

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 pled 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.