

2023 HOUSE JUDICIARY

HB 1492

2023 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Room JW327B, State Capitol

HB 1492
2/1/2023

Relating to defining mental injury for the crime of child abuse; and to provide a penalty

Chairman Klemin opened the hearing on HB 1492 at 9:32 AM.

Members present: Chairman Klemin, Vice Chairman Karls, Rep. Bahl, Rep. Christensen, Rep. Cory, Rep. Henderson, Rep. S. Olson, Rep. Rios, Rep. S. Roers Jones, Rep. Satrom, Rep. Schneider, Rep. VanWinkle, Rep. Vetter

Discussion Topics:

- Mental injury definition
- Amendment to clarify existing law
- Mental injury with measurable impact
- Child abuse to include mental injury

Representative Ista: Introduced the bill. Testimony #18328, Proposed amendment 23.0344.01002, #18329, #18330

Stephenie Davis, Ward County Assistant State's Attorney testified in favor of HB 1492, testimony #18230.

Seth O'Neill, CAWS ND, testified in favor of HB 1492, testimony #18209, #18208.

Jonathan Byers, ND Attorney General's Office, spoke in favor of HB 1492.

Paula Schwab, Licensed Foster Care provider, testified in favor of HB 1492, testimony #18514.

Jesse Walstad, ND Association of Criminal Defense Lawyers testified in opposition to HB 1492, testimony #18367.

Travis Finck, Executive Director, NDCLCI gave neutral testimony #18286.

Additional written testimony:

Jackson Lofgren, District 35 resident: Testimony #18365

Roza Larson, President, ND State's Attorney's Association: Testimony #17931

Susan Spivey, Licensed Clinical Social Worker at Lip, Carlson, Winucki & Association: Testimony #18307

Laura Frisch, CVIC, Grand Forks, ND. Testimony #18337

House Judiciary Committee

HB 1492

02/01/2023

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Hearing closed at 10:47 AM.

Delores Shimek, Committee Clerk

2023 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Room JW327B, State Capitol

HB 1492
2/1/2023

Relating to defining mental injury for the crime of child abuse; and to provide a penalty

Chairman Klemin opened the meeting on HB 1492 at 2:52 PM.

Members present: Chairman Klemin, Vice Chairman Karls, Rep. Bahl, Rep. Christensen, Rep. Cory, Rep. Henderson, Rep. S. Olson, Rep. Rios, Rep. S. Roers Jones, Rep. Satrom, Rep. Schneider, Rep. VanWinkle, Rep. Vetter

Discussion Topics:

- Appoint subcommittee

Chairman Klemin appointed a subcommittee to work on an amendment.

Members of the subcommittee: Rep. Shannon Roers Jones, Chair, Rep. Satrom, Rep. Schneider.

Meeting closed at 2:54 PM.

Delores Shimek, Committee Clerk

2023 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Room JW327B, State Capitol

HB 1492
2/6/2023
Subcommittee

Relating to defining mental injury for the crime of child abuse; and to provide a penalty

Rep. Shannon Roers Jones, Chairman opened the subcommittee hearing on HB 1492 at 9:00 AM. Members present: Representative. Shannon Roers Jones, Rep. Satrom and Rep. Schneider

Discussion Topics:

- Proposed amendment
- Defining mental injury
- Domestic violence and mental injury

Representative Ista: Introduced the proposed amendment. Testimony #19260

Representative Shannon Roers Jones, sought clarification on definitions.

Representative Satrom suggested to delete the second sentence.

Representative Schneider moved to amend proposed amendment.

Representative Satrom seconded.

Voice vote, motion carries.

Representative Schneider moved to bring the proposed amendment to full committee.

Representative Satrom seconded.

Voice vote, motion carries.

Meeting closed at 9:15 AM.

Delores Shimek, Committee Clerk

2023 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Room JW327B, State Capitol

HB 1492
2/6/2023

Relating to defining mental injury for the crime of child abuse; and to provide a penalty

Chairman Klemin opened the hearing on HB 1492 at 11:38 AM.

Members present: Chairman Klemin, Vice Chairman Karls, Rep. Bahl, Rep. Christensen, Rep. Cory, Rep. Henderson, Rep. S. Olson, Rep. Rios, Rep. S. Roers Jones, Rep. Satrom, Rep. Schneider, Rep. VanWinkle, Rep. Vetter

Discussion Topics:

- Mental injury definition.
- Subcommittee recommendations

Rep. Shannon Roers Jones: Reported to the committee the subcommittee decision. Testimony # 19260.

Rep. Shannon Roers Jones moved a verbal amendment on page 1, striking the underlined sentences 12-16, and add the definition of a mental injury.

Seconded by Rep. Satrom.

Roll call vote:

Representatives	Vote
Representative Lawrence R. Klemin	Y
Representative Karen Karls	Y
Representative Landon Bahl	N
Representative Cole Christensen	Y
Representative Claire Cory	Y
Representative Donna Henderson	Y
Representative SuAnn Olson	Y
Representative Nico Rios	N
Representative Shannon Roers Jones	Y
Representative Bernie Satrom	Y
Representative Mary Schneider	Y
Representative Lori VanWinkle	Y
Representative Steve Vetter	Y

Motion carries 11-2-0.

Rep. Shannon Roers Jones moved a do pass as amended.

Seconded by Rep. Satrom.

Roll call vote:

Representatives	Vote
Representative Lawrence R. Klemin	Y
Representative Karen Karls	Y
Representative Landon Bahl	N
Representative Cole Christensen	N
Representative Claire Cory	Y
Representative Donna Henderson	N
Representative SuAnn Olson	Y
Representative Nico Rios	N
Representative Shannon Roers Jones	Y
Representative Bernie Satrom	Y
Representative Mary Schneider	Y
Representative Lori VanWinkle	N
Representative Steve Vetter	N

Motion carries 7-6-0. Representative Roers Jones will carry HB 1492.

Meeting closed at 11:59 AM.

Delores Shimek, Committee Clerk

February 6, 2023

JA 2-6-23

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1492

Page 1, line 12, remove "injury to"

Page 1, remove lines 13 through 15

Page 1, line 16, replace "includes witnessing an act of domestic violence as defined in section 14-07.1-01" with "observable and substantial, nontransitory impairment to a child's mental or psychological ability to function within a normal range of performance or behavior"

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1492: Judiciary Committee (Rep. Klemin, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 6 NAYS, 0 ABSENT AND NOT VOTING). HB 1492 was placed on the Sixth order on the calendar.

Page 1, line 12, remove "injury to"

Page 1, remove lines 13 through 15

Page 1, line 16, replace "includes witnessing an act of domestic violence as defined in section 14-07.1-01" with "observable and substantial, nontransitory impairment to a child's mental or psychological ability to function within a normal range of performance or behavior"

Renumber accordingly

2023 SENATE JUDICIARY

HB 1492

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1492
3/14/2023

A bill relating to defining mental injury for the crime of child abuse; and to provide a penalty.

2:39 AM Chairman Larson opened the meeting.

Chairman Larson and Senators Myrdal, Luick, Sickler, Estenson, Paulson and Braunberger were present.

Discussion Topics:

- Abuse cycle
- Sexual assaults
- Trauma

2:40 PM Seth O'Neil, CAWS North Dakota, testified in favor of the bill. #24436, #24437

2:59 PM Stephanie Davis, Assistant State's Attorney, Ward County, testified in favor of the bill. #24874

3:04 PM Representative Zachary Ista introduced the bill and provided written testimony #24467.

3:24 PM Travis Finck, Executive Director, North Dakota Commission on Legal Counsel for Indigents, spoke in favor of the bill.

3:36 PM Jonathan Beyers, Lobbyist, North Dakota State's Attorney's Association, spoke in favor of the bill.

3:37 PM Greg Kasowski, Executive Director, Children's Advocacy Centers, testified in favor of the bill and provided written testimony. #24912

3:38 PM Chairman Larson closed the public meeting.

3:38 PM Chairman Larson closed the meeting.

Rick Schuchard, Committee Clerk

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1492
3/15/2023

A bill relating to defining mental injury for the crime of child abuse; and to provide a penalty.

8:39 AM Chairman Larson opened the meeting.

Chairman Larson and Senators Myrdal, Luick, Estensen, Sickler, Paulson and Braunberger are present.

Discussion Topics:

- Committee action

8:40 AM Senator Sickler moved to Do Pass the bill. Motion seconded by Senator Braunberger.

8:40 AM Roll call vote was taken.

Senators	Vote
Senator Diane Larson	Y
Senator Bob Paulson	Y
Senator Jonathan Sickler	Y
Senator Ryan Braunberger	Y
Senator Judy Estenson	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Motion passes 7-0-0.

Senator Larson will carry the bill.

This bill does not affect workforce development.

8:44 AM Chairman Larson closed the meeting.

Rick Schuchard, Committee Clerk

REPORT OF STANDING COMMITTEE

HB 1492, as engrossed: Judiciary Committee (Sen. Larson, Chairman) recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1492 was placed on the Fourteenth order on the calendar. This bill does not affect workforce development.

TESTIMONY

HB 1492

North Dakota State's Attorneys' Association

January 28, 2023

To: Judiciary Committee
Hon. Chairman Klemin
Hon. Vice-Chair Karls
Members of the Committee

RE: House Bill No. 1492

Chairman Klemin, Vice-Chair Karls, and Members of the Judiciary:

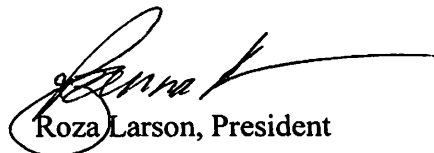
The North Dakota State's Attorneys' Association (NDSAA) is submitting this letter in **SUPPORT** of House Bill 1492 and to strongly urge you to issue a **DO PASS** on this bill.

For too long, our state has failed to address the devastating impacts on children who witness domestic violence. According to childwelfare.gov, children who witness domestic violence suffer long-term impacts including, "emotional, mental and social damage that can affect their developmental growth." According to psychologytoday.com, "children witness 68% to 80% of all domestic assaults."

A recent study on the impacts of witnessing domestic violence provides chilling information: "[t]he psychological aftermath of exposure to DV can include fear of harm or abandonment, excessive worry or sadness, guilt, inability to experience empathy or guilt, habitual lying, low frustration tolerance, emotional distancing, poor judgment, shame, and fear about the future. . . Compared with other kids, those who have witnessed DV experience far greater incidence of insomnia, bed wetting, verbal, motor, and cognitive issues, learning difficulties, self-harm, aggressive and antisocial behaviors, depression and anxiety, as well as, most troubling, adult domestic violence, with boys often becoming offenders, victims, or both, and girls more likely to become victims (Brown and Bzostek, 2003)."

Redefining our current law to charge batterers with child abuse for committing acts of domestic violence in front of children is one step in the right direction to allow our offices to prosecute these offenders and protect the children of our state. We thank you for your support of this very important issue by issuing a **do pass**.

On behalf of the North Dakota State's Attorneys:


Roza Larson, President


Ashley L. Lies, Executive Director

NORTH DAKOTA

DOMESTIC VIOLENCE FACTS 2021

5,417 *New Victims

were served by **18** CRISIS INTERVENTION CENTERS throughout North Dakota.

OF THOSE CASES:



- **87%** of the victims were **women**.



- **94 women** were **pregnant** at the time they were assaulted.



- **18% of new victims** were people with **disabilities**. Of those, 10% were people with developmental disabilities, 36% had physical disabilities, and 54% were people with mental health disabilities.



- At least **3,895 children** were directly impacted by these incidents.



- At least **18%** of the victims were **under the age of 25**; 4% were under the age of 18.

*new = unduplicated for calendar year

A CLOSER LOOK

At least **66%** of victims served were physically abused.

Weapons were used in at least **13%** of the cases identified. Guns were used in **18%** of the cases and knives were used in **16%** of the cases involving weapons.

In at least **39%** of cases, the abuser had a history of abusive behavior with other adults including prior partners.

Alcohol use by abuser only was indicated in **28%** of the new cases. Alcohol use by both victim and offender was indicated in **5%** of the cases.



ADVOCACY

31% of the victims were self-referred to domestic violence programs; **22%** were referred by law enforcement.

Domestic violence programs provided victim assistance with **450** emergency protection orders.



March 2022. Domestic Violence Statistics are compiled by CAWS North Dakota for the State Health Department. CAWS North Dakota 521 E Main Ave, Suite 320, Bismarck, ND, 58501 | 701.255.6240 | www.cawsnorthdakota.org



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House Bill No. 1492
House Judiciary Committee
Testimony Presented by Seth O'Neill, JD, MSW
Email: soneill@cawsnorthdakota.org
February 1, 2023

Chairman Klemin and members of the Committee, my name is Seth O'Neill and I am representing CAWS North Dakota in support of HB 1492.

In 2021, our member programs served 5,417 new victims of domestic violence. As a result of this, at least 3,895 children were directly impacted by these incidents.

HB1492 would provide a definition for mental injury in the child abuse statute. This definition would provide clear guidance to the courts and attorneys on what constitutes mental injury for the purposes of child abuse. Notably, the definition includes witnessing domestic violence. From our work, we know that children who witness domestic violence experience negative emotional and behavioral impacts in large numbers. Adding this definition would provide a means to hold domestic violence offenders accountable who commit child abuse through mental injury of a child.

One concern we have with the bill is theoretically a victim of domestic violence could be charged with child abuse for "allowing" their child to be exposed to domestic violence. This is clearly not the intent of the legislation but I simply making the committee aware of a potential unintended consequence for you to consider and possible methods to address it.

Overall, we encourage the committee to give HB1492 a do pass recommendation. I appreciate your time and I am happy to answer any questions you may have. Thank you.

Office of State's Attorney

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ASSISTANT STATE'S ATTORNEYS
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February 1, 2023

House Judiciary Committee

Re: Proposed House Bill 1492

Good morning Chairman Klemin & Members of the Committee,

My name is Stephenie Davis, I serve as a Ward County Assistant State's Attorney. Over the ten years I have been an attorney, I have handled far too many cases involving domestic violence where children are unrecognized. House Bill 1492 provides prosecutors with another tool in protecting the vulnerable by defining mental injury in the context of child abuse.

I want to share one heartrending story that exemplifies the importance of this bill. I had a young family ripped apart by domestic violence. The parents fought frequently, both physically and verbally, in front of their 2 year old daughter a beautiful child I nicknamed Dora. The night law enforcement, social services, and my office became involved mom and dad were once again fighting. Dora was lying between them on their bed when it got physical. Mom, who was very pregnant at the time, stabbed dad and she had marks where he punched her. Thankfully, the baby and Dora were miraculously uninjured. Both parents were ultimately arrested for domestic violence and Dora was taken into care.

Before social services arrived to take custody of Dora, one of the deputies tried to interact with her. He described Dora as almost feral in her behavior. She literally pulled up her dress, squatted in the middle of the living room floor and urinated. The deputy, who was a father to children around the same age was aghast at this. He was furious at the trauma Dora suffered. But Dora showed no physical signs of abuse. She was fed, clean, and clothed. Her parents may have been physically abusive to each other but it is clear they were not physically abusive to her.

Fast forward a few months, Dora was still in foster care, but her new sibling was in the care of her biological parents. The foster family Dora was staying with have two older children. One day her

foster brother and foster father were wrestling around, what you and I would consider normal horseplay. Dora became hysterically, screaming “no fight, no fight” and crying uncontrollably. Her foster father and foster brother immediately stopped the rough housing and the family rushed to assure Dora no one was being hurt, even with those reassurances, she was inconsolable. At the age of two it was clear Dora suffered the very type of mental injury House Bill 1492 addresses. Dora’s story has a happy ending – her foster family became her forever family. My last update is that she was a well-adjusted 5 year old who was adored by her older siblings and was blossoming in school. Thankfully, her trauma was experienced while she was very young and she could recover without many of the hurdles older children struggle with. I do not know what happened with Dora’s younger sibling and I wonder if I had been able to charge the biological parents with child abuse could social services have immediately take her into custody? Instead was another child be exposed to a domestic dispute between these parents?.

I have had other cases where the outcome has ultimately not been positive. Too often, when the only recognized victim is the person who suffered physically, domestic violence cases become practically impossible to prosecute when the party does not want to hold the abuser accountable. The physical victim ultimately allows the children to also continue to be victimized. This bill gives prosecutors a tool to hold the abuser accountable. When children experience mental and emotional abuse caused by domestic violence, begin to suffer and it shows in their behavior, school work, sleep patterns, physical health and in a myriad of other ways.

I dealt with one family constantly in upheaval. The father would drink, become verbally abusive, and sometimes violent toward his wife. They had four sons living in the house, three minors and one barely 18. The last domestic I dealt with on him got even uglier than normal. Not just fists and words were thrown, but also a knife. The boys were terrified. The oldest called 911 and reported his mom was in danger and if his step-dad knew he was on the phone, he would be too. All the kids were present in the house when the events unfolded, they all heard the fight. The two youngest did not see anything, the older two saw the knife being thrown. I charged terrorizing against the father for the immediate fear he placed his wife and the two oldest boys in. I charged child abuse against him for the mental trauma caused to all three of the minor boys. Between when I charged out the case and the preliminary hearing, mom wanted all the charges dropped and the North Dakota Supreme Court handed down the decision in Castleman. I had to drop the child abuse charges and of course once mom stated she did not want dad charged with terrorizing, both the older boys followed her lead. I literally had NOTHING of consequence I could charge him with. This bill rectifies this situation because this was a family where there was a lengthy record of how the boys were being impacted by

the domestic violence. It was evident in how the youngest suffered separation anxiety, his next youngest brother was unable to cope with stress without getting overly emotional and in the flat effect of their older brother and his emotional detachment. Their oldest sibling was determined to never drink, moved out of the house and stopped talking with the family after mom wanted to drop the charges.

These are just two of thousands of cases prosecutors across this state deal with every day. We are in the trenches and see the child abuse happening and are currently helpless to be a voice for these victims. The loophole created by the Castleman decision has emboldened that defendant. He continues to cause trauma to his minor children because he knows there is currently nothing the State can do to hold him accountable for his behavior.

Please members of the committee, I implore you give House Bill 1492 a favorable recommendation of DO PASS. It will give the prosecutors of this state a clear definition of mental injury as it relates to child abuse. This will allow us to better protect some of the most vulnerable members of society. Thank you for your time.

HB 1492
68th Legislative Assembly
House Judiciary Committee
February 1, 2023
Testimony of Travis W. Finck, Executive Director, NDCLCI

Chairman Klemin, Vice Chair Karls, my name is Travis Finck and I am the Executive Director for the North Dakota Commission on Legal Counsel for Indigents. The Commission is the state agency responsible for delivery of public defense services in North Dakota. The Commission wishes to provide the following neutral testimony.

HB 1492 is in response to the North Dakota Supreme Court decision in *State v. Castleman*. In *Castleman*, the court reviewed what constitutes a mental injury for purposes of child abuse and neglect. *Castleman* provides ““mental injury” as used in § 14-09-22(1) requires mental suffering and trauma that has some lasting, nontransitory effect. This may be shown by evidence of a medical diagnosis, counseling, behavioral changes, or other lasting effects of psychological, emotional, or other mental trauma. Without a clear statutory expression of intent to criminalize willfully causing a child to feel fear, to cry, or to suffer other temporary mental discomfort that might conceivably fall within mental or emotional harm, we cannot conclude that the plain meaning of mental injury sweeps so broadly.” *State v. Castleman*, 2022 ND 7, ¶ 16. Thus, clarification in statute requiring evidence of “observable or substantial impairment in the child’s ability to function within a normal range of performance and behavior with due regard to the child’s culture” is an appropriate definition in code of mental injury.

While the Commission supports HB 1492 in its definition of observable and substantial, the Commission has concerns regarding the inclusion of witnessing acts of domestic violence. This provision could serve to springboard all acts of domestic violence, currently misdemeanor offenses, to Class C or Class B or even Class A felonies.

Chairman Klemin, members of the House Judiciary, I stand for any questions.

Respectfully Submitted:



Travis W. Finck
Executive Director, NDCLCI

House Bill No. 1492**House Judiciary Committee****Testimony Presented by Susan Spivey, MSW, LCSW, ACFI****Email: Susan@rrcac.com****January 29, 2023**

Chairman Klemin and members of the committee, my name is Susan Spivey. I am a Licensed Clinical Social Worker at Lipp, Carlson, Witucki, & Associates. Lipp, Carlson, Witucki, & Associates is a Private Mental Health Practice in Grand Forks, ND. I have worked there for the past 5 years. I am also an Advanced Child Forensic Interviewer for the Red River Children's Advocacy Center. The Red River Children's Advocacy Center is a Non-Profit Agency, which provides Forensic Interviews, Medical Exams, and Mental Health Services for children that have been victims of physical and sexual abuse, neglect, and/or have witnessed violence. I have worked as a Child Forensic Interviewer, for the past 8 years. Child Advocacy Center are located, throughout the United States. I have worked as a Licensed Clinical Social worker, for the past 25 years. They have all been in the State of North Dakota. I have held a variety of other positions working with children that have suffered abuse/neglect and have been exposed to violence, throughout my career.

I am writing in support of HB 1492, which would define and clarify the term "mental injury", as it relates to cases involving child abuse, including children witnessing domestic violence. This bill would require there to be evidence of a "substantial, lasting, and measureable" negative impact, on a child. This bill would clarify the definition, in order that all parties be better able to identify the proper course of action. It is important to distinguish incidents, where a child may have short-lived impact versus ongoing, substantial difficulties. It is important that there is a distinction between a one-time incident, where a parent loses control and may need extra support/services versus those incidents, which cause lasting, measureable, and substantial affects. It is imperative that domestic violence offenders be

held accountable when their actions causes children to suffer ongoing affects, which can and often do, result in mental and medical health issues, and behavioral issues. This bill will make it more likely for this to happen. It will also protect parents and other adults whom may occasionally yell or lose their temper, from being criminally charged versus getting resources/support to improve their behavior. This is important, as children largely prefer to remain with their loved ones and it is in their best interest, if the parent/adult are able to correct their behavior when they haven't caused substantial, lasting, and measureable damage to the children.

For the above reasons, I would encourage you to increase the likelihood for justice for abused children and the likelihood that domestic violence offenders be held accountable, by giving HB 1492 a do pass recommendation.

Sincerely,
Susan A. Spivey

1407 24th Ave. S.

Grand Forks, ND 58201

701-739-3510



North Dakota House of Representatives

STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360



Representative Zachary Ista

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3850 15th Avenue South
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zmista@ndlegis.gov

COMMITTEES:
Finance and Taxation
Energy and Natural Resources

February 1, 2023

Mr. Chairman and Members of the Judiciary Committee:

For the record, Zac Ista from District 43, Grand Forks.

HB 1492 addresses an omission in North Dakota's existing laws protecting children from abuse by defining the currently undefined term "mental injury" and making clear that it applies to harm caused by exposing a child to domestic violence. In doing so, the Legislature would better protect victims of child abuse and put citizens on notice as to what exactly constitutes the criminal offense of child abuse.

Since at least 1999, our state's definition of child abuse has included conduct that causes "mental injury." However, we have never separately defined what that term means. Thus, prosecutors are left not knowing how to prove a case alleging child abuse by mental injury, and defendants likewise are left not knowing how to defend against such allegations.

This omission in law reached the North Dakota Supreme Court in the 2022 case of State v. Castleman. There, a defendant was convicted of child abuse after evidence at trial showed that the defendant entered his daughter's bedroom, screamed at the child's mother, held her by the neck, pushed her face into a pillow, and threatened to kill her in a graphic manner. The child was present for all of this domestic violence, and trial testimony showed that the girl felt scared, was shaking, and cried. There was no evidence, however, that the defendant physically harmed his child during this incident. Under these facts, the State charged the defendant with child abuse, alleging that he caused mental injury to his daughter. During deliberations, the jury asked the court to provide a definition of "mental injury," but the court was unable to elaborate on the term. Ultimately, the jury returned a guilty verdict on the offense of child abuse by mental injury.

On appeal, the North Dakota Supreme Court overturned the conviction. In doing so, the Court conducted an extensive analysis of what the term “mental injury” means in § 14-09-22(1) after observing that the term is neither defined nor explained in Century Code. Applying various conventions of statutory construction, the Court ultimately held that the term means “mental suffering that has some lasting, non-transitory effect,” which “may be shown by evidence of a medical diagnosis, behavioral changes, or other lasting effect of psychological, emotional, or mental trauma.” The Court rejected what it characterized as a more sweeping definition that could include only “temporary mental discomfort.” Applying this newly adopted definition to the record before it, the Court concluded that the evidence at trial was insufficient to support a conviction. In her concurrence, Justice McEvers, joined by Justice VandeWalle, further noted that children’s exposure to domestic violence can often lead to long-term detrimental mental health effects. Though she concurred that none of those effects were documented during trial, she did invite the Legislature to consider including exposure of a child to domestic violence to our existing definition of child abuse by mental injury.

HB 1492 takes up Justice McEvers’s suggestion while also filling the statutory gap the Court highlighted in Castleman. In doing so, I believe we better assert our legislative prerogative to write the laws, leaving our courts to interpret and apply them rather than having to create their own definitions where we provide none.

Including mental injuries as one type of child abuse certainly is not unique to North Dakota, and many other states—including Florida, Alaska, Idaho, Minnesota, Iowa, Maryland, Missouri, Nevada, and Pennsylvania—already define what constitutes “mental injury” in their state codes. While none of those definitions is exactly the same, they do have some common elements. First, like the Court held in Castleman, they require some sort of sustained adverse impact on the child’s mental well-being. Second, they generally require the mental injury to have a substantial or serious impact on the child. Third, they require evidence that the mental injury has caused the child to function at a level below that which would otherwise be expected in terms of the child’s emotional, behavioral, or psychological performance, *i.e.* a measurable impact. The combination of these elements—a substantial impact of sustained duration and measurable impact—creates a high bar for prosecution under a mental injury theory of child abuse.

As drafted, HB 1492 seeks to emulate these stringent requirements found in other states. The bill does not seek to criminalize behavior that only causes a child brief psychological distress, nor does it seek to turn a parent who occasionally yells at a child or loses their temper in front of their child into a criminal. Rather, it is designed to be used only when misconduct creates a substantial, lasting, and measurable negative impact on a child. As such, I expect prosecutors would only be able to rely on this statute in the most egregious of circumstances. But by defining the term “mental injury” in Century Code, we give both the State and potential defendants proper notice of what conduct is and is not criminal. By no means, though, do I claim that the proposed definition before you is a perfect one, and I invite the Committee to review definitions from other states,

which I have included at the end of this testimony, to find the language you believe to be most appropriate for North Dakota. The Committee may also find that it prefers the definition the Court created in Castleman and choose to make that our statutory definition.

No matter where the Committee lands on wordsmithing this definition, I do encourage you to retain exposure to domestic violence as one basis that could give rise to the mental injury prong of child abuse. To that end, I would direct your attention to the proposed amendment (23.0344.01002) I have uploaded that makes clear the intent of including reference to domestic violence exposure here, which is that abuse in the form of exposing a child to domestic violence can cause the requisite mental injury (which still would have to meet the high definitional bar set forth above). I would also emphasize to the Committee that the intention of the bill only is to make the person *committing* the domestic violence criminally liable if he or she exposes a child to that violence. It is not meant to subject the *victim* of that domestic violence to a charge of child abuse if he or she allegedly allows the child to be exposed to the same violence of which he or she is a victim. I am confident that local prosecutors share this view of the proposed change and will exercise their discretion appropriately in not charging a DV victim who himself or herself may not have a realistic option of leaving an abusive situation. But if the Committee feels additional language needs to be added to the bill to make that abundantly clear, I would welcome such an amendment.

The reasons for specifically including exposure to domestic violence in our child abuse criminal statute is because of the devastating effects it can have on children. As Justice McEvers notes in Castleman, “[i]t is not uncommon for children who are raised in violent homes to experience long-term negative emotional, mental or behavioral impacts of domestic violence, even when they are not the target of the abuse.” She goes on to observe that “[c]hildren who witness domestic violence may also demonstrate aggressive behavior, depression, or have cognitive deficiencies, and are at greater risk to develop serious health problems.” Other supportive testimony, including from child advocacy expert Susan Spivey and the North Dakota State’s Attorney’s Association, further describes the harmful impact that exposing a child to domestic violence can have. That’s why, in the limited but appropriate circumstances proposed in this bill, exposure to domestic violence that causes a substantial, sustained, and measurable mental injury to a child should be included within our definition of child abuse. It will give us an additional tool to protect children from the long-term damage that can arise following exposure to domestic violence.

For these reasons, members of the Committee, I urge a DO PASS recommendation for HB 1492 (with the proposed amendment). It does not expand existing criminal law or create any new crime, but rather clarifies a law we’ve had on the books for over two decades. We should assert our legislative prerogative now and clearly define the language we’ve already put into statute. Thank you for your consideration, and I stand for any questions.

Sample “Mental Injury” Definitions from Other States

In Idaho, “mental injury” means “a substantial impairment in the intellectual or psychological ability of a child to function within a normal range of performance and/or behavior, for short or long terms.” (See Idaho St. § 16-1602(30)).

In Maryland, “mental injury” means “the substantial impairment of a minor’s mental or psychological ability to function.” (See Md. § 3-602.1(a)(4)).

In Missouri, “mental injury” is defined as “an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within his or her normal range of performance or behavior.” (See Mo. St. § 568.060(1)(3)).

In Nevada, “mental injury” is defined as “an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within a normal range of performance or behavior.” (See Nev. St. § 432B.070).

In Pennsylvania, “serious mental injury” means “a psychological condition, as diagnosed by physician or licensed psychologist, including the refusal of appropriate treatment, that: (1) renders a child chronically and severely anxious, agitated, depressed, socially withdrawn, psychotic or in reasonable fear that the child’s life or safety is threatened; or (2) seriously interferes with a child’s ability to accomplish age-appropriate developmental and social tasks.” (See 23 Penn. Stat. § 6303).

23.0344.01002

Sixty-eighth
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1492

Introduced by

Representatives Ista, Cory, Mitskog, Mock, O'Brien, Roers Jones, M. Ruby, Schauer,
Schneider

Senators Hogan, Kreun, Lee

1 A BILL for an Act to amend and reenact section 14-09-22 of the North Dakota Century Code,
2 relating to defining mental injury for the crime of child abuse; and to provide a penalty.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. AMENDMENT.** Section 14-09-22 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **14-09-22. Abuse of child - Mandatory sentence - Penalty.**

7 1. Except as provided in subsection 2 or 3, a parent, adult family or household member,
8 guardian, or other custodian of any child, who willfully inflicts or allows to be inflicted
9 upon the child mental injury or bodily injury, substantial bodily injury, or serious bodily
10 injury as defined by section 12.1-01-04 is guilty of a class C felony except if the victim
11 of an offense under this section is under the age of six years in which case the offense
12 is a class B felony. For purposes of this subsection, "mental injury" means an injury to
13 the psychological capacity or emotional stability of a child as evidenced by an
14 observable or substantial impairment in the child's ability to function within a normal
15 range of performance and behavior with due regard to the child's culture. The term
16 includes a mental injury caused by witnessing an act of domestic violence as defined
17 in section 14-07.1-01.

18 2. A person who provides care, supervision, education, or guidance for a child
19 unaccompanied by the child's parent, adult family or household member, guardian, or
20 custodian in exchange for money, goods, or other services and who while providing
21 such services commits an offense under this section is guilty of a class B felony. Any
22 such person who commits, allows to be committed, or conspires to commit, against

1 the child, a sex offense as defined in chapter 12.1-20 is subject to the penalties
2 provided in that chapter.

3 3. A person who commits an offense under this section is guilty of a class B felony if the
4 victim suffers permanent loss or impairment of the function of a bodily member or
5 organ, except if the victim of the offense is under the age of six years in which case
6 the offense is a class A felony.

7 4. A person who has pled guilty or nolo contendere to, or has been found guilty of an
8 offense under this section must be sentenced to a minimum of one year imprisonment.

9 5. For any person who pleads guilty or is convicted of an offense under this section, the
10 court shall include in the sentence an order for the person to complete a parental
11 capacity evaluation, mental health evaluation, and anger management assessment,
12 and to complete treatment recommendations as ordered by the court as a condition of
13 probation.

23.0344.01002
Title.

Prepared by the Legislative Council staff for
Representative Ista
January 25, 2023

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1492

Page 1, line 16, after "includes" insert "a mental injury caused by"

Renumber accordingly

Chairman Klemin and members of the House Judiciary Committee,
My name is Laura Frisch and I serve on the senior leadership team of the Community Violence Intervention Center (CVIC) in Grand Forks, ND, a dual domestic violence and sexual assault agency. I am testifying in support of HB 1492, which would add a definition of mental injury in North Dakota's child abuse statute and would include in that definition when children are exposed to domestic violence.

As a practicing social worker, I have received training on mandated reporting of child abuse, including situations in which a child witnesses or otherwise experiences domestic violence. HB 1492 would affirm that children exposed to domestic violence does cause mental injury and would provide a criminal penalty as well.

Children exposed to domestic violence experience significant effects, both short term and long term. According to the National Child Traumatic Stress Network, a collaboration funded by the Center for Mental Health Services (CMHS), Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services and jointly coordinated by UCLA and Duke University, short term effects of children exposed to domestic violence includes:

- Generalized anxiety
- Sleeplessness
- Nightmares
- Difficulty concentrating
- High activity levels
- Increased aggression
- Increased anxiety about being separated from a parent
- Intense worry about their safety or the safety of a parent

Long-term effects, especially when repeatedly exposed to violence include:

- Physical health problems
- Behavior problems in adolescence (e.g., delinquency, alcohol or substance abuse)
- Emotional difficulties in adulthood (e.g., depression, anxiety, PTSD)

Exposure to domestic violence has also been linked to poor school performance, impaired ability to concentrate, difficulty completing homework, and lower scores on verbal, motor, and social skills.

Equally important in mitigating the effects of exposure to domestic violence is the role of the non-abusive, protective parent. HB 1492 should not be used to charge the protective parent for "allowing" a child to be exposed to domestic violence, but instead should be used to hold the offender of domestic violence accountable. With this concern noted, I ask the committee for a Do Pass recommendation.

Respectfully submitted,

Laura Frisch

January 31, 2023
Testimony to the **House Judiciary Committee**
By Jackson J. Lofgren
Testimony in Opposition to H.B. 1492

Chairman Klemin and Members of the House Judiciary Committee:

My name is Jackson Lofgren and I reside in District 35. I have had the pleasure of practicing law in North Dakota for sixteen years. The first seven years of my career were spent working as a Special Assistant Attorney General and Assistant Morton County State's Attorney. For the last nine years I have been in private practice in Bismarck. My law practice is focused almost entirely on criminal defense. I am a past president of the North Dakota Association of Criminal Defense Lawyers and the State Bar Association's representative to the Commission on Legal Counsel for Indigents. **I personally oppose H.B. 1492 as it is currently written.**

I agree with creating a statutory definition of mental injury. Some prosecutors in North Dakota have taken advantage of the fact there is not a definition of mental injury to charge parents with child abuse in cases where children are "sad" or "depressed." A few years ago, I was involved in a case where my client and her husband were charged with child abuse based on mental injury. The allegations against them included making the husband's son put soap in his mouth when he swore, posting a video of the son sleeping in church online, and not allowing the son to dye his hair purple. This made the son sad. As a result, my client and her husband were charged with child abuse and spent the weekend in jail. Ultimately, a District Judge dismissed the charges but it does not undo the fact two decent people were arrested and charged with felonies for being responsible parents. There needs to be a definition of mental injury to prevent this type of abuse of power.

But, I have strong objections to the last sentence of the proposed changes that makes witnessing domestic violence automatically "mental injury." Firstly, in North Dakota our definition of "domestic violence" is far broader than what most people think of when they hear the term. It includes crimes committed against in-laws, cousins, aunts, uncles, roommates, ex-roommates, and people that have lived together at any point. See N.D.C.C. §14-07.1-01(4). Additionally, all that is required for the commission of domestic violence in North Dakota is evidence of "pain."

A few years ago I represented a woman who got into an argument with her husband because she believed she was pregnant. They argued and she ultimately threw a tennis shoe across the room which hit him in the chest. It did not cause any visible injury but because it caused "pain" she was arrested, spent the weekend in jail, and was charged with domestic violence. In a similar case, I represented a young woman who got upset when the father of her infant child wanted to leave the house drunk at midnight to party with his friends. She threw his car keys at him and he was struck by the keys. She was arrested and pled guilty to domestic violence before retaining my services. Are these the situations we want to make into class B felonies with a mandatory year in prison? If

this bill passes that will happen. These cases often occur during heated divorce/custody battles when parents unfortunately will do whatever it takes to gain the upper hand. The proverb “all is fair in love and war” has persisted because there is much truth to it.

For these reasons I urge you to vote **DO NOT PASS** on House Bill **H.B. 1492** with the current language regarding domestic violence.

Thank You,

Jackson J. Lofgren

Jackson J. Lofgren

January 31, 2023

Testimony to the **House Judiciary Committee**

Submitted By: Jesse Walstad on behalf of the ND Association of Criminal Defense Lawyers

Testimony **in Support of H.B. 1492**

Chairmen and Members of the House Judiciary Committee:

My name is Jesse Walstad and I represent the ND Association of Criminal Defense Lawyers. The NDACDL is made up of lawyers throughout our state who dedicate a portion of their practice to criminal defense. The mission of the NDACDL is “to promote justice and due process” and to “promote the proper and fair administration of criminal justice within the State of North Dakota.” With that mission in mind, the NDACDL **opposes H.B. 1492** in its current form, and recommends a **DO NOT PASS** from the House Judiciary Committee.

I strongly agree the legislature must supply a statutory definition for the term “mental injury” in this context. The dire need for clarity is demonstrated in the 2022 North Dakota Supreme Court case *State v. Castleman*, 2022 ND 7, 969 N.W.2d 169. There, the North Dakota Supreme Court noted the statute in its current form provides no definition for mental injury in the context of child abuse cases. When conducting its statutory interpretation analysis the Court noted, “the term ‘mental injury’ is not a term in common use or for which dictionaries provide definitions consistent with common understanding.” *Id.* at ¶ 12. In the absence of a statutory definition, a common use definition, or a reasonable understanding of the term derived from the statute as a whole, the jury was left to speculate on its meaning based on their own differing experiences. The resulting ambiguity also fails to put our citizens on notice of the conduct that may constitute child abuse for “mental injury.” Accordingly, the NCACDL supports a clear statutory definition of “mental injury” that conforms with and clarifies the Supreme Court’s conclusion in *Castleman*, “that the ordinary meaning of “mental injury” as used in § 14-09-22(1) requires mental suffering and trauma that has some lasting, non-transitory effect.” *Id.* at ¶ 16.

To be clear, I agree that criminalizing conduct that directly causes what the State’s Attorney’s Association referred to in prior testimony on this bill as “the psychological aftermath of exposure to” domestic violence. However, The NDACDL strongly urges this committee to clearly delineate what is and is not “mental injury.” The NDACDL recommends that this committee reflects on the Court’s analysis in *Castleman*. Chief Justice Jensen, writing for the Court, specifically identified the inherent ambiguity and excessive breadth of the term, pointing out that “[i]f broken up into its component parts, “mental” and “injury,” the combined term conceivably encompasses any harm relating to the mind, whether brief or lasting, and whether mild or severe.” The Court indicates that in the absence of a definition one cannot determine whether “brief crying” may constitute infliction of a mental injury to such an extent that the commission of an action resulting in “brief crying” would be deemed felonious conduct punishable by no less than one year in prison.

So, I agree the term must be defined, and I agree that acts of domestic violence resulting in mental trauma of a lasting non-transitory nature are worthy of criminal punishment. However, the draft language of H.B. 1492 contains problematic ambiguity on its face, and establishes a new collateral felony offense that would attach by a child merely witnessing conduct that could be construed as domestic violence.

First, the ambiguity. The first sentence of the proposed amendment that, ““Mental injury’ means an injury to the psychological capacity or emotional stability of a child as evidenced by an observable or substantial impairment in the child's ability to function within a normal range of performance and behavior with due regard to the child's culture” is taken verbatim from Minn. Stat. Ann. § 260E.03 adopted by the Minnesota legislature in 2020. However, the disjunctive term “observable or substantial” is inherently contradictory and would be unworkable in practice. For instance, we might all agree that a child briefly crying

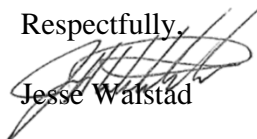
is an observable but fleeting event of harm to a child’s “emotional stability” or “ability to function within a normal range.” However, standing alone, I seriously doubt any of us could resolve our conscience to the notion that a brief incidence of crying could be a “substantial impairment” of a child’s ability to “function within a normal range.” The disjunctive “or” ambiguously requires a jury to substitute substantial harm for that which may merely be “observable.” In doing so, an extremely broad range of “observable” conduct that would not rise to the level of non-transitory injury or psychological trauma would be lumped together with the most heinous of child abuse psychological injury. This is even more concerning once the mandatory minimum sentence is applied. The NCACDL urges amendment removing “observable or” and more closely defining the definition of mental injury to the Supreme Court’s definition of “mental suffering and trauma that has some lasting, non-transitory effect.” See *Castleman*, 2022 ND 7, ¶ 16. Doing so would criminalize conduct resulting in demonstrable injuries deserving of criminal punishment, but eliminate harsh felonious punishment for minor transitory effects such as brief crying or temporary emotional outbursts.

Finally, and most importantly, the NDACDL **strongly urges** the committee to eliminate the last sentence of the proposed definition that reads as follows: “[t]he term includes witnessing an act of domestic violence as defined in section 14-07.1-01.” The reasons to abandon this portion of the proposal are manifest. It essentially renders hollow the workable definition the precedes it because it logically follows that a child who may have suffered mental trauma by virtue of observing acts of domestic violence, has also witnessed those acts in one way or another. Adopting the “witnessing” provision would eliminate the need to prove any injury, only the act of witnessing certain conduct. In doing so, proof of any injury would no longer be necessary to sustain a conviction, only “witnessing” conduct constituting domestic violence. It assumes away all the hard but important facts and will result in felonious punishment of conduct that would otherwise constitute a misdemeanor offense. In *Castleman*, the Supreme Court articulated the mental injury “may be shown by evidence of a medical diagnosis, counseling, behavioral changes, or other lasting effects of psychological, emotional, or other mental trauma.” *Id.*

By way of example, if a child under the age of six witnessed their mother snatch a cellphone from their father’s hand or some other minor altercation resulting in de minimus physical harm or reasonable apprehension, the mother could be charged with a B misdemeanor for the act on the father, and a B felony because the child witnessed it. If convicted the mother would be subjected to a minimum sentence of one year in prison. All this despite the fact that there would be no proof or even an allegation of any mental injury to the child. I submit to you that depriving that child of their parent for one year would cause a far greater mental injury to the child than the mere act of witnessing misdemeanor conduct. I sincerely hope it is not the intent of our elected officials to subject individuals to felony level mandatory prison sentences without proof beyond a reasonable doubt of actual injury. If merely witnessing conduct that could be construed as domestic violence is included within the definition, all the commonsense methods of proof the Supreme Court articulated would be meaningless and some conduct that results in absolutely no injury at all will be criminalized. Said simply, to criminalize the mere witnessing of any domestic violence would produce absurd and unjust results.

As I mentioned, the first sentence of the proposed definition is taken verbatim from the definition Minnesota adopted in 2020. Well, as a lifelong North Dakotan, and a father of three, I think we can do better. It is compelling that Minnesota did not include the “witnessing” language. The NDACDL strongly urges this committee to improve on the definition the Supreme Court supplied in *Castleman*, and the definition Minnesota recently adopted by eliminating the ambiguity in the proposed definition, and by entirely eliminating the constitutionally dubious “witnessing” language which would cause proof of injury to evade judicial review. For the aforementioned reasons, the NDACDL urges a **DO NOT PASS** on H.B. 1492 in its current form.

Respectfully,



Jesse Walstad

House Bill 1492
House Judiciary Committee

Chairman Klemin and members of the Committee, my name is Paula Schwab. I am the adoptive mother of a child with mental injury as the result of abuse and neglect. I am here as a voice for my daughter in support of House Bill 1492.

When my daughter was born, she tested positive for methamphetamine, yet she was sent home with her birth mother. Her birth mother continued to struggle with mental health and substance use issues and was not consistently feeding and caring for her child. There was also domestic violence in the home. At 6 months, she was hospitalized for failure to thrive and severe malnutrition. She was skin and bones and her development was extremely delayed.

I am a licensed foster care provider. When she was released from the hospital, she came to my home. The parental situation never improved and after nearly 3 years, parental rights were terminated, and I adopted her.

Children exposed to methamphetamine in utero are at risk for future problems such as failure to thrive, growth delays, developmental delays or disorders, neurological abnormalities, cognitive impairments, learning disabilities, emotional and stress-related impairments, and motor impairments. Malnutrition is associated with both structural and functional pathology of the brain. A wide range of cognitive effects have been reported in malnourished children. They can struggle with poor growth, attention, working memory, learning memory, and visual ability,

My daughter is now 7 and continues to face several of these challenges. She has a paraprofessional with her throughout the school day. She is on an Individual Education Plan, or IEP and has an altered curriculum. She has physical therapy, occupational therapy and speech therapy every week. Despite all the challenges she faces, she is an amazing little girl and has made great strides.

I have fostered 15 children over the last several years and nearly all of them entered the foster care system due to abuse and or neglect by a parent with substance use issues. Their stories are heartbreaking. Addressing the role substance use plays in many abuse and neglect cases is crucial to the health and wellbeing of so many children. I respectfully ask that you consider an addition to number 5 of this bill to include substance use evaluation.

I appreciate your time and I am happy to answer any questions you may have. Thank you.

Mental injury means an observable and substantial, non-transitory impairment to a child's mental or psychological ability to function within a normal range of performance or behavior. The term includes a mental injury caused by witnessing an act of DV as defined in section 14-07.1-01.



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House Bill No. 1492
Senate Judiciary Committee
Testimony Presented by Seth O'Neill, JD, MSW
Email: soneill@cawsnorthdakota.org
March 14, 2023

Chairwoman Larson and members of the Committee, my name is Seth O'Neill and I am representing CAWS North Dakota in support of HB 1492. In 2021, our member programs served 5,417 new victims of domestic violence. As a result of this, at least 3,895 children were directly impacted by these incidents.

HB1492 would provide a definition for mental injury in the child abuse statute. This definition would provide clear guidance to the courts and attorneys on what constitutes mental injury for the purposes of child abuse. From our work, we know that children who witness domestic violence experience negative emotional and behavioral impacts in large numbers. It is our hope that this definition will allow domestic violence offenders to be prosecuted for child abuse based on a child witnessing domestic violence. This is an important way to ensure the safety of children by holding domestic violence offenders accountable.

One concern we have with the bill is theoretically a victim of domestic violence could be charged with child abuse for "allowing" their child to be exposed to domestic violence. This is clearly not the intent of the legislation but I simply making the committee aware of a potential unintended consequence for you to consider.

Overall, we encourage the committee to give HB1492 a do pass recommendation. I appreciate your time and I am happy to answer any questions you may have. Thank you.

NORTH DAKOTA

DOMESTIC VIOLENCE FACTS 2021

5,417 *New Victims

were served by **18** CRISIS INTERVENTION CENTERS throughout North Dakota.

OF THOSE CASES:



- **87%** of the victims were **women**.



- **94 women** were **pregnant** at the time they were assaulted.



- **18% of new victims** were people with **disabilities**. Of those, 10% were people with developmental disabilities, 36% had physical disabilities, and 54% were people with mental health disabilities.



- At least **3,895 children** were directly impacted by these incidents.



- At least **18%** of the victims were **under the age of 25**; 4% were under the age of 18.

*new = unduplicated for calendar year

A CLOSER LOOK

At least **66%** of victims served were physically abused.

Weapons were used in at least **13%** of the cases identified. Guns were used in **18%** of the cases and knives were used in **16%** of the cases involving weapons.

In at least **39%** of cases, the abuser had a history of abusive behavior with other adults including prior partners.

Alcohol use by abuser only was indicated in **28%** of the new cases. Alcohol use by both victim and offender was indicated in **5%** of the cases.



ADVOCACY

31% of the victims were self-referred to domestic violence programs; **22%** were referred by law enforcement.

Domestic violence programs provided victim assistance with **450** emergency protection orders.



March 2022. Domestic Violence Statistics are compiled by CAWS North Dakota for the State Health Department. CAWS North Dakota 521 E Main Ave, Suite 320, Bismarck, ND, 58501 | 701.255.6240 | www.cawsnorthdakota.org



North Dakota House of Representatives

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Representative Zachary Ista

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COMMITTEES:
Finance and Taxation
Energy and Natural Resources

March 14, 2023

Madam Chair and Members of the Senate Judiciary Committee:

For the record, I am Rep. Zac Ista from District 43 in Grand Forks. HB 1492 addresses an omission in North Dakota's existing laws protecting children from abuse by defining the currently undefined term "mental injury." In doing so, the Legislature would better protect victims of child abuse and more clearly put citizens on notice as to what exactly constitutes the criminal offense of child abuse by mental injury.

At the outset, let me be clear that this bill does not expand existing criminal child abuse law in North Dakota. Rather, our state's definition of child abuse already includes conduct that causes either "mental injury or bodily injury" to a child—and it has since at least 1999 (and will continue to even if this bill were not adopted). While the law provides clear definitions of various types of bodily injuries, we have never separately defined what the term "mental injury" means. Thus, law enforcement officers are left unsure what conduct might give rise to a child abuse by mental injury charge, prosecutors are left not knowing how to prove a case with this allegation, and defendants and their counsel likewise are left not knowing how to defend against such allegations.

This omission in law reached the North Dakota Supreme Court in the 2022 case of State v. Castleman. There, a defendant was convicted of child abuse after evidence at trial showed that the defendant entered his daughter's bedroom, screamed at the child's mother, held her by the neck, pushed her face into a pillow, and threatened to kill her in a graphic manner. The child was present for all of this domestic violence, and trial testimony showed that the girl felt scared, was shaking, and cried. There was no evidence, however, that the defendant physically harmed his child during this incident. Under these facts, the State charged the defendant with child abuse, alleging that he caused mental injury to his daughter. During deliberations, the jury asked the court to provide a definition of "mental injury," but the court was unable to elaborate on the term. Ultimately, the jury returned a guilty verdict on the offense of child abuse by mental injury.

On appeal, the North Dakota Supreme Court overturned the conviction. In doing so, the Court conducted an extensive analysis of what the term “mental injury” means in § 14-09-22(1) after observing that the term is neither defined nor explained in Century Code. Applying various conventions of statutory construction, the Court ultimately held that the term means “mental suffering that has some lasting, non-transitory effect,” which “may be shown by evidence of a medical diagnosis, behavioral changes, or other lasting effect of psychological, emotional, or mental trauma.” The Court rejected what it characterized as a more sweeping definition that could include only “temporary mental discomfort.” Applying this newly adopted definition to the record before it, the Court concluded that the evidence at trial was insufficient to support a conviction.

HB 1492 seeks to fill the statutory gap the Court highlighted in Castleman. In doing so, the bill better asserts our legislative prerogative to write the laws, leaving our courts to interpret and apply them rather than having to create their own definitions where we provide none. Notably, without adopting a legislatively drafted definition, the court-created one from Castleman would remain binding legal precedent.

In preparing this legislation, I learned that including mental injuries as one type of child abuse certainly is not unique to North Dakota, and many other states—including Florida, Alaska, Idaho, Minnesota, Iowa, Maryland, Missouri, Nevada, and Pennsylvania—already define what constitutes “mental injury” in their state codes. While none of those definitions is exactly the same, they do have some common elements. First, like the Court held in Castleman, they require some sort of sustained adverse impact on the child’s mental well-being. Second, they generally require the mental injury to have a substantial or serious impact on the child (rather than the more amorphous “mental suffering” applied in Castleman). Third, they require evidence that the mental injury has caused the child to function at a level below that which would otherwise be expected in terms of the child’s emotional, behavioral, or psychological performance, *i.e.* a measurable impact. The combination of these elements—a substantial impact of sustained duration and measurable impact—creates a high bar for prosecution under a mental injury theory of child abuse.

As passed by the House, HB 1492 contains a definition including each of these three components by requiring the mental injury to be 1) “observable and substantial,” 2) “nontransitory,” and 3) measurable against the “child’s mental or psychological ability to function within a normal range of performance or behavior.” This definition is the result of careful work by a House subcommittee after defense attorneys and I worked together to address concerns they had with the original language of the bill. I believe the definition in the engrossed bill now before you satisfies their concerns while maintaining my original intent in bringing this legislation.

To that end, I do want to briefly touch on one aspect of the original bill that is no longer included in the engrossed version: a specific reference to exposing child to domestic violence as one basis that could give rise to the mental injury prong of child abuse. The reason I specifically included exposure to domestic violence in my

initial bill draft is because of the devastating effects it can have on children. In her concurrence in Castleman, Justice McEvers, joined by then-Justice VandeWalle, noted that children's exposure to domestic violence can often lead to long-term detrimental mental health effects. "It is not uncommon for children who are raised in violent homes to experience long-term negative emotional, mental or behavioral impacts of domestic violence, even when they are not the target of the abuse," Justice McEvers wrote, adding that "[c]hildren who witness domestic violence may also demonstrate aggressive behavior, depression, or have cognitive deficiencies, and are at greater risk to develop serious health problems." Others behind me planning to offer supportive testimony of HB 1490 will echo Justice McEvers's sentiments and further describe the harmful impact that exposing a child to domestic violence can have.

Addressing this particular concern was a primary motivation of mine in bringing the bill, and I continue to believe strongly that the mental injuries a child can experience from being exposed to domestic violence are among the most serious examples of this form of child abuse. That's why, in the limited but appropriate circumstances proposed in this bill, exposure to domestic violence that causes "an observable and substantial, nontransitory impairment to a child's mental or psychological ability to function within a normal range of performance or behavior" could still form the basis of a "mental injury" charge of child abuse if the State can so prove beyond a reasonable doubt. This will give law enforcement and courts an additional tool to protect children from the long-term damage that can arise following exposure to domestic violence.

So why, then, not specifically include reference to exposure to DV in this section of Century Code? As Mr. Travis Finck of the North Dakota Commission on Legal Counsel for Indigents noted during subcommittee work on the bill, there is no functional legal reason to list all possible types of conduct that could give rise to a mental injury charge. While exposure to domestic violence is one important possible basis, there surely are others that also could meet the strictures of the proposed definition. Setting forth a definition like the one proposed gives law enforcement and prosecutors a standard by which to view the facts of any particular case to determine if the evidence supports bringing a charge. Just as importantly, it gives prospective defendants and their counsel a clear definition by which to assess the availability of potential defenses against criminal liability. Ultimately, it will be up to judges to apply the facts of each case to the proposed law in this bill to determine whether a crime has been committed—a task that our judges already do on a daily basis.

For these reasons, members of the Committee, I urge a **do pass** recommendation for HB 1492. It does not expand existing criminal law or create any new crime, but rather clarifies a law we have had on the books for over two decades. We should assert our legislative prerogative now and clearly define the language we already put into statute. Thank you for your consideration, and I stand for any questions.

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March 14, 2023
Senate Judiciary Committee

Re: Proposed House Bill 1492

Good afternoon Chairman Larson & Members of the Committee,

My name is Stephenie Davis, I serve as a Ward County Assistant State's Attorney. Justice McEvers suggested in her concurring opinion in 2022 ND 7, State v. Castleman, "If the legislature wants to protect children from domestic violence, perhaps it should include exposure of the child to domestic violence as part of the definition of child abuse." This opinion is a large part of what prompted the need to bring House Bill 1492 to fruition. However, the bill passed out of the House after excluding the language which specifically stated "The term includes witnessing an act of domestic violence as defined in section 14 - 07.1 - 01." The definition as it now stands fails to address the mental damage children suffer as a result of exposure to domestic violence. The reason this is so important to include is because exposure to domestic violence is the only situation where the child is not the direct, but a collateral victim. Without this specific language, the State is left with the same difficulty in prosecuting cases like Castleman as it previously faced. It should also be noted the inability to prosecute a case where the child has suffered mental injury due to exposure to domestic violence directly conflicts with North Dakota Century Code 27-20.2-01(4)(a), 27-20.3-01(5), and 27-20.3-06 which allows a child to be removed from the custody of a parent or guardian and placed into the custody of the state as a child in need of protection. While these statutes offer the child protection on the civil side, they do not address the criminal. The lack of harmony in the Century Code needs to be

corrected. House Bill 1492 will address this but only by adding back in the language “witnessing an act of domestic violence as defined in section 14-07.1-01.

I want to share one heartrending story that exemplifies the importance of this language being part of the bill. I had a young family ripped apart by domestic violence. The parents fought frequently, both physically and verbally, in front of their 2 year old daughter a beautiful child nicknamed Dora. The night law enforcement, social services, and my office became involved mom and dad were once again fighting. Dora was lying between them on their bed when it got physical. Mom, who was very pregnant at the time, stabbed dad and she had marks where he punched her in the face. Thankfully, the baby and Dora were miraculously uninjured. Both parents were ultimately arrested for domestic violence and Dora was taken into care.

Before social services arrived to take custody of Dora, one of the deputies tried to interact with her. He described Dora as almost feral in her behavior. She literally pulled up her dress, squatted in the middle of the living room floor and urinated. The deputy, who was a father to children around the same age was aghast at this. He was furious at the trauma Dora suffered. But Dora showed no physical signs of abuse. She was fed, clean, and clothed. Her parents may have been physically abusive to each other but it is clear they were not physically abusive to her.

Fast forward a few months, Dora was still in foster care, but her new sibling was in the care of her biological parents. The foster family Dora was staying with have two older children. One day her foster brother and foster father were wrestling around, what you and I would consider normal horseplay. Dora became hysterically, screaming “no fight, no fight” and crying uncontrollably. Her foster father and foster brother immediately stopped the rough housing and the family rushed to assure Dora no one was being hurt, even with those reassurances, she was inconsolable. At the age of two it was clear Dora suffered the very type of mental injury witnessing an act of domestic violence as defined in section 14 - 07.1 – 01 can cause. Dora’s story has a happy ending – her foster family became her forever family. My last update is that she was a well-adjusted 5 year old who was adored by her older siblings and was blossoming in school. Thankfully, her trauma was experienced while she was very young and she could recover without many of the hurdles older children struggle with. I do not know what happened with Dora’s younger sibling and I wonder if I had been able to charge the biological parents with child abuse could social services have immediately take her into custody? Instead was another child be exposed to a domestic dispute between these parents?

I have had other cases where the outcome has ultimately not been positive. Too often, when the only recognized victim is the person who suffered physically, domestic violence cases become practically impossible to prosecute when the party does not want to hold the abuser accountable. The

physical victim ultimately allows the children to also continue to be victimized. Including language about exposure to domestic violence gives prosecutors a tool to hold the abuser accountable. When children experience mental and emotional abuse caused by domestic violence, they suffer and it shows in their behavior, school work, sleep patterns, physical health and in a myriad of other ways.

I dealt with one family constantly in upheaval. The father would drink, become verbally abusive, and sometimes violent toward his wife. They had four sons living in the house, three minors and one barely 18. The last domestic I dealt with against him got even uglier than normal. Not just fists and words were thrown, but also a knife. The boys were terrified. The oldest called 911 and reported his mom was in danger and if his step-dad knew he was on the phone, he would be too. All the kids were present in the house when the events unfolded, they all heard the fight. The two youngest did not see anything, the older two saw the knife being thrown. I charged terrorizing against the father for the immediate fear he placed his wife and the two oldest boys in. I charged child abuse against him for the mental trauma caused to all three of the minor boys. Between when I charged out the case and the preliminary hearing, mom wanted all the charges dropped and the North Dakota Supreme Court handed down the decision in Castleman. I had to drop the child abuse charges and of course once mom stated she did not want dad charged with terrorizing, both the older boys followed her lead. I literally had NOTHING of consequence I could charge him with. The inclusion of the domestic violence language rectifies this situation because this was a family where there was a lengthy record of how the boys were being impacted by the domestic violence. It was evident in how the youngest suffered separation anxiety, his next youngest brother was unable to cope with stress without getting overly emotional and in the flat effect of their older brother and his emotional detachment. Their oldest sibling was determined to never drink, moved out of the house and stopped talking with the family after mom wanted to drop the charges.

These are just two of thousands of cases prosecutors across this state deal with every day. We are in the trenches and see the child abuse happening and are currently helpless to be a voice for these victims. The loophole created by the Castleman decision has emboldened that defendant. He continues to cause trauma to his minor children because he knows there is currently nothing the State can do to hold him accountable for his behavior. I spoke with the mother of the alleged victim in the Castleman case and asked her if she would be willing to testify. Her reply was that as much as she wanted to, because her children are still minors, she thought it best not to. This is because of the fear she lives in that her abuser will continue to inflict harm on her children if she dares to speak out against his actions.

I spoke with Jane Doe who is the ex-wife of the Appellant, Brent Castleman in State v. Castleman, 2022 ND 7. She is the mother of four children with Mr. Castleman. At the time she left him on 2018, her oldest John Doe 1 was 12, John Does 2 was 11, Jane Doe 1 was 9 and her youngest daughter Jane Doe 2 was 4.

There was an incident of domestic violence in 2018 where Jane Doe was being physically abused by her spouse and both her daughters were present. In 2017 the incident which was the basis for the child abuse charge in the above referenced case took place in the bedroom of Jane Does 2 who was 3 at the time. While Jane Doe 2 was not physically harmed, there have been lasting mental and emotional damage to her.

Jane Doe stated she has returned to her abuser after leaving him, going so far as to move away in 213 because she is in fear of her kids being alone with him. He started out abusing her verbally, then it became physical, he would be verbally abusing toward the children and as the boys got older he became physical toward them as well.

In 2007 when John Doe 1 was a toddler and Jane Doe was pregnant with John Doe 2, her abuser struck her in front of her son and gave her a black eye.

The three oldest children have been diagnosed with stress disorders. The two boys specifically PTSD. The youngest, Jane Doe 2 would not sleep alone until she was almost 6. CPS has taken away the abusers unsupervised visits because of his conduct with the kids. He has not had supervised visits since August 2022 because he was suspended from the supervision center due to his continued unwillingness to abide by the rules. Her abuser has refused to go back through orientation.

What is sad is this is intergenerational. The abuser grew up in a household where his father was abusive. This behavior was learned and accepted. Jane Doe was told this was a normal part of marriage when she would try to leave. This story is the reason House Bill 1492 has been sponsored by a bi-partisan group of legislators.

Please members of the committee, I implore you revise House Bill 1492 to include language which defines mental injury to include exposure to domestic violence. With this amendment, I respectfully ask you to give House Bill 1492 a DO PASS. This will allow prosecutors to better protect some of the most vulnerable members of society. Thank you for your time.



**CHILDREN'S
ADVOCACY
CENTERS**
OF NORTH DAKOTA

Senate Judiciary Committee

Testimony in support of House Bill #1492

3-14-23

Madame Chair members of the Committee, my name is Greg Kasowski, and I'm the executive director of the Children's Advocacy Centers of North Dakota. I appear today in support of House Bill 1492.

As you all know, Children's Advocacy Centers function as the centralized hub for child abuse cases. Our partners in law enforcement, human services, prosecution, medical, mental health, and victim advocacy all coordinate together in one place to help victims of child abuse.

This proposed legislation fills a needed gap by defining "mental injury." Having clarity to the definition will better aid our prosecution partners in court cases of victims of child abuse.

Furthermore, our partners in law enforcement and human services will benefit from the definition. With a definition of mental injury, law enforcement and human services are able to better identify a proper course of action in cases of child abuse. It is important to distinguish incidents where a child may have short-lived impact versus ongoing, substantial difficulties.

It will also protect parents and caregivers, who may occasionally yell or lose their temper, from being criminally charged, versus getting resources and support to improve their behavior. Children generally prefer to remain with loved ones, and it is in the best interest of the child to stay if the caregiver is able to correct their behavior when they haven't caused "observable, substantial, and nontransitory impairment to the child's mental or psychological ability to function within a normal range of performance or behavior."

For these reasons, we would encourage a do pass on HB 1492.

Thank you for your time.

Sincerely,

Greg Kasowski
Executive Director

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