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 <u>mental suffering and trauma that has some lasting, non-transitory effect</u>." *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 <u>or</u> substantial" is inherently contradictory and would be unworkable in practice. For instance, we might all agree that a child briefly crying

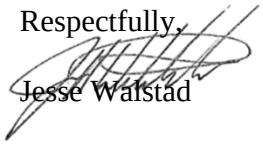
is an observable but fleeting event of harm to a child's "emotional stability" or "ability to function within a normal range." However, standing alone, I seriously doubt any of us could resolve our conscience to the notion that a brief incidence of crying could be a "substantial impairment" of a child's 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