

March 13, 2023

Testimony to the **House Judiciary Committee**

Submitted By: Jesse Walstad on behalf of the ND Association of Criminal Defense Lawyers

Testimony **in Opposition to S.B. 2107**

Chairmen and Members of the House Judiciary Committee:

My name is Jesse Walstad and I represent the ND Association of Criminal Defense Lawyers. The NDACDL is made up of lawyers throughout our state who dedicate a portion of their practice to criminal defense. The mission of the NDACDL is “to promote justice and due process” and to “promote the proper and fair administration of criminal justice within the State of North Dakota.” With that mission in mind, the NDACDL **opposes S.B. 2107** and recommends a **DO NOT PASS** from the House Judiciary Committee.

As proposed and as amended, S.B. 2107, attempts to insert a host of minimum mandatory sentences and dubiously inarticulate firearms prohibitions into our state law. During the 1980s and 1990s the Federal government and many states began adding minimum mandatory sentences into their law. By way of example, Illicit drug laws, particularly in the federal code, are riddled with minimum mandatory sentences. Yet, drug offenses continue to increase in frequency and severity. With the exception of a few particularly egregious offenses, our Legislature has historically resisted the temptation to insert a host of minimum mandatory into our law – instead relying on our exceptionally well qualified judges to fashion appropriate sentences under existing law.

The Legislature’s reluctance to follow the minimum mandatory trend of decades past was sound judgement. Data gathered over the past several decades establishes that minimum mandatory sentences have failed to prevent or deter crime while simultaneously expanding our national prison population by 500% over the past forty years. For this reason, many states and the federal government have been reforming and reducing their minimum mandatory sentence laws in recent years.¹ S.B. 2017 threatens to move North Dakota in the opposite direction of the current trend away from minimum mandatory sentencing. The Legislature should not accept this invitation to adopt a system that has demonstrably failed in other jurisdictions.

The language has been semantically softened in the amended version of S.B. 2107 before this committee, but the effect is the same. Minimum mandatory has been changed to “presumptive sentence.” The requirement that the sentence shall be served consecutively, has been changed to “may not be served concurrently.” The substantive similarity underlying the semantic changes is clear on the face of the bill. For instance, “[i]f the sentencing court does not impose at least the presumptive minimum term of imprisonment, the court shall justify the reason for a departure from the presumptive jail sentence within the judgment.” Departures from current minimum mandatory sentences must also be supported in judgment under our current law. Each year the Supreme Court issues an annual report of departures from minimum mandatory sentences, not one single departure has been reported from June 30, 2017 to the present. The suggestion that changing the diction to “presumptive sentence” would suddenly result in downward departures in deserving cases is in stark contrast with the data.

¹ The trend away from minimum mandatory sentences is exemplified by the First Step Act of 2018. There, a bipartisan Congress opened the door for the federal judiciary to depart from certain severe sentencing requirements, eliminate stacking of mandatory minimums, and reduce the three strikes law. In doing so, it transferred some measure of sentencing discretion back to the federal judges who are best situated to fashion fair and just sentences based on the unique circumstances of each case.

Testimony in favor has identified a perceived uptick in offenses including preventing arrest, fleeing, and assaults on police officers, and extolled the dangers of anecdotal worst-case scenarios. I submit that our State's Attorneys and judiciary have no difficulty distinguishing between cases meriting imprisonment and those meriting leniency. S.B. 2107 will deprive our judiciary and our State's Attorneys of the wise and seasoned discretion they use to ensure justice is done in every case.

By way of example, I have had clients charged with preventing arrest or interfering for exercising their lawful right to refuse questioning or deny entry in the absence of a warrant. I had one charged with interfering with a law enforcement function after his foot became stuck under the front seat of a police cruiser preventing his immediate exit when directed. Under S.B. 2107 those and countless other situations would serve two weeks in jail.

My colleague recently had a client who was a doctoral level professional who was moving his car out of a short-term parking zone during a snowstorm. He didn't brush the snow off his car, hoping the wind from driving would do so. An officer immediately initiated his emergency lights because the license plate and windows were snow covered. The client drove three blocks before he saw the officer's emergency lights. When he did, he stopped immediately. He was charged as fleeing. Compare that incident to one in which a suspect leads four agencies on a 3-county high speed pursuit through several cities. Does our criminal justice system benefit from a mandatory 30-day jail sentence and lasting record of conviction from an honest mistake by a person who has no criminal record?

I had another client charged with simple assault on an officer when the officer suffered what he described as an "abrasion" to his pinky finger while placing handcuffs on my client. Another man, while intoxicated to the brink of consciousness unintentionally jerked his foot hitting an EMT on the hip while lying in an ambulance gurney, the EMT was uninjured, but the client was a charged with simple assault on an emergency worker. Under S.B. 2107, each would receive a 30-day jail sentence.

A broad range of conduct, from honest mistakes to extreme public dangers, falls under each of these statutes. A credible justice system such as our contains sentencing safeguards to ensure a just and fair outcome based on the circumstances of each case. Judicial independence and discretion is central to justice. Personally, and on behalf of the NDACDL, I trust our judges to dispense justice based on the facts of each case as applied to the sentencing factors our law already provides and I strongly urge this committee to deny the flawed invitation to arbitrarily limit our judge's discretion.

Those in favor have repeatedly asserted that the normative or deterrent effect of "presumptive minimums" will disincentivize commission of these offenses. First, data shows minimum mandatories have little if any deterrent effect, even in premeditated offenses such as drug distribution, child porn, and violent crimes. Secondly, these offenses - obstruction, fleeing, simple assault on an officer - are not premeditated offenses. They are impulsive offenses with little if any corresponding forethought. If minimum mandatories don't deter premeditated offenses, it is illogical to assume they would have any deterrent effect on low level impulse crimes. As such, the deterrent effect championed by those in favor is speculative at best, and contrary to common sense and abundant data.

What we can predict with relative certainty is an immediate and dramatic increase in the number of trials, the number of inmates, and the amount of resources required to implement this ill-

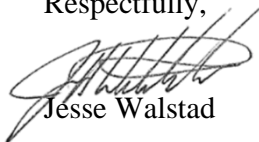
conceived plan. Those negative externalities are foreseeable and undeniable. If passed SB 2107 will place imminent and substantial resource demands on our courts, our State's Attorney's, our indigent defense commission, and our prison system. All of which are already at or over capacity.

When mandatory sentences are in play the attorneys and judges working on a case are substantially limited in their ability to resolve cases justly and amicably. When faced with minimum mandatory sentences my clients often have no incentive to enter a guilty plea, because they will receive the same sentence if convicted by a jury that they would if they plead guilty. Each jury trial is a considerable use of state and personal resources. The vast majority of criminal cases don't proceed to trial because the law provides latitude for the state, defendant, and court to agree on appropriate sentences on a case-by-case basis. Minimum mandatory sentences create an arbitrary negotiating floor often precluding agreement and unnecessarily consuming precious justice system resources.

The insinuation that North Dakota judges are soft on crime or fail to recognize and appropriately punish dangerous or repeat offenders, is categorically false. Despite the semantic gamesmanship S.B. 2107 would require severe one-size-fits all mandatory sentencing without any regard for the circumstances of the case or whether the defendant is a habitual or particularly dangerous offender. Arbitrarily limiting judicial discretion will result in unnecessarily harsh sentences in many low-level cases, while the sentencing outcomes in egregious cases will likely go unchanged.

The bottom line is the collective wisdom and experience of our judiciary enforcing our current sentencing laws ensures justice can exist in each case. S.B. 2107, in its proposed and amended form, mandates one-size fits all sentencing which will deny true tailored justice to the lowest level offenders. It means more trials, more prisoners, and unnecessary but substantial demands on our justice system. These negative consequences whether deemed "minimum mandatory" or "presumptive" need not be endured when we have an exceptional prosecutor's bar and judiciary with the discretion to fashion appropriate sentences to the facts of each case. North Dakota prosecutors and judges have broad latitude to severely punish egregious offenses while simultaneously mitigating sentencing outcomes in deserving cases. The NDACDL strongly urges this committee to trust our judges, our prosecutors, and our law by voting **DO NOT PASS** on S.B. 2107.

Respectfully,



Jesse Walstad