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Mr. Chairman and Members of the Judiciary Committee:

In a literal sense, HB 1490 might be the simplest bill you will see all session: it proposes only to add one word and two commas to Century Code. But with that simple change, I believe HB 1490 makes clear the authority our district courts have, or at least ought to have, to sentence violent offenders to a term of incarceration, while also retaining their appropriate discretion to opt for probation when circumstances justify such a sentence.

Broadly speaking, a court usually can decide any given question of law or of fact based entirely on the merits, with any conflicting options all having equal weight. But when there is a presumption, the judge must apply that specific rule or inference unless and until some evidence or factor rebuts it. In other words, it is like a bit like starting with a thumb on the scale in favor of one possible outcome. To put that in the context of a criminal sentence, the sentencing court usually 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. Presumptive probation is another exception.

Under NDCC § 12.1-32-07.4, a sentencing court presumptively must sentence any individual convicted of a class C felony or class A misdemeanor to a term of probation unless certain exceptions apply (namely 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.” The statute then defines such aggravating factors to include 1) whether the offender has a qualifying prior criminal record, 2) the age and vulnerability of the victim and whether the offender had any position of trust over the victim or abused a position of public trust or responsibility, and 3) whether the offender used threats or coercion in committing the crime.

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 promoting justice for victims. And it does so without instituting any mandatory minimum sentences that tie the hands of sentencing judges (and prosecutors and defense attorneys) to consider the individual circumstances of any given case.

Current law, however, has led to questions about whether the listed 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, 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). But based on conversations with fellow prosecutors across North Dakota, it appears that sentencing courts frequently consider only the aggravating factors explicitly listed in Century Code, leading to possible uneven application of existing law.

The Supreme Court had an opportunity to address this very issue in its 2019 decision in State v. Christensen, but it decided the case on different, narrower grounds that resulted in overturning the lower court's deviation from presumptive probation. Subsequently, it appears many sentencing courts have taken Christensen to stand for a restrictive reading of our current presumptive probation law. Given the ongoing ambiguity, I believe this is an issue that the Legislature should clarify, both to avoid inconsistent application across the state and to enumerate the scope of the presumptive probation statute.

Just last session, I introduced a bill to address this same issue. Admittedly, that bill was drafted in a way that would have created a new aggravating factor that could have swallowed the general rule of presumptive probation, and this Committee understandably rejected the bill. I took the concerns of this Committee seriously when drafting the bill before you now. By adding only the word "force" to the list of aggravated factors allowing rebuttal of presumptive probation, we would give judges another tool to hold violent offenders responsible for their misconduct by giving courts the power to sentence convicted criminals to an appropriate term of imprisonment, but we would also preserve the essence of our current presumptive probation framework.

Let me be clear: the intention of this bill is *not* to swell our prison and jail populations or to disrupt the overall goal of presumptive probation. 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. But I do believe the clarification of law contemplated in HB 1490 would be an important

tool to ensure public safety from violent offenders, to ensure justice for victims of all violent crimes, and to ensure uniform and coherent application of our sentencing laws across the state.

In that regard, I refer the Committee to the written testimony of Andrew Eyre, a prosecutor in Grand Forks County, as to why he supports the proposal. As he notes, without the proposed clarification, current law can lead to curious, if not outright 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 only threatened to strangle the victim but did not engage in the actual physical act of strangulation (misconduct that constitutes the criminal offense of terrorizing). Under a strict reading of the existing presumptive probation statute, the first defendant—the actual strangler—would receive presumptive probation while the second defendant—the one who only threatened to strangle—may not because threats are an enumerated aggravating factor under current law while the actual use of force or violence is not. HB 1490 makes clear what I think is already obvious: that actually strangling someone is just as bad as (if not worse than) threatening to strangle someone, and a court should be able to punish the former equally to the latter.

HB 1490 would fix this peculiarity of current law. In doing so, the bill also promotes public safety and ensures that all options for justice for victims of violent crimes remain in a court's toolbox—including both probation and incarceration in limited, appropriate circumstances. It does so without the mandates of required minimum sentences and without removing one bit of discretion judges have to issue sentences they believe are appropriate or impeding the ability of defendants and their counsel to argue for probation over incarceration. For these reasons, I respectfully urge a **DO PASS** recommendation on HB 1490, and I stand ready to answer the Committee's questions.