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March 24, 2023

To: Senate Judiciary Committee
Hon. Chairman Larson
Hon. Vice-Chair Paulson
Members of the Senate Judiciary Committee

From: Rozanna C Larson, Ward County State's Attorney

RE: HB 1213

I am submitting this testimony in OPPOSITION to HB 1213.

Committee members, my opposition to this bill is twofold. First is the presumption that State's Attorneys in North Dakota bring charges based upon political motivation, not evidence. Secondly the chilling effect this bill could have on charging decisions, which potentially puts prosecutors in the position of being judge and jury.

Political motivation not in North Dakota

Last year in Ward County we had over 1,000 count felony arrests and nearly 2,000 count misdemeanor arrests. In 2022 we had 797 trials were scheduled. (stack trial schedule, so this includes cases that get rescheduled). My point in telling you this, is prosecutors in this state don't have time, or motivation to bring malicious cases. We don't look for the caseload it comes to us.

There are 53 counties in this State. Of those counties, 37 counties, have what is classified as "part-time" State's Attorneys, meaning they have a private practice on the side, or at least can have a private practice. Some counties share State's Attorneys so that they are "full-time" prosecutors. Such as McLean and Sheridan share Mr. Erickson; Trail and Steel Counties share Mr. Stock; Josh Frey is the State's Attorney for both McHenry and Towner Counties. Currently, there are at least six open assistant state's attorney positions, two in my office that have not been filled in over a year, the Attorney General has 3 open prosecutor positions and one HIDTA position open, and I know of one city attorney prosecutor position that is open. My point is this committee has not been given one single example of a politically motivated prosecutor. The fact is most of the State's Attorneys in this

state, save the bigger counties, are the State's Attorneys because they are the only attorney in that county that would take the job, it's not based upon being politically motivated.

As prosecutors, we have qualified immunity. Meaning that if we are acting within the scope of our jobs, including the Rules of Professional Conduct, we are protected from being sued individually or personally. That does not mean that an individual can't try to sue the County or file a claim against the County. It also does not mean that an individual can't file a disciplinary complaint with the State Bar Association. In addition to all the Rules of Professional Conduct, Rule 3.8 of the Rules of Professional Conduct is specific to prosecutors. The very first line in that rule is "the prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. (emphasis added). Probable cause is what is necessary for a charge to be brought. Meaning 1) a crime was probably committed and 2) the defendant was the person that probably committed the crime. That is not a high standard, but is more than a "mere hunch." At trial, the State has to prove all the elements beyond a reasonable doubt, the highest standard of proof in the legal system. When a person asserts self-defense, the State must prove the "lack of self-defense" beyond a reasonable doubt. If a prosecutor violates Rule 3.8 they risk disciplinary action, which could include losing their license to practice law. In addition, if a prosecutor is acting outside the scope of their duties, they could be held personally liable, and defendants have recourse by filing a 1983 action in either State or Federal Court. 1983 actions can be specifically brought to compensate the victims and punish the malicious prosecutor. 1983 provides the remedy for malicious prosecution, but it also provides due process, evidence, and a right to a jury trial for the accused. It requires the defendant to prove the malicious prosecution, not just make the bare allegation and receive compensation, as this bill allows. HB 1213 presumes a "not-guilty" verdict is "due to the justification of self-defense, without showing anything more, such as malicious prosecution. HB 1213 takes away qualified immunity and allows for damages without any further proof. No due process.

The chilling effect of charging and becoming judge and jury

Self-defense, I was told one of the reasons HB 1213 is needed is because the North Dakota Legislature did not pass the Castle Doctrines. We know that isn't true. In fact, the Legislature has amended self-defense, defense of others, and defense of property statutes in both the 2019 and the 2021 sessions. As part of that legislature also amended the limits on the use of force, and use of deadly force and provided for immunity from civil liability for justifiable use of force. The Legislature has provided its citizens the right to stand their ground.

The proponent of HB 1213 focuses only on 2nd amendment rights and accuses State's Attorneys in this state of being anti-gun. The proponent's testimony is short-sighted and only focused on one form of self-defense. HB 1213 however is not that narrow. HB 1213 is all-encompassing for all the self-defense defenses.

Self-defense can be raised in all types of cases, not just cases where a firearm was used. Cases such as disorderly conduct, bar fights, all levels of assault, domestic violence, homicide and maybe even reckless endangerment. Not every person that asserts self-defense, is defending themselves with a firearm. Some, if not most may be defending themselves through hitting, kicking, or other physical contact including strangulation holds. Or there may be the use of a different type of weapon, such as a knife, bottle, or any other object that can be used at the time to protect themselves or others.

So when a prosecutor brings a charge wherein self-defense may be raised the issue then becomes, is the defense appropriate. Under the current law, you can't claim self-defense if you intentionally provoke unlawful actions of another or you enter into mutual combat or the initial aggressor unless

you are resisting force which is clearly excessive in the circumstances. *This analysis is made only when the arresting officer and/or the prosecutor know there may be a claim*

If it is determined there may be a self-defense claim the issue becomes the amount of force used necessary and appropriate under the circumstances. This is where HB 1213 is making the prosecutor become a judge and jury.

Examples – officers called to a domestic violence report. The officers see a person with obvious facial injuries, the person has no visible injuries. They talk to the parties involved. The injured person admits to pushing the other person. This person then punches the person back in the face causing facial injuries. Under North Dakota law, law enforcement is mandated to make arrests if they see injuries and determine whether the parties are family or household members. If HB 1213 is passed, it puts the officers in the position of having to determine if the amount of force was necessary and appropriate. That defeats the legislature's intent for mandatory arrest in domestic violence situations. It also puts law enforcement in place of the jury, making factual determinations. This is the case in a lot of domestic situations, or we find out at trial, the victim was the "initial aggressor."

When a person is arrested on a violent offense, there are safeguards and due process up to and during a jury trial. Referring back to Rule 3.8 there must be probable cause. Law Enforcement must have probable cause to make an arrest. Prosecutors must have probable cause to file the charges. The Court reviews the affidavits of probable cause, and for felony offenses, there are preliminary hearings for the Court to find probable cause. Determining whether the amount of force used was necessary and appropriate should be a jury determination, not law enforcement, not the prosecutor.

In one murder case we had several years ago, the defendant asserted self-defense. Our defendant had burglarized a home. Knowing the victim of the burglary and his friends would come looking for him, he sat in his house with a firearm next to him. The burglary victim and his friends do come to his residence, they force their way into his home. It is not at that time that the defendant shot at the intruders. There are words exchanged, the burglary victim and his friends left the residence. After they have left his home, the defendant shot multiple rounds out the window of his residence. The victim was shot four times in the back as he was running away. When does the claim of self-defense end? Now is that a case where as prosecutors we tell a family we can't try to get justice because there's going to be a self-defense claim or do we try to get justice and let the jury decide if there was self-defense and if the amount of force was necessary and appropriate? How would we balance persons right to defend themselves, others, or property, against the victims' Marcy's law rights? The jury acquitted the defendant.

I can also give you an example of a stand-your-ground case, wherein the person protected himself by discharging his firearm. Our victim and the defendant were outside on the street in front of an after-hours club. There were at least thirty people in the area. Our victim walked up to the defendant, at which time the defendant, with a gun in his hand, struck the victim in the face with the gun. A nearby security video showed our victim falling backward, and ultimately discharging a firearm at the defendant. The defendant then discharged his firearm at the victim. A bystander was struck in the foot with a bullet. Neither of the parties involved was charged with an offense as it related to the discharging of their firearms. Why, because the victim had a right to protect himself, and the threat of imminent bodily injury was real. The defendant, after being shot at, had a right also to protect himself. Now I used the term defendant in this scenario, because, there he did assault the victim first, he was charged for that assault. This is a case, where, self-defense was obvious, even in regard to a reckless endangerment offense, putting all the bystanders at risk of serious bodily injury or death.

I caution you also, in that this bill could open the door to other offenses and reparations. Could potentially open the door to other offenses that get dismissed, or the defendant's acquitted, without any finding that their charges were not warranted or that there wasn't probable cause. It would have a long-term chilling effect on prosecution, which in turn directly affect public safety.