

**Fifty-seventh Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 9, 2001**

SENATE BILL NO. 2034
(Legislative Council)
(Criminal Justice Committee)

AN ACT to create and enact three new sections to chapter 25-03.3 and a new subsection to section 25-03.3-17 of the North Dakota Century Code, relating to the referral of inmates for civil commitment and rulemaking; and to amend and reenact sections 25-03.3-01, 25-03.3-02, 25-03.3-03, 25-03.3-07, 25-03.3-08, subsection 2 of section 25-03.3-09, sections 25-03.3-10, 25-03.3-11, 25-03.3-12, 25-03.3-13, subsection 1 of section 25-03.3-17, subsection 1 of section 25-03.3-18, and section 25-03.3-19 of the North Dakota Century Code, relating to the civil commitment of sexual predators.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 25-03.3-01 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

25-03.3-01. Definitions. In this chapter, unless the context otherwise requires:

1. "Committed individual" means an individual committed for custody and treatment pursuant to this chapter.
2. "Executive director" means the executive director of the department of human services or the executive director's designee.
3. "Mental retardation" means mental retardation as defined in the "Diagnostic and Statistical Manual of Mental Disorders", American psychiatric association, fourth edition (1994).
4. "Qualified expert" means an individual who has an expertise in sexual offender evaluations and who is a psychiatrist or psychologist trained in a clinical program and licensed pursuant to this state's law or a psychologist approved for exemption by the North Dakota board of ~~psychology~~ psychologist examiners. For purposes of evaluating an individual with mental retardation, the qualified expert must have specialized knowledge in sexual offender evaluations of individuals with mental retardation.
- ~~4.~~ 5. "Respondent" means an individual subject to a commitment proceeding pursuant to this chapter.
- ~~5.~~ 6. "Sexual act" means sexual contact between human beings, including contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or the vulva and the vulva; or the use of an object that comes in contact with the victim's anus, vulva, or penis. Sexual contact between the penis and the vulva, or between the penis and the anus, or an object and the anus, vulva, or penis of the victim, occurs upon penetration, however slight. Emission is not required.
- ~~6.~~ 7. "Sexual contact" means any touching of the sexual or other intimate parts of an individual for the purpose of arousing or satisfying sexual or aggressive desires.
- ~~7.~~ 8. "Sexually dangerous individual" means an individual who is shown to have engaged in sexually predatory conduct and who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others. It is

a rebuttable presumption that sexually predatory conduct creates a danger to the physical or mental health or safety of the victim of the conduct. ~~The term does not include an individual with~~ For these purposes, mental retardation is not a sexual disorder, personality disorder, or other mental disorder or dysfunction.

~~8.~~ 9. "Sexually predatory conduct" means:

a. Engaging or attempting to engage in a sexual act or sexual contact with another individual, or causing or attempting to cause another individual to engage in a sexual act or sexual contact, if:

- (1) The victim is compelled to submit by force or by threat of imminent death, serious bodily injury, or kidnapping directed toward the victim or any human being, or the victim is compelled to submit by any threat that would render an individual of reasonable firmness incapable of resisting;
- (2) The victim's power to appraise or control the victim's conduct has been substantially impaired by the administration or employment, without the victim's knowledge, of intoxicants or other means for purposes of preventing resistance;
- (3) The actor knows or should have known that the victim is unaware that a sexual act is being committed upon the victim;
- (4) The victim is less than fifteen years old;
- (5) The actor knows or should have known that the victim ~~suffers from~~ has a mental disease or defect disability that ~~renders~~ substantially impairs the ~~victim~~ incapable of victim's understanding of the nature of the sexual act or contact;
- (6) The victim is in official custody or detained in a ~~hospital treatment facility,~~ health care facility, prison correctional facility, or other institution and is under the supervisory authority ~~of,~~ disciplinary control, or care of the actor; or
- (7) The victim is a minor and the actor is an adult; or

b. Engaging in or attempting to engage in sexual contact with another individual or causing or attempting to cause another individual to have sexual contact, if:

- (1) The actor knows or should have known that the contact is offensive to the victim; or
- (2) The victim is a minor, fifteen years of age or older, and the actor is the minor's parent, guardian, or is otherwise responsible for general supervision of the victim's welfare.

~~9.~~ 10. "Should have known" means a reasonable individual without a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction in the actor's circumstances would have known.

~~10.~~ 11. "Superintendent" means the superintendent of the state hospital or the superintendent's designee.

~~11.~~ 12. "Treatment facility" means any hospital, including the state hospital, or any treatment facility ~~that,~~ including the developmental center at westwood park, Grafton, which can provide directly, or by direct arrangement with other public or private agencies, evaluation and treatment of sexually dangerous individuals.

SECTION 2. AMENDMENT. Section 25-03.3-02 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

25-03.3-02. Jurisdiction and venue. The district court has original jurisdiction over the proceedings governed by this chapter. A proceeding pursuant to this chapter ~~must~~ may be tried in ~~the~~ any county in which the respondent resides or is located, or has committed any sexually predatory conduct, or if the respondent is an inmate, any of the foregoing venues or a county to which the respondent has indicated an intent to relocate upon release from the correctional facility.

SECTION 3. AMENDMENT. Section 25-03.3-03 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

25-03.3-03. Sexually dangerous individual - Petition.

1. If it appears that an individual is a sexually dangerous individual, the state's attorney may file a petition in the district court alleging that the individual is a sexually dangerous individual and stating sufficient facts to support the allegation.
2. Except for an order of the court committing a respondent for treatment or an order of the court discharging an individual from treatment and as provided in this section, the petition and all further records and proceedings under this chapter are confidential and are not public records or proceedings under sections 44-04-18 and 44-04-19 and sections 5 and 6 of article XI of the Constitution of North Dakota. The court may permit access to a respondent's records or proceedings under this chapter to the respondent's guardian, guardian ad litem, or other similarly situated individual. The court may permit access to information in the respondent's records to other individuals who require the information for use in performing official governmental duties.

SECTION 4. A new section to chapter 25-03.3 of the North Dakota Century Code is created and enacted as follows:

Referral of inmates to state's attorneys - Immunity.

1. The department of corrections and rehabilitation shall maintain treatment records for any inmate who has been convicted of an offense that includes sexually predatory conduct. Approximately six months before the projected release date of the inmate, the department shall complete an assessment of the inmate to determine whether a recommendation is to be made to a state's attorney for civil commitment of the inmate under this chapter. The assessment must be based on actuarial and clinical evaluations or any other information determined by the director to be relevant, including inmate behavior and whether the inmate participated in sexual offender treatment while incarcerated.
2. If, upon the completion of the assessment, the department determines the inmate may meet the definition of a sexually dangerous individual, the department shall refer the inmate to a state's attorney of an appropriate county as provided for in section 25-03.3-02. The department may make a referral of an inmate to more than one county.
3. Any referral from the department must include a summary of the factors considered material to the determination that the inmate is appropriate for referral. The department shall provide a copy of the referral and summary to the attorney general and the superintendent of the developmental center and the state hospital.
4. Following the receipt of a referral but before the release date of the inmate, the state's attorney shall notify the department and the attorney general of the state's attorney's intended disposition of the referral.
5. Any person participating in good faith in the assessment and referral of an inmate is immune from any civil or criminal liability. For the purpose of any civil or criminal proceeding, the good faith of any person required to participate in the assessment and referral of an inmate is presumed.

SECTION 5. AMENDMENT. Section 25-03.3-07 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

25-03.3-07. Appointment of guardian ad litem. At any stage of a proceeding under this chapter, on application of ~~a party~~ any individual or on its own motion, the court may appoint a guardian ad litem for a minor or an individual with mental retardation who is a respondent or witness or otherwise involved in the proceeding, if the minor or an individual with mental retardation has no parent, guardian, or custodian appearing on the minor's or the mentally retarded individual's behalf or the interests of those persons conflict with those of the minor or an individual with mental retardation. The department of human services shall pay the expense of the guardian ad litem fee as established by the court.

SECTION 6. AMENDMENT. Section 25-03.3-08 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

25-03.3-08. Sexually dangerous individual - Procedure on petition - Detention.

1. Upon the filing of a petition pursuant to this chapter, the court shall determine whether to issue an order for detention of the respondent named in the petition. The petition may be heard ex parte. The court shall issue an order for detention if there is cause to believe that the respondent is a sexually dangerous individual. If the court issues an order for detention, the order must direct that the respondent be taken into custody and transferred to an appropriate treatment facility ~~to be held for evaluation and~~ or local correctional facility to be held for subsequent hearing pursuant to this chapter. Under this section, the department of human services shall pay for any expense incurred in the detention or evaluation of the respondent.
2. If the state's attorney knows or believes the respondent named in the petition is an individual with mental retardation, the state's attorney shall notify the court in the petition and shall advise the court of the name of the legal guardian of the respondent or, if none is known, the court may appoint a guardian ad litem for the respondent. Before service of the notice required in section 25-03.3-10, the court shall appoint an attorney for the respondent. An individual with mental retardation may be detained in a correctional facility before the probable cause hearing only when no other secure facility is accessible, and then only under close supervision.

SECTION 7. AMENDMENT. Subsection 2 of section 25-03.3-09 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

2. After consultation with counsel, the respondent may waive the right to counsel or the right to any hearing provided pursuant to this chapter by notifying the court in writing. The notification must clearly state the respondent's reasons for the waiver and ~~be signed by the respondent's counsel~~ for the respondent shall separately certify that counsel has explained to the respondent the proceedings, the legal and factual issues, potential defenses, the burden of proof, and possible outcomes of the proceedings. No guardian, guardian ad litem, attorney, or other individual may waive the right to counsel on behalf of an individual with mental retardation.

SECTION 8. AMENDMENT. Section 25-03.3-10 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

25-03.3-10. Notice. If a respondent is detained pursuant to section 25-03.3-08, the state's attorney shall provide the respondent, or the respondent's guardian, if appropriate, with a copy of the petition filed with the court. The state's attorney shall provide the respondent with written notice of the respondent's right to a preliminary hearing and a commitment hearing, if probable cause is found to exist; the right to counsel and that counsel will be appointed for the respondent, if the respondent is indigent; and the right to have an expert of the respondent's choosing conduct an evaluation and testify on the respondent's behalf or, if the respondent is indigent, that the court will appoint a qualified expert for the respondent. The notice must state the date, time, and place for the preliminary hearing. If

notice is given to a respondent who the state's attorney knows or believes is an individual with mental retardation, the state's attorney also shall give notice to the respondent's attorney, guardian, and guardian ad litem, if any.

SECTION 9. AMENDMENT. Section 25-03.3-11 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

25-03.3-11. Preliminary hearing - Probable cause. The respondent is entitled to a preliminary hearing within seventy-two hours of being taken into custody pursuant to an order of the court, excluding weekends and holidays, unless the respondent ~~chooses to waive~~ knowingly waives the preliminary hearing pursuant to section 25-03.3-09. The respondent has a right to be present, to testify, and to present and cross-examine witnesses at any preliminary hearing. The court may receive evidence that would otherwise be inadmissible at a commitment hearing. Every individual not necessary must be excluded, except that the court may admit any individual having a legitimate interest in the proceeding. If the court determines after a preliminary hearing that there is probable cause to believe the respondent is a sexually dangerous individual, the court shall order that the respondent be transferred to an appropriate treatment facility for an evaluation as to whether the respondent has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes the respondent likely to engage in further acts of sexually predatory conduct. If the court determines that probable cause does not exist to believe that the respondent is a sexually dangerous individual, the court shall dismiss the petition. If the respondent waives the preliminary hearing, then the respondent must be immediately transferred to an appropriate treatment facility for an evaluation as to whether the respondent has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes the respondent likely to engage in further acts of sexually predatory conduct. An individual with mental retardation may be evaluated under this chapter at a facility only if that facility provides care and treatment to individuals with mental retardation.

SECTION 10. AMENDMENT. Section 25-03.3-12 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

25-03.3-12. Sexually dangerous individual - Evaluation. The evaluation must be conducted by one or more experts chosen by the executive director. Whenever a respondent is subject to an evaluation pursuant to this chapter, the respondent may retain an expert to perform an evaluation or testify on the respondent's behalf. When the respondent is an adult with mental retardation and a guardian or guardian ad litem has not been appointed for the respondent, the court shall appoint an expert to perform an evaluation on behalf of the respondent. In the case of a respondent who is indigent, the court shall appoint a qualified expert to perform an examination or participate in the commitment proceeding on the respondent's behalf. The department of human services shall compensate any qualified expert appointed by the court on behalf of an indigent respondent in a reasonable amount based on time and expenses. An expert retained on behalf of the respondent must have reasonable access to the respondent for the purpose of the examination and to all relevant medical, psychological, and court records and reports.

SECTION 11. AMENDMENT. Section 25-03.3-13 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

25-03.3-13. Sexually dangerous individual - Commitment proceeding - Report of findings. Within ~~thirty~~ sixty days after the finding of probable cause, the court shall conduct a commitment proceeding to determine whether the respondent is a sexually dangerous individual. The court may extend the time for good cause. At the commitment proceeding, any testimony and reports of an expert who conducted an examination are admissible, including risk assessment evaluations. Any proceeding pursuant to this chapter must be tried to the court and not a jury. At the commitment proceeding, the state's attorney shall present evidence in support of the petition and the burden is on the state to show by clear and convincing evidence that the respondent is a sexually dangerous individual. An individual may not be committed unless evidence is admitted establishing that at least two experts have concluded the individual has a congenital or acquired condition that is manifested by

a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct. The respondent has a right to be present, to testify, and to present and cross-examine witnesses. Every person not necessary must be excluded, except that the court may admit any person having a legitimate interest in the proceeding. If the respondent is found to be a sexually dangerous individual, the court shall commit the respondent to the care, custody, and control of the executive director. The executive director shall place the respondent in an appropriate facility or program at which treatment is available. The appropriate treatment facility or program must be the least restrictive available treatment facility or program necessary to achieve the purposes of this chapter. The executive director may not be required to create a less restrictive treatment facility or treatment program specifically for the respondent or committed individual. Unless the respondent has been committed to the legal and physical custody of the department of corrections and rehabilitation, the respondent may not be placed at and the treatment program for the respondent may not be provided at the state penitentiary or an affiliated penal facility. If the respondent is found not to be a sexually dangerous individual, the court shall discharge the respondent.

SECTION 12. AMENDMENT. Subsection 1 of section 25-03.3-17 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. A committed individual must remain in the care, custody, and control of the executive director until, in the opinion of the executive director, the individual is safe to be at large ~~and has received the maximum benefit of treatment.~~

SECTION 13. A new subsection to section 25-03.3-17 of the 1999 Supplement to the North Dakota Century Code is created and enacted as follows:

If the executive director moves a committed individual from a placement in the community to a placement in a secure treatment facility that is more restrictive, the committed individual may challenge the move at a hearing to be held within thirty days after the move in accordance with procedures established by the department of human services.

SECTION 14. AMENDMENT. Subsection 1 of section 25-03.3-18 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. Annually, the executive director shall provide the committed individual with written notice that the individual has a right to petition the court for discharge. The notice must explain to the committed person when the committed person has a right to a hearing on the petition. The notice must inform the committed person of the rights this chapter affords the committed person at a discharge hearing. The executive director shall forward a copy of the notice to the committing court. If the committed individual is mentally retarded, the executive director shall also provide the written notice to the individual's attorney, guardian, and guardian ad litem, if any.

SECTION 15. AMENDMENT. Section 25-03.3-19 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

25-03.3-19. Appeal. The respondent has the right to an appeal from an order of commitment or an order denying a petition for discharge. Upon entry of an appealable order, the court shall notify the respondent of the right to appeal and the right to counsel. The notice of appeal must be filed within thirty days after entry of the order. The appeal must be limited to a review of the procedures, findings, and conclusions of the committing court. Pending a decision on appeal, the order appealed from remains in effect. If the respondent is a mentally retarded individual, the court shall provide notice of the right to appeal to the respondent's attorney, the respondent's guardian, and guardian ad litem.

SECTION 16. A new section to chapter 25-03.3 of the North Dakota Century Code is created and enacted as follows:

Rules. The department of human services may adopt rules under chapter 28-32 to implement this chapter, but the rules may not restrict or limit the rights guaranteed by this chapter.

SECTION 17. A new section to chapter 25-03.3 of the North Dakota Century Code is created and enacted as follows:

Individual rights. For so long as a committed individual is placed in and resides at a treatment facility, the committed individual has the same rights as other residents of the facility, subject to the following limitations and restrictions:

1. The individual's rights are subordinate to legitimate safety precautions and to the terms of the applicable individualized habilitation or treatment plan.
2. If an individual's rights are inconsistent with this chapter in a particular situation, the specific provisions of this chapter prevail.

President of the Senate

Speaker of the House

Secretary of the Senate

Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Fifty-seventh Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2034.

Senate Vote: Yeas 46 Nays 0 Absent 3

House Vote: Yeas 77 Nays 17 Absent 4

Secretary of the Senate

Received by the Governor at _____ M. on _____, 2001.

Approved at _____ M. on _____, 2001.

Governor

Filed in this office this _____ day of _____, 2001,

at _____ o'clock _____ M.

Secretary of State