NORTH DAKOTA HOUSE OF REPRESENTATIVES

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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."

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

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.