North Dakota
House of Representatives
STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360

Representative Zachary Ista
District 43
3850 15th Avenue South
Grand Forks, ND 58201-3727
C: 701-361-6671
zmista@ndlegis.gov

COMMITTEES:
Finance and Taxation
Energy and Natural Resources

March 7, 2023

Madam Chair and Members of the Senate Judiciary Committee:

For the record, Rep. Zac Ista from District 43 (Grand Forks). Today I come before you with HB 1490, which passed the House by a vote of 92-0 on February 6, 2023. 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 all conflicting options having equal weight. But when there exists a legal presumption, the judge must apply that specific rule or inference unless and until some evidence or factor rebuts it. In other words, it is 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 a given offense up to the maximum punishment set by law for that offense's 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 an 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 specifically defines these 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 would 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 (plus 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 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," which generally means the list is meant to be illustrative but not exhaustive. *See* NDCC § 12.1-01-04(15). But based on conversations with 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.

But 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. I do believe, though, that 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 ask this Committee to consider which criminal conduct is worse: threatening to strangle someone or actually strangling someone? Current law treats the threatened act (which constitutes the criminal act of terrorizing) as worse than the actual act. This is because threats against a person are specifically listed as an aggravating factor that allows a judge to deviate from presumptive probation and sentence such a defendant to a term of incarceration. But actual acts of physical force (like strangulation) are not listed as an aggravating factor, meaning that a judge may lack a legal basis to sentence the hypothetical actual strangler to prison. 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. In

fixing this peculiarity of current law, 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.

As you consider the bill, I will raise one issue I overlooked during the House's deliberations: an application clause. Because the bill impacts criminal penalties, there may arise questions about when the new aggravating factor would apply. Without a specific application clause, the general common law rule is that the law in effect at the time an offender is charged controls. To avoid any risk of that rule not prevailing here, I have drafted a proposed amendment to include an application clause specifying that the new presumptive probation language would only apply to charges filed after the effective date of this bill (8/1/2023).

For the foregoing reasons, I respectfully ask this committee to consider the proposed application clause amendment, and I urge a **do pass** recommendation on HB 1490. Thank you for your time, and I stand ready to answer the Committee's questions.