

2021 HOUSE JUDICIARY

HB 1228

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary
Room JW327B, State Capitol

HB 1228
1/25/2021

Relating to presumptive probation.

Chairman Klemin called the hearing to order at 9:00 AM.

Present: Representatives Klemin, Karls, Becker, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, Satrom, and Vetter. Absent: Rep. Buffalo

Discussion Topics:

- Court discretion for sentencing
- Aggravating factors
- Amendment

Rep. Ista: Introduced the bill: Testimony #2256 9:00 AM

Aaron Burst, Association of Counties: 9:16

Jackson Lofgren, ND Assoc. of Criminal Defense Lawyers: 9:18

Travis Finck, Executive Director ND Commission on Legal Counsel for Indigents:
Testimony # 2490 9:20

Additional Written Testimony: #2223, #2563

Chairman Klemin closed the hearing at 9:25 AM.

DeLores D. Shimek
Committee Clerk



NORTH DAKOTA HOUSE OF REPRESENTATIVES

STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360



Representative Zachary Ista

District 43
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COMMITTEES:

Finance and Taxation
Energy and Natural Resources

January 25, 2021

Chairman Klemin and Members of the Judiciary Committee:

I write in **support** of HB 1228, which would clarify existing law related to when a court must presumptively sentence certain offenders to probation and when a court can find that presumption is rebutted by aggravating factors. I urge a **DO PASS** recommendation.

Generally, a sentencing court has discretion to sentence an offender convicted of any given offense up to the maximum punishment set by law for that classification level. There are some notable exceptions to this general rule, including crimes for which the law sets minimum mandatory sentences. Another such exception is the requirement for presumptive probation.

Under NDCC § 12.1-32-07.4, a sentencing court must presumptively sentence any individual convicted of a class C felony or class A misdemeanor to a term of probation unless certain enumerated exceptions apply (e.g., domestic violence offenses, offenses subject to registration as a sex offender or offender against children, offenses involving certain weapons, and offenses with a statutorily mandated minimum term of incarceration). If none of these enumerated exceptions apply, the court can deviate from presumptive probation and sentence an offender to a term of incarceration only if the court finds “aggravating factors present to justify a departure from presumptive probation.” NDCC § 12.1-32-07.4(2). The statute then defines such aggravating factors to “include” 1) whether the offender has a qualifying prior criminal record, 2) whether the victim or offender held certain statuses in relation to one another, and 3) whether the offender used threats or coercion. *Id.*

Each of these listed examples of aggravating factors appropriately address situations in which an offender, by the nature of his conduct (past or present) should face at least the possibility of incarceration for an offense that might otherwise receive presumptive probation. The aggravating factors proviso is an important tool for ensuring public safety and for victims to feel a sense of justice.

Current law, however, has led to questions about whether the list of aggravated factors are the *only* such factors a court can rely upon to deviate from presumptive probation. As noted above, the list of enumerated aggravated factors in NDCC § 12.1-32-07.4(2) is preceded by the word “include.” Generally in the law, the use of the words “include” or “includes” indicates that what follows is meant to be an illustrative, but not exhaustive, list. In fact, the criminal title of the Century Code even states that “[i]ncludes’ should be read as if the phrase ‘but is not limited to’ were also set forth.” See NDCC § 12.1-01-04(15).¹ But based on conversations with fellow

¹ It bears noting that while the presumptive probation statute uses the singular word “include” and the criminal title only defines the plural word “includes,” NDCC § 1-01-35 provides that “[w]ords used in the singular number include the plural and words used in the plural number include the singular, except when a contrary intention plainly appears.”

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Testimony of Representative Zachary Ista (District 43, Grand Forks) in Support

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prosecutors across North Dakota, it appears that sentencing courts frequently hold that aggravating factors are limited only to those expressly enumerated in NDCC § 12.1-32-07.4(2)(a)–(c). I believe this is an issue that the Legislature should clarify both to avoid inconsistent application across the state and to clarify precisely the scope of the presumptive probation statute.

HB 1228 attempts to address this by adding a fourth aggravated factor of “any other factor determined by the court to be appropriate.” I believe this is just another way of stating what the use of the word “include” already implies. In that sense, my proposal reflects a clarification of, rather than change to, existing law. Prosecutors still would have to show to a sentencing court’s satisfaction that any alleged factor was, in fact, an aggravating one and appropriate to justify deviation from presumptive probation. Nothing in this bill would foreclose any substantive argument from a criminal defendant or his attorney as to why presumptive probation should still apply, particularly where the purported aggravating factor is not one of the specifically defined factors in NDCC § 12.1-32-07.4(2)(a)–(c) or not analogous to such factors. So, too, would a sentencing court have to support its reliance on the proposed subdivision (d) by stating on the record which factors the judge relied on and why such factors are aggravating and thus rebut the presumption of probation. With the enumerated factors in subdivisions (a) through (c), a sentencing court already has guideposts for the type of factors that appropriately may be deemed to be “aggravating,” thus providing another limiting principle on sentencing courts from going too far afield in finding factors substantially different from those already spelled out in statute. Likewise, a defendant would retain his right of appeal on that legal issue and could challenge a sentence of incarceration before the North Dakota Supreme Court by arguing the district court abused its discretion in finding aggravating factors existed to deviate from presumptive probation.

I am not insensitive, though, to criticisms that the proposed new enumerated factor amounts to an exception that would subsume the rule. In other words, critics contend that the bill essentially does away with presumptive probation altogether by leaving sentencing purely at the mercy of a court’s discretion to find whatever aggravating factors it likes. Others are likely to argue that it could balloon jail populations and place added costs on DOCR. Let me be clear: that is not the intention of this bill. I do not want to undo the state’s presumptive probation framework, and I certainly do not want to incarcerate even one more person than is absolutely necessary to serve the ends of justice and public safety. So, I welcome any amendment from the Committee that might address these overbreadth concerns.

But while the bill’s intent is not to usher in a new era of over-incarceration, I do believe the clarification of law contemplated by HB 1228 would be an important tool to ensure public safety from violent offenders and to ensure justice for victims of all violent crimes. In that regard, I refer the Committee to the written testimony of Andrew Eyre, a prosecutor in Grand Forks, as to why he supports the proposal. As he notes, without the proposed clarification, current law can lead to absurd results. Consider, for example, a hypothetical scenario in which the same person is victimized by two separate defendants with whom the victim has no prior relationship. The first defendant strangled the victim. The second defendant merely threatened to strangle the victim. Under a strict reading of the existing presumptive probation statute, the first defendant—the strangler—would be sentenced to presumptive probation while the second defendant—the one who only threatened to strangle—would not because such a threat is an enumerated aggravating factor under NDCC § 12.1-32-07.4(2)(c). Likewise, someone who unlawfully distributes intimate images (*i.e.*, “revenge porn”) would receive the benefit of presumptive probation if none of the enumerated aggravated are present. I believe a sentencing court should at least retain the option to sentence such an offender to a term of incarceration for such a crime of moral turpitude.

Whatever the intention of the existing presumptive probation statute, I believe both these examples represent absurd results that do not promote justice, public safety, victim’s rights, nor any coherent delineation of when alternatives to incarceration should and should not be considered. While presumptive probation is entirely

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appropriate in many, many cases, I believe my bill would give sentencing courts the necessary discretion to ensure that no such absurd results persist.

In summary, HB 1228 clarifies existing law, promotes public safety, and ensures that all options for justice for victims of violent and repulsive crimes remain in a court's toolbox—including both probation and incarceration in limited, appropriate circumstances. For these reasons, I respectfully urge you to recommend **DO PASS** on HB 1228, and I stand ready to answer the Committee's questions.

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House Judiciary Committee
January 25, 2021
Testimony of Travis W. Finck, Executive Director, NDCLCI

Chairman Klemin, members of the House Judiciary Committee, my name is Travis Finck and I am the executive director for the North Dakota Commission on Legal Counsel for Indigents. The Commission is the state agency responsible for the delivery of indigent defense services in North Dakota. I rise today to provide neutral testimony on behalf of the Commission regarding HB 1228.

HB 1228 will effectively end presumptive probation in North Dakota. Presumptive probation is a tool created through justice reinvestment which this body crafted. Four short years ago, the 65th Legislative Assembly passed this very provision with final vote tally of 88 yeas, 2 nays in the House and 42 yeas, 0 nays in the Senate. North Dakota was heralded for taking steps to curve the burgeoning prison population. In 2017 it was expected prison populations would increase by approximately 36% by FY 2022 at a cost of more than \$100 million dollars to the taxpayers. News articles at the time reported how the research conducted by the Council of State Government Justice Center indicated 62% of prison admissions each year were for low level felonies.

This legislation seeks to add “any other factor determined by the court to be appropriate” as an override to presumptive probation. This language no longer makes presumptive probation presumptive. The way this bill is written, it serves the same as if the whole section was just removed from code.

Mr. Chairman, members of the committee, the Commission on Legal Counsel will continue to monitor this bill for potential implications on the delivery of indigent defense services.

Respectfully Submitted:



Travis W. Finck

Executive Director, NDCLCI

HB 1228 - relating to presumptive probation

Testimony of Andrew Eyre
January 22, 2021

Chairman Klemin and Members of the Judiciary Committee,

I write to you in support of HB 1228 which would clarify existing law regarding presumptive probation. This committee and the legislature should consider an Amendment to Section 12.1-32-07.4 of the North Dakota Century Code.

As a prosecutor, I have had experience working with this statute and I have seen how our district court judges are strictly interpreting this statute in an effort to follow the letter of the law. I am asking this committee to consider an Amendment to N.D.C.C. 12.1-32-07.4.

My concern with the statute in its current form is that the list of aggravating factors is too narrow. The current statute says:

1. The sentencing court shall sentence an individual who has pled guilty to, or has been found guilty of, a class C felony offense or class A misdemeanor offense to a term of probation at the time of initial sentencing, except for an offense involving domestic violence; an offense subject to registration under section 12.1-32-15; an offense involving a firearm or dangerous weapon, explosive, or incendiary device; or if a mandatory term of incarceration is required by law.
2. The sentencing court may impose a sentence of imprisonment if the sentencing court finds there are aggravating factors present to justify a departure from presumptive probation.

Aggravating factors include:

- a. That the individual has plead guilty to, or has been found guilty of, a felony offense or class A misdemeanor offense prior to the date of the commission of the offense or offenses charged in the complaint, information, or indictment;
 - b. The age and vulnerability of the victim, whether the individual was in a position of responsibility or trust over the victim, or whether the individual abused a public position of responsibility or trust; or
 - c. If the individual used threats or coercion in the commission of the offense.
3. This section does not preclude the sentencing court from deferring imposition of sentence in accordance with subsection 4 of section 12.1-32-02 or sentencing an individual to a term of incarceration with credit for time spent in custody if execution of the sentence is suspended.

I am concerned that the wording of the statute can be considered ambiguous. Specifically, I am concerned that there is a lack of clarity as to whether the three aggravating factors are meant to be the **only** aggravating factors a district court judge can consider.

The end of subsection (2) says, "Aggravating factors include:" It should be noted that 12.1-32-07.4 uses "include" and not "includes." "Includes" is defined in 12.1-01-04(5). "Includes" should be read as if the phrase 'but is not limited to' were also set forth." I believe the more broad definition of "includes" is the correct one. However, after practicing law in North Dakota for a number of years, I have learned that our district court judges do their best to follow the

legislature's lead, and will generally follow the strict letter of the law. If the legislature can clarify its meaning, lawyers and judges will have an easier time applying the law.

If the factors mentioned in 12.1-32-07.4(2) are the only factors to be considered, a person convicted of distribution of intimate images (12.1-17-07.2) would be entitled to a presumptive probation sentence, so long as none of the other listed aggravating factors apply. A person who strangles his neighbor could get a presumptive probation sentence, as long as none of the other aggravating factors are present. A person who threatens to strangle his neighbor would not get a presumptive probation sentence because threatening conduct is included in the aggravating factors in 12.1-32-07(2)(c).

District court judges have always exercised broad discretion in sentencing. We should give our district court judges discretion to consider other factors in determining whether the presumptive probation statute would apply.

I write to support a modification to the presumptive probation statute. I support HB 1228. I do not want to testify in person, and respectfully submit this written testimony for the judiciary committee's consideration.

January 24, 2021

Testimony to the **House Judiciary Committee**

By Leah Carlson

Testimony In Opposition to HB 1228

Chairman Klemin and Committee Members:

My name is Leah Carlson and I am an attorney in West Fargo, ND. I practice primarily criminal defense at the state and federal level. I am **opposed** to HB 1228.

Presently, the plain language of N.D.C.C. § 12.1-32-07.4 requires a court to initially sentence an individual who has been convicted of a class A misdemeanor or a class C felony to a term of probation. As you are aware, this is known as “presumptive” probation. Typically, presumptive probation applies in cases involving first time offenders. The law includes exceptions to presumptive probation in cases involving particular offenses or the presence of aggravating factors, thus allowing a court to impose a sentence of imprisonment.

HB 1228 seeks to add as an aggravating factor, “Any other factor determined by the court to be appropriate.” Including this language as an aggravating factor undermines the mandatory presumption of probation provided for by this law. This amendment would provide a broad, catch all factor under which a court could choose not to impose probation for virtually any reason. It would essentially eliminate presumptive probation and render the current law useless.

For this reason, I urge a **DO NOT PASS** on HB 1228.

Thank You,

Leah R. Carlson

Leah Carlson

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary
Room JW327B, State Capitol

HB 1228
2/8/2021

Relating to presumptive probation.

Chairman Klemin called the hearing to order at 3:56 PM.

Representatives	Attendance
Representative Lawrence R. Klemin	P
Representative Karen Karls	P
Representative Rick Becker	P
Representative Ruth Buffalo	P
Representative Cole Christensen	P
Representative Claire Cory	P
Representative Karla Rose Hanson	P
Representative Terry B. Jones	P
Representative Jeffery J. Magrum	P
Representative Bob Paulson	P
Representative Gary Paur	P
Representative Shannon Roers Jones	P
Representative Bernie Satrom	P
Representative Steve Vetter	P

Discussion Topics:

- Amendments proposed
- Committee work

Rep. Christensen: Moved a Do Not Pass. Seconded by **Rep Magrum.**

Roll Call Vote:

Representatives	Vote
Chairman Klemin	N
Vice Chairman Karls	N
Rep Becker	Y
Rep. Christensen	Y
Rep. Cory	Y
Rep T. Jones	N
Rep Magrum	Y
Rep Paulson	Y
Rep Paur	Y
Rep Roers Jones	N

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Rep Buffalo	N
Rep K. Hanson	N

Motion carried. 8-6-0.

Chairman Klemin closed the hearing at 4:01 PM.

DeLores D. Shimek
Committee Clerk

REPORT OF STANDING COMMITTEE

HB 1228: Judiciary Committee (Rep. Klemin, Chairman) recommends **DO NOT PASS** (8 YEAS, 6 NAYS, 0 ABSENT AND NOT VOTING). HB 1228 was placed on the Eleventh order on the calendar.