SENATE JUDICIARY COMMITTEE
JANUARY 21, 2025

TESTIMONY OF CLAIRE NESS
OFFICE OF ATTORNEY GENERAL
SENATE BILL NO. 2128

Chairman Larson and members of the Committee:

For the record, my name is Claire Ness. I am the Chief Deputy Attorney General, and I am here on behalf of the Attorney General's Office in support of Senate Bill 2128, our **Truth-in-Sentencing Bill**. The Attorney General regrets he is unable to be here today because he is returning from President Trump's inauguration. I respectfully ask that you keep the hearing on this bill open so he may complete our office's presentation in support of the bill upon his return.

My testimony today has 2 parts:

First, I will explain how each section of the bill – including the amendment that we have distributed – operates. Based on media reports and questions we have received, there seem to be several misperceptions about the bill that we can clear up.

Second, I will describe the underlying goals of the bill and the values of the Attorney General's Office and our great state that are advanced by this bill.

Throughout my testimony, I also will describe some of the voluminous background data and information that demonstrate why passing this bill is a critical step toward reducing crime in our communities.

Our office has worked with, and incorporated feedback from, State's Attorneys, law enforcement personnel, legislators, and others to develop this bill, and we look forward to working with members of the Legislative Assembly on the bill during the session.

How the Bill, as Amended, Operates

Section 1

Section 1 of Senate Bill 2128 makes two changes to definitions in Chapter 12-44.1 of the North Dakota Century Code (N.D.C.C.). The first is to clarify that the term "correctional facility" does not include transitional centers, and the second is to define "transitional facilities". The definition of "transitional facility" in the bill reflects publicly available information from the Department of Corrections and Rehabilitation (DOCR).

Transitional facilities – sometimes called transition centers or halfway houses – are structurally, operationally, and in almost all ways distinct from commonly understood "correctional facilities" (jails and prisons). Transitional facilities function similarly to staffed dormitories or apartments that offer on-site counseling or other services. Most individuals who live there are free to check-out of, and check-in to, the transitional facility, so they can spend their days unsecured in the community. DOCR informed us these individuals are not required to undergo daily drug testing when they return to the facility in the evening.

Section 2

Under Section 2, the Legislative Assembly will have authority to establisih common sense and public safety guardrails for transferring prisoners among DOCR facilities. For example, DOCR will have to abide by statutory limits on transfers of prisoners to facilities that have little or no security.

Currently, under N.D.C.C. 12-47-18.1, the Director of DOCR has vast, unilateral power to take a prisoner from the penitentiary and transfer them to the dorm-like setting of a transitional facility, regardless of the risk to the community. The Director can do this for just about any

reason, as long as the Director subjectively thinks it is a good idea for "the public, the offender, **or** the department." That word "or" in the statute is key. Even if transferring a prisoner to a halfway house is not in the public's best interest, the Director now can legally order it as long as the Director thinks the transfer would be good for either the prisoner or DOCR.

DOCR may tell you that would never happen because it might risk public safety. We would welcome that testimony because it would mean that Section 2 of this bill is simply what we all agree should be codified in law.

Section 3

Section 3 is first and foremost a public safety measure. Under current law, the Director of DOCR has authority to approve work release programs and other release programs for offenders in DOCR custody. The Director also has the power to contract with transitional facilities to house offenders in release programs. These offenders have the privilege of being out and about in our communities without guards or other security measures. So it is critical that they do not pose a danger to others.

Section 3 of SB 2128 identifies which offenders may participate in these release programs and live in transitional facilities. For clarity, it uses the term "eligible offender" to identify these individuals and then defines that term.

An "eligible offender" is an offender who has:

- Served 85 percent of their sentence; or
- Had their sentence commuted; or
- Is serving a sentence only for a nonviolent crime listed in Section 3.
    - Computer fraud (12.1-06.1-08)

- Perjury (12.1-11-01)
- Fraudulent practice in urine testing (12.1-11-07)
- Interception of wire or oral communications (12.1-15-02)
- Trafficking in intercepting devices (12.1-15-03)
- Property damage by fire or explosion (12.1-21-02(1)(c))
- Negligent act resulting in fire (12.1-21-03.1)
- Property damage by criminal mischief (12.1-21-05(1)(b))
- Interference with telephone during emergency call (12.1-21-06.1)
- Stowing away (12.1-22-05)
- Theft (12.1-23-02)
- Theft of lost property (12.1-23-04)
- Misapplication of entrusted property (12.1-23-07)
- Defrauding secured creditors (12.1-23-08)
- Forgery or counterfeiting (12.1-24-01)
- Simple drug possession (19-03.1-23(7))
- Possession of drug paraphernalia (19-03.4-03), or
- DUI (39-08-01).

Section 3 also serves an important transparency purpose. It requires DOCR to give the Attorney General and the Legislative Council quarterly reports of eligible offenders. This transparency measure will help everyone decipher the "time served" statistics from DOCR. Time spent in transitional facilities when offenders are allowed to check-out and check-in during the day is actually included in an offender's "time served," as calculated by DOCR. The reports

required in Section 3 of this bill will give you a window into how much of each sentence is spent, not in cells, but in the community.

Section 4

Section 4 of the bill provides common sense transparency and accountability regarding offenders' eligibility for release programs and transitional facilities. Keep in mind, offenders in these programs and facilities have the privilege to be in our communities without security, and the vast majority of us do not know who they are.

Under Section 4 of SB 2128, 4 changes will be made:

1. Before an offender can participate in these programs, DOCR must be able to determine "with a high degree of reliability" – meaning, the determination must be based on an objective, reliable assessment – that the offender is not a high security risk, is not likely to commit a crime of violence, is "not likely to escape," and is likely to be rehabilitated by the program.
    - Under current law, DOCR's decision that an offender can participate in a release program and live in a halfway house does not have to have any objective or reliable basis at all. DOCR may say they already use reliable data; if so, there should be no objection to Section 4.
    - Also under current law, DOCR can allow an offender who is likely to escape (or, really, just "walk away," which is how it is described) to participate in these programs. DOCR does not even have to consider this issue before granting the privilege of participating in release programs.

2. The Parole Board will have better information from DOCR about the offenders in release programs.

    - Under current law, the Parole Board may approve, disapprove, or defer action on the DOCR Director's decision to let an offender participate in a release program. The Parole Board should know, based on reliable and objective information, whether they will be a high security risk, are likely to escape, are likely to commit violent crimes, etc. Section 4 will require DOCR to make reliable assessments of all these factors so the Parole Board will have better information for its decisions.

3. The Parole Board will set common sense criteria for revoking an offender's participation in a release program.

    - For example, if an offender in a release program breaks a rule indicating they are likely to commit a crime of violence or are likely to try to escape, DOCR willl have to end the offender's participation in the release program.
    - Under current law, revoking an offender's participation in a release program is completely discretionary, even if continued participation is likely to result in harm to a member of the public. It is hard to imagine why anyone would object to establishing these kinds of practical and obvious limits on release programs, especially when they are weighed against public safety.

4. Grants of short leave could not be stacked to give one offender more than 72 hours of leave at a given time.

    - Under current law, offenders may be granted leave up to 72 hours by the DOCR Director (for offenders with sentences of 10 years or less) or by the

Parole Board (for other offenders). There is no prohibition now on granting back-to-back leave.

Section 5

Section 5 is a critical piece of this legislation. Although the current law regarding "good time" given to offenders seems straightforward, we have found that it is not applied the way most people think it is. Section 5 will make the law crystal clear. Under Section 5:

- Offenders will actually have to "satisfactorily fulfill" performance criteria before earning good time;
- Depending on how well they fulfill those criteria, offenders may receive "up to" 5 days per month of good time, giving DOCR more flexibility to enforce the performance criteria;
- Good time will be capped at 15 percent of an offender's sentence.
- Good time will have to be "earned" by offenders for time they actually "served."
    - Currently, according to documents from DOCR's staff, in practice even if contrary to policy, when an offender enters DOCR custody, DOCR awards the full amount of good time for the entire sentence imposed on the offender. Good time is not earned month-by-month, although theoretically it could be lost. If the offender is released early for parole (or another reason), the amount of good time is not reduced. Using these methods, DOCR gave at least one offender 40 days of good time per month of time actually served. That is just one example. This inflated amount of good time then appears to be included in the statistics you see regarding the amount of "time served" by offenders in DOCR custody.

Section 6

Section 6 of the bill will reduce the amount of time that can be taken off an offender's sentence for meritorious conduct from two days to one day per month. It also states that meritorious conduct sentence reductions will no longer be used as a special control or security measure. Such measures relate to DOCR operational needs and not meritorious conduct. Calling them meritorious conduct lacks transparency and muddies data.

DOCR claims this provision will cost the state $645,600 per biennium for 4 new employees because offenders will no longer want to participate on resident crisis support teams when doing so will reduce their sentences by one day per month instead of two days per month. The Attorney General's Office is not aware of any evidence for this.

Sections 7 and 8

Sections 7 and 8 of the bill are similar to provisions we brought forward in 2023 at the urging of law enforcement officers around the state. Being punched, beaten, kicked, or otherwise assaulted is <u>not</u> part of an officer's job, and these assaults should not go unpunished. You can talk to just about any law enforcement officer in the state, and they will tell you about the dramatic increase in the rate of attacks on, and injuries to, law enforcement in recent years. Officers deserve serious deterrence for these crimes and serious penalties for the people who commit them.

In 2023, we heard that criminals already get sentences for these crimes, and it was just as misleading then as it is now. These sentences almost always are concurrent sentences, meaning

they are served at the same time as the criminal's other sentences. In other words, the sentences are freebies for the criminals.

Section 7 will make the sentence for preventing arrest at least 14 days' imprisonment, and, if there is a sentence for an underlying conviction, the 14-day sentence would have to run consecutively to it. Keep in mind, to get this sentence, the criminal has to create a substantial risk of bodily injury to someone besides himself, or do something serious enough to justify the use of substantial force to overcome his resistance to the arrest.

Section 8 will make the sentence for assaulting a peace officer, correctional officer, or other emergency personnel listed in N.D.C.C. 12.1-17-01(2)(a) at least 30 days' imprisonment. If there is a sentence for an underlying conviction, the 30-day sentence would have to run consecutively to it. To get this sentence, the criminal has to willfully cause bodily injury to someone or negligently cause bodily injury to someone with a weapon that is likely to cause death or serious bodily injury.

Section 9

Section 9 of the bill contains public safety guardrails on release programs and, in response to many of the comments we have received, removes certain offenders guilty of drug possession from existing mandatory minimum sentencing. Section 9 amends N.D.C.C. 12.1-32-02.1, the current statute that requires a subset of armed offenders to be sentenced to minimum 2-year or 4-year sentences if prosecutors surmount the additional hurdles embedded in the statute. Currently, these offenders can serve up to 25 percent (6 months) of their sentences, or more when you factor in good time awarded by the DOCR, in transitional facilities on work release,.

Section 9 of the bill will clarify that these violent offenders are not "eligible offenders" as defined in N.D.C.C. 12-48.1-01(2)(b) in Section 3. However, they will be eligible for participation in release programs and transitional facilities after serving 85 percent of their sentences under N.D.C.C. 12-48.1-01(2)(a) in Section 3.

Section 9 also removes certain offenders convicted of felony drug possession from the list of individuals currently subject to the minimum sentencing provisions of N.D.C.C. 12.1-32-02.1. Under current law, if an individual who is prohibited by law from having a firearm is found to possess both a firearm and illegal drugs for their individual use, that individual is subject to the minimum sentences in N.D.C.C. 12.1-32-02.1. Section 9 would remove those individuals from that statute. This change does not affect penalties for illegal drug manufacturers or dealers.

Section 10

Section 10 of SB 2128 will provide real Truth-In-Sentencing. Our criminal justice system rightly gives the Legislative Assembly the power to decide the sentencing ranges for each type of crime – and gives judges the power to sentence offenders found guilty of those crimes by juries of their peers. North Dakotans elect legislators and judges to public office – investing you with your lawful authority and the accountability for exercising it.

Those same citizens believe criminals generally serve their sentences in secured settings that keep us all safe. However, over the past several years, a tremendous amount of bureaucratic discretion has been given to DOCR to move criminals to transitional facilities, to give them unsecured access to our communities, and to award them unearned good time. The pendulum has swung far to the left in our state.

Shortly after filing SB 2128, the Attorney General decided to add a clarifying amendment to Section 10 enhancing the state's parole system because Parole Board members are public officials with accountability to the public for their decisions. That provision is included in our amendment and in my description of this section.

Section 10 will bring common sense, transparent, truth-in-sentencing back to our criminal justice system by setting a floor on the percentage of each sentence a criminal must serve in jail or prison. North Dakotans are surprised when they learn this isn't already the law and are even more surprised to find out what percentage of each sentence a criminal spends in jail or prison. The phrase "time served" has a very different meaning to our citizens than it does to many people familiar with our corrections system. One judge noted recently that a defendant sentenced to two years would serve "two, three months."

Under Section 10 of SB 2128, an offender – with a few exceptions – may:

- Be paroled after 50 percent of their sentence (not including good time) is served;
- Be released after serving a commuted sentence;
- Be released after being pardoned; or
- Be transferred to a transitional facility after 85 percent of their sentence is served.

The exceptions I mentioned are for currently existing requirements for some violent offenders who already have to serve 85 percent of their sentences and a new requirement for dangerous special offenders and habitual offenders, both of which are defined in N.D.C.C. 12.1-32-09, to do the same. Also, as described in Section 3 of the bill, offenders sentenced for the nonviolent crimes listed in Section 3 may be transferred to transitional facilities and granted the privilege of participating in release programs before serving 85 percent of their sentences.

I'd like to address a red herring we have heard about truth-in-sentencing. Section 10 of SB 2128 will not take away any offender's opportunity to participate in rehabilitation programs or programs that help an offender prepare for reentry to the community. Those programs can continue to be offered in prison and other correctional facilities. The Attorney General's Office supports these types of programs and for years has offered to support requests for the resources to ensure they can continue.

Section 11

Similarly to Sections 7 and 8, Section 11 responds to an alarm raised by law enforcement officers around the state for years. Fleeing from law enforcement is an urgent, dangerous, and escalating problem in our state, and we are all on notice from law enforcement that this is due to the lack of consequences for people who flee. We introduced an almost-identical provision to Section 11 in 2023, and, since that time, we have experienced tragic examples of how fleeing can impact officers and their communities.

Section 11 would provide a minimum 30-day sentence for felony fleeing as defined in N.D.C.C. 39-10-71, and the sentence would have to be consecutive to any sentence for an underlying conviction. Also, a State's Attorney could ask a judge to impound a vehicle used in fleeing for up to six months. The State's Attorney and the judge would both be able to consider the individual circumstances of the case and would not be required to request or order the impoundment.

Section 12

To avoid any confusion or litigation, we added an application clause for SB 2128 so the changes it makes will apply to individuals who are charged after then bill takes effect. Although we believe this would be the outcome without the application clause, the clause will provide certainty for affected individuals.

Goals and Values that Compel Passage of SB 2128

Because all of us here love this state and care deeply about the people who live here, we owe it to them to do the hard work necessary to bring down our steadily rising crime statistics. And, yes, methodically collected data from North Dakota's law enforcement agencies prove that they are rising. Everywhere we go, we hear from family, friends, neighbors, and concerned citizens about crime in our communities.

Personally, I moved home to North Dakota to raise my son – a fifth generation North Dakotan – after years of school and work in other states because this is the best place to live and raise a family. We can still make changes to reverse the crime trends we see. Doing so will require the accountability, transparency, and truthfulness in SB 2128.

Accountability

The critical foundation of the work we must do is accountability. Power and authority must remain with the people who are accountable for it.

As SB 2128 demonstrates, the Attorney General's Office is committed to preserving the power of the Legislative Assembly to establish sentencing ranges and the authority of judges to impose sentences that will be faithfully carried out by DOCR.

Each time legislators vote on statutes containing sentencing ranges, they are accountable to their constituents for their decisions.

Judges also are accountable to voters (and subject to Supreme Court rulings) for their sentencing decisions. Judges have particularized training and expertise, and they are present throughout trials and plea hearings. In each case, the judge has a unique, in-depth understanding of the law, context, and nuances that inform their sentence.

The Legislative Assembly's votes and judges' sentences should not be supplanted by a bureaucracy that can release the offender into the community after a fraction of the sentence is served.

Transparency and Truthfulness

Accountability in our criminal justice system cannot be maintained without transparency and truthfulness comprised of at least the following elements that SB 2128 will address.

- Words have to have commonly understood definitions.
  - Some relevant terms do not have straightforward meanings now. For example:
    - According to DOCR, their published "recidivism" rates only include offenders who were released from DOCR and are returned to DOCR. The recidivism rates do not include offenders who were released from DOCR and then were sentenced to county jails, federal prison, or other states' jails or prisons. The true recidivism rate is therefore higher than what is published.
    - You may have heard that offenders already serve on average, 70-, 80-, or 85 percent of their sentences. However, as calculated by DOCR,

"time served" includes time spent in transitional facilities where offenders have daily check-in/check-out privileges so they can be out and about in the community, as well as inflated calculations of "good time" (as discussed in my testimony for Section 5 of the bill).

- Outcomes have to be clear, objectively measured, and meaningful.
    - For example, there do not seem to be objective, documented statistics showing that the last several years of the "Norway model" have significantly reduced crime, reduced true recidivism, reduced the number of offenders in prison, or reduced assaults on corrections officers.

- Data and statistics have to be easily available and based on fully described methodologies. For example:
    - Crimes committed by offenders on work release or other release programs should be thoroughly documented, and statistics on these crimes should be readily available, especially to legislators and law enforcement personnel.
    - The rate at which DOCR inmates are prosecuted and sentenced for new crimes after release – regardless of whether they are sentenced to DOCR, county jails, federal prison, or other states' prisons – should be documented and readily available.
    - The public should be made aware every time an offender "walks away" or absconds from a transitional facility.

- The cost of crimes committed by offenders in DOCR custody and crimes committed by offenders released from DOCR custody – including the costs to apprehend, charge, prosecute, try, reprocess, and rehouse the offenders – should be calculated to determine the true financial costs of the current system.

Thank you for your time today. The Attorney General's Office is always available to discuss these issues and provide additional information, and we urge you to vote for a "DO PASS" on Senate Bill 2128. With that, I'd be happy to answer your questions.