-02.1, the minimum term could be imposed only by a court, rather than the Parole Board, presumably by a proceeding brought under N.D.R. Crim. P. 35(a) permitting a correction of sentence.

An additional question presented is whether a person who receives a minimum term of incarceration pursuant to N.D.C.C. § 12.1-32-02.1 has a right to appear before the Parole Board pursuant to N.D.C.C. § 12-59-05.

N.D.C.C. 12-59-05 provides:

> 12-59-05. Consideration by board -- Guarantee. At a meeting to be determined by the parole board, within one year after a prisoner's admission

> to the penitentiary, or within six months after the prisoner's admission to the state farm, at such intervals thereafter as it may determine and by application pursuant to section 12-59-08, the board may deny or grant parole or continue consideration to another meeting. The board shall consider all pertinent information regarding each prisoner, including the circumstances of the offense, the presentence report, the previous social history and criminal record, the conduct, employment, and attitude in prison, and the reports of such physical and mental examinations as have been made.

Although N.D.C.C. § 12.1-32-02.1, as previously set forth, requires an offender sentenced under that section to a minimum term of imprisonment without benefit of parole, that section does not prohibit the offender from appearing before the Parole Board. N.D.C.C. § 12.1-32-02.1 merely prevents the Board from granting a parole during the minimum term of imprisonment. It does not, however, prohibit the Board from meeting with the offender, assisting the offender in preparing for his or her eventual release from incarceration or continuing consideration of a parole request to a later Board meeting.

No conflict exists between the provisions of N.D.C.C. § 12-59-05 and 12.1-32-02.1. N.D.C.C. § 12-59-05 does not establish any right to parole which may be in conflict with the parole prohibition of N.D.C.C. 12.1-32-02.1. Rather, N.D.C.C. § 12-59-05 only grants the right to an appearance before the Parole Board, which is not prohibited by N.D.C.C. § 12.1-32-02.1.

An appearance before the Parole Board during the minimum term of incarceration imposed by N.D.C.C. § 12.1-32-02.1 may be helpful to both the offender and the Parole Board when looking toward the eventual release of the offender from incarceration. Regardless of whether the offender may have a term of imprisonment for a period longer than the minimum term or such offender may be subject to a mandatory parole component imposed by virtue of N.D.C.C. § 12.1-32-10, the appearance before the Parole Board will assist the offender in developing a plan for future parole and successful re-entry into society. In some cases, an offender may require early assistance to meet these goals. Although the Board could not grant parole during a minimum term of imprisonment imposed pursuant to N.D.C.C. § 12.1-32-02.1, this assistance to the offender may be provided by the Board by application of the procedures set forth in N.D.C.C. § 12-59-05.

You also question whether the receipt of good time under N.D.C.C. ch. 12-54.1 affects the application and imposition of the mandatory parole components of N.D.C.C. § 12.1-32-10.

N.D.C.C. § 12.1-32-10 provides:

> 12.1-32-10. Mandatory parole components. If an offender is sentenced to a term of imprisonment for a class A, class B, or class C felony, or a class A misdemeanor, he shall be subject to the following mandatory parole components:

1. For a sentence to a term of years in a range from fifteen years to life imprisonment, the parole component shall be five years.

2. For a sentence to a term of years in a range from three years to fifteen years less one day, the parole component shall be three years.

3. For a sentence to a term in a range from one year to one day less than three years, the parole component shall be one year.

The mandatory parole components set forth in this section shall not be served unless the convicted offender shall serve the whole of the term of imprisonment to which he was sentenced. A mandatory parole component may be terminated by the state parole board or by the board of pardons. Nothing in this section shall prohibit the parole of the offender in accordance with other provisions of law.

N.D.C.C. ch. 12-54.1 allows offenders who are sentenced to the Penitentiary or State Farm to earn good conduct or meritorious conduct sentence reductions.

N.D.C.C. § 12.1-32-10 will require imposition of the mandatory parole component to be imposed only when the convicted offender "shall serve the whole of the term of imprisonment to which he was sentenced."

A mandatory parole component is independent of the sentence received by the offender. Mandatory parole components were intended to provide additional supervision of an offender after completion of service of the original sentence. The mandatory parole component would come into play only where an offender has served the total term to which he had been sentenced. Classification Plan adopted by Subcommittee on Classification of the Judiciary Committee, August 6, 1971, as modified on August 30, 1971.

The purpose of the mandatory parole component is to ensure that persons who most need a period of parole because they may not have been rehabilitated during imprisonment will serve a period of controlled supervision following imprisonment. Webb, A Prosecutor Looks at the Criminal Code, 50 N.D.L. Rev. 630, 634 (1974).

N.D.C.C. § 12.1-32-10 is a modification of the parole component terms of the Proposed Federal Criminal Code, a code on which much of N.D.C.C. Title 12.1 is based. National Commission on Reform of Federal Criminal Law, Final Report, 3201 (1971). In addition, the provisions of the Model Penal Code, also considered by the drafters of the Proposed Federal Criminal Code, contained similar provisions pertaining to a separate parole component. Model Penal Code, § 6.10 (Proposed Official Draft 1962).

In each of these proposed codes, it was envisioned that every sentence to imprisonment have two separate components: a prison component and a parole component. By

requiring that the mandatory parole component under N.D.C.C. § 12.1-32-10 be applicable only after the offender has served "the whole of the term of imprisonment to which he was sentenced," the North Dakota Legislature has adopted these separate components.

The prison component under current North Dakota law includes the actual time of incarceration, earned good conduct or meritorious conduct reductions under N.D.C.C. ch. 12-54.1, and any time that the offender was on parole pursuant to the original sentence.

The mandatory parole component under N.D.C.C. § 12.1-32-10 will be applied at the expiration of the latter of either: 1) the full service of the sentence of incarceration less any earned good conduct or meritorious conduct reductions if no parole was granted or 2) the completion of parole granted upon the original sentence of incarceration less any earned good conduct or meritorious conduct reductions. Only when the original sentence, including any parole, has been completed, will the mandatory parole components of N.D.C.C. § 12.1-32-10 apply.

After completion of the original sentence, the separate parole component term will then be invoked subjecting the offender to an additional legislatively mandated parole term extending beyond the original sentence imposed by the court. During this mandatory parole component term, both the State Parole Board and the Board of Pardons possess the authority to terminate the parole status.

Since the mandatory parole component is independent and distinct of the original sentence imposed by the court, this additional parole term imposed by N.D.C.C. § 12.1-32-10 will not be affected by the good conduct or meritorious conduct reduction authorized by N.D.C.C. ch. 12-54.1.

Your final inquiry is whether a person who violates a parole condition during the mandatory parole component period imposed by N.D.C.C. § 12.1-32-02.1 must serve the entire time period set forth by that section after revocation of parole.

N.D.C.C. § 12.1-32-10 is unclear as to the length of incarceration an offender must serve after having violated a condition of parole imposed pursuant to the mandatory parole component.

As noted previously, N.D.C.C. § 12.1-32-10 is a modification of the Proposed Federal Criminal Code establishing a parole component and that of the Model Penal Code establishing a separate parole term.

As the mandatory parole concept was originally proposed, in accordance with the Proposed Federal Criminal Code, an offender who commits a violation of parole during the mandatory parole component would be subject to reincarceration for the remainder of the parole component or one year, whichever period was greater. Classification Plan adopted by Subcommittee on Classification of the Judiciary Committee, August 6, 1971,

as modified on August 30, 1971. However, the North Dakota Legislature did not specifically adopt this proposal.

Both the Model Penal Code and the Proposed Federal Criminal Code anticipated that the length of reincarceration of a violator of a parole component or separate parole term would consist of the unexpired length of the parole term. Model Penal Code, 610 (Proposed Study Draft 1962); National Commission on the Reform of Federal Criminal Law, II Working Paper, 1283-1284, 1298-1299 (1970). In other words, an offender who would violate a condition of parole during the third year of that offender's five-year mandatory parole component could be reincarcerated for the remaining two years. This reincarceration, however, would be subject to the authority of the Parole Board or Pardon Board to terminate the parole.

Although differences exist between the Model Penal Code/Proposed Federal Criminal Code provisions pertaining to the imposition of a special parole term or parole component and N.D.C.C. § 12.1-32-10, nothing in the North Dakota statute in its legislative history justifies a determination that the North Dakota Legislature intended to depart from the underlying position of the model and proposed codes to allow reincarceration of a violator only for the portion of the mandatory parole component term remaining after the date of the act which constituted the parole violation.

Legislative action may be appropriate to reflect this intent. However, the current lack of clear legislative direction does not prohibit a construction of this statute in this manner.

The ability to enforce the parole component is necessary to make the statute effective. In enacting a statute, it is presumed that the entire statute is intended to be effective and that a result feasible of execution is intended. N.D.C.C. § 1-02-38. To ensure that these legislative goals are met, N.D.C.C. § 12.1-32-10 must be construed to permit an offender, as under the model codes, to be reincarcerated for the remainder of the parole component term for a violation of a parole condition.

I trust that I have adequately responded to your inquiries.

Sincerely,

Nicholas J. Spaeth

ja