

SB 2226
Senate Judiciary Committee
January 27, 2025
Testimony in Support of SB 2226
Travis W. Finck, Executive Director, NDCLCI

Good morning. Madam Chair Larson, members of the Judiciary Committee, my name is Travis Finck, and I am the Executive Director of the North Dakota Commission on Legal Counsel for Indigents (hereinafter "the Commission"). I rise today on behalf of the Commission in support of SB 2226.

Senate Bill 2226 changes language in the Commission's operating statute declaring all incarcerated individuals' indigent for purposes of establishing release conditions at an initial appearance. Currently an individual must first apply for counsel and be found to be indigent prior to receiving appointment of counsel. The Commission supports this change to meet what we believe is a constitutional mandate the state has currently abdicated, to follow court rules and to provide important relief to overcrowded jails.

The Commission has been following litigation from other states regarding counsel at initial appearances. Particularly, we have been following the proceedings in *Farella v. Anglin* arising from the U.S. District Court for the District of Western Arkansas. In *Farella*, a federal district court held not having counsel at initial appearances was a violation of the sixth amendment of the U.S. Constitution as applied to the states in the 14th Amendment. In that case, the defendants were the state court judge, the state public defender, and the local chief public defender. The case has been appealed to the 8th Circuit Court of Appeals. If the 8th Circuit Court of Appeals affirms the lower court decision, it will be mandatory all states in the 8th Circuit provide an attorney at initial appearances. North Dakota is in the 8th Circuit.

When this opinion was published in August, the Commission began looking at potential options. The Commission voted to establish a work group of potential stakeholders. The workgroup involved the following persons and agencies:

- Justice Douglas Bahr, N.D. Supreme Court
- Travis Finck, Indigent Defense Commission
- Todd Ewell, Indigent Defense Commission
- Mark Friese, Indigent Defense Commissioner
- Judge Daniel Narum, District Court Judge
- Sheriff Chad Kaiser, Stutsman County Sheriff

- Bradley Peterson, Attorney at Protection and Advocacy
- Laura Balliet, Assistant Attorney General, Attorney General's Office
- Corey Schlinger, Director of Pre-Trial Services, DOCR
- Leah Carlson, Attorney, Fargo Public Defender Office
- William Hartl, Contract Attorney with the Commission
- Joshua Frey, State's Attorney for Towner and McHenry Counties
- Sarah Behrens, Staff Attorney, State Court Administrator's office
- Rep. Lisa Meier, Representative, ND House of Representatives
- Sen. Jonathan Sickler, Senator, ND Senate
- Stephanie Dassinger-Engbretson, Deputy Director, N.D. League of Cities
- Judge Robert Keogh, Municipal Judge, City of Dickinson
- Malia Brink, Senior Policy Attorney, Deason Criminal Justice Reform Center at SMU Law School

When the Commission established the workgroup, Justice Bahr was asked to chair the workgroup. Justice Bahr chaired the group in his individual capacity and was clear to all participants he would not, and did not speak as to the constitutional issue. The workgroup had several meetings and reviewed several different proposals. We were fortunate enough to have Malia Brink from the Deason Center assist us in a technical capacity. The Deason Center has been very active in counsel at initial appearance cases and has provided input in the *Farella* case.

The workgroup reviewed several different options available within North Dakota. This included reviewing potential expansion statewide of pre-trial services, the potential of using pre-trial services or clerk's offices to screen applications for counsel prior to the initial appearances and adding a presumption of indigence into code. We heard from clerks of court, pre-trial services conducted a pilot data study, and the committee reviewed several different options for a presumption by reviewing other state's statutes. Ultimately, the workgroup recommended a presumption to be added to our code. I reported back to the Commission and the Commission asked me to find a sponsor for this legislation. Our budget is being heard in the Senate, so I thought it best to have this matter started on the Senate side. Senator Sickler graciously agreed to sponsor this legislation. The result is SB 2226.

Counsel at initial appearance is not a new concept in North Dakota. North Dakota Rule of Criminal Procedure Rule 44 provides for the right to counsel in all felony and non-felony criminal cases. It specifically provides for counsel "at public expense to represent the defendant

at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.” However, when the Commission was moved from under the Court to an executive branch agency, it has been determined an individual must be first declared indigent. Because of the way court processes work in North Dakota, this determination is typically not made until or after the initial appearance. Thus, individuals are not represented by counsel at an initial appearance unless they have hired their own.

One way the state of North Dakota has attempted to meet this constitutional requirement is to provide counsel through agreements with the Court in jurisdictions where pre-trial services are being offered by the DOCR. Another potential exception is the rare time when a defendant is summoned to court and fills out an application prior to court. When this is done, we can typically find an attorney and have the case assigned prior to the appearance. However, these are the exceptions, and most individuals arrested and detained pre-trial are making their initial appearances without counsel.

This Legislative Assembly has heard many times this session about the overcrowding of our jails and our prisons. Many of the individuals in our county jails are serving on a pre-trial status. According to the Federal Bureau of Justice Statistics, “at midyear 2023, 70% of the jail population (467,600) was unconvicted and awaiting court action on a current charge or being held in jail for other reasons. The remaining 30% (196,600) was convicted and either serving a sentence or awaiting sentencing on a conviction.”¹ Data from the North Dakota Department of Corrections and Rehabilitation in their budget testimony paints a similar picture for North Dakota. By having counsel at initial appearances, an indigent defendant has a voice in the Courtroom. Research is clear as to the importance of having assistance of counsel when bail is set.

Research has repeatedly shown that an individual’s pretrial status shapes virtually every aspect of their case.² The American Bar Association (ABA) recognizes, the “[d]eprivation of

¹ <https://bjs.ojp.gov/library/publications/jails-report-series-preliminary-data-release-2023#:~:text=At%20midyear%202023%2C%2070%25%20of,awaiting%20sentencing%20on%20a%20conviction.>

² 2017 Va. Pretrial Data Rep., supra note 20, at 80, Table 53 (finding defendants who remained detained the entire pretrial period had higher conviction rates (77%) than those released before trial (56%)). See also, Léon Digard & Elizabeth Swavola, Justice Denied: The Harmful and Lasting Effects of Pretrial Detention, Vera Evidence Brief, Apr. 2019 (collecting studies demonstrating worse outcomes for people held in pretrial detention compared to their released peers), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>; Emily Leslie & Nolan G. Pope, The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments, 60 J. L. & Econ. 529 (2017) (finding that pretrial

liberty pending trial is harsh and oppressive, subjects' defendants to economic and physical hardship, interferes with their ability to defend themselves, and in many instances, deprives their families of support."³ The Judge in the *Farella* case researched the effects of having counsel at initial appearance and the discrepancies when counsel does not appear with a defendant. The Court reviewed the Baltimore study amongst others and concluded "more than two-and-one-half times as many represented defendants were released on recognizance from pretrial custody as were unrepresented defendants" and, additionally, that "two-and-one-half times as many represented defendants had their bail reduced to an affordable amount." *Farella v. Anglin*, 5:22-CV-5121 (W.D.Ark. 2024) (citing Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 *CARDOZO L. REV.* 1719, 1720 (2002)). SB 2226 would change the operations of Courts in the State of North Dakota and have an attorney at every initial appearance when someone is in custody. By so doing, the research would suggest the pre-trial jail population would be decreased, alleviating the pressure on local jails.

For the reasons stated herein, the Commission respectfully requests the Judiciary Committee give a do pass recommendation and refer this bill to appropriations.

Respectfully submitted:



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detention increases conviction rates by at least 13%); and Will Dobbie, Jacob Goldin, & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 *Am. Econ. Rev.* 201, 225 (2018) (finding that pretrial release decreases guilty outcomes by 15%, mainly due to increased plea-bargaining power). Evidence from New York City Arraignments, 60 *J. L. & Econ.* 529 (2017) (finding that pretrial detention increases conviction rates by at least 13%); and Will Dobbie, Jacob Goldin, & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 *Am. Econ. Rev.* 201, 225 (2018) (finding that pretrial release decreases guilty outcomes by 15%, mainly due to increased plea-bargaining power).

³ ABA STANDARDS FOR CRIM. JUST.: PRETRIAL RELEASE, Std. 10-1.1 (AM. BAR ASS'N 3d ed. 2007) [hereinafter ABA Pretrial Release Stds].