March 16, 2025
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. 2128**

Chairman Klemin and Members of the Senate 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. 2128** and recommends a **DO NOT PASS** from the House Judiciary Committee.

Minimum Mandatory Sentences DO NOT Prevent Future Crime

S.B. 2128 would create minimum mandatory sentences for Fleeing (30-day minimum), Simple Assault on an officer, EMT, firefighter, or Emergency Room staff member (30-day minimum), and Preventing Arrest (14-day minimum). While protecting our law enforcement and emergency services personnel is of paramount importance, minimum mandatory sentencing is a demonstrably failed experiment our preceding Legislatures have wisely declined to endorse.

During the 1980s and 1990s the federal government and many states added minimum mandatory sentences. By way of example, illicit drug crimes, particularly in the federal code, are riddled with minimum mandatory sentences. Decades later, drug offenses continue to increase in frequency and severity across the United States. Scholarly analysis of data obtained from failed state and federal minimum mandatory systems over the past four decades proves minimum mandatories do not disincentivize criminal activity but do dramatically increase justice system costs.[1] Except for particularly egregious offenses, our Legislature has historically refused to insert a host of minimum mandatory into our law, wisely relying on our exceptionally well qualified judges to fashion appropriate sentences under existing law.

Our Legislature's reluctance to follow the failed minimum mandatory trend of decades past was sound judgement. Data gathered over several decades establishes that minimum mandatory sentences 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 sentences in recent years.[2] S.B. 2128 threatens to move North Dakota in opposition to the trend away from minimum mandatory sentencing. The Legislature should not accept this invitation to adopt a demonstrably failed sentencing system.

Our State's Attorneys and judiciary have no difficulty distinguishing between cases meriting imprisonment and those meriting leniency. S.B. 2128 would deprive our judiciary and our State's

[1] Testimony of Dr. Andrew Myer, criminal justice professor and a research fellow with the University of Cincinnati Corrections Institute, in opposition to S.B. 2128. (#30208).

[2] 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.

Attorneys of the wise and seasoned discretion they use to ensure justice is done in every case. A credible justice system contains sentencing safeguards to ensure a just and fair outcome tailored to the circumstances of each case. 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 and I strongly urge the House Judiciary to deny the flawed invitation to arbitrarily limit our judge's discretion by implementing the minimum mandatory sentences proposed in S.B. 2128.

Judicial and prosecutorial discretion is particularly important when you consider the exceptionally broad range of conduct, from honest mistakes to extreme public dangers, that fall within each of the offenses addressed under S.B. 2128. 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. One client was charged with interfering with a law enforcement function after their foot became stuck under the front seat of a police cruiser preventing his immediate exit. Under S.B. 2128 those and countless other trivial situations would serve no less than two weeks in jail.

Another client, a doctoral level professional, 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 with 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?

Another client was charged with simple assault on an officer when the officer suffered what he described as an "abrasion" to his pinky finger while placing them in handcuffs. Another, while intoxicated to the brink of consciousness unintentionally jerked their 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. 2128, each would receive a 30-day jail sentence.

Those in favor assert minimum mandatories will disincentivize commission of these offenses. First, data proves minimum mandatories have little if any deterrent effect,[3] even in premeditated offenses such as drug distribution, child porn, and planned violent crimes. Secondly, these offenses - obstruction, fleeing, simple assault on an officer - are not premeditated offenses. They are impulsive offenses committed with forethought. If minimum mandatories do not deter premeditated offenses, it is illogical to assume they would have any deterrent effect on low level impulse crimes. The claimed deterrent effect is speculative at best, and contrary to abundant data.

What can be predicted with certainty is an immediate and dramatic increase in the number of trials, the number of inmates, and the vast resources required to implement S.B. 2128. Those negative externalities are foreseeable and inescapable. If passed S.B. 2128 will place imminent and substantial

[3] Stemen, Don, Dept, of Criminal Justice and Criminology, Loyola University; *The Prison Paradox: More Incarceration will Not Make Us Safer*; July 2017. https://vera-institute.files.svdcdn.com/production/downloads/publications/for-the-record-prison-paradox_02.pdf

resource demands on our courts, our State's Attorneys, 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 arbitrarily restricted in their ability to resolve cases justly and amicably. When faced with minimum mandatory sentences defendants often have no incentive to enter a guilty plea, because they will likely 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 do not proceed to trial because the current law provides sufficient latitude for the parties and the court to agree on appropriate sentences in most cases. Minimum mandatory sentences create an arbitrary negotiating floor precluding agreement and unnecessarily consuming scarce 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. S.B. 2128 would require severe one-size fits all sentencing without regard for the circumstances of the case or whether the defendant is a habitual or dangerous offender. Arbitrarily limiting judicial discretion will result in unnecessarily harsh sentences in 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 be done in each case. S.B. 2128 would deny tailored justice to the lowest level offenders, without materially effecting egregious offenders. The costs and negative consequences of minimum mandatory sentencing 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. The NDACDL strongly urges this committee to trust our judges, our prosecutors, and our law by voting **DO NOT PASS** on the minimum mandatories proposed in S.B. 2128.

Evidence-Based Sentence Reduction and Rehabilitative Tools <u>DO</u> Prevent Future Crime

S.B. 2128 also proposes substantial changes to N.D.C.C. §§ 12-48.1-01 and 2, which severely limit the seasoned and informed discretion of the director of the DOCR, by codifying extremely narrow "eligibility" criteria, and mandating quarterly reporting of each eligible offender within the DOCR by name. It would also elevate the DOCR's threshold determination for participation in release programs to "a high degree of reliability" without providing any guidance as to what that means, or how it differs from the current determination. Moreover, S.B. 2128 would move North Dakota in opposition to national trends, by amending N.D.C.C. § 12-54.1-01 to arbitrarily cap good time credit, essentially eliminating evidence-based sentence reduction incentives.

There is no evidence to support the errant proposition that longer sentences deter future crime.[4] In reality, S.B. 2128 would dramatically increase the cost to the taxpayers, without any proof or credible promise of increased safety or decreased crime.[5] Truth in Sentencing statutes in other States have proven to "reduce[] incentives to complete rehabilitative programming, increase[] risk to safety

[4] U.S. Dept. of Justice, Office of Justice Programs National Institute of Justice; *Five Things About Deterrence*, May 2016. https://www.ojp.gov/pdffiles1/nij/247350.pdf.

[5] "Truth in Sentencing" *Paying More Money to Make Our Communities Less Safe*; Families Against Mandatory Minimums Fact Sheet, April 2024. FAMM-Truth-in-Sentencing-Fact-Sheet.pdf

for correctional officers and individuals in prison, and increase[] recidivism."[6] DOCR Director Colby Braun opines, and the NDACDL strongly agrees, evidence-based sentence reduction strategies, couples with rehabilitative and transitional tools best serve the people of North Dakota, and provide the best chance at long term positive results throughout our justice system and across our state.

S.B. 2128 would substantially decrease access to valuable and cost effective rehabilitative and transitional tools. It would effectively abolish Electronic Home Monitoring ("EHM") and community placement transitional options, both which have been exceedingly effective in ensuring accountability while the expense is borne by the offender, not the public.[7] It would divest sheriffs of authority to use programs like Cass County's Community Placement Program which has been exceedingly successful, and very cost effective. The "truth in sentencing" portions of S.B. 2128 would have an immediate devastating impact on the network of rehabilitation and transitional resources in communities across our state. These programs change, and in many cases, save our citizens' lives. Adam Martin, of the F5 Project, offered compelling firsthand proof that evidence-based sentence reduction and reentry centers reduce recidivism. *See* (#29951). He testified that the F5 Project has a 75% success rate for participants who go through Free Through Recovery. Kevin Arthaud, of the Bismarck Transition Center, testified that not only would S.B. 2128 deprive many inmates of the valuable transitional and rehabilitation services currently offered, it would also deprive local businesses of employees in transition, and jeopardize the sustainability of transition centers. *See* (#3000). Said another way, S.B. 2128 would have an immediate detrimental economic impact on families and communities across the state. Those negative economic externalities go far beyond the basic costs estimated in the fiscal note.

Each of S.B. 2128's proposed changes directly conflict with national trends and the policy of the presidential administration, as demonstrated by the First Step Act and other efforts to incentivize good behavior, rehabilitation, and successful transition among inmate populations. The national trend favoring access to rehabilitation and evidence-based sentence reduction should not be ignored by our Legislature. Testimony from the American Conservative Union CPAC – Faith and Freedom Coalition opposes S.B. 2128 and encourages the Legislature to follow President Trump's approach under the First Step Act, demonstrating that inmates who earned early release had a 55% lower recidivism rate. *See* (#30054). Right on Crime, a conservative criminal justice campaign by the Texas Public Policy Foundation, offered testimony in opposition to S.B. 2128 focused on the importance of incentivized inmate rehabilitation to end the cycle of recidivism, and the danger of truth in sentencing models. *See* (#29798). Right on Crime opines that deprivation of evidence-based sentence reduction incentives, as offered under S.B. 2128, directly harms successful post sentence transition and causes worse behavior during incarceration. Importantly, that other states with Truth in Sentencing laws have little evidence of their efficacy. In Arizona for example, taxpayers have spent $1.3 billion per year on incarceration, while the effectiveness of "truth in sentencing" has been dismal.[8]

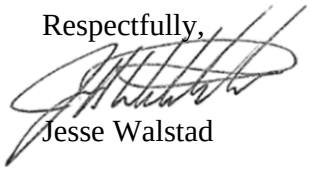
The post-conviction amendments proposed by S.B. 2128 stand in stark contrast to the evidence-based sentence reduction advances North Dakota and our DOCR have made over the past decade. Coupling S.B. 2128's vast expansion of 85% offenses, and corresponding reduction in good

[6] Green-Lowe, Evan, Recidivisz; *The consequences of Truth in Sentencing;* April 2022. https://www.recidiviz.org/updates/the-consequences-of-truth-in-sentencing.
[7] Testimony of ADAPT Electronic Monitoring LLC in Opposition to S.B. 2128 (#30372).
[8] Macdonald, D.C. (2024). *Truth in Sentencing, Incentives and Recidivism*, Truth in Sentencing, Incentives and Recidivism | The Review of Economics and Statistics | MIT Press

time credit, with decreased access to rehabilitative and transitional tools is a recipe for disaster. As an example, an inmate would be released after serving 85% of their sentence, while simultaneously having substantially limited access to rehabilitative and transitional tools and no evidence-based motivation to utilize them. Studies demonstrate that without meaningful access to transitional and rehabilitative assistance the odds of successful post-sentence reintegration are substantially diminished, and the likelihood of recidivism is correspondingly increased.

For all of these reasons, the NDACDL strongly urges this committee to trust our judges, our corrections professionals, and the wealth of statistical information favoring evidence-based sentence reduction by voting **DO NOT PASS** on S.B. 2128.

Respectfully,



Jesse Walstad