HB 1417

Chairperson Lawrence Klemin
Committee Members

From: Rozanna C Larson
Ward County State's Attorney

RE: House Bill 1417

Chairperson Klemin and Members of the Committee,

This is my written testimony OPPOSING HB 1417. I am the State's Attorney for Ward County and have been a prosecutor for 27 years.

HB 1417 is part of a group of bills created to control the population of offenders remanded to the custody of DOCR. I am not unsympathetic to the demands that are put on DOCR, both with the rate of incarceration and the number of offenders placed on supervised probation. For as long as I have been a prosecutor, prison/jail space has been an issue. Throughout the years, during the interim, legislature has had studies and committees to address the issues relating to inmate population. These studies related to recidivism, criminology, and risk assessments etc. One of the bigger studies, during my tenure as a prosecutor, was with Justice Reinvestment Initiative. (hereinafter (JRI). I was part of this committee. This testimony is not aimed at undoing or criticizing the efforts made from the JRI study.

History of legislation addressing incarceration issues

Due to the recommendations of the JRI were a number of sentencing changes. The focus of these changes was aimed at addressing the prison population. The JRI specifically identified addiction and mental health issues to be a contributing factor to recidivism and criminology. As a result of this "insight", in 2017 changes were made to NDCC 19-03.1-23 and other controlled substance statues. These changes included reducing the level of offense for drug dealers (NDCC 19-03.1-23) from class A felony to Class B felony, for substances other than marijuana. First offense possession of drugs and paraphernalia for controlled substances, other than marijuana, was reduced to a Class A misdemeanor, subsequent offenses remained a Class C felony. In 2019 legislature went further and eliminated all mandatory sentences for drug dealers.

In addition to amending NDCC 19-03.1-23 as part of the reform recommendations by JRI, amendments were made to NDCC 12.1-32-07, the statute that HB 1417 seeks to change in a significant manner. In 2017 legislation amended NDCC 12.1-32-07 to reduce the number of years an offender could be placed on supervised probation. Apart from certain specific types of violent offenders, or offenders identified in 12.1-32-15 (sex offenders), the longest period of time a person can be initially placed on probation for a felony offense was reduced from 5 years to 3 years. There was also legislation that added the authority, as an intermediate measure, to DOCR probation officer to sanction an offender up to 30 days incarceration in lieu of filing a petition to revoke probation. (I'm not certain this intermediate measure has been used).

Another change made in 2017, based upon recommendation of the JRI, was Presumptive Probation, NDCC 12.1-32-07.4. The primary purpose of presumptive probation was to reduce the rate of incarceration. Apart from some specific offenses, and specific "aggravating factors" offenders charged with a Class A misdemeanor or Class C felony presumptively receive probation, no incarceration. In 2019 class C felony aggravated assault was eliminated from 12.1-32-09.1 (85% rule) making the offense a presumptive probation offense.

As stated, this purpose of this testimony is not to undo the efforts that have been made to address the rate of incarceration or opportunities created to assist offenders to avoid felony convictions and address underlying issues or causes of their criminal behavior.

However, I will point out that despite these efforts, and despite the opportunities created, crime does not stop, the rate or demand on incarceration may have been delayed, but the need continues. This is clearly evidenced by the number of counties that have invested millions of dollars expanding local jails. Williams, McKenzie, Southwest Correctional Center, Burleigh Morton Detention Center, Mountrail, Ward, Grand Forks and Cass Counties have all expended the funds to expand and provide additional incarceration space. This was done to provide for the safety of the respective communities, the demand for incarceration, and the lack of space at DOCR.

Opposition to 1417

The population of these local correctional centers has been growing exponentially just as the population at DOCR. The population includes pretrial inmates as well as those serving a sentence. All the people currently incarcerated are there based upon the authority and discretion of a Judge. Judges have statutory authority, discretion and obligation to ensure the safety of the community. Judges make decisions regarding bond conditions, (pretrial orders) and sentences based upon specific facts of a case, plea agreements, recommendations from prosecutors, and arguments made. The Judges, prosecutor and defense counsel are the ones that know each of the offenders, the specifics of each case and any special considerations to be made for defendants at sentencing, including probation conditions. HB 1417 aims to take away that discretion when it comes to probation conditions and revocations.

The purpose of probation is to hold offenders accountable and to have supervision to ensure safety of the community and that the court's orders are followed. The conditions of probation are ordered by the Court, as provided for by statute. Keep in mind there are a lot of times offenders are repeat offenders. It is also not uncommon for an offender to be on probation for more than one file. If fact it is common that someone can be on probation for two or 3 files.

HB 1417 creates "graduated" sanctions for violations of probation (NDCC 12.1-32-07). It also adds a definition for "technical violations" of probation. HB 1417 takes away the discretion of the Court and prosecutor when it comes to probation revocations. The practical result of HB 1417 is that for many probation violators, they will NEVER serve the balance of the original sentence. This is due to the fact most of violations of probation would be deemed "technical violations." -- ie: Failure to follow the Court's order.

The reasons for opposing HB 1417 are much the same as I stated in my testimony against HB 1425. It comes down to truth in reporting by DOCR. Currently DOCR has complete discretion when deciding when to report violations to the Court and State's Attorneys (ie: file a petition to revoke). What DOCR does not have currently is discretion in determining the conditions of probation, or what the consequences are if there is a petition to revoke. (Section 4 sub. 2) Currently that determination is at the discretion of the Court.

HB 1417 distinguishes between "violations" and "technical violations." HB 1417 mandates the consequences for "first" "second" etc. violation. HB 1417 makes nearly all violations of probation "technical" violations. The exceptions are 1) an arrest or summons (ie: new crime), 2) criminal offense 3) violation of a protection order or an order prohibiting contact and 4) absconding. I would point out, in regard to "absconding" (failure to report), it is not unusual for this to not be immediately reported, or for a petition to revoke not be filed for several months. Technical violations are everything else. Failed drug tests, failure to obtain evaluations, failure to engage in services or complete them etc. All things ordered to assist the offender in addressing addiction and/or mental health issues.

Here is the issue. DOCR already has unbridled discretion, when a probationer has technical violation, they are not reported immediately. DOCR, with its discretion, may or may not impose "intermediate measures." This is provided for currently in NDCC 12.1-32-07. The Court and the SAs are not told about these technical violations or intermediate measures being imposed until such time as those measures have failed as well. Most often, when a petition to revoke is filed there have been numerous technical violations. The allegations on the petition often reference back to several months (1-9) of violations. If HB 1417 passes, this petition would be considered the "first" violation. The mandated consequence would be 15 days.

The process for a petition to revoke is this – the petition comes to the SA office, we sign it, it gets filed with the Court. An order to apprehend the offender is issued. When they get picked up they make an appearance before the Master Court Judge. The offender is advised of the petition and the allegations. The offender is advised they have a right to an attorney. Bail Bond is set. The revocation hearing must be held with the sentencing Judge. The hearing is often set the next month. Assuming there are no continuances (which often occurs), a hearing on the petition is likely held one month to 3 months after the offender makes an "initial appearance" on the petition and gets an attorney appointed.

My point being for the "first" violation/petition, it is not uncommon for the offender to have already been on probation for over a year. The MAXIMUM time a defendant can be on probation is 3 years. A FOURTH PETITION will never be filed, as the probation period will have run. HB 1417 essentially is designed so that probationers with "technical violations" will never be sentenced back to DOCR.

I would also point out, on "first" petitions to revoke probation it is very seldom the offender will actually be sentenced to DOCR. This is due to the discretion of the Court, and the recommendations of the prosecutor and defense counsel. This is especially true for "technical violations." It is not unusual for the Court to order (again) offenders to obtain addiction

evaluations, engage in services etc. as a bond condition, before the revocation hearing. If the offender has begun services or completed them, it is not unusual for the petition to be dismissed or the offender to be placed back on supervision without any further incarceration.

HB 1417 calls for "local sentences." This puts an additional burden on local jails that are already full.

HB 1417 Section 4, sub 2 takes the discretion of determining the conditions of probation away from the Court's discretion and places it with DOCR. DOCR will then do a "risk assessment." A couple (probably more) of things are wrong with this.

FIRST, this will delay sentencing and cause further hearings and a burden on the Courts' already packed docket. Change of plea can occur at any time. Defendants are not required to give notice of intent to change their plea. Sentencings often occur simultaneously to the change of plea. Sentences include probation conditions. Case law, (Supreme Court) and statute explicitly states that probation conditions must be read in court to the defendant (or waived). The defendant must sign those conditions before leaving court at sentencing. As proposed in HB 1417, the "assessment" would have to be completed before sentencing, or the "conditions" they determine to be appropriate could be found to be not enforceable.

SECONDLY. I have a real issue with DOCR making this determination based on a "risk assessment" they created. Currently they use this risk assessment tool for pretrial services. The defendants are then put into three categories, "low, moderate, or high" . When they are low and moderate, often that only requires the defendants to "call in." There is no face to face, no weekly check-ins with drug testing, no home visits, no searches etc. So once again there is already a built-in problem that those on probation with low/moderate risk rating may be hiding violations because DOCR would not actually be supervising defendants in a manner the public assumes is being done.

HB 1417 gives DOCR complete authority in managing defendants and determining what is a violation, technical violation and WHEN (and IF) those violations ever get reported to the Court and the SAs. It is the SAs and the Court that hear from the public and victims of crime when offenders are not being held responsible and accountable. It is the SAs that must answer the victims' questions and concerns when they don't get restitution that is ordered or see the offender out on the streets. One example of DOCRs failure to report violations was just brought to my attention. There was a defendant sentenced for Possession with Intent to Deliver (meth) and placed on probation in December 2023. In January 2025 he was arrested again for Delivery of Fentanyl, Possession with Intent to Deliver and Tampering with evidence. While reviewing the file for discovery the ASA contacted this probation officer. The ASA was told by the officer this defendant has been doing "horribly" on probation. The officer told the ASA that the officer has had to "chase him down" to have contact with him. (sounds like absconding). The ASA also learned, based on the evidence in this case it would appears he has been dealing drug the entire time while he was on probation. Yet, despite the officer admitting the supervision has been "horrible" there has been no notice to us as prosecutors or a petition filed to revoke his probation.

Finally, regarding "new crimes." In this jurisdiction our Courts will not revoke probation if the allegations are "only" new crimes committed, until such time as the "new crime" has been resolved. (ie: found guilty or plead guilty) This is due to a Supreme Court decision stating the "preferred procedure" is to allow the new offenses to be resolved so the defendant's "right to remain silent" is not violated at a revocation hearing. I don't know what the practice is in other districts. The practical result is the offender will be placed on probation on the new offense, the former probation will be closed.

I would appreciate a DO NOT PASS vote to HB 1417 Giving DOCR complete control, without accountability or transparency in reporting all violations does not create safer communities. Currently there is no requirement for DOCR to report violations.