

## **HB 1144 – Testimony by Dustin Gawrylow (Lobbyist #266) North Dakota Watchdog Network**

On the weekend of July 18th, 2020, I experienced something no American should experience. Namely, I was thrown in jail for 48 hours due to a brotherly skirmish that I did not start.

I do not want my brother to experience what I went through, so I will refrain from disclosing details beyond the following: I acted in self-defense and reported the incident to the police myself, but my brother beat me to the police station. He was given the benefit of the doubt.

My resolve to tackle the underlying policy issues at play comes from the fact that “it happened to me.” But my motivation for writing this article, and pursuing the following legislative reforms, is based on the “this should not happen to anybody” doctrine.

The Bismarck Police Department enforced the “shall arrest” clause of the law that treats a fight between brothers as a “domestic violence simple assault.” That law (N.D.C.C. 12.1-17–01.2, 14-07.1-01, & 14-07.1-10) requires officers to arrest someone (based on probable cause) accused of being the “predominant aggressor” (defined as “an individual who is the most significant, not necessarily the first, aggressor”). I am still unsure how I was determined to be the “predominant aggressor,” as I did not take the first physical action. I also was the one that ran away from the situation (which brings in the question of so-called “duty to retreat laws), and I was the one reaching out to law enforcement.

I have been seeking the police reports, emails exchanged, text messages exchanged, and officer notes to determine how that judgment was made. I assume there is some communication trail to explain the decision, even if it is not captured informal notes. However, by some technicality that lawyers, including former prosecutors have told me is a normal practice – the case is being held open so that I am not entitled to those records – both as someone involved and from an open records standpoint.

Once the incident was determined to be a “domestic violence” event, the officers apparently had no discretion but to make the arrest – or at least so they say. My question is how someone in my case, or anyone-else’s case, is determined to be the aggressor.

The word “domestic” in “domestic violence” applies to more than a romantic relationship gone bad with an abuser. The law is being applied to adult siblings arguing over petty issues, in a scuffle that can barely be called a fight outside a junior high school playground.

By declaring such situations as “domestic violence” as a “catch-all” charge, from a public policy standpoint, we are prevented from differentiating very serious kinds of domestic violence from incidents like mine – those that have the same label but are completely different in nature. An extremely broad concept of domestic abuse ensures that our understanding of victims of abuse is diluted in a sea of useless statistics. This is demeaning and does a disservice to victims who need help escaping dangerous abuse. Meanwhile, it also facilitates the weaponizing of false accusations and bogs down the legal system with cases that are not “domestic violence” as understood by the average person.

It has always been my belief that upon booking at a police station, I was allowed a call to a lawyer. While they did let me call my father and ask him to put money on my “jail phone card,” I was not allowed access to a phone for a free call to a lawyer for 6 hours. From 3pm to 9pm, I asked 3 separate guards for phone access, with each one saying the next guard would bring the phone around.

Being of the political world, I personally know lots of lawyers. I've just never needed one in a criminal situation. So I was appalled that I was not allowed access to a phone to call a lawyer until it was far too late in the day to even do anything about the situation.

I was held for 48 hours, the first 24 hours being in a "solitary confinement cell." The cell was lit with a bright and blinding LED-style light for 18 hours and with a bright orange light for the remaining hours. A two-inch-thick "mattress" on concrete was what was provided. Of course, under these sleep-deprivation conditions, sleep was not possible on the first night. Nor was sleep possible for the second night when they transferred me to a "POD" with all repeat offenders. Luckily, they were fairly well-behaved while I was there. (Once they found out what I do for a living in politics, they all wanted my attention and advice on how to fix their situations. Of course, I had no answers for them.)

After 48 hours in jail, and while waiting to be called for a bail/bond hearing in front of a judge (as required by law), I was released after the "states' attorney declined to pursue prosecution." Upon release – and I knew this would happen – I found news that my mugshot had already made the rounds on social media. To this moment, no official notice or statement has been made by the county states' attorney stating that the charges are not being pursued. As a result, I cannot get the various websites that aggregate and syndicate mugshot photos to remove those.

As this situation has continued to unravel, in attempting to obtain my case records from the police department and the states' attorney's office, I have been told verbally by a paralegal that an attorney in the states' attorney's office approved downgrading the original charge to a "Mutual Combat" which is just a normal fight, that is subject to civil law, not criminal law. I have also been told that the case "is under further review" and that as such I cannot obtain my case records because without there being charges in place, I am not currently a defendant so I have no rights of a defendant. And because it is an open case without charges, it is exempt from Open Records Laws.

Saying the "justice system is broken" is an empty talking-point from politicians who want to sound like they care. Based on my experience, I now believe that most people, including lawmakers, have little-to-no understanding as to just how it is broken. From my experience in all this, I have determined that our justice system is broken in a very tangible way. Below are five reforms I believe the North Dakota legislature can and should enact in the 2021 legislative session.

### **Public Policy Reform Suggestions**

Based on my experience, I believe there are at least five meaningful and viable changes to our criminal justice system that would dramatically bring us into closer alignment with "innocent until proven guilty," the principle that every North Dakotan expects. Sure, I was not officially administered any punishment. But 48 hours of detainment and sleep deprivation is punishing, and it makes absolutely no sense to subject an innocent person to such punishment. I say this as someone who has never been in trouble for more than a speeding ticket and who has a decent handle on the law.

1. The definition of "domestic" in "domestic violence" is far too broad. Situations that currently qualify for a domestic violence charge, on the probable cause basis as determined by the police, can snag far too many people in the net. For instance, timelines should be thoughtfully considered when determining that an incident is domestic in nature. Two adults involved in an incident of aggression

who, as children of the same parents, had previously lived together many years ago are not genuinely engaged in a “domestic” dispute. Our encounter being framed as “domestic violence” not only violates common sense but goes against the supposed “family values” philosophy that many politicians proclaim. I am wondering how many decades my adult brother and I would have needed to live apart to avoid the “domestic” label for our incident. In any case, a redefining of “domestic” in our century code is imperative.

2. An arrested person’s mugshot should not be a matter of public record until a judge has been seen and a prosecutor has determined that a case is viable. If, as in my case, a prosecutor determines not to pursue prosecution, then a publicly issued mugshot represents nothing more than public shaming for an innocent individual. We can keep victims of actual domestic violence safe while not arbitrarily humiliating innocent individuals. Arrestees should be able to have timely contact family to get help with the situation, especially first time arrestees who don’t understand the ins and outs of the system.

3. Funds should be appropriated such that city, county, and state governments can use video conferencing for calls on weekends. It is not right that a weekday arrest can be over in mere hours while a weekend arrest can drag on for 48 hours or more. Accepting the cost of weekend calls and avoiding the cost of housing and monitoring innocent people is clearly the fiscally responsible choice, How much taxpayer money is used to over-build jails based on the “weekend surge,”? How many people are forced to needlessly endure the sort of sleep-deprivation conditions that I did? By funding and requiring daily and timely bail/bond hearings, it may cost more in salary for judges and officials. However, such costs will be offset by the reduced presence of detained individuals.

4. Those arrested, including everyone but especially those with no prior conviction, should be treated with basic human dignity. The average person would consider the treatment I received to be intentional sleep deprivation tactics. Jail should be no vacation, but it should not induce physical harm or pain either. The way things are, people with mental or behavioral health struggles are only going to leave jail in a worse state, not better. A key question is, if law enforcement processes are not designed to protect the innocent and help keep offenders from repeating their mistake, then what is the point to all of this? We are spending a lot of taxpayer money to mistreat folks who will ultimately be found innocent while failing to help actual offenders avoid a life of crime. By worsening rather than bettering the people who come into contact with law enforcement, we ensure a perpetual process that will only continue to increase costs. Again, what is the point of that?

5. Patients who have been arrested should not be denied access to their needed medications as determine by their doctor prior to arrest. Prior to booking, I was taken to the emergency room when I informed the arresting officer that I have long standing high blood pressure. I have also had surgeries, medical conditions, and other injuries that have led my doctor to prescribe medications for me. For instance, I use a migraine medication for migraines caused by high blood pressure spikes. My lack of access to my medications exacerbated my blood pressure problem by increasing my pain level. In a worse-case scenario, a patient like myself could suffer a stroke or aneurysm and even death. What as a society do we gain from risking the lives of those who are arrested? Why would we as a society want to put an accused person in more danger than is required? Taxpayers

should not only be mindful of how responsibly their taxes are used, but also whether the system their taxes fund will treat them and their fellow citizens as humans, first and foremost.

6. Once someone has spent a minute of time in jail, they should have the right to have access to your case file. A person deserves to know why and how the cops determined to arrest and jail them. Not just by the law of the book, but how their judgment as officers came to that conclusion. And the reasons for charges being dropped or reduced if that occurs. This would seem to be a very common sense reading a “due process” and a “fair and speedy trial”. Leaving an investigation open to deprive citizens of the statute of limitations appears to be a very well established case where the judicial branch has total power to reject the legislative intent of such statutes passed by the legislature. There is no “checks and balance” when the legislative intent can be nullified by the judiciary, and without a judge’s order.

In my 48-hour experience, I witnessed several obvious opportunities to reform our system. I am grateful the experience did not last longer. As a society, we need to listen to people who have been through the law enforcement and criminal justice system. We must take such people seriously and not just treat them like “criminals complaining.”

I hope that lawmakers they will have an open mind about these issues. especially upon hearing about them from someone they do know who now has direct experience.

I also hope Governor Burgum will take on this issue and treat it much the same way he has with the “Recovery Reinvented” program that First Lady Kathryn Helgaas Burgum has led. Indeed, tackling this topic is a natural next step for the Burgums. Our society’s overly punitive approach toward people who suffer from the disease of addiction is indispensable if we ever hope to reduce the stigma of addiction.

I believe that because of my history as a political activist and consultant, it is my moral duty to pursue this issue now. I intend to bring the same zeal and tenacity that I have brought to issues, like cutting taxes, limiting the growth of government, and increasing government transparency.

Reforming the criminal justice system may not be cheap in the short-term. Early on, it may require increased spending and possibly even increased taxes. But these investments will pay off. Treating the accused – those who are found innocent, and those who are found guilty – like human beings with lives that matter will absolutely foster more trust and less crime. Lower recidivism is money well-spent. Avoiding serious harm to individuals is money well-spent. Citizens who are steered away from a lifetime of entanglement with law enforcement will become productive participants in our families and in our economy. Such positive outcomes should be a priority of every citizen and politician who claims to value an efficient, appropriately sized government.