

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION  
SFN 2053 (2/85) 5M



ROLL NUMBER
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DESCRIPTION

2320

2007 SENATE JUDICIARY

SB 2320

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2320**

**Senate Judiciary Committee**

Check here for Conference Committee

Hearing Date: January 30, 2007

Recorder Job Number: 2254 & 2257

Committee Clerk Signature

*Mona LeSally*

**Minutes:** Relating to the revocation of probation.

**Senator David Nething**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

**Testimony In Support of Bill:**

**Sen. Wardner**, Dist. #33 (meter 30) Introduced the bill and Read page 5, section 7.

Sen. Lyson (1:52) I would like to see a "time limit" for the process. I would not be opposed of three months.

**Paul Myerchin**, Bismarck Attorney (meter 2:59) Gave Testimony – Att. #1

Review of current process. (meter 5:00) I think this will be a cost savings and spoke of what other states and the Federal regulations already require.

**Sen. Nething** and **Mr. Myerchin** discussed what the parole officer's duties and more details of current process. This is not referring to the apprehension stage it is at the sentencing or mitigation stage.

**Chad McCabe**, Bismarck Defense Attorney (meter 12:41) Spoke of revocation procedure and the lack of time to get all of the information in time for the hearing. Judges do not allow us time in form of them to read it-even if most of the time this is when we first see the information. We look foolish when we are presented the information at the 11<sup>th</sup> hour. We have a problem

getting all of the people to connect. Stated (meter 15:06) personal case of representing someone in court.

**Testimony in Opposition of the Bill:**

None

**Testimony Neutral to the Bill:**

**Robyn Schmalenberger**, ND Program Manager with the Dept. of Corrections (meter 16:53)

Gave testimony – Att. #2a and Amendment – Att. #2b

**Sen. Lyson** questioned is the fiscal note reflecting the time it takes you to do a pre-sentence?

Yes. Aren't you currently doing this? You have monthly reports from the officers that they dictate, Yes. How then could this cost so much more when you are already doing it? Spoke of "death by fiscal". Robyn discussed the process and the time limitations.

**Senator David Nething**, Chairman closed the hearing.

**Job Number: 2258**

**Senator David Nething**, Chairman opened the hearing.

The committee discussed the need for the bill. They also discussion of the 90 day time limit amendment.

**Sen. Lyson** made the motion to Do Pass and **Sen. Olafson** seconded the motion. All members were in favor and the motion passes.

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Carrier: **Sen. Lyson**

**FISCAL NOTE**  
 Requested by Legislative Council  
 03/12/2007

Amendment to:           Engrossed  
                                   SB 2320

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$125,649		\$125,649	
Appropriations			\$125,649		\$125,649	

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2005-2007 Biennium			2007-2009 Biennium			2009-2011 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

Provision of this bill would require the DOCR to conduct a new or updated presentence investigation and prepare a new or updated presentence report for the consideration of the court when a defendant's probation is revoked past 90 days of the original sentence.

**B. Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Over the course of the 2007-09 biennium, the DOCR estimates that the provisions of this bill would require the DOCR to prepare and issue a PSI on the following:

- 633 defendants without a previous PSI (new)
- 318 defendants with a previous PSI (update)

The DOCR estimates the time to prepare a new PSI at 6.9 hours and to update an existing PSI at 1.0 hour. The cost for a new PSI is estimated at \$184.92 and for an updated PSI at \$26.80.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

As noted above, under the provisions of this bill the DOCR would expect to prepare and/or update a total of 951 PSI reports. Of that amount, 633 would be new reports at a total cost of \$117,139, and 318 would be updated reports at a total cost of \$8,510. The total cost for the preparation of all PSI is estimated at \$125,649.

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The estimated cost to prepare the PSI reports noted above is not included in the 07-09 DOCR executive recommendation. In order to accomplish the provisions of this bill the 07-09 DOCR appropriation would need to be increased by \$125,649.

<b>Name:</b>	Dave Krabbenhoft	<b>Agency:</b>	DOCR
<b>Phone Number:</b>	328-6135	<b>Date Prepared:</b>	03/13/2007

**FISCAL NOTE**  
 Requested by Legislative Council  
 02/15/2007

Amendment to: SB 2320

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$125,649		\$125,649	
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Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

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The estimated cost to prepare the PSI reports noted above is not included in the 07-09 DOCR executive

recommendation. In order to accomplish the provisions of this bill the 07-09 DOCR appropriation would need to be increased by \$125,649.

<b>Name:</b>	Dave Krabbenhoft	<b>Agency:</b>	DOCR
<b>Phone Number:</b>	328-6135	<b>Date Prepared:</b>	02/20/2007





**REPORT OF STANDING COMMITTEE**

**SB 2320: Judiciary Committee (Sen. Nething, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2320 was placed on the Sixth order on the calendar.

Page 5, line 1, replace "If" with "Unless within ninety days of the original sentence." and replace "defendent" with "defendant"

Renumber accordingly

2007 HOUSE JUDICIARY

SB 2320

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2320

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/7/07

Recorder Job Number: 4509, 4514

Committee Clerk Signature



Minutes:

**Chairman DeKrey:** We will open the hearing on SB 2320.

**Sen. Rich Wardner:** Sponsor, support. On page 5, section 7 on that page, the underlined language is the new part. It's adding a presentence investigation in the situation. There has to be at least 90 days that have lapsed if there has been one previously. We are talking about the Corrections budget in Senate, and one of the things that we're always looking at, is finding ways to cut down on the costs of corrections. I think this is just a small step in that process. Maybe it doesn't make any difference, there may be arguments against it, such as the costs are too much to do this presentence investigation. However, it is going to cost a lot more if you got someone that probably shouldn't be incarcerated, is incarcerated, if this makes a difference and keeps them out, we're going to save there. We do have an attorney who will be talking more on this bill.

**Rep. Klemin:** The bill I'm looking at doesn't say anything about 90 days in it.

**Sen. Wardner:** Yes, there is an engrossed version. It shows the change in the engrossed bill.

**Chairman DeKrey:** Thank you. Further testimony in support.

**Paul Myerchin, attorney:** (see attached testimony).

**Rep. Delmore:** Do you have written testimony for what you just covered and do you have specific examples where you feel someone was really messed with, got a bad deal because this wasn't done.

**Paul Myerchin:** I do have written testimony that I provided to the Senate Judiciary committee. As for specific examples, I can certainly recall one case that I had a gentleman sentenced, we went back on the revocation proceeding and that person's sentence was increased. Another point that I failed to make, that I think is important too, is that there is a tremendous amount of power that the probation officer has to bring a person back before the court. Typically, what I have seen is a warning from judges saying, if you come back in front of my court, I'm going to throw the book at you, essentially and I'm going to make sure that you receive a harsh sentence. Sometimes that's fair and sometimes it's not. Typically there are a number of requirements that a probationer or defendant has to abide by. Some of them can be minor, some of them also are to the extent that one addition that is in every piece of a probationer's sentence is that they agree to go through various community constraints. It's actually right in this piece of legislation. What that is, is that the probation officer to avoid revocation, can say to the defendant, look we're either going to do community service, we're going to do day reporting, intensive supervision, or we're going to do some form of house arrest, or some other form of confinement for a small period, so you don't have to go back in front of the judge. I can tell you, I have seen cases where the intermediate measures, not offered to that person, sometimes they are and the person refuses, but I cannot recall a revocation of probation proceeding where the person was offered intermediate measures and they ultimately adopted both.

**Rep. Delmore:** I would like to see the report that the Department has to review. I'm not familiar with that. I certainly would like to see the paperwork required by the DOCR, that they would have to go through with every single case as the case would be with this bill.

**Paul Myerchin:** Again, the comment I would make for that, it is my understanding that the person is ultimately sent to the State Penitentiary, the DOCR is doing this, collecting a lot of this same information in the first 30 days that the person is there. So do they do it at the front end or at the back end.

**Rep. Koppelman:** It appears to me that under current law, a court could order this to be done. Can the court not do this now, or that they can, but they deny it.

**Paul Myerchin:** I think that, my position is that yes, my feeling is that if I were to ask for a PSI, that I would hear the prosecutor say there's no time for that, we don't need to do that, that's not a requirement for this, and we're not going to do that. You don't get a PSI. If in the process of requesting it from the court, it may be a hit and miss scenario where it is either granted or denied.

**Rep. Koppelman:** So it wouldn't solve the problem to have permissive kind of language in this section, in other words, that the court may order, rather than shall. You could ask for one and they could say that they don't have to provide you with one, because there isn't a statute that says they have to.

**Paul Myerchin:** Well, I think it is certainly better than what we have now. If permissive language is certainly better than what we have now, it would be a notice to everyone that it is a possibility. I guess another point to consider is, it does say in all cases. Possibly it isn't necessary for a Class B misdemeanor, where the maximum sentence is 30 days. I don't know that anyone's life is so disrupted in a Class B misdemeanor that they can't make it through, but certainly anything above that Class A misdemeanor, the possible sentence is up to a year, so

that's a significant period of time. I think that is another amendment that could again be a compensating factor, which may not be needed in every single case.

**Rep. Klemin:** I understand that the PSI is not required in all cases to start with.

**Paul Myerchin:** Correct.

**Rep. Klemin:** So the way it reads now, would it appear that this, under this new provision, could it require a PSI even in those cases where it was not originally required, and if so, why would we want to do that.

**Paul Myerchin:** You are exactly correct. The bill as it is written now, does conclude those cases where a person, where a PSI was not required the first go around. I think, however, that this is very necessary because it gets back to the fundamental fairness issue in this case. I think it's one where there are the crimes where a PSI is mandatory and where it is required is pretty narrow, a pretty select few crimes that are delineated in statute. There are a whole host of other felonies and other crimes out there that certainly carry significant sentences. Again, it gets back the issue of fundamental fairness. Again, that full knowledge, as I point out in my written testimony Michigan's Supreme Court, in talking about this issue about not having a new or updated PSI, they said sentencing a defendant without adequate knowledge of his needs would thereby reduce the sentencing process from a first step toward rehabilitation to the dignity of it being a game of chance. I think that again, it simply gets back to that issue of fundamental fairness and that the judge should have all the knowledge before them in black and white.

**Rep. Wolf:** I worked for a lawyer and we ordered PSI and they were used to look at circumstances surrounding sentencing, maybe gave them time for certain issues, I'm having a real hard time connecting with the revocation. When you're looking at a revocation I can't see where reading the PSI will help with the revocation proceeding.

**Paul Myerchin:** I think that it comes into play on the revocation proceeding because that person is exposed, the law is clear the person is exposed to the maximum sentence that's out there. So the judge really does have the discretion to ignore that initial sentence that was handed down the first go around. My way of thinking is if you are going to expose that person again to that stiffer sentence, that you should have all the information out there. It comes into play when you have revocation proceedings where a person may be put on probation for 3, 4 or 5 years and we get into that 3<sup>rd</sup>, 4<sup>th</sup> year, what's the person been doing since they were last seen by the court in this 2, 3 or 4 year absence since they were before the court. Why are we having this revocation proceeding at this time when we're getting pretty close to the end of this person's period of probation. Why are they back before the court. Let's get that information out, let's get it in the form of a PSI, yes, either #1, to get all those mitigating factors out there, too, or are there aggravating factors, has the person had a drug and alcohol substance issue and suddenly they are back using. What is the issue, then it's there in black and white, it's the process where the defendant and the defendant's attorney can sit down and say, this is the information that needs to go into the report, again it can expose aggravating circumstances and expose mitigating circumstances.

**Rep. Wolf:** But he's not being exposed to anything different in a revocation that he wasn't exposed to in the original sentencing, correct.

**Paul Myerchin:** Yes.

**Rep. Wolf:** Just looking at circumstances, wouldn't all that information already be contained in the parole officer's report and notes over the 3-4 years that he had been on probation. The probation officer is the one who is going to present the reason for the revocation, so wouldn't all that information then be contained and when they do the revocation hearing and you have a

defendant on the stand, and the judge can question them just like the PSI questions, you are getting the same information without having to have this formal report, and the costs for it.

**Paul Myerchin:** I guess my practice and what I've seen and heard, many a time, is that's what was in the probation officer's notes. This is my side of the story, this is the rest of it, and again primarily my experience has been, what was focused on in that revocation hearing was an attempt not to have the person's probation revoked. This looks at sentencing factors, it looks at those issues. Because very little time was spent on the issue of sentencing. My thinking is that is unfortunate. This slows the process down and rather than just a reflex, saying this person is back in front of me, we are going to revoke them, we're going to give them the original sentence. Let's see if this is really necessary. Let's give him time to find out more information. It's an issue of fundamental fairness.

**Rep. Wolf:** You couldn't get to that issue of fairness on the stand in the courtroom, with the judge you are meeting with and the probation officer testifying and the defendant testifying. You can't get to it then.

**Paul Myerchin:** Well, when we get to that point, we are almost conceding at the get go, my experience with revocation of probation proceedings is that the way the process works, the probation officer testifies, the defendant may or may not testify at that point on the issues of did this person violate the condition a of their probation; did this person violate condition c of their probation, did this person violate condition f of their probation. So at that point in time, that's primarily what the hearing is concerned with. Did they violate their conditions of probation. Then the judge makes the decision that we are going to revoke your probation. Then, at that point, prosecutor what is your recommendation for sentencing. Mr. Defense attorney what is your recommendation for sentencing. Very little of the time is spent on the issue of sentencing. It's just the way the procedure has worked many times.

**Chairman DeKrey:** Thank you. Further testimony in support.

**Judge Bob Wefald:** Opposed (see attached testimony).

**Rep. Kretschmar:** What is the approximate cost of a PSI.

**Judge Bob Wefald:** I don't know.

**Chairman DeKrey:** It is on the fiscal note, it has indicated about \$184.92/each.

**Judge Bob Wefald:** There is going to be a cost to the counties to keep the defendant in jail while awaiting sentencing on revocations. That's a big cost to the counties. I don't know what that number will be.

**Rep. Klemin:** Under the Rules of Criminal Procedure that you cited here, the court may order a PSI at any time, which could include the point in time that we are talking about now to the probation/revocation.

**Judge Bob Wefald:** That's exactly right. We can order these any time and a presentence investigation on a PSI is a very rare thing. I can think of one case that I know of, where a presentence investigation was ordered and prepared.

**Rep. Klemin:** If the defendant or defense attorney, says Judge, there are some other things that we think ought to be taken into account, which you don't know about that could be in an updated presentence investigation and they asked you to do that, has that ever happened or could you do it at that point in time at their request.

**Judge Bob Wefald:** In my eight plus years on the bench, no one has ever asked for a PSI on a revocation. Typically they are fairly cut and dried. The people come to court and say they screwed up and it's a question of what to do with them. I will tell you this, frequently I don't increase the sentence, I don't send them to jail, a lot of times I'll say come on, we'll give you another chance. We give people lots of chances because we want people to follow the

rules, and not go to jail. The people that go to prison, in my opinion, worked pretty hard to get there. They just can't follow the rules.

**Chairman DeKrey:** Thank you. We will recess the hearing on SB 2320.

**Chairman DeKrey:** We will reopen the hearing on SB 2320.

**Sen. Stan Lyson:** I'm on the bill and when I was first asked to sign on to this bill, I didn't read it carefully enough. I was thinking that this was in the cases where the PSI had already been done, and I felt that it wouldn't take very long to do another PSI. The judge can order them to be done. The problem that I have with the bill now is that once the judge has already sentenced, and is coming back in for a hearing on a violation of probation, they still have the opportunity to ask for a PSI at that time, before he makes a decision. So I don't think the bill, for that purpose, is necessary. If there was a PSI done, and it was very simple to fill in the blanks by using the criminal record, which is all you're going to get from that time on, they would have the criminal record on file anyhow. I see no purpose in it for that reason. The other problem that I have is, without looking at a bill and all the consequences that can happen, when you order a PSI, the county has to keep that person in jail until the PSI is done and the judge determines what he is going to do with him. That's a huge cost to the county.

**Rep. Koppelman:** The testimony that we heard earlier, indicated that even though the court can order this PSI if they choose, and couldn't it be requested. The response that we got was that in practice, this gentleman might request one but the court might say that there isn't time or no need for it. Then I asked the question what about permissive language that the court may order this, and he basically said that there is nothing for that sort of thing. Now I think that Judge Wefald testified that if we are going to do this, we should only do it in cases where we've had a PSI previously.

**Sen. Stan Lyson:** At that point, I don't even think it is necessary at that point, because if you are going to do the PSI after you've done one, and you're coming back for a violation within a certain timeframe, the only thing that's going to change in there is your criminal record. That criminal record is going to be there, so it wouldn't really be necessary.

**Rep. Koppelman:** Wouldn't this also include that while either on probation, I understand the reason for revoking it.

**Sen. Stan Lyson:** I can't say to that. There are monthly reports from the probation officer when the person is on probation and the criminal record follows him, so there is really no purpose for the PSI.

**Rep. Meyer:** After they violate probation, aren't they going to be incarcerated anyway, while they wait for a PSI, or are they incarcerated until after the hearing.

**Sen. Stan Lyson:** If the person violates their probation, and the state's attorney files a complaint, the judge will normally issue an arrest warrant and then the sheriff will go and pick him up and throw him in jail. I don't remember any violation where we let him run around out there and do whatever he wanted to do.

**Rep. Meyer:** Why would it cost more to wait for the PSI.

**Sen. Stan Lyson:** Because you have to take care of the medical expenses and everything else that comes up during his time in jail.

**Rep. Meyer:** But isn't he in jail already.

**Sen. Stan Lyson:** Certainly, if he is picked up, he is put in jail today. The hearing comes in about 2 weeks or so. A PSI can take up to 60 days to finish, then schedule a hearing.

**Rep. Klemin:** The way Judge Wefald explained it to us, was that he thought this would create a two step hearing process. One hearing to determine whether the probation should be revoked and if so, then you would have a presentence investigation and then a second

hearing, at which time you would do the sentencing based on the new presentence investigation. Is that how you see it too.

**Sen. Stan Lyson:** When the judge determined that they were in violation, and ordered us to get further information, so we did have a two step process, because it certainly would create a two step process, because the court is going to have to determine whether he violated or not first.

**Chairman DeKrey:** Thank you. Further testimony in support. Testimony in opposition.

**Robin Schmalenberger, ND DOCR, Field Services Division:** Opposed (see attached testimony).

**Rep. Griffin:** I noticed that some of these individuals will remain in jail. Do you think some will be released.

**Robin Schmalenberger:** Some of them will be probably released on bond, because what happens currently is that some are able to bond out, depending on the severity of their crime whether they are locked up or not.

**Chairman DeKrey:** Thank you. Further testimony in opposition. We are going to close the hearing.

# 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2320

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/7/07

Recorder Job Number: 4584

Committee Clerk Signature

*R. Penrose*

Minutes:

**Chairman DeKrey:** We will take a look at SB 2320.

**Rep. Griffin:** Explained his amendments. I move the amendments.

**Rep. Meyer:** Second.

**Chairman DeKrey:** Voice vote. Motion carried. We now have the bill before us as amended.

What are the committee's wishes.

**Rep. Dahl:** I move a Do Not Pass as amended.

**Rep. Wolf:** Second.

7 YES 6 NO 1 ABSENT

DO NOT PASS AS AMENDED CARRIER: Rep. Dahl

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2320

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/14/07

Recorder Job Number:

Committee Clerk Signature

Minutes:

**Chairman DeKrey:** Did anyone have amendments to add to SB 2320. We will not reconsider our action. We will return it to the Floor without action.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2320

Page 5, line 2, replace "unless waived by" with "in its discretion or if requested by the state's attorney or"

Page 5, line 5, after the underscored period insert "This subsection does not apply unless at least one year has elapsed since the imposition or last modification of the probation."

Renumber accordingly

Date: 3/7/07  
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2320

House JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Not Pass as Amended

Motion Made By Rep. Wahl Seconded By Rep. Wolf

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin		✓	Rep. Griffin		✓
Rep. Boehning	✓		Rep. Meyer		✓
Rep. Charging			Rep. Onstad		✓
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Heller		✓			
Rep. Kingsbury	✓				
Rep. Koppelman		✓			
Rep. Kretschmar	✓				

Total (Yes) 7 No 6

Absent 1

Floor Assignment Rep. Wahl

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**SB 2320, as engrossed: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO NOT PASS (7 YEAS, 6 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2320 was placed on the Sixth order on the calendar.**

Page 5, line 1, replace "Unless within ninety days of the original sentence," with "If"

Page 5, line 2, replace "unless waived" with "in its discretion or if requested by the state's attorney or"

Page 5, line 3, remove "by"

Page 5, line 5, after the underscored period insert "This subsection does not apply unless at least one year has elapsed since the imposition or last modification of the probation."

Renumber accordingly

REPORT OF STANDING COMMITTEE (410)  
March 14, 2007 4:50 p.m.

Module No: HR-48-5366  
Carrier: Dahl  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

**SB 2320, as engrossed and amended: Judiciary Committee (Rep. DeKrey, Chairman)**  
recommends **DO NOT PASS** (7 YEAS, 6 NAYS, 1 ABSENT AND NOT VOTING).  
Engrossed SB 2320, as amended, was placed on the Fourteenth order on the  
calendar.

2007 TESTIMONY

SB 2320

AH #1

1-30-07

same  
to House

Mr. Chairman and Members of the Senate Judiciary Committee:

My name is Paul Myerchin. I am a local attorney, having practiced in Bismarck for nearly 10 years. I am here before you today to testify in favor of SB2320. This bill will bring fundamental fairness to revocation proceedings by requiring a new or updated Pre-Sentence Investigation report (PSI) prior to the Court re-sentencing a defendant.

Currently, North Dakota law is clear, both by statute and case law, that the trial court is allowed to impose any sentence that would have been available at the initial time of sentencing. *State v. Miller*, 418 N.W.2d 614, 615 (N.D. 1988); N.D.C.C. § 12.1-32-07(06) (Supp. 2005); *State v. Jones*, 418 N.W.2d 782, 784 (N.D. 1988); *State v. Causer*, 2004 ND 75, at ¶ 75.

In my practice, I have witnessed judges warn defendants that if they come back to their courtroom, they will impose a severe sentence. Unfortunately, I have also witnessed some probationers make minor mistakes on probation. These minor mistakes could be handled through intermediate measures. Instead, however, the defendant is brought back before the same judge and is re-sentenced to serve the original or even harsher sentence. All of this is done without the Court having a new or updated PSI.

This current process does not give judges the complete information about a defendant to set a proper, individualized sentence. The Michigan Supreme Court explained the importance of a PSI this way: '[s]entencing a defendant without an adequate knowledge of his needs would thereby reduce the sentencing process from a first step toward rehabilitation to the dignity of a game of chance.' *People v. Triplett*, 287 N.W.2d 165, 167 (Mich. 1980). This bill would correct this problem. As a people confident in its laws and constitutions, we should support a bill that brings fundamental fairness to the revocation process.

From a practical side, the mandatory requirement of this bill should not be a concern for three reasons: (1) the defendant can choose to waive his right to a new or updated PSI; (2) this amendment could actually bring about a cost savings to the system if we are not incarcerating people that don't need to be incarcerated; and (3) other states such as California, Illinois, Michigan and, in fact, the federal government, all provide new or updated PSI's at the revocation stage.

Thank you for your time and consideration.

Sincerely,

Paul H. Myerchin  
Attorney at Law

Att # 2a  
1-30-07

SENATE JUDICIARY COMMITTEE  
SENATOR DAVE NETHING, CHAIRMAN  
JANUARY 30, 2007

ROBYN SCHMALENBEGER, NORTH DAKOTA DEPARTMENT OF  
CORRECTIONS, FIELD SERVICES DIVISION  
PRESENTING TESTIMONY RE: SB 2320

My name is Robyn Schmalenberger and I am a program manager with the North Dakota Department of Corrections, Field Services Division. I am here to provide neutral testimony on SB 2320 and propose amendments to provide clarity.

In the current form, SB 2320 adds a subsection to 12.1-32-07 that requires the Department of Corrections, unless waived by the defendant, to conduct a new or updated presentence investigation before re-sentencing a defendant whose probation has been revoked. The current language may be interpreted to include any defendant on probation appearing before the court for resentencing on a revocation.

Since there are unsupervised probationers not under Department of Corrections custody or supervision, on behalf of the DOCR, I am proposing amendments that will limit the requirement of completing new or updated presentence investigations and reports by the Department of Corrections to only individuals under the supervision of the Department of Corrections.

Between January 1, 2005 and December 31, 2006, 1,749 individuals under the supervision of the Department of Corrections that had their probation revoked. 584 of these individuals had presentence investigations completed at the time of their initial sentencing. These presentence investigations would need to be updated. 1,165 of these individuals did not have presentence investigations completed at the time of their initial sentencing. New presentence investigations would need to be completed on these individuals. It takes approximately one hour to update a presentence investigation and 6.9 hours to complete a new presentence investigation.

1. Amendments Attached

I understand that a fiscal note was not attached to SB 2320. Using current known costs, the fiscal impact to the Department of Corrections if this bill becomes law is roughly \$231,000 per biennium. These funds are not included in our current budget.

AH 2b  
1-30-07

DEPARTMENT OF CORRECTIONS AND REHABILITATION'S  
PROPOSED AMENDMENTS TO SENATE BILL 2320

Page 5, line 1, after "If", insert "a defendant is under the supervision and management of the department of corrections and rehabilitation and" and remove "before resentencing the defendant."

Page 5, line 2, remove "the department of"

Page 5, remove line 3

Page 5, line 4, remove "investigation and prepare" and after "presentence" insert "investigation and"

Page 5, line 5, remove "consideration of the"

Page 5, line 5, after "court" insert "before resentencing the defendant"

Renumber accordingly.

*Time Limit*

*Spelling Error pg 5, line 1*

## TESTIMONY ON SB 2320

Judge Bob Wefald

I am testifying in opposition to SB 2320 which would add a new subsection to NDCC 12.1-32-07 to require a new or updated Pre-Sentence Investigation (PSI) unless the revocation of a defendant's probation occurs within 90 days of the original sentence. Currently a PSI is required under NDCC 12.1-32-02 (11) for certain felonies as follows:

11. Before sentencing a defendant on a felony charge under section 12.1-20-03 [Gross sexual Imposition], 12.1-20-03.1 [Continuous Sexual Abuse of a Child], 12.1-20-11 [Incest], 12.1-27.2-02 [Use of a Minor in a Sexual Performance], 12.1-27.2-03 [Promoting or Directing an Obscene Sexual performance], 12.1-27.2-04 [Promoting Sexual Performance by a Minor], or 12.1-27.2-05 [Sexual Performance by a Minor - Affirmative Defense], a court shall order the department of corrections and rehabilitation to conduct a presentence investigation and to prepare a presentence report. A presentence investigation for a charge under section 12.1-20-03 must include a risk assessment. A court may order the inclusion of a risk assessment in any presentence investigation. In all felony or class A misdemeanor offenses, in which force, as defined in section 12.1-01-04, or threat of force is an element of the offense or in violation of section 12.1-22-02 [Burglary], or an attempt to commit the offenses, a court, unless a presentence investigation has been ordered, must receive a criminal record report before the sentencing of the defendant. Unless otherwise ordered by the court, the criminal record report must be conducted by the department of corrections and rehabilitation after consulting with the prosecuting attorney regarding the defendant's criminal record. The criminal record report must be in writing, filed with the court before sentencing, and made a part of the court's record of the sentencing proceeding.

I have added in brackets the names of the crimes. The North Dakota Rules of Criminal Procedure in Rule 32(c)(1) give the Courts the discretion to order a PSI:

(c) Presentence Investigation.

(1) When Made. The court may order a presentence investigation and report at any time. Except when the defendant consents in writing, the report may not be submitted to the court or its contents disclosed unless the defendant has pleaded guilty or has been found guilty.

SB 2320 substantially increases the number of PSIs that will be MANDATORY and will require them in revocation cases where there was never a PSI in the first instance.

There is a fiscal note for about \$125,000 as this bill will definitely require more time and expense just in terms of personnel to do these additional reports. There will also be more jail expenses while defendants are held in custody for waiting for a PSI to be completed before they can be re-sentenced on the revocation of their probation.

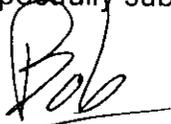
This new subsection 7 will make PSIs MANDATORY in ALL revocations. This is entirely unnecessary. The probation officials have good knowledge of the probationers they supervise and they give them opportunities to square away their lives before they ever file a motion to revoke their probation. The judge upon reviewing the file gets a good idea of what is required upon re-sentencing. In most judicial districts felony revocations are done before the same judge who imposed the original sentence. In misdemeanors any judge can re-sentence the defendant. The system works well. Twenty-five of my 41 District Court colleagues have taken the time to email me their concerns about SB 2320 and no one has indicated it is a good idea. If you are going to adopt this bill, at least amend it to limit it to what is currently required in NDCC 12.1-32-02 (11) which is limited to the crimes of set forth in 12.1-20-03 [Gross sexual Imposition], 12.1-20-03.1 [Continuous Sexual Abuse of a Child], 12.1-20-11 [Incest], 12.1-27.2-02 [Use of a Minor in a Sexual Performance], 12.1-27.2-03 [Promoting or Directing an Obscene Sexual performance], 12.1-27.2-04 [Promoting Sexual Performance by a Minot], or 12.1-27.2-05 [Sexual Performance by a Minor - Affirmative Defense], and 12.1-22-02 [Burglary]. Without such an amendment this bill will require a very substantial and unnecessary increase in PSIs.

If you are going to adopt this bill, please consider this amendment: After the word "defendant," and before the word "shall" please add the words "in cases in which a

presentence investigation is required under section 12.1-32-02(11),". That will limit these additional PSIs to cases in which there was a required PSI in the first instance.

But let me also suggest to you that this bill is unnecessary even in cases where a PSI is required in the first instance. It is unnecessary because the sentencing judge is very familiar with the defendant and is easily brought up to speed by the defendant's probation officer. It is very easy for the probation officer and for the defendant and the defendant's attorney to submit any new information to update the Court on any changes since the original PSI was considered by the Court at the original sentencing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rob", written over a horizontal line.

Robert O. Wefald  
District judge

**HOUSE JUDICIARY COMMITTEE  
DUANE DEKREY, CHAIRMAN  
March 7, 2007**

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**ROBYN SCHMALENBEGER, NORTH DAKOTA DEPARTMENT OF  
CORRECTIONS, FIELD SERVICES DIVISION  
PRESENTING TESTIMONY RE: SB 2320**

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Good morning Mr. Chairman and members of the House Judiciary Committee. For the record my name is Robyn Schmalenberger and I am a program manager with the North Dakota Department of Corrections, Field Services Division. I am testifying in opposition to SB 2320.

SB 2320 adds a subsection to NDCC 12.1-32-07 that orders the Department of Corrections to complete an updated or new Pre-sentence Investigation at the time of revocation of probation, unless the revocation occurs within 90 days of the original sentencing or unless waived by the defendant.

SB 2320 will significantly increase the number of Pre-sentence Investigations (PSIs) completed by the Department of Corrections. Offender numbers have steadily increased over the last several months. The Department of Corrections does not believe increasing the number of mandated PSIs is an efficient use of limited resources. On behalf of the Department of Corrections, I urge this committee to give a do not pass recommendation to SB 2320.

The Department of Corrections currently completes approximately 1100 PSIs per biennium. Approximately 1750 individuals under the supervision of the Department of Corrections have their probation revoked each biennium. If updated or new Pre-sentence investigations are mandated on these cases, the current biennial rate of Pre-sentence Investigations could more than double.

Another concern is that SB 2320 does not exclude probationers that may not be under the custody or supervision of the Department of Corrections on misdemeanor and unsupervised probation. In the last calendar year over 15,000 individuals were placed on unsupervised probation in North Dakota. It is not clear how many of these individuals had their supervision revoked, but even a fraction of these cases would further significantly increase the number of PSIs mandated. It would be unmanageable for the Department of Corrections.

Parties with information pertinent to re-sentencing a defendant are present in the courtroom during revocation hearings. Revocation hearings are typically held in front of the original sentencing Judge and the supervising probation officer is

available to provide testimony. Information provided by the defense attorney and defendant may also be considered. If the court does not believe it has sufficient information at the time of re-sentencing, it currently has ability to order a PSI.

In addition to the impact on the Department of Corrections, the court will be affected, as an additional hearing for re-sentencing will need to be scheduled. The county jails will also be affected, as some of these individuals will remain in jail awaiting the completion of a PSI.

If this committee chooses to adopt SB 2320, I ask that the following amendments be considered to minimize strain on current resources.

**Amendment**

Page 5, Line 1, replace "within ninety days of the original sentence, the court revokes the" with "the court revokes the defendant's probation within one year of the original sentence, the court shall order a new or updated presentence investigation and report from the department of corrections and rehabilitation before resentencing the defendant after revocation of probation for a class C felony sexual offense, a class C felony offense involving violence, a class B felony offense, a class A felony offense, or a class AA felony offense. The defendant may waive the requirements of this subsection."

Page 5, remove lines 2-5

Renumber accordingly

In closing, please consider a do not pass recommendation on this bill. If you choose to recommend do pass, I ask that you consider the proposed amendments to limit the scope of mandated PSIs.

NORTH DAKOTA DEPARTMENT OF CORRECTIONS AND REHABILITATION'S PROPOSED  
AMENDMENTS TO ENGROSSED SENATE BILL NO. 2320

Page 5, Line 1, replace "within ninety days of the original sentence, the court revokes the" with "the court revokes the defendant's probation within one year of the original sentence, the court shall order a new or updated presentence investigation and report from the department of corrections and rehabilitation before resentencing the defendant after revocation of probation for a class C felony sexual offense, a class C felony offense involving violence, a class B felony offense, a class A felony offense, or a class AA felony offense. The defendant may waive the requirements of this subsection."

Page 5, remove lines 2-5

Renumber accordingly