

**2021 HOUSE INDUSTRY, BUSINESS AND LABOR**

**HB 1296**

# 2021 HOUSE STANDING COMMITTEE MINUTES

## Industry, Business and Labor Committee Room JW327C, State Capitol

HB 1296  
1/25/2021

<b>Confidentiality of booking photos</b>
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(9:00) Chairman Lefor calls the hearing on HB 1296.

<b>Representatives</b>	<b>Attendance</b>
Chairman Lefor	P
Vice Chairman Keiser	P
Rep Hagert	P
Rep Jim Kasper	P
Rep Scott Louser	P
Rep Nehring	P
Rep O'Brien	P
Rep Ostlie	P
Rep Ruby	P
Rep Schauer	P
Rep Stemen	P
Rep Thomas	P
Rep Adams	P
Rep P Anderson	P

### Discussion Topics:

- Person's reputation effects
- Assistance in criminal investigation
- Open records law

Rep Roers-Jones~District 46 introduced the bill.

Dustin Gawrylow~ND Watchdog Network: Attachments # 2385, 2384, 2383.

Adam Martin~Executive Director-F5 Project. Testified in favor.

Mark Friese~Practicing Attorney in Fargo: Attachment # 2327.

Jack McDonald~Representing ND Newspaper & Broadcasters Association:  
Attachment # 2649.

Sarah Elmquist Squires~Executive Director-ND Newspaper Association. Testified in opposition.

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Donnell Preskey-ND Association of Counties. Testified in opposition.

Rep D Ruby: Moves to adopt amendment from Gabby Reed to add "or on behalf of" on lines 13-14. Attachment #2501.

Representative Schauer seconded.

Voice vote Motion carried.

Chairman Lefor requested the bill be held & Rep O'Brien to research the words "inmate" and "compelling".

**Additional written testimony:** Attachments #2573, 2632, 2810 & 3172.

(10:35) End time.

*Ellen LeTang, Committee Clerk*

**HB 1144 – Testimony by Dustin Gawrylow (Lobbyist #266) North Dakota Watchdog Network**

On the weekend of July 18th, 2020, I experienced something no American should experience. Namely, I was thrown in jail for 48 hours due to a brotherly skirmish that I did not start.

I do not want my brother to experience what I went through, so I will refrain from disclosing details beyond the following: I acted in self-defense and reported the incident to the police myself, but my brother beat me to the police station. He was given the benefit of the doubt.

My resolve to tackle the underlying policy issues at play comes from the fact that “it happened to me.” But my motivation for writing this article, and pursuing the following legislative reforms, is based on the “this should not happen to anybody” doctrine.

The Bismarck Police Department enforced the “shall arrest” clause of the law that treats a fight between brothers as a “domestic violence simple assault.” That law (N.D.C.C. 12.1-17–01.2, 14-07.1-01, & 14-07.1-10) requires officers to arrest someone (based on probable cause) accused of being the “predominant aggressor” (defined as “an individual who is the most significant, not necessarily the first, aggressor”). I am still unsure how I was determined to be the “predominant aggressor,” as I did not take the first physical action. I also was the one that ran away from the situation (which brings in the question of so-called “duty to retreat laws), and I was the one reaching out to law enforcement.

I have been seeking the police reports, emails exchanged, text messages exchanged, and officer notes to determine how that judgment was made. I assume there is some communication trail to explain the decision, even if it is not captured informal notes. However, by some technicality that lawyers, including former prosecutors have told me is a normal practice – the case is being held open so that I am not entitled to those records – both as someone involved and from an open records standpoint.

Once the incident was determined to be a “domestic violence” event, the officers apparently had no discretion but to make the arrest – or at least so they say. My question is how someone in my case, or anyone-else’s case, is determined to be the aggressor.

The word “domestic” in “domestic violence” applies to more than a romantic relationship gone bad with an abuser. The law is being applied to adult siblings arguing over petty issues, in a scuffle that can barely be called a fight outside a junior high school playground.

By declaring such situations as “domestic violence” as a “catch-all” charge, from a public policy standpoint, we are prevented from differentiating very serious kinds of domestic violence from incidents like mine – those that have the same label but are completely different in nature. An extremely broad concept of domestic abuse ensures that our understanding of victims of abuse is diluted in a sea of useless statistics. This is demeaning and does a disservice to victims who need help escaping dangerous abuse. Meanwhile, it also facilitates the weaponizing of false accusations and bogs down the legal system with cases that are not “domestic violence” as understood by the average person.

It has always been my belief that upon booking at a police station, I was allowed a call to a lawyer. While they did let me call my father and ask him to put money on my “jail phone card,” I was not allowed access to a phone for a free call to a lawyer for 6 hours. From 3pm to 9pm, I asked 3 separate guards for phone access, with each one saying the next guard would bring the phone around.

Being of the political world, I personally know lots of lawyers. I've just never needed one in a criminal situation. So I was appalled that I was not allowed access to a phone to call a lawyer until it was far too late in the day to even do anything about the situation.

I was held for 48 hours, the first 24 hours being in a "solitary confinement cell." The cell was lit with a bright and blinding LED-style light for 18 hours and with a bright orange light for the remaining hours. A two-inch-thick "mattress" on concrete was what was provided. Of course, under these sleep-deprivation conditions, sleep was not possible on the first night. Nor was sleep possible for the second night when they transferred me to a "POD" with all repeat offenders. Luckily, they were fairly well-behaved while I was there. (Once they found out what I do for a living in politics, they all wanted my attention and advice on how to fix their situations. Of course, I had no answers for them.)

After 48 hours in jail, and while waiting to be called for a bail/bond hearing in front of a judge (as required by law), I was released after the "states' attorney declined to pursue prosecution." Upon release – and I knew this would happen – I found news that my mugshot had already made the rounds on social media. To this moment, no official notice or statement has been made by the county states' attorney stating that the charges are not being pursued. As a result, I cannot get the various websites that aggregate and syndicate mugshot photos to remove those.

As this situation has continued to unravel, in attempting to obtain my case records from the police department and the states' attorney's office, I have been told verbally by a paralegal that an attorney in the states' attorney's office approved downgrading the original charge to a "Mutual Combat" which is just a normal fight, that is subject to civil law, not criminal law. I have also been told that the case "is under further review" and that as such I cannot obtain my case records because without there being charges in place, I am not currently a defendant so I have no rights of a defendant. And because it is an open case without charges, it is exempt from Open Records Laws.

Saying the "justice system is broken" is an empty talking-point from politicians who want to sound like they care. Based on my experience, I now believe that most people, including lawmakers, have little-to-no understanding as to just how it is broken. From my experience in all this, I have determined that our justice system is broken in a very tangible way. Below are five reforms I believe the North Dakota legislature can and should enact in the 2021 legislative session.

### **Public Policy Reform Suggestions**

Based on my experience, I believe there are at least five meaningful and viable changes to our criminal justice system that would dramatically bring us into closer alignment with "innocent until proven guilty," the principle that every North Dakotan expects. Sure, I was not officially administered any punishment. But 48 hours of detainment and sleep deprivation is punishing, and it makes absolutely no sense to subject an innocent person to such punishment. I say this as someone who has never been in trouble for more than a speeding ticket and who has a decent handle on the law.

1. The definition of "domestic" in "domestic violence" is far too broad. Situations that currently qualify for a domestic violence charge, on the probable cause basis as determined by the police, can snag far too many people in the net. For instance, timelines should be thoughtfully considered when determining that an incident is domestic in nature. Two adults involved in an incident of aggression

who, as children of the same parents, had previously lived together many years ago are not genuinely engaged in a “domestic” dispute. Our encounter being framed as “domestic violence” not only violates common sense but goes against the supposed “family values” philosophy that many politicians proclaim. I am wondering how many decades my adult brother and I would have needed to live apart to avoid the “domestic” label for our incident. In any case, a redefining of “domestic” in our century code is imperative.

2. An arrested person’s mugshot should not be a matter of public record until a judge has been seen and a prosecutor has determined that a case is viable. If, as in my case, a prosecutor determines not to pursue prosecution, then a publicly issued mugshot represents nothing more than public shaming for an innocent individual. We can keep victims of actual domestic violence safe while not arbitrarily humiliating innocent individuals. Arrestees should be able to have timely contact family to get help with the situation, especially first time arrestees who don’t understand the ins and outs of the system.

3. Funds should be appropriated such that city, county, and state governments can use video conferencing for calls on weekends. It is not right that a weekday arrest can be over in mere hours while a weekend arrest can drag on for 48 hours or more. Accepting the cost of weekend calls and avoiding the cost of housing and monitoring innocent people is clearly the fiscally responsible choice, How much taxpayer money is used to over-build jails based on the “weekend surge,”? How many people are forced to needlessly endure the sort of sleep-deprivation conditions that I did? By funding and requiring daily and timely bail/bond hearings, it may cost more in salary for judges and officials. However, such costs will be offset by the reduced presence of detained individuals.

4. Those arrested, including everyone but especially those with no prior conviction, should be treated with basic human dignity. The average person would consider the treatment I received to be intentional sleep deprivation tactics. Jail should be no vacation, but it should not induce physical harm or pain either. The way things are, people with mental or behavioral health struggles are only going to leave jail in a worse state, not better. A key question is, if law enforcement processes are not designed to protect the innocent and help keep offenders from repeating their mistake, then what is the point to all of this? We are spending a lot of taxpayer money to mistreat folks who will ultimately be found innocent while failing to help actual offenders avoid a life of crime. By worsening rather than bettering the people who come into contact with law enforcement, we ensure a perpetual process that will only continue to increase costs. Again, what is the point of that?

5. Patients who have been arrested should not be denied access to their needed medications as determine by their doctor prior to arrest. Prior to booking, I was taken to the emergency room when I informed the arresting officer that I have long standing high blood pressure. I have also had surgeries, medical conditions, and other injuries that have led my doctor to prescribe medications for me. For instance, I use a migraine medication for migraines caused by high blood pressure spikes. My lack of access to my medications exacerbated my blood pressure problem by increasing my pain level. In a worse-case scenario, a patient like myself could suffer a stroke or aneurysm and even death. What as a society do we gain from risking the lives of those who are arrested? Why would we as a society want to put an accused person in more danger than is required? Taxpayers

should not only be mindful of how responsibly their taxes are used, but also whether the system their taxes fund will treat them and their fellow citizens as humans, first and foremost.

6. Once someone has spent a minute of time in jail, they should have the right to have access to your case file. A person deserves to know why and how the cops determined to arrest and jail them. Not just by the law of the book, but how their judgment as officers came to that conclusion. And the reasons for charges being dropped or reduced if that occurs. This would seem to be a very common sense reading a “due process” and a “fair and speedy trial”. Leaving an investigation open to deprive citizens of the statute of limitations appears to be a very well established case where the judicial branch has total power to reject the legislative intent of such statutes passed by the legislature. There is no “checks and balance” when the legislative intent can be nullified by the judiciary, and without a judge’s order.

In my 48-hour experience, I witnessed several obvious opportunities to reform our system. I am grateful the experience did not last longer. As a society, we need to listen to people who have been through the law enforcement and criminal justice system. We must take such people seriously and not just treat them like “criminals complaining.”

I hope that lawmakers they will have an open mind about these issues. especially upon hearing about them from someone they do know who now has direct experience.

I also hope Governor Burgum will take on this issue and treat it much the same way he has with the “Recovery Reinvented” program that First Lady Kathryn Helgaas Burgum has led. Indeed, tackling this topic is a natural next step for the Burgums. Our society’s overly punitive approach toward people who suffer from the disease of addiction is indispensable if we ever hope to reduce the stigma of addiction.

I believe that because of my history as a political activist and consultant, it is my moral duty to pursue this issue now. I intend to bring the same zeal and tenacity that I have brought to issues, like cutting taxes, limiting the growth of government, and increasing government transparency.

Reforming the criminal justice system may not be cheap in the short-term. Early on, it may require increased spending and possibly even increased taxes. But these investments will pay off. Treating the accused – those who are found innocent, and those who are found guilty – like human beings with lives that matter will absolutely foster more trust and less crime. Lower recidivism is money well-spent. Avoiding serious harm to individuals is money well-spent. Citizens who are steered away from a lifetime of entanglement with law enforcement will become productive participants in our families and in our economy. Such positive outcomes should be a priority of every citizen and politician who claims to value an efficient, appropriately sized government.

# Fight Against Mugshot Sites Brings Little Success

STATELINE ARTICLE December 11, 2017 By: Rebecca Beitsch Topics: [Justice](#) & [Social Issues](#) Read time: 7 min



Terrill Swift spent 15 years in an Illinois prison for a crime he didn't commit and still has his photo on Mugshots.com. Illinois is one of 18 states with laws cracking down on mugshot websites by banning them from charging removal fees, stemming the flow of mugshots from law enforcement agencies, or requiring that the postings be accurate.

*Stacey Wescott, Chicago Tribune*

Mike Anderson was an 18-year-old freshman at Texas State University when he was busted with less than a gram of weed. Police arrested him, took his mugshot, and he spent the night in jail.

The legal consequences for being caught with such a small amount of marijuana — just enough for a joint or two — were minimal, but expensive. Prosecutors offered to drop the charges if he attended a drug program and did community service, and he could later get the record of his arrest expunged for about \$500, wiping the history of his arrest from public view.

“After I got it expunged I thought it was pretty much a done deal,” he said of the order granted earlier this year.

But the next time he Googled his name, he realized the ordeal was far from over. His arrest photo was posted on Mugshots.com. The page was one of the top results for anyone who might be looking for him. And as Anderson applied for internships — a graduation requirement for mechanical engineering majors — recruiters who initially seemed interested would offer the spot to someone else.

“It wasn’t right,” said Anderson, a junior, who asked that his real name not be used for fear of drawing further attention to his mugshot.

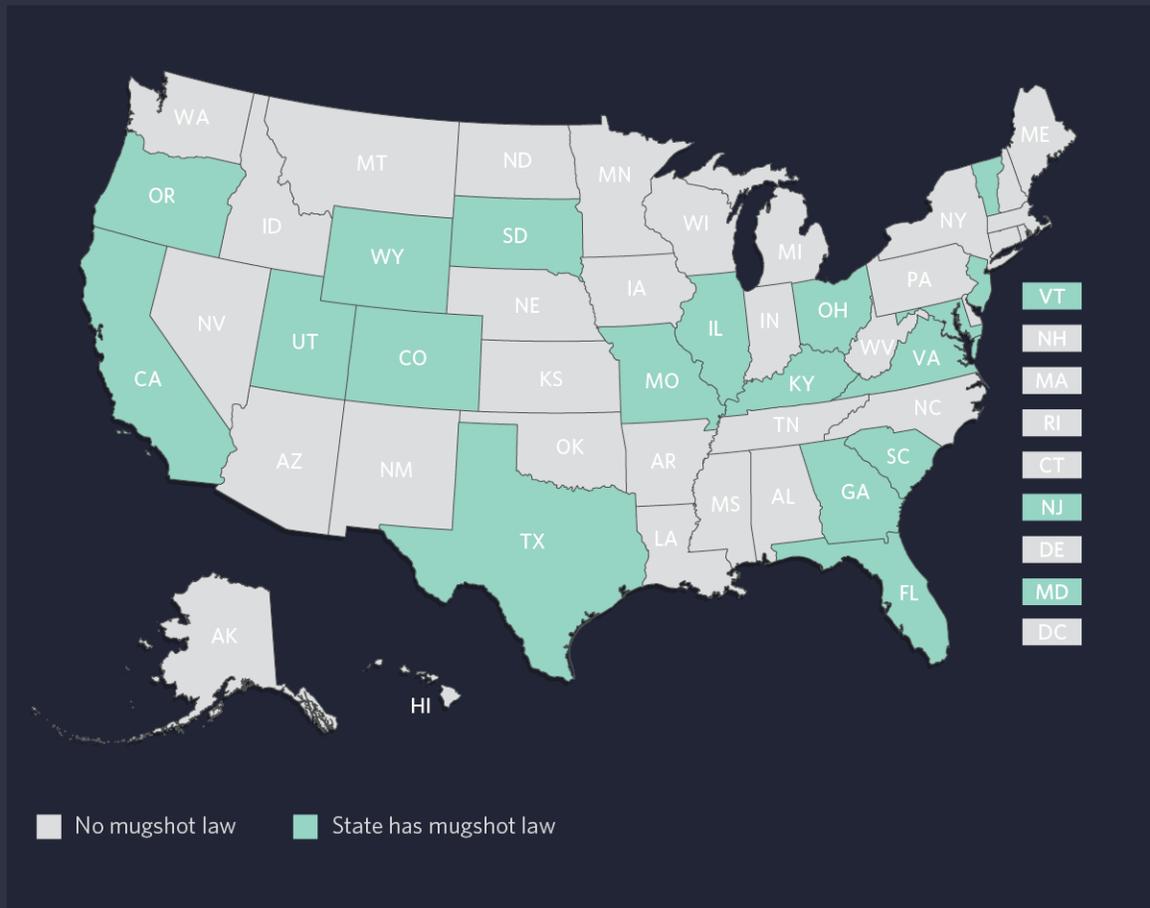
“I called [Mugshots.com] on the phone, and they told me basically the only way I could get the mugshot to come down was to pay a certain fine. Proof of expunction wasn’t valid.”

At a time when personal information can end up online and rocket around the globe in seconds, the estimated 78 million Americans with criminal records are a rich target for websites that collect mugshots from police departments and sheriffs’ offices across the country and typically charge hundreds or thousands of dollars to have the photos removed. Even people who are arrested but never charged have their photos on the sites.

Since their business practices [came to light in 2013](#), the websites have drawn the ire of state lawmakers who criticize them as exploitative. Texas is one of 18 states with laws designed to help people like Anderson, cracking down on mugshot websites by banning them from charging removal fees, stemming the flow of mugshots from law enforcement agencies, or requiring that the postings be accurate.

## These States Have Laws To Restrict Internet Mugshots

Eighteen states have some sort of law that restricts the business practices of websites that post mugshots, whether by banning them from charging to remove photos, by stemming the flow of mugshots, or by requiring that the postings be accurate.



Source: National Conference of State Legislatures

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But so far, the laws have been largely ineffective in providing relief to those whose photos are featured on the sites.

“They haven’t worked,” said Eumi Lee, a law professor at University of California-Hastings who has spent three years studying the effectiveness of mugshot laws for an upcoming legal review article to be published by Rutgers. “But they’ve had a bunch of unintended consequences.”

Mugshot websites have ignored the laws or quickly figured out ways to work around them, Lee said. In places where people can no longer pay to have photos deleted, they often have no remedy to get them removed. And once law enforcement releases the photos, they have little control over where they end up.

Mugshots.com, one of the biggest purveyors, has entries for nearly 30 million people, including people in states that hoped to make it easier to have mugshots removed.

A *Stateline* review found evidence across the country of the laws' inadequacy:

- Georgia twice tried to get mugshots off websites, first blocking sites from charging arrestees who were never convicted to have their pictures removed, and then requiring affidavits from any entity requesting law enforcement copies of mugshots. Still, Mugshots.com claims to have 2.3 million records from Georgia on its site, including entries for those arrested after the law took effect.
- California enacted a law in 2014 barring mugshot companies from charging to remove photos. But even its sponsor doesn't know how well it's working. Pressed recently by *Stateline* for evidence of the law's effectiveness, the office of state Sen. Jerry Hill, a Democrat, found a still-operating site, Whogotarrested.org, requesting a fee to remove photos. He requested a [probe](#) by the state's attorney general.
- And in Illinois, where the law similarly bans fees to remove mugshots, Mugshots.com is being sued for charging arrestees.

One of the plaintiffs in the Illinois suit, Peter Gabiola, said he can't escape a criminal past — despite time served — because his face keeps popping up on Google searches. Gabiola said Mugshots.com told him it would cost \$15,000 to have his information removed from the site. He contends he's repeatedly been fired shortly after starting new jobs, even when he disclosed his criminal past, because Mugshots.com incorrectly insists he is still on parole.

"I made my life hard enough making some of the decisions I made in the past as a knucklehead, so I don't need some worldwide company or whatever making it harder by publishing incorrect information," Gabiola said.

Sheryl Ring, Gabiola's attorney, said that's part of the company's business model — people who are already struggling because of a criminal record will be more likely to pay if the listing makes things look worse than they really are.

Despite the laws' dubious track records, states keep enacting them. This year Florida, New Jersey, Ohio and South Dakota all enacted laws targeting mugshot websites.

To be sure, trying to rein in mugshot websites is a challenge. In most states, mugshots are a public record. The companies can digitally scrape the photos from law enforcement websites, uploading them to their own sites in just hours, or put in public information requests to get others. When they've been sued, the sites' attorneys have repeatedly argued their work is protected under the First Amendment.

Among those who defend putting mugshots online are newspaper publishers, whose sites often feature local mugshots in crime coverage.

David Ferrucci, an attorney for Mugshots.com, said people featured on the site are being harmed not by the website but rather by their own criminal history.

“If your claim is that the publication of public records has hurt your reputation, then you’re complaining about the publishing of public records,” Ferrucci said.

Most of the state mugshot laws include some sort of criminal component, typically making it a misdemeanor offense for not complying. But it’s not clear that police have ever filed charges against a mugshot website. The onus falls almost entirely on the person whose photo is posted, and lawsuits are no small undertaking, particularly for those who cannot afford an attorney.

“It’s just like anything else. It’s against the law to murder somebody, but people get murdered every day,” said Georgia state Rep. Roger Bruce, a Democrat who sponsored both of the laws Georgia enacted to address mugshot websites. “But now the law is on their side. They can get an attorney and go after whoever posted their mugshot.”

A *Stateline* review of federal court dockets showed about 10 lawsuits in five states, many of which have come from people defending themselves in court. Several cases taken on by bigger law firms have stalled in court, complicated by an inability to get class certification or fears the firm would not ultimately see much money from the case, lawyers involved in the cases said.

## Catch-22

Gabiola’s suit in Illinois is one of the first using a state law that bars mugshot websites from charging people to remove their photo from the site. Among others upset at the website is Terrill Swift, who spent 15 years in prison for a crime he didn’t commit and whose photo is still on Mugshots.com five years later.

“They should do the right thing and take our pictures off those websites,” Swift told the [Chicago Tribune](#) earlier this year.

Both the lawyer for Mugshots.com and supporters of the law say it puts arrestees whose photos are on the site in a bit of a Catch-22 – they can no longer be charged to remove photos, but they don’t have a legal avenue to get them removed from the site. So Mugshots.com can keep them up.

“Perhaps the cruel irony of the Illinois law is that people who previously were able to have the information removed can no longer do so,” said Ferrucci, the Mugshots.com attorney.

Mugshots.com tried to get the case dismissed on First Amendment grounds, but a U.S. district judge denied the request. Illinois Attorney General Lisa Madigan, a Democrat, intervened in the case in favor of Gabiola, saying Mugshots.com was engaged in an “extortionate practice” not protected by the First Amendment.

Ring, Gabiola’s attorney, says it’s already clear that mere passage of the laws does little to change the companies’ business practices.

“In terms of whether these statutes are effective, we’re going to need to find out if courts will actually enforce them,” Ring said.

If the suit gets class certified, the \$1,000 in damages provided by state law could require Mugshots.com to pay out millions.

"I WAS FOUND GUILTY" ; "MY CASE IS PENDING" ; WILL YOU REMOVE MY MUGSHOT?

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No.

"MY RECORD WAS EXPUNGED" ; "I WAS PARDONED" ; "MY CASE WAS DISMISSED" ; WILL YOU REMOVE MY MUGSHOT?

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As you may be aware Expungement and pardon only apply to certain government agencies' databases, and not all of them. Certainly not to the private sector.

ISN'T PUBLISHING MY MUG SHOT A VIOLATION OF MY RIGHTS?

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No, it is not. Originally collected and distributed by Law Enforcement agencies, Booking records are considered and legally recognized as public records, in the public domain. Furthermore, while it may be you or someone you know in the mugshot, the ownership of these records is public.

A screenshot of Mugshots.com.

Mugshots.com

## Finding Workarounds

In Texas, Mugshots.com refused to take down Anderson’s photo without a \$300 payment, even though state law requires that mugshot sites jibe with the state’s criminal records – and according to Texas, he doesn’t have one.

Kelvin Bass, an aide to Democratic state Sen. Royce West, who helped craft the state’s mugshot law, acknowledged it doesn’t have a good enforcement mechanism. He’d like to amend the law to put more pressure on the attorney general or local law enforcement agencies to take action.

“This guy’s a college student,” Bass said. “Why should he have to sue to get someone to follow the law when he’s already notified this business that they’re in violation? It should be easier.”

Kayleigh Lovvorn, a spokeswoman with the Texas Attorney General’s Office, said the office has received 19 complaints against Mugshots.com, but the state has taken no legal action

against the company.

Sponsors of mugshot laws in several states say they haven't kept a watchful eye on the laws' effects, but they've been contacted by people who say they've been helped by their passage. They say the laws aren't intended to shut down the websites, just to curb their extortive practices.

But they also say mugshot sites have found workarounds: Attempts to block payment are often ignored, and sites can still make money off ad revenue. Even when mugshots aren't released, the websites use old arrest photos or mugshots from when people are booked in prison. The private sector has tried to step in; Google tried to change its analytics so mugshot websites aren't among the first to surface in a name search, but the mugshot sites can [game the new algorithms](#).

Lee, the professor studying mugshot laws, thinks the only way to stop improper use of the photos is to stop releasing them at all, even to the media, ceasing their designation as a public record.

"It completely undermines the efficacy of those efforts," she said of the laws.

Federal mugshots have largely not been available since 2016, when the 6th Circuit Court of Appeals ruled against the *Detroit Free Press*, which wanted access to the photos. But even some who want to crack down on the sites are hesitant to go that far.

"Arrest information is always public, and I don't know if we want to prohibit that," said Hill, the state senator from California. "We start sounding like a totalitarian state where people are secretly arrested and no one knows about it. No one can react to it or take action."

Back in Texas, Anderson continues his search for the internship he will need to graduate.

"I'm a junior right now, and I have about a year left," he said, but "once a company searches my name, I just don't get the same attention I did before."

## RELATED

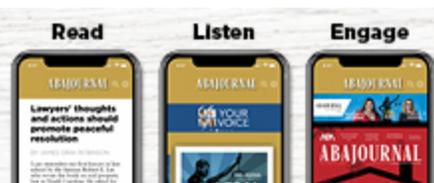
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LAW SCRIBBLER

## Use copyright law to battle mugshot extortion

BY JASON TASHEA ([HTTPS://WWW.ABAJOURNAL.COM/AUTHORS/64729/](https://www.abajournal.com/authors/64729/))

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Jason Tashea

for her LinkedIn and Facebook profiles.

Making matters worse, she did not find her photo on a newspaper or crime blotter website that reports local crime. Cantu found herself in the mugshot racket. Her photo was on Arrestmugshot.com, Mugshots.com and Tampacriminal.com—all of which demanded a fee to take down these photos (two

After her DUI charge was dropped, Julie Cantu thought her nightmare was over. Then, she went on a date.

Over dinner, Cantu's would-be-suitor was asking questions anyone asks on a first date. Then he asked about her criminal record. Caught off-guard by the question, she thought about the dropped charge. Her blood alcohol had been 0.021, well below the legal limit of 0.08, and she had no other contact with the law. How did her date know?

After getting home, the Florida resident and retired nurse went online and searched her name. Her mugshot, eyes puffy and red from crying, was displayed prominently between results

of these sites, arrestmugshot.com and tampacriminal.com, are no longer active, with the latter now redirecting to a lawyer's website).

After paying \$175 to one site to take down the photo, she found her mugshot pop up on another, which asked for even more money. An exploitative game of online whack-a-mole had begun.

Cantu says she worried that the photo was "going to be there the rest of my life."

From what we post online to what is posted about us, our internet profiles are defining. While there have been attempts to curb mugshot websites by state governments and tech companies, this extortion racket is alive and well. It is an ongoing, national problem that requires a new solution, bringing together police and communities against these nefarious websites. To fight back, law enforcement agencies must flex their legal ownership of mugshots to combat this destructive practice.

An estimated 70 million Americans have a criminal record, making this a national issue.

Yet having a criminal record does not mean a person was found guilty or even charged with a crime. At a bare minimum, it means a person was arrested and then let go. Regardless of the legal outcome of an arrest, there is likely a commemorative mugshot, which can find its way online. Even if the individual expunges their record and mugshot, the legal process of erasing a criminal record, the internet never forgets—in part due to mugshot websites.

The individual struggle against these websites is well-documented

(<https://www.nytimes.com/2017/06/03/opinion/sunday/innocent-until-your-mug-shot-is-on-the-internet.html>), affecting employment, housing and potential relationships ([https://motherboard.vice.com/en\\_us/article/7xzn4x/dating-app-gatsby-doesnt-want-you-to-swipe-right-on-criminals](https://motherboard.vice.com/en_us/article/7xzn4x/dating-app-gatsby-doesnt-want-you-to-swipe-right-on-criminals)). Seventy-seven percent of employers Google job applicants, according to the job-posting website Monster.com (<https://www.monster.com/career-advice/article/hr-googling-job-applicants>). And it is an unanswered question as to whether turning down tenants based on their criminal records violates the Fair Housing Act.

Hiring and renting policies like these are commonplace and uniquely hurt minority job candidates and renters. While black people are 13 percent of the U.S. population

(<https://www.census.gov/quickfacts/fact/table/US/PST045216>), they make up 33 percent of those in our prisons and jails. Similarly, Hispanics make up 18 percent of the country and 23 percent of the prison population, according to the Department of Justice (<https://www.bjs.gov/content/pub/pdf/p16.pdf>). About 95 percent of people in prison will re-enter society after their sentence.

Completing a sentence, however, does not mean the punishment is over. Those with a conviction have to disclose their record on job and loan applications, while other states limit the right to vote based on a criminal record. As for mugshots, they can follow people, with or without a conviction, like a scarlet letter into perpetuity.

For those like Cantu who have the tenacity to take on these websites, it can be an expensive and time-consuming endeavor. After paying the \$175, Cantu says another site asked for \$500 to take her mugshot down. Compounding this individual economic burden, by one account

(<http://cepr.net/documents/publications/ex-offenders-2010-11.pdf>), criminal records as a hurdle to employment could cost the U.S. economy up to \$65 billion a year.

All the while, the existence of these sites does not improve public safety.

States have attempted to rein in these websites with dubious impact. According to the PEW Charitable Trusts (<http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/12/11/fight-against-mugshot-sites-brings-little-success>), 18 states have passed laws to restrict mugshot websites, including a ban on charging money to take down photos, limiting private sector access to mugshots and requiring that mugshot sites are accurate and reflect official records.

Even when people take steps to expunge their criminal records, these websites have no interest in reflecting the updated and accurate records. As one prominent mugshot website states: “As you may be aware expungement and pardon only apply to certain government agencies’ databases, and not all of them. Certainly (sic) not to the private sector.”

Due to the industry’s response, PEW points out that the success of these laws is limited. Mugshot sites continue to extort residents in states with these regulations, including California, Georgia, Illinois and Texas.

Outside of government, Google attempted to ameliorate the problem by deindexing mugshot websites from their search results in 2013. However, Sarah Esther Lageson, an assistant professor at Rutgers University, writes in her forthcoming book, *Digital Punishment*, that mugshot websites worked around Google’s changes. As a subsequent, devastating consequence, many people reported that their mugshots proliferated on the search engine.

The internet’s seeming lawlessness and lack of jurisdiction can make this problem seem intractable. It is not.

Police departments around the country are in the unique position to serve and protect those like Cantu by using existing copyright law to support their community and fight back against the mugshot racket. Doing so provides a unique opportunity to combat online extortion and improve community-police relationships.

Mugshots hold an administrative purpose in the criminal justice system, so their existence will likely continue. This means that open records laws will continue to usher these photos online. (An exception to this rule is a 2016 ruling from the 6th U.S. Circuit Court of Appeals, which held (<http://www.opn.ca6.uscourts.gov/opinions.pdf/16a0164p-06.pdf>) that a federal agency can, on a case-by-case basis, decline a Freedom of Information Act request for a mugshot due to privacy concerns.)

This makes it easy for mugshot websites to collect photos and start the cycle of extortion. To this end, police departments have a responsibility, as the creators of these pictures, to mitigate their harm.

In the U.S., the default copyright holder of a photo is the person or organization that took the photo, not the person in the image. In the case of mugshots, this is most likely the law enforcement agency.

When someone without permission posts copyrighted material to the Internet, the owner of the copyright can use the Digital Millennium Copyright Act to send a takedown notice. If the site refuses, the unauthorized publishing of this material can cost a site up to \$150,000 in penalties per photo, as Amanda Lewendowski (<https://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/>) wrote in 2014 regarding a similar argument made against revenge porn websites.

Because police departments will hold multiple copyrights to photos on these websites, they would be able to take down hundreds at a time. By using the DMCA for its intended purpose, police departments will help tens of thousands of people— from Baltimore to Oakland—and earn goodwill in their communities.

That said, using the DMCA in this manner is not a silver bullet.

First, some governments—such as the federal government—do not allow themselves to own copyrights. In the absence of a copyright, a DMCA takedown notice will not work. This is an impediment that each jurisdiction will have to consider. Depending on local laws, one potential solution is contracting a private, third-party vendor to take the photos and act as owner and party to the DMCA takedown notices.

Second, some of these websites do not use American servers, so they can be hard to reach legally. Nearly half of the world has signed the World Intellectual Property Organization Copyright Treaty—the basis for the DMCA—and it obliges each signatory to accept each other's takedown notices. So there is a mechanism to go after off-shore perpetrators.

However, enforcement is not uniform. Adding challenges, a country that did not sign the WIPO treaty could host a mugshot site, putting the site beyond reproach.

Third, an entrepreneurial police department undertaking this challenge would have to find the mugshots from their department spread across dozens on websites to send the appropriate takedown notices. To make this practice more efficient, police departments could keep a list of hash values—a unique, fixed identifier—associated with their mugshots.

This technology, like Microsoft's PhotoDNA, already exists and is being deployed to curtail the spread of child pornography online. Its use could streamline and largely automate the process to battle mugshot extortion.

These complications must be considered, but they do not foreclose on this novel approach that will help our family members, friends and neighbors with a record.

While the internet can challenge our notions of law and justice, the DMCA can be a powerful tool to help those who are victims of mugshot websites. The police, whether they know it or not, are uniquely positioned to help people like Julie Cantu.

After her arrest and the subsequent fallout, Cantu says it took her three years to have a glass of wine in public again. Having moved to a new city since the arrest, the experience still leaves her feeling “paranoid” and uneasy around the police.

“It's just one of those things that stays in the back of your mind,” she says.

Now, eight years and an expungement later, Cantu's mugshot can still be found online.

It is time that police departments take a leadership role to end this exploitative cycle. Allowing extortion to continue unabated is not an acceptable alternative.

**Give us feedback, share a story tip or update, or report an error.**

January 23, 2021

The Honorable Mike Lefor  
Chair, ND House Industry, Business and Labor  
600 East Boulevard Avenue  
Bismarck, ND 58505

**Submitted electronically only:**

**Re: Testimony in Support of HB 1296**

Dear Chairman Lefor members of IBL Committee, and HB 1296 Sponsors,

I write individually in support of HB1296. I am an attorney in private practice in Fargo. I am a resident of Legislative District 45. I primarily practice in State and Federal courts in North Dakota, I am also admitted to practice in Minnesota state courts and the United States Court of Appeals for the Armed Forces. For the past 20 years, my primary practice has been criminal defense. I retired from the North Dakota Army National Guard after serving twenty four years, the last eight of which were with the Judge Advocate General Corps. Prior to law school, I served as a Bismarck Police officer for more than five years. I have had the previous privilege of working with members of the Assembly as a citizen member of the Interim Commission on Alternatives to Incarceration.

Unlike federal authorities, North Dakota authorities routinely release booking photographs and contact information for presumptively innocent citizens accused of crimes. If the charge is dismissed or citizen is acquitted, it is impossible to undo the damage done. Like federal law, this bill balances individual right of privacy and the public's right to information collected by government employees. The bill preserves the fundamental purpose of booking photos, permitting unrestricted sharing of the collected information among law enforcement. It permits pre-disposition public dissemination of booking photos in instances in which public interest requires it (i.e., the accused is a fugitive from justice, fails to appear for court, or is convicted of the offense).

I understand a personal friend and colleague may ask for consideration of additional protections, similarly restricting release of the home address and telephone number of an accused. For the reasons outlined below, I equally support that request.

**BOOKING PHOTOS AND PRESERVING THEIR LAW ENFORCEMENT PURPOSES**

Booking photographs are collected by the government for government purposes. They are not collected so media or those interested can avoid the private investigative work necessary to locate personal photographs from other sources, like social media, news outlets, or others. As records collected for a governmental purpose, the government has a compelling interest to ensure release of the booking photographs does not undermine other important government purposes.

Routine release of booking photographs creates a risk of suppression of evidence in criminal courts. Court proceedings may include identification testimony. A witness to the crime may be asked to identify the suspect in court. If that witness has observed widespread public dissemination of a booking photograph, challenges may arise to the identification testimony—i.e., it is not reliable because it is based on seeing the published photograph rather than personally observing the person depicted. The result may be suppression of identification testimony, or more aptly, undermining the prosecution’s case. *See e.g., New Jersey v. Green*, 216 A.3d 104 (N.J. 2019) (holding out-of-court identification was undermined by mugshot exposure and suppressing the identification testimony).

### **STATES MOVING TO PROTECT BOOKING PHOTOGRAPHS PRIOR TO CONVICTION**

The National Conference of State Legislatures (NCSL) has a comprehensive compilation of state laws and the growing trend to protect the confidentiality of booking photographs until conviction. Like this bill, states implementing protections have specific exceptions, permitting release in the interest of public safety, like when the accused is a fugitive from justice. The trends and compiled NCSL data may be helpful for your consideration: <https://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx>

### **FEDERAL LAW ENFORCEMENT EMPLOYS AN APPROACH SIMILAR TO THIS BILL**

Until 2016, Federal law enforcement routinely released booking photographs. Similar to North Dakota’s open records law, N.D.C.C. Ch. 44-04, the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, governs the release and dissemination of information collected by governmental employees. In 2016, the United States Court of Appeals for the Sixth Circuit reversed twenty years of precedent, concluding citizens “enjoy a non-trivial privacy interest in their booking photos” and held routine release of booking photographs during ongoing criminal proceedings violated the FOIA. *Detroit Free Press Inc. v. United States Dept. of Justice*, 829 F.3d 478 (6th Cir. 2016).

The *Free Press* court recognized the FOIA’s competing interests: a “general philosophy of full agency disclosure,” balanced with a need to restrict information compiled for law enforcement purposes when restriction is necessary to protect against “an unwarranted invasion of personal privacy.” *Id.* at 480. Addressing personal privacy, the court described booking photos as:

- “snapped ‘in the vulnerable and embarrassing moments immediately after [the person is] accused, taken into custody, and deprived of most liberties’”
- “[m]ore than just ‘vivid symbols of criminal *accusation*’
- Conveying “*guilt* to the viewer”
- Uniformly interpreted “with guilt and criminality”
- “effectively eliminating the presumption of innocence and replacing it with an unmistakable badge of criminality”

The court went on to note: “A disclosed booking photo casts a long, damaging shadow over the depicted individual.” The court further noted mug-shot collection websites harvest booking photos, posting them online, and demanding a ransom to remove them. Ultimately, recognizing the change in technology and the ubiquity of the internet, in overruling its 1996 decision holding FOIA required the release of booking photographs, the court recognized that ten years earlier it “could not have known or expected that a booking photo could haunt the depicted individual for decades.” As a result of this case, federal law enforcement rarely releases booking photographs, reserving release for instances when public safety requires it.

I urge members to review the decision: <https://caselaw.findlaw.com/us-6th-circuit/1742220.html> I urge lawmakers to adopt the rationale of the decision, recommending passage of this bill and implementing protections similar to those provided by federal law.

### **FURTHER PROTECTIONS**

I am told my colleague and friend, Dan Herbel, may ask this Committee to consider amending the bill to include protections against public disclosure of home addresses and telephone numbers for those accused of crimes. For many of the same reasons, and more, I strongly support Mr. Herbel’s suggestion.

Collection of personal information and sharing of that information between governmental agencies has unquestionable importance. Prior to conviction, sharing that information with the media, the public, and solicitors generally does not. Law enforcement does not function to limit the legwork a reporter must otherwise complete on her own. More importantly, the law which authorizes collection of data must also protect us all from improper use of that data.

Since arrest and court records have become automated and readily accessible, opportunists have developed mechanisms to mine that data for profit. Like the extortionist mugshot photograph websites discussed in *Detroit Free Press*, other opportunists seeking to take advantage of people at their weakest have begun routinely using police and court records to solicit. Often those solicitations are misleading.

I regularly represent citizens accused of impaired driving. Virtually every client receives an unsolicited letter for installation of ignition interlock devices. The official-looking letters suggest the drivers are required by law to install these expensive devices. But North Dakota law does not require what is suggested. Although I warn prospective clients of this scam, even represented clients have taken the bait. The majority of those accused of this type of offense are unrepresented, and therefore even more vulnerable. Too many people are being duped by opportunists mining law enforcement and court records. Protection is warranted.

Regrettably, even in my profession, opportunists are using these records to send unsolicited representation letters to recent and vulnerable arrestees. Lawmakers should address whether public policy favors the use of open records as a cost-saving measure for lawyers who wish to save the expense of advertising or traditional methods of attracting clients. I personally detest the reality that some within my profession are using public records for personal profit in circumstances in which the

The Honorable Mike Lefor

January 23, 2021

Page 4

recipient is vulnerable. In these circumstances, if they wish to directly solicit, they should be required to find contact information on their own, rather than from government records.

Finally, restricting public access to address and contact information of an accused prior to conviction is a sound policy to protect the accused and her family. I have represented clients who following accusation have been directly threatened by vigilante tactics on social media. Essentially anyone can anonymously post threats online. Those threats are often coupled with contact information for the person threatened. As a matter of policy, our law should not permit government records to be the source of the contact information included in the threat.

### **CONCLUSION**

I write in support of HB1296. Government employees in law enforcement and court services are not employed to collect information for interested reporters or solicitors. Government records should not be used to hurt vulnerable citizens, even those accused of a crime. Booking photographs collected for legitimate law enforcement purposes should be preserved for those purposes. Absent a compelling public interest, booking photographs—effectively eliminating the constitutional presumption of innocence—should not be publically disclosed prior to conviction.

Respectfully submitted,

*/s/ Mark A. Friese*

Mark A. Friese

Cc: Sen. Ronald Sorvaag, [rsorvaag@nd.gov](mailto:rsorvaag@nd.gov)  
Rep. Mary Johnson, [marycjohnson@nd.gov](mailto:marycjohnson@nd.gov)  
Rep. Tom Kading, [tkading@nd.gov](mailto:tkading@nd.gov)

Monday, January 25, 2021

House Industry, Business and Labor Committee  
HB 1296

REP. LEFOR AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We oppose HB 1296. This bill shuts out the public from law enforcement records that have been open at least since 1989 under §44-04-18.7 (2) (i), NDCC, and probably before then.

We believe that open records serve the public well and, unless there is a groundswell of support for closure, and that records that are open should remain open. We do not detect such a ground swell in this instance. There is one person proposing is and I believe that effort is misdirected.

The media are going to carry stories about an arrest, photo or no photo. Therefore, the fear of future Googling hurting parties by revealing their past crimes is not going to be solved by eliminating mug shots. The vast majority of arrests lead to convictions. To delay the release of a mug shot until conviction does nothing to solve the problem of future Googlers.

Just as cameras in the court room enhances the publics' understanding of the criminal justice system, so do photos enhance the media's stories of these crimes and, we believe, help readers.

And, we also believe by not addressing §44-04-18.7(2)(i) NDCC (attached), this bill introduces confusion into the law where now there is none.

Thank you for your time and consideration. I'd be happy to answer any questions.

§ 44-04-18.7. Criminal intelligence information and criminal investigative information - Nondisclosure  
- Record of information maintained

2. "Criminal intelligence and investigative information" does not include:

- a. Arrestee description, including name, date of birth, address, race, sex, physical description, and occupation of arrestee.
- b. Facts concerning the arrest, including the cause of arrest and the name of the arresting officer.
- c. Conviction information, including the name of any person convicted of a criminal offense.
- d. Disposition of all warrants, including orders signed by a judge of any court commanding a law enforcement officer to arrest a particular person.
- e. A chronological list of incidents, including initial offense report information showing the offense, date, time, general location, officer, and a brief summary of what occurred.
- f. A crime summary, including a departmental summary of crimes reported and public calls for service by classification, nature, and number.
- g. Radio log, including a chronological listing of the calls dispatched.
- h. General registers, including jail booking information.
- i. Arrestee photograph, if release will not adversely affect a criminal investigation.**

Gabby Reed, Manager  
State Government Affairs – Rocky Mountain Region

 RELX Group

Elsevier  
LexisNexis Legal & Professional  
LexisNexis Risk Solutions  
Reed Exhibitions

January 24, 2021

The Honorable Mike Lefor  
Chairman, House Industry, Business and Labor Committee  
North Dakota State Capitol  
600 East Boulevard  
Bismarck, ND 58505-0360

# 2501

**Re: HB 1296 “Confidentiality of Booking Photos”**

Dear Chairman Lefor and Members of the House Industry, Business and Labor Committee:

I am writing on behalf of RELX Group and LexisNexis Risk Solutions, a leader in providing essential information to help customers across industry and government assess, predict and manage risk, to respectfully request a small technical amendment to HB 1296 “Confidentiality of Booking Photos”.

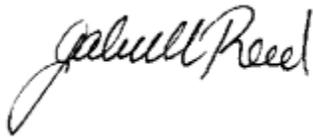
One lines 13 and 14 of the introduced bill, we request the following change:

This section does not prohibit the dissemination of booking photos among **OR ON BEHALF OF** law enforcement agencies or officers.

LexisNexis Risk Solutions provides solutions to the law enforcement community that assist in the critical sharing of information among participating agencies; such information can only be used by law enforcement personnel for lawful purposes. The proposed amendment provides clarity that law enforcement may disseminate booking photos to other agencies and officers via third party vendors that many agencies utilize.

Thank you for your consideration of the requested amendment to HB 1296. Should you have any questions, please do not hesitate to contact me either via e-mail at [gabby.reed@relx.com](mailto:gabby.reed@relx.com) or at 202-403-7893.

Sincerely,



Gabby Reed  
Manager, State Government Affairs - Rocky Mountain Region  
RELX Group

Ladies and Gentlemen of North Dakota's 67th Legislative Assembly,

The presumption of innocence has long been held as a standard of practice both internationally and in the United States. The concept of a person being innocent until proven guilty beyond a reasonable doubt is absolutely paramount to ensure a fair trial for a person in our criminal justice system.

Technology has not been kind to this custom. We live in a time where we have access to a world of information at our fingertips in fractions of a second. News headlines are now almost always presented with an image and in cases that include an arrest, a booking photo is almost always used. Sometimes the booking photo is used from previous incidents that aren't even related to the current news article or charge. This news technology is fueled by hosts getting end users to click an image, or a link to their page. These clicks can result in the initial report or story being shared countless times through any myriad of methods to countless people, and are often accompanied with opinions that are based on very few facts. It can lead to a digital rumor mill and that is devastating for the accused's right to a fair trial.

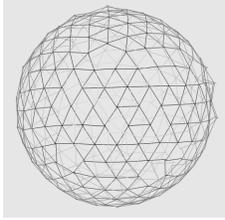
Having your image circulated without your consent along with a negative headline before you've stood trial to establish guilt or innocence can cause a host of other issues for the accused. Most people don't take the time to research the end result of the initial charges and our criminal justice system often drops charges, strikes plea agreements or dismisses cases. But these updates don't seem to get the same sort of "front page" attention that the initial story does. This can lead to a guilty without trial association and can prove to be incredibly harmful for a person's social, emotional and mental wellbeing, and could negatively affect a person's ability to secure housing, employment and how they are viewed in their own community.

In 2013 I was charged with a felony. I was fortunate enough to not be arrested and have a booking photo taken. I'm convinced that not having a booking photo was the only reason my story didn't make the news. The way rumors circulated regarding my circumstances without the aid of a digital story was incredibly harmful to me and my mental health. Months prior I had left my career in law enforcement and was still having trouble finding work. I can only imagine how my troubles would have been compounded if my picture had been circulated around the news and social media with an attention grabbing headline. The charges against me were eventually dropped and I'm not a convicted felon but I can only imagine the irreversible damage that initial story could have been to my life story.

I fully support HB 1296. I agree with Adam Martin of the F5 project when he says there is a difference between a wanted poster and a news story with a booking image. One of these things is a public safety concern and the other is unwanted interruption of a person's civil liberties and due process.

Respectfully,

Skyler Dutton



SYNTHESIS.EARTH

01-25-21

RE: TESTIMONY IN FAVOR OF HB 1296

HB1296 seeks to maintain confidentiality for booking photos until guilt or innocence has been established.

In America, we believe in due process. As such, the accused are afforded many rights to ensure they will be afforded every opportunity to tell their side of the story, mount a defense, and clear their name.

It has been said that a picture is worth a thousand words. In the Internet age and with our modern attention span, a picture and a headline is more than enough to convict someone in the court of public opinion. As such, publishing booking photos of the accused, along with a description of the crime they are alleged to have committed, interferes with due process by broadcasting in perpetuity a photo and a headline that implies guilt. By keeping booking photos confidential until guilt or innocence has been established, we can maintain due process and ensure that no one's reputation is sullied unfairly.

As such, we urge the committee to move forward with a DO PASS recommendation for HB 1296.

Sincerely,  
Ryan Warner  
Synthesis.Earth

Good Morning,

I am respectfully let you know that the Cass County Sheriff's Office stands in opposition to this bill. Many items were not considered when this bill was drafted. I cannot testify this morning in opposition to the bill because of another commitment but will reach out to others to do so. The items that were not considered with this bill are the following.

- "Compelling Public Safety Interest" - When you are dealing with public safety, you should not have to meet the standard of compelling. The public safety of our citizens in Cass County should be a top priority. Any inclination of a public safety risk should not be met with having to reach the standard of compelling. I would ask who has the authority to determine the compelling standard?
- The state victim notification website partner, SAVIN/Vinelink, would need to be modified, as every jail in the state currently is tied to that system with an automatic upload of arrest info, court updates, which includes a mugshot that Vinelink displays. This will cause fiscal impacts to all counties, so I would hope there is an appropriations plan to reimburse counties. There will be a fiscal impact on the taxpayers of Cass County.
- Finally, many times these photos are released to assist in ongoing and active criminal investigations. When we release these photos, we tend to get additional information from witnesses and victims, which helps prosecute cases. For example, recently, we have had a string of ATM thefts that have affected the City of Fargo and our rural Cass County Communities. When we posted the booking photo with the media, we received additional information from our citizens, which is currently helping us link these cases together. This would not have happened if the photo was not released. Imagine a scenario where someone has been a victim of sexual assault and is afraid to come forward for fear of retribution. With that victim seeing that the suspect has been apprehended, that could bring relief and hopefully encourage that person to come forward to report that they were a victim. This bill has a strong consideration for the suspect and is not considering the victim.

I hope you consider these points. I always want to specify that I am always available to talk about these bills as you are drafting them Instead of trying to go back and fix them later. Everything done in the criminal justice system affects something else. It would be nice to talk about these on the front end to see how they will affect public safety in our community and what fiscal impacts they will have on our taxpayers. If you have any other questions, please do not hesitate to reach out. Thank you for taking the time to evaluate this.

Jesse Jahner

Cass County Sheriff

1612 23rd Ave. N.

Fargo, ND 58102

(701)793-6187

DHS National Leadership Academy 3rd Session

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Dan Herbel  
Attorney at Law  
Licensed in North Dakota

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January 24, 2021

**Electronic submission only**

Rep. Mike Lefor  
Chair, House IBL Committee  
ND State Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505

RE: House Bill No. 1296; and proposed amendment

Honorable Chairman Lefor and members of the House IBL Committee,

I write to you in support of House Bill 1296 - the confidential mug shot bill. I think it is a terrific idea, as it prioritizes the interests of the Courts and the criminal justice system over sensational media. Media will ultimately get the information. All we ask is that the justice system function effectively and fairly first, before the media machine is whipped up.

One of my former clients, a PTA mom, leader in the church, and pillar of her community, was the subject of a traffic stop, supported by minimal suspicion, on her way home from Applebee's after supper and a glass of wine with a friend. Because of an odor of alcohol, which one glass of wine creates, she was arrested for DUI, and her mug shot was immediately available on Google and a host of other online locations for the world to see. When it came time for the State to try my client, the prosecutor dismissed the charge, determining that the evidence was so bare that the State could not convince a jury that a crime was committed.

Although my client was vindicated in Court, her mug shot still lives online. Had her mug shot been confidential at the outset, it likely would never have seen the light of day. Now, my former client is considering paying a ransom to an online company in the hopes they remove it from their website. I regrettably informed her that her mug shot has likely been harvested and shared by a multiple of at least 1,000, and that North Dakota courts are, for the most part, powerless to provide her relief.

This legislation is important, and I support it. I also write you to request that you add language to the bill to also make confidential the address and the phone number of the arrestee. (*See* amendment, attached as Exhibit A). This will protect North Dakota citizens from sketchy solicitations and from out-of-state profiteers.

I'm not sure if you are aware, but over the last several years the attorney who has handled the most DUI cases in the State of North Dakota actually lives in Florida. Out-of-state attorneys use sophisticated technology that mines recent arrest data, including the arrestee's name, address, and

Page 2  
Chairman Lefor letter  
January 24, 2021

phone number, and then promptly mail letters to arrestees explaining how they can handle the arrestee's case for a low flat fee. This has produced a considerable amount of revenue for out-of-state lawyers. This has also produced problems for the client with case outcomes. If you were to amend House Bill 1296 to exclude the address and phone number of the arrestee, this would protect the people of North Dakota by delaying or obstructing the mining efforts of out-of-state attorneys, who make court appearances by telephone, even before the Pandemic.

Another reason to keep an arrestee's contact information confidential is that many of our DUI clients receive unrequested mail solicitations for ignition interlock devices immediately following their arrest. (See solicitation letter, attached as Exhibit B). Out-of-state private companies mine arrestee's contact information, along with the mug shots, and target their letters to DUI arrestees, with a motive of financial gain. Even though ignition interlocks are not required in North Dakota (some states do require them), many clients actually pay these out-of-state companies significant fees for the service - a service that is not imposed by North Dakota courts.

The ignition interlock solicitations are so misleading that the client believes he is required to use the service and then does so, at great expense. First, the solicitation envelope directs the recipient to "PLEASE OPEN IMMEDIATELY" to review "DRIVING PERMIT INFORMATION." (See attached). However, these interlock solicitations do not constitute driving permit information and are not required to get a permit in North Dakota. The solicited sale only lines the pockets of out-of-state companies - it does not acquire a permit for the North Dakota driver.

Also, the enclosed return envelope the driver uses to enroll in this expensive service is directed to "Regain License Program." An enrollee would naturally think he "regains" his license through this program, but this is nothing more than sleight of hand. Use of the words "regain license" is only prestidigitation. The service lines the pockets of out-of-state companies, but it does not actually regain a driver's license.

House Bill 1296 is important to protect an accused, who is presumed innocent. Adding the amendment to make confidential the address and phone number of an accused as well, would serve to protect North Dakota citizens from out-of-state profiteers. I write to you to urge your support for House Bill 1296, and ask for a Do Pass vote on the bill after amendment.

Thank you for your consideration.

*/s/ Dan Herbel*

Dan Herbel  
Attorney at Law

Introduced by

Representatives Roers Jones, Boschee, Lefor, Mock, Pyle

Senators Dwyer, Lee, Oban, K. Roers

1 A BILL for an Act to create and enact a new section to chapter 12-44.1 of the North Dakota  
2 Century Code, relating to the confidentiality of booking photos.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1.** A new section to chapter 12-44.1 of the North Dakota Century Code is created  
5 and enacted as follows:

6 **Prohibition - Booking photo - Confidential.**

- 7 1. Unless there is a compelling public safety interest warranting release, the booking  
8 photo of an inmate is a confidential record until the inmate:  
9 a. Fails to appear for court;  
10 b. Is a fugitive from justice; or  
11 c. Is convicted of the offense for which the inmate was arrested or an offense  
12 related to the offense for which the inmate was arrested.  
13 2. This section does not prohibit the dissemination of booking photos among law  
14 enforcement agencies or officers.

, address, and telephone number

# North Dakota Ignition Interlock Device Intoxalock Information

TO:  <div style="border: 1px solid black; width: 300px; height: 100px; display: flex; align-items: center; justify-content: center; margin: 20px auto;"><h2>Exhibit B</h2></div>	ARREST DATE: 01/04/2021
	CHARGE CODE: DUI
	ENROLL PHONE: (833) 960-2148

Dear

Records indicate that on 01/04/2021, you were arrested for Driving Under the Influence (DUI). Intoxalock is a certified ignition interlock provider that can help you meet your ignition interlock device (IID) requirement to obtain an **Ignition Interlock License**.

To install an IID, contact Intoxalock at (833) 960-2148 as soon as possible. A trained North Dakota DUI specialist will walk you through the process and answer any questions.

If an IID is required, failure to install an ignition interlock could result in additional penalties and/or jail time.

For more information about regaining your driving privileges call (833) 960-2148

**To obtain your Ignition Interlock Restricted Driver's License, you may need to:**

1. Install an ignition interlock device;
2. Complete an addiction evaluation;
3. Serve jail time;
4. Pay all fines;
5. Provide proof of SR-22 insurance;
6. Satisfy all other requirements.

## Intoxalock Ignition Interlock Information

**Call: (833) 960-2148**

Intoxalock is a privately owned Ignition Interlock Device (IID) vendor that can fulfill requirements directed by a court or administrative body but is not a governmental agency. Intoxalock is not the sole authorized provider in North Dakota and products are not owned or operated by the state of North Dakota. If necessary, consult a licensed attorney for specific legal questions. Please provide vehicle make, model, year and VIN number when contacting Intoxalock.

# NORTH DAKOTA IGNITION INTERLOCK INTOXALOCK DEVICE INFORMATION FORM



Please complete the form below to enroll in the ignition interlock process with one of the state-approved providers, Intoxalock. Return in the included business reply envelope and mail to begin the installation process. For more information, please call (833) 960-2148.

**SUBMIT COMPLETED FORM TO:**  
 Regain License Program  
 ATTN: IID ENROLLMENT DEPT.  
 11035 Aurora Ave.  
 Des Moines, IA 50322-9922  
**OR EMAIL:** IIDEnrollment@intoxalock.com  
**OR FAX:** (515) 978-7154

**PERSONAL INFORMATION**

FIRST NAME:

LAST NAME:

PHONE:  -  -  ZIP CODE:

EMAIL:  VIOLATION DATE: MM/DD/YYYY  
 /  /

OFFENSE #:  VIOLATION COUNTY:

**VEHICLE**

MAKE:  MODEL:

YEAR:  VIN #:

**OFFICE USE ONLY**

IDENTIFICATION #:  REPORTING AUTHORITY:

DATE: MM/DD/YYYY  
 /  /

SIGNATURE:

**NOTE:** Upon receipt of this form, a state-approved provider will contact applicant via phone for further processing. Returning this form does not fulfill your obligation to install an ignition interlock device until all state requirements are met.

**IID Info Line: (833) 960-2148**



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	A	B	C	D
1	North Dakota MVD-Approved Installation Locations			
2	Intoxalock Ignition Interlock Devices			
3	** Includes 6 Installation Locations in North Dakota as of 3/2			
4	** Call the corresponding toll-free number to schedule an install time or get pricing information			
5	^^ Approved mobile services			
6				
7	Burleigh County			
8	Bismarck	1202 Burlington Dr.	Advanced Fleet Services	(833) 460-0403
9	Cass County			
10	Fargo	5257 51st Ave. S.	Audio Garage	(833) 460-0401
11	Fargo	4109 12th Ave N	Code Zero Car Audio & Electronics Inc	(833) 460-0400
12	Stutsman County			
13	Jamestown	500 17th St. SW	Lloyds Toyota	(833) 460-0403
14	Ward County			
15	Minot	400 46th Ave NE Unit 4&5	LFS Elite Inc.	(833) 460-0401
16	Williams County			
17	Williston	7602 2nd Ave West	Northside Automotive & Radiator Service	(833) 460-0402



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IF MAILED  
IN THE  
UNITED STATES

**BUSINESS REPLY MAIL**  
FIRST-CLASS MAIL PERMIT NO. 9077 DES MOINES, IOWA

POSTAGE WILL BE PAID BY ADDRESSEE

Regain License Program  
Attn: **BAID Enrollment Department**  
11035 Aurora Ave  
Des Moines, IA 50322-9922



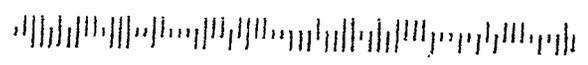
1270 Ardmore Ave.  
Itasca, IL 60143



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Permit, 272

**DRIVING PERMIT INFORMATION:**  
**PLEASE OPEN IMMEDIATELY**

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# 2021 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee  
Room JW327C, State Capitol

HB 1296  
1/27/2021

<b>Confidentiality of booking photos</b>
--

(3:34) Chairman Lefor calls the committee work on HB 1296.

<b>Representatives</b>	<b>Attendance</b>
Chairman Lefor	P
Vice Chairman Keiser	P
Rep Hagert	P
Rep Jim Kasper	P
Rep Scott Louser	P
Rep Nehring	A
Rep O'Brien	P
Rep Ostlie	P
Rep Ruby	P
Rep Schauer	P
Rep Stemen	P
Rep Thomas	P
Rep Adams	P
Rep P Anderson	P

## Discussion Topics:

- Committee work.

Rep O'Brien presented amendment 21.0701.03001. Attachment #3839.

(3:45) End time.

*Ellen LeTang, Committee Clerk*

21.0701.03001  
Title.

Prepared by the Legislative Council staff for  
Representative O'Brien  
January 26, 2021

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1296

Page 1, line 2, after "photos" insert "; and to amend and reenact subsection 2 of section 44-04-18.7 of the North Dakota Century Code, relating to criminal information"

Page 1, line 7, after "safety" insert "or law enforcement"

Page 1, line 8, replace the first "inmate" with "arrestee"

Page 1, line 8, replace the second "inmate" with "arrestee"

Page 1, line 11, replace "inmate" with "arrestee"

Page 1, line 12, replace "inmate" with "arrestee"

Page 1, after line 14, insert:

**"SECTION 2. AMENDMENT.** Subsection 2 of section 44-04-18.7 of the North Dakota Century Code is amended and reenacted as follows:

2. "Criminal intelligence and investigative information" does not include:
  - a. Arrestee description, including name, date of birth, address, race, sex, physical description, and occupation of arrestee.
  - b. Facts concerning the arrest, including the cause of arrest and the name of the arresting officer.
  - c. Conviction information, including the name of any person convicted of a criminal offense.
  - d. Disposition of all warrants, including orders signed by a judge of any court commanding a law enforcement officer to arrest a particular person.
  - e. A chronological list of incidents, including initial offense report information showing the offense, date, time, general location, officer, and a brief summary of what occurred.
  - f. A crime summary, including a departmental summary of crimes reported and public calls for service by classification, nature, and number.
  - g. Radio log, including a chronological listing of the calls dispatched.
  - h. General registers, including jail booking information.
  - i. ~~Arrestee photograph, if release will not adversely affect a criminal investigation."~~

Renumber accordingly

# 2021 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee  
Room JW327C, State Capitol

HB 1296  
2/1/2021

<b>Confidentiality of booking photos</b>
--

(10:49) Chairman Lefor calls the work session to order.

<b>Representatives</b>	<b>Attendance</b>
Chairman Lefor	P
Vice Chairman Keiser	P
Rep Hagert	P
Rep Jim Kasper	P
Rep Scott Louser	P
Rep Nehring	P
Rep O'Brien	P
Rep Ostlie	P
Rep Ruby	P
Rep Schauer	P
Rep Stemen	P
Rep Thomas	P
Rep Adams	P
Rep P Anderson	A

## Discussion Topics:

- Committee work.

Rep O'Brien explained amendment 21.0701.03001. Amendment #3839.

Rep D Ruby moved the amendment .03001 & include changing "inmate" to "arrestee".

Rep Stemen seconded the motion.

Voice Vote Motion carried.

Rep Thomas moved Do Pass as Amended.

Rep Kasper seconded the motion.

<b>Representatives</b>	<b>Vote</b>
Chairman Lefor	Y
Vice Chairman Keiser	N
Rep Hagert	Y
Rep Jim Kasper	Y
Rep Scott Louser	Y
Rep Nehring	Y
Rep O'Brien	Y
Rep Ostlie	Y
Rep Ruby	Y
Rep Schauer	N
Rep Stemen	Y
Rep Thomas	Y
Rep Adams	Y
Rep P Anderson	A

Vote roll call taken Motion carried 11-2-1 & Rep O'Brien is the carrier.

(11:04) End time.

*Ellen LeTang, Committee Clerk*

February 1, 2021

DO 2/1/21  
lsl

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Page 1, line 13, after "among" insert "or on behalf of"

Page 1, after line 14, insert:

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Renumber accordingly

**REPORT OF STANDING COMMITTEE**

**HB 1296: Industry, Business and Labor Committee (Rep. Lefor, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). HB 1296 was placed on the Sixth order on the calendar.

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21.0701.03001  
Title.

Prepared by the Legislative Council staff for  
Representative O'Brien  
January 26, 2021

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