

2009 SENATE JUDICIARY

SB 2116

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2116

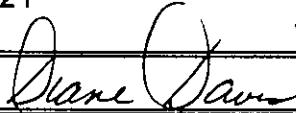
Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 01/12/09

Recorder Job Number: 6821

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

**Leann Bertsch** – Director of the Department of Corrections and Rehabilitation - See written testimony. Recommends a do pass.

**Senator Fiebiger** – Asks if we should keep the language vague to encompass new technology coming in the future.

**Bertsch** – Responded that when you are dealing with a criminal penalty we do not want the criminal defendant to be able to challenge that it wasn't encompassed. There is a need to be specific.

**Senator Fiebiger** – Asks about medical records being disclosed for research purposes. He asks who can get this information.

**Bertsch** – Said there is a director of research and planning who has to approve all research projects. The wording says "allows it", doesn't mean they will get it. It still has to go through all the approvals.

**Senator Nething** – Asks if any county jails are qualified to house female inmates following the enactment of 12-47-38.

**Bertsch** – Says 12-47-38 does not provide for any type of standards with regards to housing. She said this is one that should have been repealed as well. She explains the difference in the two bills, 2114 and 2116.

Discussion continues on using county jails for women inmates.

Closed hearing on 2116.

# 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2116

Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/26/09

Recorder Job Number: 7757

Committee Clerk Signature

*Deane Davis*

Minutes: **Senator Nething, Chairman**

Committee work

Committee discusses which correctional facility they are talking about. The repealer now says you can put women into county jails if the director wants to and before they couldn't do that without qualification. Senator Lyson thinks this should be done.

Senator Lyson motions do pass, Senator Fiebiger seconds

Vote is 6 yes, 0 no

Senator Lyson will carry

Date: 1-26/09  
Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES **SB 2116**  
BILL/RESOLUTION NO.

Senate JUDICIARY Committee

Check here for Conference Committee

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

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Sen Lyson Seconded By Sen Fiebiger

Senators	Yes	No	Senators	Yes	No
Sen. Dave Nething - Chairman	X		Sen. Tom Fiebiger	X	
Sen. Curtis Olafson - V. Chair.	X		Sen. Carolyn Nelson	X	
Sen. Stanley W. Lyson	X		Sen. Mac Schneider	X	

Total (Yes) 6 (N) 0

Absent \_\_\_\_\_

Floor Assignment Sen Lyson

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

**REPORT OF STANDING COMMITTEE**

**SB 2116: Judiciary Committee (Sen. Nething, Chairman) recommends DO PASS**  
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2116 was placed on the  
Eleventh order on the calendar.

2009 HOUSE JUDICIARY

SB 2116

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2116

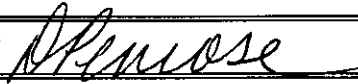
House Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/4/09

Recorder Job Number: 10176

Committee Clerk Signature



Minutes:

**Ch. DeKrey:** We will open the hearing on SB 2116.

**Leann Bertsch, Director, ND DOCR:** Sponsor, support (attachment). Explained the bill.

**Chairman DeKrey:** What are the differences between this bill and SB 2114?

**Leann Bertsch:** I wish they could have been done together. SB 2116 deals with the section for the penitentiary or prison. SB 2114 has to do with the section of code that has to do with county and regional jails. We wanted the language to be the same because we don't want different contraband statutes for inmates in a prison or an inmate in a regional/county jail. We wanted the same penalty.

**Chairman DeKrey:** How hard would it be to combine the two bills?

**Leann Bertsch:** Probably would be confusing.

**Rep. Boehning:** Do you currently allow the prisoners to have TV and/or radios.

**Leann Bertsch:** They can have a TV but the TV has to be purchased through the Commissary, and it's a special TV that's considered safe, they are limited in what they can see.

**Rep. Boehning:** What about radio.

**Leann Bertsch:** They can have boom boxes.



**Rep. Boehning:** I think in the bill it talks about any other electronic device, etc. Would that ban radio?

**Leann Bertsch:** No, they can't use these to communicate back and forth. We are concerned with cell phones. We need to have control over TV, radio, phones, and it has to be a secured phone that is monitored. They can only have items purchased at the Commissary. They can't have any item where they would be able to communicate out of the prison.

**Rep. Koppelman:** So should we add something to the bill that if you purchased it from the Commissary it would be okay.

**Leann Bertsch:** Yes, and also medical devices are fine.

**Rep. Griffin:** In section 3, what was the impetus behind that wanting to release these records? Who is pushing for that?

**Leann Bertsch:** This is just to clarify, we have people all the time that want to do research based on prison populations. This just clarifies and allows us the ability to restrict that access. This will enable us to be able to release some information to researchers.

**Rep. Griffin:** Has this information been provided before.

**Leann Bertsch:** We had a similar statute on the juvenile side, but we didn't have it on the adult side. This will allow us to share critical information.

**Rep. Griffin:** When the information is provided, are the names removed.

**Leann Bertsch:** That's where you see, that they may not redisclose identifying information. At times a researcher may get the names, but there is a huge process that they have to go through to get approved and be able to do their research. It may actually have some identifying information, it has to be approved by us that they cannot redisclose any information or publish any names, etc.

**Rep. Dahl:** Is there anything in here that would conflict with federal law, or HIPAA.

**Leann Bertsch:** No, actually this language is modeled after the federal law.

**Rep. Delmore:** Does the prisoner sign a release for his information to be included in the research.

**Leann Bertsch:** In some instances yes and in some instances not. Sometimes it is just basic information that a person would have access to in the public.

**Ch. DeKrey:** So you're okay with putting in language about the commissary in SB 2114 and the medical device language in both bills.

**Rep. Klemin:** Going back to SB 2114, which deals with county and regional jails; would that also have things that are purchased in the commissary?

**Leann Bertsch:** They do have commissaries; I think when you're talking about short stays you're probably not going to have TV's or radios. They may have a radio; but I don't think that most jails have cable access. I know that some jails have devices.

**Rep. Klemin:** So they're not really purchased in the commissary that's the issue, it's whether it's approved by your department.

**Leann Bertsch:** I would agree with that.

**Chairman DeKrey:** Thank you. Further testimony in support. Testimony in opposition. We will close the hearing.

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2114 & SB 2116

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/4/09

Recorder Job Number: 10177

Committee Clerk Signature

*D. Penrose*

Minutes:

**Chairman DeKrey:** We will take a look at SB 2114. I need a motion to reconsider our actions taken on 3/3/09.

**Rep. Delmore:** I move that we reconsider our action on SB 2114.

**Rep. Vig:** Second.

**Chairman DeKrey:** Voice vote, motion carried. I will appoint a subcommittee of Rep. Klemin, Rep. Koppelman and Rep. Delmore to work on SB 2114 and SB 2116.

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2116

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/10/09

Recorder Job Number: 10604

Committee Clerk Signature

*Delmore*

Minutes:

**Ch. DeKrey:** We will take a look at SB 2116.

**Rep. Klemin:** Explained the amendment. It is exactly the same as SB 2114, in terms of the law enforcement purposes, taking out the battery and putting in the other medically prescribed devices.

**Rep. Griffin:** Second.

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

What are the committee's wishes?

**Rep. Koppelman:** I move a Do Pass as amended.

**Rep. Delmore:** Second.

11 YES 0 NO 2 ABSENT

DO PASS AS AMENDED

CARRIER: Rep. Delmore

PROPOSED AMENDMENTS TO SENATE BILL NO. 2116

Page 1, line 1, replace the first "a" with "three" and replace "subsection" with "subsections"

Page 1, line 9, replace "A" with "Three" and replace "subsection" with "subsections"

Page 1, line 10, replace "is" with "are"

Page 1, line 11, remove "a."

Page 1, line 14, after "divisions" insert "except for law enforcement purposes"

Page 1, line 15, remove "b."

Page 1, line 20, after "divisions" insert "except for law enforcement purposes"

Page 1, line 21, remove "c."

Page 2, line 13, remove "battery or"

Page 2, line 16, after the underscored period insert "A wireless electronic communications device does not include a medically prescribed device or any other device approved by the department."

Renumber accordingly

VK  
3/11/09

PROPOSED AMENDMENTS TO SENATE BILL NO. 2116

Page 1, line 1, remove "a new" and after "subsection" insert "8"

Page 1, line 9, replace "A new subsection" with "Subsection 8"

Page 1, line 10, after the colon insert:

"8."

Page 1, line 14, after "divisions" insert "except for law enforcement purposes"

Page 1, line 20, after "divisions" insert "except for law enforcement purposes"

Page 2, line 13, remove "battery or"

Page 2, line 16, after the underscored period insert "A wireless electronic communications device does not include a medically prescribed device or any other device approved by the department."

Renumber accordingly

Date: 3/10/09  
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2116

**HOUSE JUDICIARY COMMITTEE**

Check here for Conference Committee

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

Action Taken  DP  DNP  DP AS AMEND  DNP AS AMEND

Motion Made By Rep. Koppelman Seconded By Rep. Delmore

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Vig	✓	
Rep. Dahl			Rep. Wolf	✓	
Rep. Hatlestad	✓		Rep. Zaiser		
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 11 No 0

Absent 2

Floor Carrier: Rep. Delmore

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

**REPORT OF STANDING COMMITTEE**

**SB 2116: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SB 2116 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "a new" and after "subsection" insert "8"

Page 1, line 9, replace "A new subsection" with "Subsection 8"

Page 1, line 10, after the colon insert:

"8."

Page 1, line 14, after "divisions" insert "except for law enforcement purposes"

Page 1, line 20, after "divisions" insert "except for law enforcement purposes"

Page 2, line 13, remove "battery or"

Page 2, line 16, after the underscored period insert "A wireless electronic communications device does not include a medically prescribed device or any other device approved by the department."

Renumber accordingly



2009 SENATE JUDICIARY

CONFERENCE COMMITTEE

SB 2116

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2116

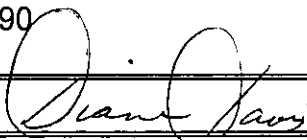
Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 4/15/09

Recorder Job Number: 11890

Committee Clerk Signature



Minutes:

**Senator Lyson, Chairman**

**Representative Klemin**

**Senator Olafson**

**Representative Hatlestad**

**Senator Fiebiger**

**Representative Delmore**

Senator Lyson asks Representative Klemin to explain the amendments the House put on.

Senator Fiebiger said he thinks the language is awkward, and thinks maybe a sentence could be put in to make it flow better. He says it only talks about what an inmate cannot do, then it adds for law enforcement purposes. He mentions it doesn't say anything about law enforcement personnel carrying these devices. Senator Lyson agrees with Senator Fiebiger and asks Leann Bertsch from the Dept. of Corrections to speak on the amendment.

Representative Hatlestad said his perception of this is if an inmate was to carry a wire for law enforcement that this would allow that to happen. Representative Klemin brings up that the language in 2116 and 2114 are virtually identical except that 2114 refers to correctional facilities, 2114 refers to penitentiaries. Leann Bertsch says very seldom will you have an inmate wired in a penitentiary setting most likely it will be in a county or regional jail. She said

there might be a time where they may want to wire an inmate.

Representative Klemin moves the Senate accede to the House amendments. It was seconded by Senator Olafson.

Roll call vote taken. 6 yes, 0 no

Senator Fiebiger will carry for the Senate

Representative Klemin will carry for the House

Date: 4/15/09

Roll Call Vote #: 1

2009 SENATE CONFERENCE COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. **SB2116** as (re) engrossed

Senate \_\_\_\_\_ Judiciary \_\_\_\_\_ Committee

Check here for **Conference Committee**

- Action Taken
- SENATE accede to House Amendments
  - SENATE accede to House Amendments and further amend
  - HOUSE recede from House Amendments
  - HOUSE recede from House amendments and amend as follows

Senate/House Amendments on SJ/HJ pages(s) 893 -- \_\_\_\_\_

**Unable to agree**, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) \_\_\_\_\_ was placed on the Seventh order of business on the calendar.

Motion Made By Rep. Klemin Seconded By Sen. Olafson

Senators				Y	N	Representatives				Y	N
				e	o					e	o
				s						s	
Senator Lyson -Chair	X			X		Rep. Klemin	X			X	
Senator Olafson	X			X		Rep. Hatlestad	X			X	
Senator Fiebiger	X			X		Rep. Delmore	X			X	

Vote Count 6 Yes 0 No \_\_\_\_\_ Absent

Senate Carrier Fiebiger House Carrier Rep. Klemin

LC NO. \_\_\_\_\_ of amendment

LC NO. \_\_\_\_\_ of engrossment

Emergency clause added or deleted \_\_\_\_\_

Statement of purpose of amendment \_\_\_\_\_

**REPORT OF CONFERENCE COMMITTEE**

**SB 2116:** Your conference committee (Sens. Lyson, Olafson, Fiebiger and Reps. Klemin, Hatlestad, Delmore) recommends that the **SENATE ACCEDE** to the House amendments on SJ page 893 and place SB 2116 on the Seventh order.

SB 2116 was placed on the Seventh order of business on the calendar.

2009 TESTIMONY

SB 2116

SB-2116  
Attachment 1

SENATE JUDICIARY COMMITTEE  
Senator Dave Nething, Chairman  
January 12, 2009

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North Dakota Department of Corrections and Rehabilitation  
Leann K. Bertsch, Director  
Presenting Testimony Concerning: SENATE BILL 2116

Chairman Nething and members of the Committee, for the record, I am Leann Bertsch, Director of the Department of Corrections and Rehabilitation testifying in support of Senate Bill 2116.

Section 1 of Senate Bill 2116 provides for a new subsection to Section 12-47-21 of the North Dakota Century Code. This new subsection to section 12-47-21 makes it a class C felony willfully manufacture, possess, or use a wireless electronic communication device on or within any premises under the control of the department of corrections and rehabilitation ("DOCR") or any of its divisions, or for any person to willfully deliver, or possess with intent to deliver such device to a penitentiary inmate or allow a penitentiary inmate to possess or use a wireless electronic communications device on or within any premises under the control of the DOCR or any of its divisions.

Section 2 of Senate Bill 2116 provides for amendment to subsection 7 of section 12-47-21 of the North Dakota Century Code. The proposed amendment sets forth a detailed definition of a wireless electronic communication device. I refer to such devices as cell phones in the remainder of my testimony.

In a prison, cell phones in the hands of inmates can be dangerous for a number of reasons. A cell phone may allow an inmate an opportunity in an unmonitored way to continue to conduct criminal activity. An inmate could order a hit on someone, make threatening calls, arrange to have drugs or weapons smuggled in, or plan an escape, to name a few dangers. Cell phones have become a greater problem as the devices have gotten smaller. As technology has

advanced, cell phones are more frequently equipped with internet and e-mail capabilities, opening up more chances for unmonitored communication and misuse. Recent headlines confirm that cell phones are dangerous in the hands of inmates. In Philadelphia, a woman was brutally murdered before she could testify in court against a career criminal. She was the victim of a hit ordered from prison by an inmate using a cell phone. A prison dental assistant in Nevada was fired for sneaking a cell phone to an inmate, which he used to plan a successful escape. Prison inmates who have cell phones may be planning an escape or an uprising, taking care of their drug business or planning a murder or some other terrible crime. Cell phones in prison can be much more dangerous than other types of contraband. The penalty for such should reflect that.

Section 3 of Senate Bill 2116 provides for a new subsection to section 12-47-36 of the North Dakota Century Code. The proposed amendment allows the disclosure of medical, psychological, and treatment records of the department relating to persons in the custody or under the supervision of the division of adult services of the department of corrections and rehabilitation for the purpose of conducting research and educational activities. The person conducting research or educational activities may not re-disclose identifying information received under this subsection.

Section 4 of Senate Bill 2116 repeals section 12-47-38 of the North Dakota Century Code. Female inmates are challenging the constitutional validity of N.D.C.C. § 12-47-38, among multiple other claims, in a class action lawsuit now pending before the Eighth Circuit Court of Appeals. They are challenging this statute on equal protection grounds because it requires the DOCR to contract with a county for the housing of female inmates in the county jail, to the extent space is available in the county jail, if no qualified state facility is available. N.D.C.C. § 12-47-38 was enacted in 2003. It only applies to county jails. It does not apply to regional corrections centers. And it is only applicable if no qualified facility is available to house DOCR female inmates.



The DOCR has never housed its female inmates in county jails following the enactment of Section 12-47-38; instead, it has housed its female inmates at New England, North Dakota, in the Dakota Women's Correctional and Rehabilitation Center ("DWCRC").

The DWCRC is a prison facility – it is not a county jail. It is not subject to any of the provisions of N.D.C.C. ch. 12-44.1, the chapter that governs county jails and regional corrections centers.

The DOCR first began housing lower custody female inmates at the DWCRC in 2003 and its higher custody inmates remained at the James River Correctional Center ("JRCC") until the DWCRC was ready to house the higher custody inmates. The higher custody inmates were moved from the JRCC to the DWCRC in the fall of 2004. Qualified facilities have been available.

Under N.D.C.C. § 54-23.3-04(11), the director of DOCR has authority:

To contract for correctional services, and to provide such services, with the United States, Canada, other states, and any of their governmental subdivisions and agencies and with ***another agency or governmental unit in this state***, or with any private or public correctional or treatment facility or agency. The director shall reimburse the entity at an amount based upon the services required for the housing and treatment of inmates. . . .

This section has been around since 1989, when the DOCR was first formally established, and there was a similar predecessor section since about 1971. The DOCR's authority to contract for correctional services for its female inmates has never been dependent upon Section 12-47-38. And that section has never been

the basis for the transfer of female inmates to DWCR. NDCC Section 12-47-38 is unnecessary and needs to be repealed.

Section 5 of Senate Bill 2116 declares the Act to be an emergency measure.

The Department of Corrections and Rehabilitation requests this committee give Senate Bill 2116 a "do pass" recommendation.

**HOUSE JUDICIARY COMMITTEE**  
**Representative Duane DeKrey, Chairman**  
**March 4, 2009**

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**North Dakota Department of Corrections and Rehabilitation**  
**Leann K. Bertsch, Director**  
**Presenting Testimony Concerning: SENATE BILL 2116**

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Attached to the copy of my testimony is proposed amendment to Senate Bill 2116. The amendment is being offered at the request of law enforcement. The definition of a wireless device is comprehensive and there was a concern that law enforcement may be prohibited from conducting investigations that may require an inmate or individual in a prison from using a recording device. The amendment provides an exception for law enforcement purposes.

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pending before the Eighth Circuit Court of Appeals. They are challenging this statute on equal protection grounds because it requires the DOCR to contract with a county for the housing of female inmates in the county jail, to the extent space is available in the county jail, if no qualified state facility is available. N.D.C.C. § 12-47-38 was enacted in 2003. It only applies to county jails. It does not apply to regional corrections centers. And it is only applicable if no qualified facility is available to house DOCR female inmates.

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based upon the services required for the housing and treatment of inmates. . . .

This section has been around since 1989, when the DOCR was first formally established, and there was a similar predecessor section since about 1971. The DOCR's authority to contract for correctional services for its female inmates has never been dependent upon Section 12-47-38. And that section has never been the basis for the transfer of female inmates to DWCR. NDCC Section 12-47-38 is unnecessary and needs to be repealed.

Section 5 of Senate Bill 2116 declares the Act to be an emergency measure.

The Department of Corrections and Rehabilitation requests this committee give Senate Bill 2116 a "do pass" recommendation.

Proposed amendment to Senate Bill 2116

Page 1, Line 14, after "divisions", insert ", except for law enforcement purposes"

Page 1, Line 20, after "divisions", insert ", except for law enforcement purposes"

Renumber accordingly