January 26, 2023

Mr. Chairman and Members of the House Judiciary Committee:

My name is Andrew Eyre, and I am an Assistant State's Attorney in Grand Forks County. I write to you in support of HB 1490, which would create an exception to our presumptive probation statute for crimes involving the use of force. HB 1490 would take violent crimes out of presumptive probation's framework. I urge this Committee to issue a DO PASS recommendation on HB 1490.

North Dakota's presumptive probation statute has hindered this State's ability to sentence violent offenders to a period of incarceration. Our district court judges and Supreme Court justices do their best to narrowly interpret the legislature's words and intentions. Because our judges narrowly interpret our statutes, our presumptive probation statute has led to interesting results.

Our current presumptive probation statute is codified as Section 12.1-32-07.4. The statute directs our district courts to presume that a period of probation is the appropriate sentence for a first class C felony or class A misdemeanor, unless the case involves domestic violence, a sex offense requiring sex offender registration, an offense involving a firearm, or if a mandatory minimum sentence is required by law. 12.1-32-07.4(2) includes three exceptions that can take a case out of presumptive probation's purview. The exceptions include:

(a) – that the individual has a prior A misdemeanor or C felony conviction
(b) – the age or vulnerability of the victim, or whether the offender was in a position of power over the victim
(c) – the individual used threats or coercion in the commission of the offense

The word "include" is key here. When presumptive probation was first enacted, the legislature provided three aggravating factors that can take a case out of presumptive probation. Normally, the word "includes" means "includes but is not limited to." NDCC 12.1-01-04(15). So, under our normal definitions, the three aggravating factors listed in the presumptive probation section would not be an exhaustive list, unless the word "include" has a radically different definition than the word "includes." There is disagreement and uncertainty among attorneys about whether the three aggravating factors are meant to be an exhaustive list. The North Dakota Supreme Court has only analyzed one presumptive probation case (State v. Christensen). The Supreme Court was able to decide that case without giving an opinion as to whether the three enumerated factors are an exhaustive list, so the question remains unanswered.

If we are to conclude that the three enumerated aggravating factors are meant to be an exhaustive list, then our presumptive probation statute could yield curious results in criminal cases when it comes to sentencing that are illustrated in the following examples:

- Driving under suspension is a class B misdemeanor for a first, second, or third offense within a five year period. Driving under suspension is a class A misdemeanor for a fourth offense within a five year period. Presumptive probation under 12.1-32-07.4 only applies to class A misdemeanors and class C felonies. So, our district court

judges *could* sentence a person to thirty days in jail for the first, second, and third driving under suspension conviction. However, because of presumptive probation, our district court judges could not impose a jail sentence on the person's fourth driving under suspension conviction, assuming, of course, that there is no other factor that would take the case out of presumptive probation.

- Simple assault (12.1-17-01) for causing bodily injury is a class B misdemeanor. Because presumptive probation only applies to class A misdemeanors and class C felonies, a district court judge could impose a thirty day jail sentence for a person's first conviction for a class B misdemeanor simple assault. Assault (12.1-17-01.1-substantial bodily injury) is an A misdemeanor. So, if the courts narrowly interpret the presumptive probation statute, unless one of the three aggravating factors applies, a person who commits a more serious violent offense could get a probation sentence.
- Simple assault against a police officer, a correctional officer, a person engaged in a judicial proceeding, a municipal or volunteer fire fighter, or an emergency medical provider is a class C felony under 12.1-17-01. If a person with no prior criminal history assaults a police officer, or an emergency department nurse, that person could get a presumptive probation sentence under our current law. So, a person *could* get a 30 day jail sentence for a first offense driving under suspension, but could not get the same jail sentence for a first offense, class C felony, simple assault on a police officer.
- 12.1-32-07.4(2)(c) excludes crimes involving a threat from presumptive probation. A person who threatens to strangle a random citizen can be sentenced to a period of incarceration on a class C felony terrorizing charge, but a person who actually strangles a random citizen can get a presumptive probation sentence on a class C felony aggravated assault charge, as long as that person didn't make any threats before strangling their victim.

Our current statute is flawed. Section 12.1-32-07.4, if it is narrowly interpreted, does not give our district courts the ability to sentence certain categories of violent offenders to a period of incarceration. Certainly, a person can get a *suspended* jail sentence, which could be imposed later if there is a probation violation and the case comes back to the district court for a probation revocation hearing. But, at the initial sentencing phase, Section 12.1-32-07.4 ties our district court judges' hands.

The amendment included in HB 1490 would not *require* district court judges to impose a jail sentence for any offense. Rather, it would simply give our district court judges the discretion to impose a jail sentence for offenses involving force. The legislature should give prosecutors and district court judges the discretion to seek a jail sentence for crimes involving violence or the use of force.

Our district courts and our supreme court do an excellent job at narrowly interpreting the law as it is written. Our courts understand that their role is to interpret the law as it is, rather than interpreting the law as they would wish it to be. The legislature has created exceptions to presumptive probation. I ask that you support HB 1490, which would create one more specific exception to presumptive probation. HB 1490 is a limited, narrowly tailored amendment to

Section 12.1-32-07.4 that would allow our State's district court judges to impose a jail sentence for crimes of violence.

I urge this Committee to issue a DO PASS recommendation on HB 1490.

Very respectfully,

Andrew C. Eyre