

# MICROFILM DIVIDER

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



ROLL NUMBER

DESCRIPTION

2444

2001 SENATE JUDICIARY

SB 2444

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2444

Senate Judiciary Committee

☐ Conference Committee

Hearing Date February 14th, 2001

Tape Number	Side A	Side B	Meter #
1	x		0.0-20.6
Committee Clerk Signature			

Minutes: **Senator Watne** opened the hearing on SB 2444: A BILL FOR AN ACT TO CREATE AND ENACT SECTION 19-03.4 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO VOLATILE CHEMICALS AND DRUG PARAPHERNALIA; TO AMEND AND REENACT SUBSECTION 1 OF SECTION 15.1-24-05, SUBSECTION 7 OF SECTION 19-03.1-23.2, SECTION 19-03.1-23.2, SUBSECTION 6 OF SECTION 19-03.1-36, AND SUBSECTION 4 OF SECTION 19-03.1-37 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO DRUG OFFENSES; TO REPEAL SECTION 12.1-31-06 AND CHAPTER 12.1-31.1 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO VOLATILE CHEMICALS AND DRUG PARAPHERNALIA; AND TO PROVIDE A PENALTY.

**Senator G. Nelson**, representing district 22, the prime sponsor of the bill. Very supportive of all the bills being heard today in the judiciary committee. SB 2444, 4018, 4019 and 2445.

**Senator Bercier**, I can't allow the majority leader off the hook this morning....Happy Valentines Day!

**Senator G. Nelson**, you too! You just made my day.

**Wayne Stenehjem**, Attorney General for ND, testifies in favor of SB 2444. (testimony attached) 8 goals he would like to reach; 1, stop importation of illegal drugs; 2, stop the clandestine manufacture of drugs in ND; 3, create a broad public awareness; 4, identify groups; 5, give North Dakotans assistance by helping family members with drug problems; 6, keep high quality law enforcement officers in ND; 7, ensure all drug programs are trying to reduce the drug problem in ND; 8, make public accountability for drug control programs.

**Senator Trenbeath**, on page 7, determining whether it is drug paraphernalia line 12 bothers me. That means when Osco Drug sells too many cigarette paper, they need to stop. Isn't that a problem about criminal law, defining criminal activity.

**Senator Nelson**, in section 3, we had evaluations of drug addictions, now we are saying they are necessary in felonies.

**Wayne Stenehjem**, the courts have been careful of evaluations.

**Senator Dever**, section 1 where the law enforcement shall notify a school principle, does that work both ways.

**Wayne Stenehjem**, we want to get everyone involved. We wanted to do this in a proper way to get everyone involved.

**Senator Bercler**, where is education going to be addressed in? Another bill?

**Wayne Stenehjem**, a lot of education programs are already active now. Working in schools is an important part of prevention. When we have agents in schools, that means they are not out in the field arresting criminals. I talked about the problem with drugs to crowd around ND, and most people didn't know the specifics about drugs.

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**John Olson**, representing peace officers and state attorneys, supports the bill. Only comment is that this is a multifaceted issue.

**Howard Anderson**, executive director of the Board of Pharmacy, went on the record in support of this bill.

**Senator Watne** closed the hearing on SB 2444.

**SENATOR NELSON MOTIONED TO AMEND THE BILL, SECONDED BY SENATOR LYSON. VOTE INDICATED 6 YEAS, 0 NAYS AND 1 ABSENT AND NOT VOTING. SENATOR NELSON MOTIONED TO DO PASS AS AMENDED, SECONDED BY SENATOR BERCIER. VOTE INDICATED 6 YEAS, 0 NAYS AND 1 ABSENT AND NOT VOTING. SENATOR NELSON VOLUNTEERED TO CARRY THE BILL.**

PROPOSED AMENDMENTS TO SENATE BILL NO. 2444

Page 1, line 7, remove the second "and" and after "penalty" insert "; and <sup>to</sup> declaring <sup>e.</sup> an emergency"

Page 8, after line 13, insert:

**"Section 10. Emergency.** This Act is declared to be an emergency measure."

Renumber accordingly

Date: 2/14  
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 246/4

Senate	Judiciary	Committee

☐ Subcommittee on \_\_\_\_\_

or

☐ Conference Committee

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

Action Taken Amend 2464 Emergency Clause

Motion Made By Nelson Seconded By Lysa

[illegible]

Total (Yes) 6 No 2

Absent

## Floor Assignment

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

Date: 2/14/01  
Roll Call Vote #: 2

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB 2444

Senate Judiciary Committee

☐ Subcommittee on \_\_\_\_\_  
or  
☐ Conference Committee

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

Action Taken Do Pass as Amended

Motion Made By Nelson Seconded By Bercier

Senators	Yes	No	Senators	Yes	No
Traynor, J. Chairman			Bercier, D.	<input checked="" type="checkbox"/>	
Watne, D. Vice Chairman	<input checked="" type="checkbox"/>		Nelson, C.	<input checked="" type="checkbox"/>	
Dever, D.	<input checked="" type="checkbox"/>				
Lyson, S.	<input checked="" type="checkbox"/>				
Trenbeath, T.	<input checked="" type="checkbox"/>				

Total (Yes) 6 No 0

Absent 1

Floor Assignment C. Nelson

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



**REPORT OF STANDING COMMITTEE (410)**  
February 15, 2001 8:48 a.m.

**Module No: SR-28-3450**  
**Carrier: C. Nelson**  
**Insert LC: 10791.0101 Title: .0200**

**REPORT OF STANDING COMMITTEE**

**SB 2444: Judiciary Committee (Sen. Traynor, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2444 was placed on the Sixth order on the calendar.

Page 1, line 7, remove the second "and" and after "penalty" insert "; and to declare an emergency"

Page 8, after line 13, insert:

"**SECTION 10. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly

2001 HOUSE JUDICIARY

SB 2444

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2444

House Judiciary Committee

☐ Conference Committee

Hearing Date 03-05-01

Tape Number	Side A	Side B	Meter #
TAPE I	8		01 to 4380
Committee Clerk Signature <i>Jean Davis</i>			

Minutes: Chairman DeKrey opened the hearing on SB 2444. Relating to volatile chemicals and drug paraphernalia; relating to drug offenses; relating to volatile chemicals and drug paraphernalia; to provide a penalty and to declare an emergency.

Wayne Stenehjem: Attorney General (see attached testimony).

Chairman DeKrey: I have a question, a farmer I know has sever allergies, he buys medicine by the case, and needles etc, if he had a son that was involved in making illegal substances, but the farmer is not, what will happen to the farmer and his land.

Wayne Stenehjem: We have a concern about the innocent people, if they have a logically explanation, they would not be prosecuted. If the son was the user, that may be more complicated, but the farmer would still have the use of the courts.

Rep Eckre: Why is meth becoming the "in" thing?

Wayne Stenehjem: There are a couple of reasons, the cost and the high lasts longer. It can be made at home, but meth is viciously addictive.

Rep Eckre: In the bill, written instructions are mentioned, what happens if a kid gets it off the Internet and he ran off the material and brought it to school just to be cool. Now what happens/

Wayne Stenehjem: There is nothing going to be wrong with that, if you look at that section many of the ingredients can be bought legitimately. Having the recipe isn't going to be a problem.

Rep Eckre: Sometimes kid just do stupid things.

Wayne Stenehjem: What this bill is talking about is not a single act.

Rep Eckre: I worry about an over zealous officer.

Wayne Stenehjem: I had some of the same concern, but I have not seen any of that.

Rep Klemin: In section seven on line 10, you said beyond a reasonable doubt, I don't see that.

Wayne Stenehjem: He explains the section to Rep Klemin.

Rep Klemin: ON page seven line 9, what is constructive possession , can you give an example.

Wayne Stenehjem: What about a bookmark on the computer?

Rep Klemin: I know what constructive notice is, but I am still a little fuzzy.

Wayne Stenehjem: That is still the best I can come up with.

Rep Klemin: Do you have anyway to track back on the Internet to do something about it.

Wayne Stenehjem: Maybe it is possible, but very hard to do.

Rep Klemin: Makes a comment about violating the copy right law.

Wayne Stenehjem: He laughs and explains the copy right law.

Rep Onstad: In section one, where it talks about notification, does that include the BIA?

Wayne Stenehjem: We are going to try and educate people, the public would be better served this way.

Rep Onstad: What happens if they fail to do so?

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House Judiciary Committee

Bill/Resolution Number SB 2444

Hearing Date 03-05-01

Wayne Stenehjem: I don't know.

Rep Onstad: I know on other practices, they do not report.

Wayne Stenehjem: A large part of the drug problem in on the reservation.

Vice Chr Kretschmar: If there any agencies of the state that are doing any thing to reduce the market?

Wayne Stenehjem: Yes, there are. there is "Drug Free School" but we want to go further.

Vice Chr Kretschmar: How wide spread is the use by minors?

Wayne Stenehjem: I saw a list of a report of a survey. in junior high it is about 8% and 11% in the high school, but those numbers are higher then the national average. It frightens me when I drive by a high school and know that one in ten of those have tried meth.

Vice Chr Kretschmar: There was some report that I saw just recently that meth can cause permanent brain damage.

Wayne Stenehjem: Yes, it causes permanent damage and their brain centers will be altered for life.

Chairman DeKrey: If there are no further questions, thank you for appearing. Anyone wishing to appear in support, in opposition of SB 2444.

Rep Ed Lloyd: District 19, voiced his concerns with the bill and the effect that would have on the experiment stations that are connected to the state colleges.

Chairman DeKrey: If there are no questions, thank you for appearing.

Bob Bennett: Assistant Attorney General (see attached testimony).

Rep Klemin: You reference a dangerous special offender on the second to the last page and then on the top of the next page it is special dangerous offender, is that a typo?

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House Judiciary Committee  
Bill/Resolution Number SB 2444  
Hearing Date 03-05-01

Bob Bennett: Yes, I will fix that with an amendment or a new amendment.

Chairman DeKrey: If there are no questions, thank you for appearing before the committee.

Anyone else wishing to testify for or against or neutral on SB 2444?

Wayne Stenchjem: I would like to respond to Rep Lloyd's concerns, they are already covered under current law. That language has been on the books since 1981.

Howard Anderson Jr: Executive Director of the Board of Pharmacy, testified in support of SB 2444.

Chairman DeKrey: Anyone else wish to testify on SB 2444. We will close the hearing on SB 2444.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2444b

House Judiciary Committee

☐ Conference Committee

Hearing Date 03-12-01

Tape Number	Side A	Side B	Meter #
TAPE 1		x	3622 to 3903
Committee Clerk Signature <i>Joan DeKrey</i>			

Minutes: Chairman DeKrey called the committee to order on SB 2444.

DISCUSSION

Rep Delmore there are some amendments.

Chairman DeKrey: We will table this bill until such time as the amendments are brought to the committee.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2444c

House Judiciary Committee

☐ Conference Committee

Hearing Date 03-14-01

Tape Number	Side A	Side B	Meter #
TAPE I	x		4830 to 5274
TAPE I		x	536 to 1070
Committee Clerk Signature <i>Jean Buss</i>			

Minutes: Chairman DeKrey called the committee to order on SB 2444.

DISCUSSION

Chairman DeKrey: We need to get someone from the Attorney General's Office to see what is needed for amendments. We will come back this afternoon and take up this bill.

TAPE I SIDE B

Chairman DeKrey: called the committee back to order.

Bob Bennet: Assistant Attorney General was called to the committee to explain the amendments.

Chairman DeKrey: we need someone to move the Attorney General's amendments.

Rep Maragos: I move the amendments, seconded by Rep Delmore.

Chairman DeKrey: we will take a voice vote on the amendments, motion carries.

DISCUSSION

Chairman DeKrey: What are the wishes of the committee. Rep Wrangham moved a DO PASS motion on SB 2444, seconded by Rep Delmore.



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House Judiciary Committee

Bill/Resolution Number SB 2444

Hearing Date 03-14-01

DISCUSSION

Chairman DeKrey: the clerk will call the roll on a DO PASS motion on SB 2444. The motion passes by a vote of 13 YES, 0 NO and 2 ABSENT. Carrier Vice Chr Kretschmar.

VR  
3/14/01  
1063

HOUSE AMENDMENTS TO ENGROSSED SENATE BILL 2444 HOUSE JUDICIARY 03-15-01  
Page 1, line 3, after "reenact" insert "section 12.1-32-09,"

Page 1, line 6, after "offenses" insert "and enhanced sentencing"

Page 1, after line 9, insert:

**"SECTION 1. AMENDMENT.** Section 12.1-32-09 of the North Dakota Century Code is amended and reenacted as follows:

**12.1-32-09. Dangerous special offenders - Habitual offenders - Extended sentences - Procedure.**

1. A court may sentence a convicted offender to an extended sentence as a dangerous special offender or a habitual offender in accordance with the provisions of this section upon a finding of any one or more of the following:
  - a. The convicted offender is a dangerous, mentally abnormal person: ~~The court may not make such a finding unless the presentence report, including a psychiatric examination, concludes that the offender's~~ whose conduct has been characterized by persistent aggressive behavior; and ~~that such~~ the behavior makes the offender a serious danger to other persons.
  - b. The convicted offender is a professional criminal; ~~The court may not make such a finding unless the offender is an adult and the presentence report shows that the offender~~ who has substantial income or resources derived from criminal activity.
  - c. The convicted offender is a habitual offender. The court may not make such a finding unless the offender is an adult and has previously been convicted in any state or states or by the United States of two felonies of class C or above committed at different times when the offender was an adult. For the purposes of this subdivision, a felony conviction in another state or under the laws of the United States ~~shall be~~ is considered a felony of class C or above if it is punishable by a maximum term of imprisonment of five years or more.
  - d. The offender was convicted of an offense ~~which~~ that seriously endangered the life of another person and the offender had previously been convicted of a similar offense.
  - e. The offender is especially dangerous because the offender used a firearm, dangerous weapon, or destructive device in the commission of the offense or during the flight therefrom.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the offender has been pardoned on the ground of innocence must be disregarded for purposes of subdivision c. In support of findings under subdivision b, it may be shown that the offender has had control of income or property not explained as derived from a source other than criminal activity. For purposes of subdivision b, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour

week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the offender's declared adjusted gross income under chapter 57-38.

2. The extended sentence may be imposed in the following manner:
  - a. If the offense for which the offender is convicted is a class A felony, the court may impose a sentence up to a maximum of life imprisonment.
  - b. If the offense for which the offender is convicted is a class B felony, the court may impose a sentence up to a maximum of imprisonment for twenty years.
  - c. If the offense for which the offender is convicted is a class C felony, the court may impose a sentence up to a maximum of imprisonment for ten years.
3. Whenever an attorney charged with the prosecution of a defendant in a court of this state for an alleged felony committed when the defendant was over the age of eighteen years has reason to believe that the defendant is a dangerous special offender or a habitual offender, the attorney, at a reasonable time before trial or acceptance by the court of a plea of guilty, may sign and file with the court, and may amend, a notice specifying that the defendant is a dangerous special offender or a habitual offender who upon conviction for the felony is subject to the imposition of a sentence under subsection 2, and setting out with particularity the reasons why the attorney believes the defendant to be a dangerous special offender or a habitual offender. In no case may the fact that the prosecuting attorney is seeking sentencing of the defendant as a dangerous special offender or a habitual offender be disclosed to the jury before a verdict. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, ~~it~~ the court may order the notice sealed and the notice ~~shall~~ is not be subject to subpoena or public inspection during the pendency of ~~such~~ the criminal matter, except on order of the court, but ~~shall be~~ is subject to inspection by the defendant alleged to be a dangerous special offender or a habitual offender and the offender's counsel.
4. Upon any plea of guilty, or verdict or finding of guilt of the defendant of such felony, a hearing must be held, before sentence is imposed, ~~by the court sitting without a jury.~~ in accordance with this subsection as follows:
  - a. By a jury, or the court if a jury is waived by the defendant, if the notice alleges that the defendant is a dangerous special offender under subdivision a, b, d, or e of subsection 1. The jury, or the court if a jury is waived, must find that the defendant is a dangerous special offender under one or more of these subdivisions by proof beyond a reasonable doubt. However, in the case of a notice alleging only subdivision e of subsection 1, the trial jury, or the trial court if a jury is waived, may make a special finding of proof of this subdivision without an additional hearing subsequent to a verdict or finding of guilt.
  - b. By the court if the notice alleges that the defendant is a habitual offender under subdivision c of subsection 1. The court must find that the defendant is a habitual offender by a preponderance of the evidence.

5. Except in the most extraordinary cases, the court shall obtain a presentence report and may receive a diagnostic testing report under subsection 5 of section 12.1-32-02 before holding a hearing under this subsection. The court shall fix a time for the hearing and notice thereof must be given to the defendant and the prosecution at least five days prior thereto. The court shall permit the prosecution and counsel for the defendant, or the defendant if the defendant is not represented by counsel, to inspect the presentence report sufficiently ~~prior to~~ before the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion ~~which that~~ might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant is entitled to compulsory process and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment is prima facie evidence of such former judgment or commitment. ~~If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon the jury or the court finds, after hearing, one or more of the grounds set forth in subsection 1, that the defendant is a dangerous special offender or a habitual offender, the court shall sentence the defendant to imprisonment for an appropriate term within the limits specified in subsection 2. The court shall place in the record its findings including an identification of the information relied upon in making such findings and its reasons for the sentence imposed."~~

Renumber accordingly

Date: 03-14-01  
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB-2444

House JUDICIARY Committee

☐ Subcommittee on \_\_\_\_\_  
or  
☐ Conference Committee

Legislative Council Amendment Number 107991.0203 .0300

Action Taken Do Pass as amend

Motion Made By Rep Wrangham Seconded By Rep Delmore

Representatives	Yes	No	Representatives	Yes	No
CHR - Duane DeKrey	✓				
VICE CHR -- Wm E Kretschmar	✓				
Rep Curtis E Brekke					
Rep Lois Delmore	✓				
Rep Rachael Disrud	✓				
Rep Bruce Eckre	✓				
Rep April Fairfield					
Rep Bette Grande	✓				
Rep G. Jane Gunter	✓				
Rep Joyce Kingsbury	✓				
Rep Lawrence R. Klemin	✓				
Rep John Mahoney	✓				
Rep Andrew G Maragos	✓				
Rep Kenton Onstad	✓				
Rep Dwight Wrangham	✓				

Total (Yes) 13 No 0

Absent 2

Floor Assignment Vice Chr Kretschmar

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

**REPORT OF STANDING COMMITTEE**

SB 2444, as engrossed: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). Engrossed SB 2444 was placed on the Sixth order on the calendar.

Page 1, line 3, after "reenact" insert "section 12.1-32-09,"

Page 1, line 6, after "offenses" insert "and enhanced sentencing"

Page 1, after line 9, insert:

**"SECTION 1. AMENDMENT.** Section 12.1-32-09 of the North Dakota Century Code is amended and reenacted as follows:

**12.1-32-09. Dangerous special offenders - Habitual offenders - Extended sentences - Procedure.**

1. A court may sentence a convicted offender to an extended sentence as a dangerous special offender or a habitual offender in accordance with the provisions of this section upon a finding of any one or more of the following:
  - a. The convicted offender is a dangerous, mentally abnormal person: ~~The court may not make such a finding unless the presentence report, including a psychiatric examination, concludes that the offender's~~ whose conduct has been characterized by persistent aggressive behavior; and ~~that such~~ the behavior makes the offender a serious danger to other persons.
  - b. The convicted offender is a professional criminal: ~~The court may not make such a finding unless the offender is an adult and the presentence report shows that the offender who~~ has substantial income or resources derived from criminal activity.
  - c. The convicted offender is a habitual offender. The court may not make such a finding unless the offender is an adult and has previously been convicted in any state or states or by the United States of two felonies of class C or above committed at different times when the offender was an adult. For the purposes of this subdivision, a felony conviction in another state or under the laws of the United States ~~shall be~~ is considered a felony of class C or above if it is punishable by a maximum term of imprisonment of five years or more.
  - d. The offender was convicted of an offense ~~which~~ that seriously endangered the life of another person and the offender had previously been convicted of a similar offense.
  - e. The offender is especially dangerous because the offender used a firearm, dangerous weapon, or destructive device in the commission of the offense or during the flight therefrom.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the offender has been pardoned on the ground of innocence must be disregarded for purposes of subdivision c. In support of findings under subdivision b, it may be shown that the offender has had

control of income or property not explained as derived from a source other than criminal activity. For purposes of subdivision b, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the offender's declared adjusted gross income under chapter 57-38.

2. The extended sentence may be imposed in the following manner:
  - a. If the offense for which the offender is convicted is a class A felony, the court may impose a sentence up to a maximum of life imprisonment.
  - b. If the offense for which the offender is convicted is a class B felony, the court may impose a sentence up to a maximum of imprisonment for twenty years.
  - c. If the offense for which the offender is convicted is a class C felony, the court may impose a sentence up to a maximum of imprisonment for ten years.
3. Whenever an attorney charged with the prosecution of a defendant in a court of this state for an alleged felony committed when the defendant was over the age of eighteen years has reason to believe that the defendant is a dangerous special offender or a habitual offender, the attorney, at a reasonable time before trial or acceptance by the court of a plea of guilty, may sign and file with the court, and may amend, a notice specifying that the defendant is a dangerous special offender or a habitual offender who upon conviction for the felony is subject to the imposition of a sentence under subsection 2, and setting out with particularity the reasons why the attorney believes the defendant to be a dangerous special offender or a habitual offender. In no case may the fact that the prosecuting attorney is seeking sentencing of the defendant as a dangerous special offender or a habitual offender be disclosed to the jury before a verdict. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, ~~it the court~~ may order the notice sealed and the notice ~~shall~~ is not ~~be~~ subject to subpoena or public inspection during the pendency of ~~such the~~ criminal matter, except on order of the court, but ~~shall be~~ is subject to inspection by the defendant alleged to be a dangerous special offender or a habitual offender and the offender's counsel.
4. Upon any plea of guilty, or verdict or finding of guilt of the defendant of such felony, a hearing must be held, before sentence is imposed, ~~by the court sitting without a jury~~. In accordance with this subsection as follows:
  - a. By a jury, or the court if a jury is waived by the defendant, if the notice alleges that the defendant is a dangerous special offender under subdivision a, b, d, or e of subsection 1. The jury, or the court if a jury is waived, must find that the defendant is a dangerous special offender under one or more of these subdivisions by proof beyond a reasonable doubt. However, in the case of a notice alleging only subdivision e of subsection 1, the trial jury, or the trial court if a jury is waived, may make a special finding of proof of this subdivision

without an additional hearing subsequent to a verdict or finding of guilt.

b. By the court if the notice alleges that the defendant is a habitual offender under subdivision c of subsection 1. The court must find that the defendant is a habitual offender by a preponderance of the evidence.

5. Except in the most extraordinary cases, the court shall obtain a presentence report and may receive a diagnostic testing report under subsection 5 of section 12.1-32-02 before holding a hearing under this subsection. The court shall fix a time for the hearing and notice thereof must be given to the defendant and the prosecution at least five days prior thereto. The court shall permit the prosecution and counsel for the defendant, or the defendant if the defendant is not represented by counsel, to inspect the presentence report sufficiently ~~prior to~~ before the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion ~~which that~~ might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant is entitled to compulsory process and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment is prima facie evidence of such former judgment or commitment. ~~If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon the jury or the court finds, after hearing, one or more of the grounds set forth in subsection 1, that the defendant is a dangerous special offender or a habitual offender, the court shall sentence the defendant to imprisonment for an appropriate term within the limits specified in subsection 2. The court shall place in the record its findings including an identification of the information relied upon in making such findings and its reasons for the sentence imposed."~~

Renumber accordingly



2001 TESTIMONY

SB 2444

## **Testimony on SB 2444**

### **Presented by Attorney General Wayne Stenehjem**

For some months I have been promoting a comprehensive statewide plan to deal with drug activity in North Dakota, focusing in particular on the explosion of methamphetamine manufacturing and trafficking. My plan includes four pieces of legislation – the first of which was heard by this committee last week – SCR 4017. As you will recall, SCR 4017 called for a study on the feasibility of including law enforcement under the state retirement system.

This morning your committee will hear testimony on the remaining three components to my plan, the cornerstone of which is Senate Bill 2444. It improves the drug paraphernalia law already on the books by providing more certainty that materials used in the illegal manufacture of drugs can be successfully prosecuted. The bill provides a list of examples of items that fall within the drug paraphernalia category – including anhydrous ammonia, cold capsules, and other items that can be used to manufacture meth. It will include, as well, containers used to transport anhydrous ammonia. Under the bill, there will be no burden placed on those who legally possess these materials, but the law would allow a judge or jury to consider the "totality of the circumstances" for those who possess such material. For example, a farmer may legally possess a quantity of anhydrous ammonia. However, if a person is caught with a supply of anhydrous, together with a recipe for the manufacture of meth, various test tubes and other chemicals commonly used for manufacturing meth, and has no logical explanation for its possession, a jury may reasonably conclude the person is engaged in illegal drug activity.

With that overview, let me discuss each section of the bill in more detail.

**Section 1** – Requires that a law enforcement agency notify a school principal of a student's violation of controlled substance and paraphernalia laws in addition to the present requirement of notification of drug and alcohol law violations.

**Section 2** – Transfers the volatile chemical (huffing) statute to chapter 19-03.1.

**Section 3** – This section adds a requirement that a person who violates the drug paraphernalia statute to undergo a drug evaluation. It also includes a provision requiring a drug evaluation to be submitted to a court before sentencing for a felony drug or paraphernalia offense. The bill allows this evaluation to be submitted before or after sentencing for a misdemeanor offense.

**Section 4** – Prohibits a suspension of a mandatory imprisonment sentence if an offender has a prior imitation controlled substance or paraphernalia violation. This change is necessary because present law applies only to a prior violation of chapter 19-03.1, the general controlled substance provisions.

**Section 5** -- This is a technical change that amends the drug forfeiture law to correspond with the transfer of the drug paraphernalia law from the criminal code (title 12.1) to title 19.

**Section 6** -- Requires the results of analytical findings in a certified copy of a state toxicologist's analytical report for an imitation controlled substance offense be accepted as prima facie evidence in the same manner as in current paraphernalia and general drug offense prosecutions. And again, the subsection is amended to correspond with the transfer of the drug paraphernalia law from the criminal code (title 12.1) to title 19.

**Section 7** -- This section was drafted in response to a ND Supreme Court case that placed a prohibition on the prosecution of conspiracies where only a buyer-seller relationship was involved. The amendment clarifies that the state is not required to prove the offender knew that the other person to the drug transaction intended to resell or redeliver the illegal drug purchased or sold.

**Section 8** -- This section transfers the drug paraphernalia law from title 12.1 to title 19. It also includes several changes that expand our ability to prosecute for possession of drug paraphernalia. On page 5, line 8, we have added "grinders" used or intended for use to manufacture or produce controlled substances as an example of an object that may be drug paraphernalia. On that same page, language regarding containers or other objects used, designed or intended for use to store or conceal products or materials used or intended for use to manufacture or produce controlled substances was added. This provision expands current law from containers used to store or conceal to containers used **to transfer** substances like anhydrous ammonia.

On page 6, lines 7 -10 we added **ingredients or components**, whether or not lawfully obtained, that are used or intended for use in the manufacture or production of controlled substances. This section will allow law enforcement to charge as drug paraphernalia the possession of inexplicable amounts of anhydrous ammonia or even nonprescription medications. As I stated earlier, this does not mean that a sixteen year old who has a box of cold medication will be charged with drug paraphernalia. As with all charges brought under the drug paraphernalia statute, the prosecutor must consider the totality of the circumstances and find intent to manufacture before prosecuting.

Finally, on page 7, lines 9 - 13, we added language that the possession or presence of written instructions, directions or recipes used or intended for use to manufacture or produce controlled substances may serve as a relevant factor for a judge or jury to consider when determining whether an object may be drug paraphernalia.

**Section 9** – This section simply repeals the old huffing law found in section 12.1-31-06 and the drug paraphernalia laws found in chapter 12.1.

With my testimony you will find one amendment to the bill – language adding an emergency clause. This is important legislation and we would like to be able to begin work on our new program as soon as possible.

To bring this program together my office will be working with the hospitality and retailer associations to develop education programs for their employees regarding this new law. We will also work closely with educators, mental health and other addiction professionals to develop new ideas on prevention and treatment programs. I urge a do pass on the bill.

## Amendments to SB 2444

1. Page 1, line 7, delete the word "and" ; after the word "penalty" insert " ; and declaring an emergency"
2. Page 8, insert the following section: **Section 10. Emergency.** This Act is declared to be an emergency measure.



OFFICE OF ATTORNEY GENERAL  
STATE OF NORTH DAKOTA

Wayne Stenehjem  
ATTORNEY GENERAL

**DRUG ENFORCEMENT INITIATIVE**

CAPITOL TOWER

State Capitol  
600 E. Boulevard Ave.  
Dept. 125  
Bismarck, ND 58505-0040  
701-328-2210  
800-366-6888 (TTY)  
FAX 701-328-2226

Consumer Protection  
and Antitrust Division

701-328-3404  
800-472-2600  
Toll Free in North Dakota  
FAX 701-328-3535

Gaming Division  
701-328-4848  
FAX 701-328-3535

Licensing Section  
701-328-2329  
FAX 701-328-3535

CAPITOL COMPLEX  
State Office Building  
900 E. Boulevard Ave.  
Bismarck, ND 58505-0041  
FAX 701-328-4300

Civil Litigation  
701-328-3640

Natural Resources  
701-328-3640

Racing Commission  
701-328-4290

Bureau of Criminal  
Investigation  
P.O. Box 1054  
Bismarck, ND 58502-1054  
701-328-5500  
800-472-2185  
Toll Free in North Dakota  
FAX 701-328-5510

Fire Marshal  
P.O. Box 1054  
Bismarck, ND 58502-1054  
701-328-5555  
FAX 701-328-5510

Fargo Office  
P.O. Box 2665  
Fargo, ND 58108-2665  
701-239-7126  
FAX 701-239-7129

For some months I have been promoting a plan for a comprehensive statewide plan to deal with drug activity in North Dakota, dealing in particular with the explosion of methamphetamine manufacturing and trafficking.

This plan includes eight goals, which I reiterate here:

Goal 1: Stop the importation of illegal drugs, especially finished-product methamphetamine, from Mexico and the Southwestern United States;

Goal 2: Stop the clandestine manufacture of methamphetamine in North Dakota;

Goal 3: Create a broad and deep general public awareness and understanding of the state's illegal drug problem, and the harmful effects of illegal drugs;

Goal 4: Identify and target vulnerable groups for increased education, awareness, and enforcement of drug dealers that prey on vulnerable groups;

Goal 5: Ensure that all North Dakota citizens have resources to assist them or their families with problems associated with drug abuse;

Goal 6: Ensure all possible measures are taken to keep experienced, high quality, police officers in North Dakota to combat the drug problem;

Goal 7: Ensure all drug control programs are coordinated between entities working to reduce the drug problem in North Dakota;

Goal 8: Provide public accountability for drug control programs and laws that have objective results so the public, legislature, and administrators can measure what programs are working to reduce our drug problem, and what programs do not work effectively and should have their resources redirected.

In formulating this plan, I have worked closely with police officers, states attorneys, BCI, legislators and officials from the Hoeven administration to implement this plan. I have maintained that most of these goals can be met without the need for additional legislation; however there are several changes in state law that will enhance our ability to deal with the problem, and I am here to explain those changes that have been

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Introduced:

1. A bill draft to improve the drug paraphernalia law already on the books. This bill will provide more certainty that materials used in the illegal manufacture of drugs can be successfully prosecuted. The bill provides a list of examples of items that fall within the drug paraphernalia category – including anhydrous ammonia, cold capsules, and other items that can be used to manufacture meth. It will include, as well, containers used to transport anhydrous ammonia. Under the bill, there will be no burden placed on those who legally possess these materials, but the law would allow a judge or jury to consider the "totality of the circumstances" for those who possess such material. For example, a farmer may legally possess a quantity of anhydrous ammonia. However, if a person is caught with a supply of anhydrous, together with a recipe for the manufacture of meth, various test tubes and other chemicals commonly used for manufacturing meth, and has no logical explanation for its possession, a jury may reasonably conclude the person is engaged in illegal drug activity.
2. The bill moves all drug related offenses into one chapter of the code, for ease in enforcement.
3. The bill provides for notification of a juvenile's school principal following violation of the paraphernalia law, and allows a court to order a drug abuse evaluation and follow-up.

In an effort to help recruit and retain qualified law enforcement officers, I propose an interim study on the feasibility of including local law officers in the state retirement program, and enacting a plan for them similar to that enjoyed by the state Highway Patrol. We are frequently losing trained and experienced law enforcement officers to other states that offer better pay and benefits, and we must address this critical issue, or our efforts will fall behind.

Public accountability of these programs will be provided by requiring regular reports to the legislature of the effectiveness of our efforts to stem the tide of illegal drug use. We further need to take an in-depth look at our chemical dependency commitment laws to determine if new standards are needed to deal with the treatment of those addicted to meth. The effects of addiction to this substance are different than nearly any other substance, and our commitment statute must keep abreast of the reality of this substance. I am proposing an interim study of changes that must be made of these laws, as well as a study of the effectiveness of current sentencing statutes. We need to determine whether our minimum mandatory sentencing laws, and other approaches are working or whether different approaches might better meet the needs of our citizens.

These bills are the result of collaboration with many entities. They are no magic fix - but an ongoing effort is required.

There are three components that must be addressed in this plan:

1. Education;
2. Enforcement;
3. Treatment.

I have convened a special panel, working in collaboration with various agencies, to further develop this three-part plan.

I'd like to thank the legislators who stepped up to co-sponsor these pieces of legislation: Senator Gary Nelson, Senator Carolyn Nelson, Senator Stan Lyson, Representative Duane Dekray, Representative Ron Carlisle, and Representative John Mahoney.

I'd also like to thank Governor Hoeven for dedicating some of his top staff to helping to develop and implement this plan.

Wayne Stenehjem  
Attorney General

## HB 2444

### Section 1

Requires that a law enforcement agency notify a school principal of a student's violation of **imitation controlled substance and paraphernalia** laws **in addition** to the present requirement of notification of drug and alcohol law violations.

### Section 2

Transfers the **volatile chemical (huffing)** statute to chapter 19-03.1.

### Section 3

Adds a requirement that a person who violates a drug paraphernalia law to undergo a **drug evaluation** -

Requires a drug evaluation to be submitted to a court **before sentencing** for a **felony drug or paraphernalia offense** but **allows** the evaluation to be submitted **before or after sentencing** for a **misdemeanor offense** -

### Section 4

**Prohibits** a suspension of a mandatory imprisonment sentence if an offender has a **prior imitation controlled substance or paraphernalia** violation.

**Present law** applies only to a prior violation of **chapter 19-03.1**, the general drug law provisions.

### Section 5

**Amends** the **drug forfeiture law** to correspond with the **transfer** of the drug paraphernalia law from the criminal code (title 12.1) to title 19.

## Section 6

Requires that the **results** of analytical findings in a **certified copy of a state toxicologist's analytical report** for an **imitation controlled substance** offense will be accepted as prima facie evidence in the same manner as in current paraphernalia and general drug offense prosecutions.

Amends this subsection to correspond with the **transfer** of the drug paraphernalia law from the criminal code (title 12.1) to title 19.

## Section 7

**Responds** to North Dakota Supreme Court **decisions** which placed a **prohibition on the prosecution of conspiracies** where only a **buyer-seller** of illegal drugs relationship was involved.

The **state** is **not required to prove** that the **offender knew** that the **other person** to the drug transaction **intended to resell or redeliver** the illegal drug purchased or sold.

## Section 8

**Transfers the drug paraphernalia law** from the criminal code (title 12.1) to title 19.

Page 5, line 8, adds **grinders used or intended for use to manufacture or produce controlled substances** as an **example** of an object that may be drug paraphernalia.

Page 5, line 14 an 15, adds **containers or other objects used, designed, or intended for use to store or conceal products or materials used or intended for use to manufacture or produce controlled substances** as an **example** of objects that may be drug paraphernalia.

**Current law** makes reference only to containers used to store or conceal controlled substances.

Page 6, lines 7 - 10, **adds ingredients or components**, whether or not otherwise lawfully obtained, which are **used, or intended for use**, in the **manufacture or production of controlled substances** as an example of objects that may be drug paraphernalia.

Includes, as further descriptive examples, anhydrous ammonia, nonprescription medications, or lawfully prescribed controlled substances.

Page 7, lines 9 - 13, **adds the possession or presence of written instructions, directions, or recipes used or intended for use to manufacture or produce controlled substances** as a relevant factor to be considered by a judge or jury that an object may be drug paraphernalia.

### **Section 9**

Repeals section 12.1-31-06 (Volatile Chemicals- the "huffing" law) upon its **transfer** to chapter 19-03.1 (**Section 2 of this bill**).

Repeals the drug paraphernalia laws in chapter 12.1 (the criminal code) upon their **transfer** to the new chapter 19-03.4 (**Section 8 of this bill**).

## **Testimony on SB 2444**

### **Presented by Attorney General Wayne Stenehjem**

For some months I have been promoting a comprehensive statewide plan to deal with drug activity in North Dakota, focusing in particular on the explosion of methamphetamine manufacturing and trafficking. My plan includes four pieces of legislation, the cornerstone of which is Senate Bill 2444. It improves the drug paraphernalia law already on the books by providing more certainty that materials used in the illegal manufacture of drugs can be successfully prosecuted. The bill provides a list of examples of items that fall within the drug paraphernalia category -- including anhydrous ammonia, cold capsules, and other items that can be used to manufacture meth. It will include, as well, containers used to transport anhydrous ammonia. Under the bill, there will be no burden placed on those who legally possess these materials, but the law would allow a judge or jury to consider the "totality of the circumstances" for those who possess such material. For example, a farmer may legally possess a quantity of anhydrous ammonia. However, if a person is caught with a supply of anhydrous, together with a recipe for the manufacture of meth, various test tubes and other chemicals commonly used for manufacturing meth, and has no logical explanation for its possession, a jury may reasonably conclude the person is engaged in illegal drug activity.

With that overview, let me discuss each section of the bill in more detail.

**Section 1** -- Requires that a law enforcement agency notify a school principal of a student's violation of controlled substance and paraphernalia laws in addition to the present requirement of notification of drug and alcohol law violations.

**Section 2** -- Transfers the volatile chemical (huffing) statute to chapter 19-03.1.

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With my testimony you will find one amendment to the bill – language adding an emergency clause. This is important legislation and we would like to be able to begin work on our new program as soon as possible.



To bring this program together my office will be working with the hospitality and retailer associations to develop education programs for their employees regarding this new law. We will also work closely with educators, mental health and other addiction professionals to develop new ideas on prevention and treatment programs. I urge a do pass on the bill.

TESTIMONY OF  
ROBERT P. BENNETT  
ASSISTANT ATTORNEY GENERAL

Proposed Amendments to Engrossed Senate Bill 2444

In Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), the United States Supreme Court held that a fact used to enhance a criminal sentence beyond the statutory maximum for the crime committed must be decided by a jury beyond a reasonable doubt. The court did state, however, that this rule did not apply to an enhanced punishment based upon the finding that a defendant is a repeat or habitual offender. Enhancements based upon prior convictions would continue to be treated as a sentencing factor not subject to a separate finding beyond a reasonable doubt.

The Apprendi rule, however, will impact sentence enhancements where a defendant has, for example, used a firearm or dangerous weapon in the commission of a crime. Under the law of North Dakota and many states, the use of a firearm or dangerous weapon may result in an increase in the statutory maximum sentence that a defendant may receive. North Dakota Century Code § 12.1-32-09, which relates to dangerous special offenders and the imposition of extended sentences, permits substantial increases in a defendant's sentence based upon the type of offender or the circumstances surrounding the offense. If the convicted offender is a dangerous, mentally abnormal person, a professional criminal, has seriously endangered the life of another person after having been convicted of a similar offense, or is especially dangerous because of the use of a firearm or other dangerous weapon during the commission of the crime, the sentencing court would be permitted to at least double a defendant's maximum sentence and, in some cases, impose a sentence of up to life imprisonment. In each of these cases, the Supreme Court's rule in Apprendi v. New

Jersey, would require a finding of the facts triggering the enhanced sentence to be made by a fact finder beyond a reasonable doubt.

The Apprendi decision was reviewed recently by the North Dakota Supreme Court in Clark v. State, 2001 ND 9, decided on January 30, 2001. This decision became final only a short time ago. Clark was convicted in Stark County of manslaughter. He received a ten year sentence for the manslaughter and an additional five years incarceration as a dangerous special offender because a firearm was used to kill the victim. Clark claimed that the rule in Apprendi required either that his additional five year sentence be removed or that his case be remanded for resentencing since the jury did not make a specific finding beyond a reasonable doubt that he used a dangerous weapon while killing the victim. The Stark County State's Attorney's office argued that the Apprendi decision was not retroactive because it established a new rule of constitutional law and the decision was not in effect at the time of Clark's trial.

The North Dakota Supreme Court found it unnecessary to resolve the application of Apprendi to the North Dakota dangerous special offender statute as found in North Dakota Century Code § 12.1-32-09. The Court concluded that Clark had never contested the fact that he used a firearm to kill the victim. As a result, any error was harmless and did not require reversal of the sentencing decision. Clark's enhanced sentence was confirmed by the Supreme Court.

The Court did state, however, in a footnote that substantial portions of N.D.C.C. § 12.1-32-09 may not withstand constitutional challenge under the Apprendi rule and the Court urged the Legislature to address this issue.

These amendments to Senate Bill 2444 are intended to address the Apprendi rule. Except in the case of a persistent or habitual offender, the facts which would

trigger the imposition of a greater sentence under the dangerous special offender statute, N.D.C.C. § 12.1-32-09, would be determined by a fact finder, whether a jury, or the court if a jury is waived by the defendant, beyond a reasonable doubt. However, in the case in which it is alleged that a firearm or dangerous weapon was involved in the commission of a crime, a trial jury may make a special finding as a part of its verdict without any additional hearing. In other cases, however, a hearing subsequent to the finding of guilt would be held at which time the jury, or the court if a jury is waived by the defendant, would make a finding by proof beyond a reasonable doubt that the defendant was a special dangerous offender under one or more of the provisions of section 12.1-32-09. In cases involving a persistent or habitual offender, the court will continue, consistent with the Apprendi decision, to make the finding by a preponderance of the evidence that would trigger a defendant's enhanced sentence.

These amendments to Engrossed Senate Bill 2444 are intended to bring our statute within the requirements of the rule announced in Apprendi v. New Jersey. The Attorney General requests that this amendment be adopted to insure that definite standards are established to provide guidance to prosecutors, defense attorneys, and the courts in application of the dangerous special offender statutes.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL 2444

Page 1, line 3, after "reenact" insert "section 12.1-32-09"

Page 1, line 6, after "offenses" insert "and enhanced sentencing"

Page 2, after line 29, insert

**"Section 3. AMENDMENT.** Section 12.1-32-09 of the North Dakota Century Code is amended and reenacted as follows:

**Dangerous special offenders--Habitual offenders--Extended sentences--Procedure**

1. A court may sentence a convicted offender to an extended sentence as a dangerous special offender or a habitual offender in accordance with the provisions of this section upon a finding of any one or more of the following:
  - a. The convicted offender is a dangerous, mentally abnormal person. ~~The court may not make such a finding unless the presentence report, including a psychiatric examination, concludes that the offender's~~ whose conduct has been characterized by persistent aggressive behavior, and ~~that such the~~ behavior makes the offender a serious danger to other persons.
  - b. The convicted offender is a professional criminal. ~~The court may not make such a finding unless the offender is an adult and the presentence report shows that the offender~~ who has substantial income or resources derived from criminal activity.
  - c. The convicted offender is a habitual offender. The court may not make such a finding unless the offender is an adult and has previously been convicted in any state or states or by the United States of two felonies of class C or above committed at different times when the offender was an adult.

For the purposes of this subdivision, a felony conviction in another state or under the laws of the United States shall be considered a felony of class C or above if it is punishable by a maximum term of imprisonment of five years or more.

- d. The offender was convicted of an offense which seriously endangered the life of another person and the offender had previously been convicted of a similar offense.
- e. The offender is especially dangerous because the offender used a firearm, dangerous weapon, or destructive device in the commission of the offense or during the flight therefrom.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the offender has been pardoned on the ground of innocence must be disregarded for purposes of subdivision c. In support of findings under subdivision b, it may be shown that the offender has had control of income or property not explained as derived from a source other than criminal activity. For purposes of subdivision b, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the offender's declared adjusted gross income under chapter 57-38.

- 2. The extended sentence may be imposed in the following manner:
  - a. If the offense for which the offender is convicted is a class A felony, the court may impose a sentence up to a maximum of life imprisonment.
  - b. If the offense for which the offender is convicted is a class B felony, the court may impose a sentence up to a maximum of imprisonment for twenty years.

c. If the offense for which the offender is convicted is a class C felony, the court may impose a sentence up to a maximum of imprisonment for ten years.

3. Whenever an attorney charged with the prosecution of a defendant in a court of this state for an alleged felony committed when the defendant was over the age of eighteen years has reason to believe that the defendant is a dangerous special offender or a habitual offender, the attorney, at a reasonable time before trial or acceptance by the court of a plea of guilty, may sign and file with the court, and may amend, a notice specifying that the defendant is a dangerous special offender or a habitual offender who upon conviction for the felony is subject to the imposition of a sentence under subsection 2, and setting out with particularity the reasons why the attorney believes the defendant to be a dangerous special offender or a habitual offender. In no case may the fact that the prosecuting attorney is seeking sentencing of the defendant as a dangerous special offender or a habitual offender be disclosed to the jury prior to a verdict. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender or a habitual offender and the offender's counsel.
4. Upon any plea of guilty, or verdict or finding of guilt of the defendant of such felony, a hearing must be held, before sentence is imposed, ~~by the court sitting without a jury.~~ In accordance with this subsection as follows:
- a. By a jury, or the court if a jury is waived by the defendant, if the notice alleges that the defendant is a dangerous special offender under subdivision a,b,d, or e of subsection 1. The

jury, or the court if a jury is waived, must find that the defendant is a special dangerous offender under one or more of these subdivisions by proof beyond a reasonable doubt. However, in the case of a notice alleging only subdivision e of section 1, the trial jury, or the trial court if a jury is waived, may make a special finding of proof of this subdivision without an additional hearing subsequent to a verdict or finding of guilt.

- b. By the court if the notice alleges that the defendant is an habitual offender under subdivision c of section 1. The court must find that the defendant is an habitual offender by a preponderance of the evidence.

- 5. Except in the most extraordinary cases, the court shall obtain a presentence report and may receive a diagnostic testing report under subsection 5 of section 12.1-32-02 before holding a hearing under this subsection. The court shall fix a time for the hearing and notice thereof must be given to the defendant and the prosecution at least five days prior thereto. The court shall permit the prosecution and counsel for the defendant, or the defendant if the defendant is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant is entitled to compulsory process and cross-examination of such



witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment is prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon the jury or court finds, after hearing, one or more of the grounds set forth in subsection 1, that the defendant is a dangerous special offender or a habitual offender, the court shall sentence the defendant to imprisonment for an appropriate term within the limits specified in subsection 2. ~~The court shall place in the record its findings including an identification of the information relied upon in making such findings and its reasons for the sentence imposed."~~

Renumber accordingly

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL 2444  
Post Hearing Redraft

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  - c. The convicted offender is a habitual offender. The court may not make such a finding unless the offender is an adult and has previously been convicted in any state or states or by the United States of two felonies of class C or above committed at different times when the offender was an adult.

For the purposes of this subdivision, a felony conviction in another state or under the laws of the United States shall be considered a felony of class C or above if it is punishable by a maximum term of imprisonment of five years or more.

- d. The offender was convicted of an offense which seriously endangered the life of another person and the offender had previously been convicted of a similar offense.
- e. The offender is especially dangerous because the offender used a firearm, dangerous weapon, or destructive device in the commission of the offense or during the flight therefrom.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the offender has been pardoned on the ground of innocence must be disregarded for purposes of subdivision c. In support of findings under subdivision b, it may be shown that the offender has had control of income or property not explained as derived from a source other than criminal activity. For purposes of subdivision b, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the offender's declared adjusted gross income under chapter 57-38.

- 2. The extended sentence may be imposed in the following manner:
  - a. If the offense for which the offender is convicted is a class A felony, the court may impose a sentence up to a maximum of life imprisonment.
  - b. If the offense for which the offender is convicted is a class B felony, the court may impose a sentence up to a maximum of imprisonment for twenty years.

- c. If the offense for which the offender is convicted is a class C felony, the court may impose a sentence up to a maximum of imprisonment for ten years.

3. Whenever an attorney charged with the prosecution of a defendant in a court of this state for an alleged felony committed when the defendant was over the age of eighteen years has reason to believe that the defendant is a dangerous special offender or a habitual offender, the attorney, at a reasonable time before trial or acceptance by the court of a plea of guilty, may sign and file with the court, and may amend, a notice specifying that the defendant is a dangerous special offender or a habitual offender who upon conviction for the felony is subject to the imposition of a sentence under subsection 2. and setting out with particularity the reasons why the attorney believes the defendant to be a dangerous special offender or a habitual offender. In no case may the fact that the prosecuting attorney is seeking sentencing of the defendant as a dangerous special offender or a habitual offender be disclosed to the jury prior to a verdict. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender or a habitual offender and the offender's counsel.

4. Upon any plea of guilty, or verdict or finding of guilt of the defendant of such felony, a hearing must be held, before sentence is imposed, ~~by the court sitting without a jury.~~ In accordance with this subsection as follows:

- a. By a jury, or the court if a jury is waived by the defendant, if the notice alleges that the defendant is a dangerous special offender under subdivision a,b,d, or e of subsection 1. The

jury, or the court if a jury is waived, must find that the defendant is a dangerous special offender under one or more of these subdivisions by proof beyond a reasonable doubt. However, in the case of a notice alleging only subdivision e of subsection 1, the trial jury, or the trial court if a jury is waived, may make a special finding of proof of this subdivision without an additional hearing subsequent to a verdict or finding of guilt.

- b. By the court if the notice alleges that the defendant is an habitual offender under subdivision c of subsection 1. The court must find that the defendant is an habitual offender by a preponderance of the evidence.

5. Except in the most extraordinary cases, the court shall obtain a presentence report and may receive a diagnostic testing report under subsection 5 of section 12.1-32-02 before holding a hearing under this subsection. The court shall fix a time for the hearing and notice thereof must be given to the defendant and the prosecution at least five days prior thereto. The court shall permit the prosecution and counsel for the defendant, or the defendant if the defendant is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant is entitled to compulsory process and cross-examination of such

witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment is prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon the jury or court finds, after hearing, one or more of the grounds set forth in subsection 1, that the defendant is a dangerous special offender or a habitual offender, the court shall sentence the defendant to imprisonment for an appropriate term within the limits specified in subsection 2. ~~The court shall place in the record its findings including an identification of the information relied upon in making such findings and its reasons for the sentence imposed."~~

Renumber accordingly