

Testimony on House Bill 1213

Prepared for the North Dakota Senate Judiciary Committee

Josh Traiser, Cass County Assistant State's Attorney

March 26, 2023

Chair Larson and Members of the Senate Judiciary Committee,

My name is Josh Traiser. I am a prosecutor in Cass County. I grew up in North Dakota and have lived and worked here for the bulk of my life. I now reside in North Fargo with my family. I'm writing in **OPPOSITION** to House Bill 1213 because I'm concerned with the potential costs of this bill, structural issues of fairness and process, and because of the chilling effect it could have on domestic violence prosecutions. These consequences are not outweighed by the purported benefit of the bill.

House Bill 1213 charges the taxpayers of North Dakota with reimbursing acquitted defendants "for all reasonable costs incurred in defense, including loss of wages and time, attorney fees, and other expenses involved in the defense" if ordered by the Court. The Bill does not set forth a funding stream for meeting these costs should they be imposed. Given the fact that fees for expert witnesses, billable hours for attorney teams, and "other expenses" can run into the hundreds of thousands of dollars, this Bill creates a significant liability but imposes no tax to pay the costs. Rather, these expenses will, presumably, be passed on directly to the taxpayer in the form of an income tax or property tax. It seems unfair for taxpayers to foot these potentially exorbitant bills when they have very little to do with the case.

It is similarly unfair to impose the costs of a defense on a Statewide basis. If a prosecution in Cass County fails and a jury comprised of Cass County residents imposes the costs of a defense, it seems unfair to push that bill upon the people of Burleigh County, who neither elected the Cass County State's Attorney, nor played any role in the deciding of the case. Criminal prosecutions are intensely local and prosecutors are elected on a local level. As the law stands, if an acquitted Defendant has a cause of action for a malicious prosecution, it is the local jurisdiction which can ultimately be held liable. This Bill unnecessarily imposes Statewide obligations upon taxpayers.

There are several significant vetting mechanisms for unwise prosecutions written into the law already. First, law enforcement's reports are vetted by a prosecutor who must weigh the evidence before filing charges. Second, if the prosecutor has decided to file charges, a warrant may be issued only if a Judge believes that probable cause supports an arrest. Third, if a warrant is issued and a felony offense is charged, a Defendant may elect

to contest probable cause at a preliminary hearing. At this hearing, the Defendant may put on witnesses and argue facts to the Judge, who is screening the case for probable cause. Fourth, if probable cause is found and a case proceeds to trial, the Trial Judge has the ability to acquit a Defendant at the conclusion of the State's case under Rule 29 of the North Dakota Rules of Criminal Procedure before the case is given to the jury. Fifth and finally, while the Defendant may have their bond reviewed at any time during the pendency of the case. One of the enumerated bail factors to be considered by the Judge under Rule 46 of the North Dakota Rules of Criminal Procedure is the weight of the evidence. Because there are multiple layers of review built into our law already, it is unlikely that a Defendant would need or succeed on a claim under the Bill, unless that Defendant happened to be tried in front of a renegade jury.

By converting self-defense from a shield to a sword, the Bill places claimant Defendants in an unusual and unjust position. Self-defense in North Dakota is a defense, *not* an affirmative defense. This is a significant distinction because in North Dakota a Defendant need only provide very limited notice and virtually no discovery in their criminal proceeding. This makes sense in the context of a criminal case wherein the State is the moving party, but it doesn't make sense in a civil context wherein a Plaintiff is seeking damages. Normally, when one party is suing another civilly, both parties are entitled to discovery, depositions, and various procedural tools to pursue their claims. As written, a Defendant may seek damages immediately post-trial when the State has not had an opportunity to meet and depose defense witnesses, interview a Defendant, or formulate a case strategy designed for civil court. Moreover, if the Court or jury imposes damages in error, it's not clear that the State would be entitled to appellate review of the scope or basis for that determination.

This Bill may discourage prosecutors from filing charges in domestic violence cases. Domestic violence is pervasive in our community and domestic violence charges constitute a large percentage of the prosecutions in any given jurisdiction. In these cases, the cycle of domestic violence is a reoccurring problem and results in difficult prosecutions. In such cases, victims may recant their initial statements to officers or attempt to explain away or deny obvious physical injury. Often times these recantations are the product of manipulation by the domestic violence offender. Given the spectre of a monetary judgment against the State, it is possible that some prosecutors will refrain from filing charges in such cases if they expect that a victim may recant on the witness stand.

Given the significant liability created by this Bill and its numerous costs, one would assume that there is a large and pressing problem which this Bill is intended to fix. A review of the record shows that this is not the case. As of March 26, 2023, I can see only one piece of written testimony in favor of the Bill, which was penned by the Bill's prime sponsor. In this testimony, the prime sponsor remarks that "way too often" we see

“politically motivated prosecutors bring[ing] charges against individuals over clear instances of self defense.” This has not been my experience. Over the years, our Legislature has expanded the law of self-defense in our State. As a result, I have personally declined many cases in which I do not believe that I can prove, beyond a reasonable doubt, that a suspect was not acting in self-defense. In many of these cases, my decision not to file charges has upset victims and members of law enforcement. In the few cases of which I’m familiar wherein a Defendant is acquitted on a theory of self-defense, there is no benefit to the prosecutor who lost the case. Rather, there is scrutiny from law enforcement and members of the public, who may or may not be familiar with the facts of the case. This Bill is a solution in search of a problem as each and every local prosecutor’s office is directly politically accountable for each, and every decision they make.

Madam Chair and members of the Senate Judiciary Committee, I urge a **DO NOT PASS** recommendation to House Bill 1213. Thank you for your time and consideration to my testimony.



Josh Traiser  
Cass County Assistant State’s Attorney