Appendix B – Klemin Response to Opposition Testimony on HB 1417

Community Supervision Sanctions & Incentives

Section 1 amends the law concerning parole violations by adding language directing DOCR to consider graduated sanctions and incentives before issuing a warrant to arrest an individual for a parole violation

Claims: While this section uses the term "considering," it will become a mandate later in 12.1-32-07. This bill allows DOCR to create graduated sanctions, with sanctions becoming presumptions, eventually becoming mandatory.

- **Response:** There are two aspects of Section 1 that need to be clarified to respond to this concern. The very first part of Section 1 (lines 10-14) requires DOCR to *consider* graduated responses that address the violation behavior in lieu of revocation – so this is a step that happens before the Parole Board revokes parole. This is a practice that DOCR already has in place for people on probation. In part 3 of 12.1-32-07, it is required that a probationer undergo "various agreed-to community constraints" to avoid revocation (unless the court waives the requirement). One of the primary goals of this bill is to promote community supervision consistency, and this provision helps accomplish that by replicating a practice currently used prior to probation revocations and applying it to parole cases. *Note: it may be helpful to offer amending the "graduated sanction" language here, updating it to "intermediate measures" or "various agreed-to community constraints" to match the language that is used in 12.1-32-07, section 3.*

  These "graduated sanctions and incentives" are distinct from the tiered sentencing recommendations that are outlined in part 6 (b) of Section 1 (page 2, lines 28-31, and page 3 lines 1-2). The tiered sentencing recommendations provide guidance for how long to detain someone for a technical violation after the Parole Board has made the decision to revoke the parole. The recommended custody terms vary based on the instance of the violation (escalating in severity when misconduct escalates). The custodial terms are not mandatory.

  Section 4 of the bill does include a mandatory component, but it applies to DOCR's pre-revocation practices outlined in part 1 of section 1(lines 10-14). The mandate is specifically for DOCR to use a "matrix system" when considering graduated sanctions and incentives. Again, this happens before the Parole Board decides to

revoke. The goal of a matrix system is to help ensure that consistent, appropriate responses are used when addressing the conduct of people who are supervised by DOCR (whether it is offering an incentive to someone who has exhibited positive behavior or using a sanction in response to negative behavior).

Claim: "This [bill] makes it mandatory to go through graduated sanctions for parole violations."

- **Response:** HB 1417 does **not** require the Parole Board to take any specific action on technical violations. Instead, section 1 (part 6(b)) of the bill permits the Board to use incarceration terms that gradually increase in length depending on the severity of the violation. The tiered responses outlined in this bill are guidelines based on the recommendations of organizations like the American Parole and Probation Association, which has pioneered evidence-based practices for responding to technical violations in many jurisdictions with no reduction in public safety.

Claim: Graduated sanctions will result in even less parolees being revoked for violations.

- **Response:** This policy is designed to reduce revocations specifically for technical violations. Data findings from the interim study on Reentry indicated that revocations for technical violations are a driver of prison admissions in North Dakota. Admissions for community supervision violations amounted to a total of a third of prison admissions in 2023 – and technical violations represented nearly three-quarters of parole revocations and two-thirds of probation revocations that same year. This bill provides guidelines for limiting the use of prison and jail stays for violations that are less severe.

Claim: Currently DOCR seldom revokes parole and rarely sends defendants to jail for parole violations.

- **Response:** Data findings from the interim study process revealed that parole revocations are resulting in prison admissions. In 2023, 15% of prison admissions were due to parole violations. Community supervision revocations (probation and parole combined) made up nearly half of all prison admissions in 2023.

Claim: "it basically has to be a fourth petition to revoke if the sentence has to be more than 90 days for probation violations."

- **Response:** The decision to revoke probation is up to the judge, and the tiered sentencing recommendations do not force a judge to apply a custodial sanction. In North Dakota, use of the word "may" in the Century Code confers a right or a privilege, while use of the word "shall" confers an obligation or duty. This bill says a

court "may" impose the gradual penalties of 15 days for a first technical violation revocation, 30 for a second, 90 for a third, or the remaining sentence for a fourth or subsequent – nothing in the bill creates a new duty or obligation to impose a custodial stay in response to a technical violation.
It is also important to note that this tiered sentencing recommendation is specifically for technical violations. The goal of this policy is to offer escalating penalties as a tool for a judge to use when making the decision to revoke someone who needs to be taught a lesson, but who is not a danger to the community. This can help ensure that our prison and jail resources are being prioritized for the people who are dangerous.

Claim: This places a heavy burden on courts, law enforcement, State's Attorneys and local jails as it will create more docket events, require more revocation petitions, and there will be no way to enforce probation conditions.

- **Response:** This policy notably came from a recommendation made during the interim study on reentry where the courts, law enforcement, State's Attorneys and local jails were represented. The reentry study findings demonstrated that revocations for technical violations are contributing to prison admissions, and already placing a burden by adding to corrections costs. The Work Group agreed that tailoring sanctions to align with the severity of the violation conduct was a smart way to hold people who have violated accountable without exhausting prison and jail resources.

Claim: There is a safety risk because defendants will have no reason to follow parole conditions.

- **Response:** Thirty-four states[1] have implemented caps on sentences for non-criminal community supervision violations in some form, including nearby states like Wyoming[2] and Nebraska.[3] These caps are not an untested theory which could result in decreased public safety – they are the standard, evidence-based practice that a majority of states have adopted in order to control corrections costs and respond effectively to supervision violations.

Claim: [HB 1417] gives DOCR more discretion to create incentives in addition to good time. These sanctions and incentives will weaken probation conditions to effectively not having a penalty for probation violations.

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[1] Limiting Incarceration for Technical Violations of Probation and Parole
[2] See WY Stat. § 7-13-1803 & § 13-1802
[3] See NRS § 29-2266.03 & § 29-2266

- **Response:** The "incentives" contemplated include common best practices such as positive feedback and motivational interviewing – not a substitute or addition to good time. The practice of earning supervision good time – "compliance credits" – are not included in this bill.

Absconding

Claim: The defendant could provide a known address, or a false location, and this would not be defined as absconding because an address was provided. With the limited definition of absconding, most defendants would be able to refuse to report without it being considered absconding. This definition also seems to imply that the defendant "needs to have an appointment to miss an appointment with a probation officer."

- **Response:** This bill creates a definition of absconding, which did not previously exist in Century Code. The definition importantly includes a "willful" intent to abscond where the supervisee "avoids supervision by making their whereabouts unknown or fails to report to a supervising authority." The above examples (a false address, refusing to report from a known address) would constitute absconding under the new definition, because they are *intentional* acts by the supervisee.

  Additionally, "failing to report to a supervising authority" should adequately cover circumstances where the defendant fails to contact the supervising officer (as mentioned in the oppositional testimony), as well as cases where the supervising officer is actively looking for the individual. The language does not state that absconding is limited to when a scheduled appointment has been missed.

Claim: Allowing DOCR to use a hold and consider intermediate measures for absconding would lead to less revocations for absconding.

- **Response:** This allows DOCR to distinguish between people who are failing to report because they are *willfully* attempting to evade justice, and people who are failing to report because they are experiencing an obstacle to compliance (perhaps a behavioral health issue, for example). Intermediate measures allow officers to respond appropriately to any situation, including with support if necessary – and DOCR retains the right to petition for revocation in cases of willful resistance.
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Technical Violations

Claim: The following circumstances would be considered technical violations ineligible for revocation:

- Sex offender having contact with children
- A sex offender having an undisclosed phone or computer with access to the internet
- A probationer refusing to attend treatment (DV, CD, or otherwise)
- A probationer failing an intermediate measure
- A 4th offense DUI offender drinking
- A probationer possessing a dangerous weapon
- A probationer willfully defrauding a UA
- A probationer leaving the state without permission

- **Response:** In North Dakota, use of the word "may" in the Century Code confers a right or a privilege, while use of the word "shall" confers an obligation or duty. This bill says a court "may" imposing tiered sentencing in the case of a probation violation – nothing in the bill creates a new duty or obligation to do so. Under HB 1417, the Parole Board or a court could fully revoke supervision for any of the above-referenced examples of concerning violations. This bill does not tie the hands of any sentencing body – just the opposite, it provides more options to deal with a range of violations, from the most serious matters, like those above, to less serious instances of non-criminal behavior that may not justify full revocation.

Risk assessments

Claim: This bill takes away courts' discretion over sentences and conditions of probation.

- **Response:** This bill adopts a data-driven and evidence-based approach to supervision conditions. Research shows that community supervision conditions which are not tailored to the assessed needs of the defendant increase corrections costs, result in unnecessary prison admissions and can even increase recidivism, as time spent in custody is a criminogenic risk. HB 1417 requires the use of validated risk assessments to determine factors which increase likelihood of success, as well as pose potential obstacles. The language is permissive rather than mandatory – the relevant section says DOCR "may administer a risk assessment for the evaluation of each defendant." Nothing would prevent the imposition of standard conditions, like refraining from committing new offenses.

Claim: DOCR Risk assessments may not "be case specific by the local level and that work with the defendant's matters."

- **Response**: This bill updates the risk assessment definition to ensure that assessments are a "validated, standardized actuarial tool used to identify potential risk factors that increase the likelihood an individual will reoffend and responsivity factors, when addressed, reduce the likelihood an individual will reoffend." A "validated" risk assessment is one that is responsive to local context and a defendant's specific needs.

Claim: This takes away State's Attorneys' discretion to offer plea agreements involving specific conditions of probation.

- **Response:** Nothing in the bill removes a State's Attorney's ability to offer a plea agreement predicated on a specific condition, or a court's ability to impose such a condition.

Claim: An individual case plan for each defendant will place significant burden on the State's Attorneys.

- **Response:** State's Attorneys will continue to be free to propose conditions in any case as they see fit. State's Attorneys' offices will not be responsible for creating case plans. In fact, research suggests that conditions which are tailored to an individual's risk and responsivity factors will lead to reduced recidivism and fewer revocations – resulting in less burden on State's Attorneys offices.

Claim: Courts rarely revoke on a first petition currently, and rarely revoke if new charges are pending, instead waiting for convictions.

- **Response:** Before the changes in this bill and after, a judge or Parole Board continues to decide the most appropriate response to a technical violation. This bill simply provides those sentencing bodies with additional tools.

Fees

Claim: This bill eradicates the court's ability to require the defendant to reimburse for costs of indigent defense, and places those costs on the state county and city.

- **Response**: People have a constitutional right to a public defender when charged with a crime if they cannot afford a lawyer, and right now in North Dakota an indigent defendant can be required to reimburse for their representation fees. The American Bar Association's Ten Principles of a Public Defense Delivery System says that "jurisdictions should not charge an application fee for public defense services, nor

should persons who qualify for public defense services be required to contribute or reimburse defense services." Members of the Reentry Study Work Group who represented many different areas of our state’s criminal justice system agreed that removing this fee for indigent people is a logical step for North Dakota.