January 24, 2021
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. 1196**

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 **supports H.B. 1196** and recommends a **DO PASS** from the House Judiciary Committee.

Criminal records severely impair a person's access to employment, education, housing, public assistance, and civic engagement. The overwhelming majority of employers, colleges, landlords and lenders employ background screening checks specifically to determine whether a person has prior convictions. Chapter 12-60.1, N.D.C.C., offers a ray of hope and a powerful rehabilitative incentive to those who have been convicted of applicable offenses. State and local governments across the county have recognized the profound and long lasting negative impacts stale criminal records have on individuals, families, and society. They have also acknowledged the disproportionately negative effect stale criminal records have on minorities and disadvantaged socioeconomic groups. Thankfully, North Dakota has been among the majority of state governments to expand record sealing remedies to address these legitimate concerns.

The record sealing provision of Chapter 12-60.1, N.D.C.C., as passed by the Legislative Assembly only two years ago, recognizes and rewards rehabilitation by helping to alleviate the taint of stale convictions after the individual has demonstrated the requisite period of law abiding behavior. It implicitly recognizes society's interest in maintaining an easily accessible record of conviction while simultaneously acknowledging that after an individual has paid their debt to society and demonstrated a lengthy period of rehabilitation the value of maintaining a public record is outweighed by the stigma and collateral consequences of a stale conviction. Since the statute took effect in August 2019, my colleagues and I have routinely advised our clients of the statute's record sealing provision including the requirement that they must remain law abiding for the requisite period of years and demonstrate reformation warranting relief. I genuinely believe it provides an achievable goal and the vast majority of my clients take it very seriously and strive to earn this relief.

H.B. 1196 is common sense legislation that would add necessary clarity to Chapter 12-60.1, N.D.C.C. Specifically, H.B. 1196 would amend Section 12-60.1-02 to clarify that a subsequent "conviction" rather than a mere "charge" within the requisite period would preclude the record sealing benefit of the statute. This is a critical distinction particularly because the main thrust of the sealing provision is a demonstration of reformation warranting relief. Guilt does not attach to a defendant until they are convicted, whereas charges may be filed on information wholly incapable of sustaining a conviction or proving guilt. Most importantly, the defendant is innocent until proven guilty. Amending "charged with" to "convicted of" implicitly acknowledges the defendant's innocence at the charging stage, recognizes that our justice system makes mistakes in the charging stage, and comports with the statute's overall goal of rewarding reformation.

H.B. 1196 would also remove "from the date of release from incarceration, parole, or probation" and insert "before filing the petition" as the triggering mechanism initiating the three or five year period. The inherent flaw in the current language is clearly demonstrated in State of North Dakota, v. M.J.W, 2020 WL 5232263 (N.D.)(Aug. 27, 2020). In that case, an individual plead guilty to misdemeanor offenses in 2000, 2001, 2003, and 2004. The individual did not have any other convictions and lived an otherwise law abiding life for the next fifteen years. After Chapter 12-60.1, N.D.C.C., took effect on August 1,

2019, the individual petitioned to have the stale records sealed, arguing that they had remained law abiding for fifteen years and warranted relief. The District Court found the statute to be ambiguous and granted the petition to seal the records in all five prior cases. The State appealed arguing that, due to the close temporal proximity of the convictions between 2000 and 2004, the individual had been charged with subsequent crimes during the period beginning "from the date of release from incarceration, parole, or probation." The Supreme Court concluded that while the individual remained law abiding for the fifteen years preceding the petition, they had been charged with offenses within the period following the triggering "from" date so the statute did not afford them relief on its face. The sealing orders were reversed. The proposed amendment in H.B. 1196 would prevent similar situations from occurring by requiring a three or five year look back period from the date the petition is filed. Thus a person, such as the individual in State v. M.J.W., would no longer be defined by a brief troubled period buried deep in their past but by the recent law abiding conduct of the reformed petitioner standing before the court.

H.B. 1196 would also amend Section 12-60.1-04 to clarify the manner in which a petition would be denied and limit the period in which a person would be prohibited from bring a subsequent petition. In its present form, the statute prevents a subsequent petition following denial for "at least" three years. H.B. 1196 would amend this language to state "up to" three years. The current language is ambiguous and make no clear distinction regarding when a subsequent petition must be considered by the court. It is clear that no subsequent petition would be considered within three years, but it leaves open the question of whether a subsequent petition would have to be considered at all. The proposed amendment would allow a subsequent petition to be filed with the three years at the discretion of a District Court, but would guarantee a subsequent petition would be considered after three years at the latest.

The proposed amendment to Section 12-60.1-04 would also require the district court to provide it's rational when denying a petition. This common sense change would require the court to insert into the record the reasons for denial, thereby giving the petitioner clear guidance for those areas of concern that require additional rehabilitative efforts before the court would grant the requested relief. In essence, it would ensure a clear record and give the individual a better understanding of areas of improvement and increased attention to work on before submitting a subsequent petition, eliminating confusion and charting a clear course to success for the determined reforming petitioner.

For the forgoing reasons, the NDACDL urges a **DO PASS** on H.B. 1196.

Respectfully,

Jesse Walstad

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