January 20, 2025
Testimony to the **Senate Judiciary Committee**
Submitted By: Jesse Walstad on behalf of the ND Association of Criminal Defense Lawyers
Testimony **in Opposition to S.B. 2128**

Chairwoman Larson 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 Senate Judiciary Committee.

Minimum Mandatory Sentences <u>DO NOT</u> 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. 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.[1] 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 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. 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

[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.

this committee 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 falls 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 his foot became stuck under the front seat of a police cruiser preventing his immediate exit when directed. Under S.B. 2128 those and countless other 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 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. 2128, each would receive a 30-day jail sentence.

Those in favor assert minimum mandatories 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 planned 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. The claimed deterrent effect is speculative at best, and contrary to abundant data.

What we can predict with certainty is an immediate and dramatic increase in the number of trials, the number of inmates, and the vast amount of resources required to implement S.B. 2128. Those negative externalities are foreseeable and undeniable. If passed SB 2128 will place imminent and substantial 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 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 current law provides latitude for the parties and the court to agree on appropriate

sentences on a case-by-case basis. 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 any 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 exist 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.

In practice the changes 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. It would also divest sheriffs of authority to use programs like Cass County's Community Placement Program which has been exceedingly successful, and very cost effective.

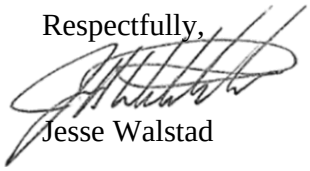
S.B. 2128, would also move North Dakota in stark opposition to national trends, by amending N.D.C.C. § 12-54.1-01 to arbitrarily cap good time credit "to a maximum of fifteen percent of the offender's sentence." This essentially eliminates good time credit in any meaningful way when coupled with the "truth in sentencing" amendment proposed to N.D.C.C. § 12.1-32-09.1 that converts every criminal offense into an 85% offense. It would also reduce meritorious conduct sentence reductions by half.

Each of these proposed changes directly conflicts with national trends and the policy of the incoming 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. As outlined in the written testimony of many others in opposition, every

credible major study has concluded that minimum mandatory sentences and reduced access to evidence-based sentence reduction increases, rather than decreases recidivism rates. The post-conviction amendments proposed by S.B. 2128 are not based on the data and stand in stark contrast to the evidence-based sentence reduction advances North Dakota, our Courts, and our DOCR have made over the past decade.

Coupling S.B. 2128's vast expansion of 85% offenses, and corresponding reduction in good 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. 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