CHAPTER 25-03.3
COMMITMENT OF SEXUALLY DANGEROUS INDIVIDUALS

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. "Intellectual disability" means mental retardation as defined in the "Diagnostic and Statistical Manual of Mental Disorders", American psychiatric association, (4th edition, text revision 2000).
3. "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 psychologist examiners. For purposes of evaluating an individual with an intellectual disability, the qualified expert must have specialized knowledge in sexual offender evaluations of individuals with an intellectual disability.
4. "Respondent" means an individual subject to a commitment proceeding pursuant to this chapter.
5. "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. "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. "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. For these purposes, intellectual disability is not a sexual disorder, personality disorder, or other mental disorder or dysfunction.
8. "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 or coercion that would render a person reasonably 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 has a disability that substantially impairs the victim's understanding of the nature of the sexual act or contact;
        (6) The victim is in official custody or detained in a treatment facility, health care facility, correctional facility, or other institution and is under the supervisory authority, disciplinary control, or care of the actor;

(7) The victim is a minor and the actor is an adult; or
(8) The other individual is a person related to the actor within a degree of consanguinity within which marriages are declared incestuous and void by section 14-03-03 and the actor knows that; 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. "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. "Superintendent" means the superintendent of the state hospital or the superintendent's designee.
11. "Treatment facility" means any hospital, including the state hospital, or any treatment facility, including the life skills and transition center, which can provide directly, or by direct arrangement with other public or private agencies, evaluation and treatment of sexually dangerous individuals.

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 may be tried in 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.

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. The petition and any proceeding under section 25-03.3-11 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. Notwithstanding any other provision of law, proceedings under section 25-03.3-13 and any evidence introduced or presented to the court for any such proceeding are required to be open to the public, with the exception of a proceeding involving an individual who has not been convicted of a sexual act as defined in section 25-03.3-01. The protections of subsection 10 of section 12.1-34-02 and section 12.1-35-03 apply to any records or proceedings under this chapter.

25-03.3-03.1. 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 life skills and transition center and the state hospital.
4. Following the receipt of a referral, but at least sixty days 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.

25-03.3-04. Retention of records.

Notwithstanding any other provision of law, all adult and juvenile case files and court records of an alleged offense defined by chapters 12.1-20 and 12.1-27.2 must be retained for twenty-five years and made available to any state's attorney for purposes of investigation or proceedings pursuant to this chapter. If the subject of a case file or court record has died before the expiration of the twenty-five-year period, the official, department, or agency possessing the case files and records shall maintain the case files and records in accordance with the case file and records retention policies of that official, department, or agency. For purposes of this section, "adult and juvenile case files" mean the subject's medical, psychological, and treatment clinical assessments, evaluations, and progress reports; offenses in custody records; case notes; and criminal investigation reports and records.

25-03.3-05. Abrogation of confidentiality statutes and privileges.

1. Notwithstanding any other provision of law requiring confidentiality of information about individuals receiving care, custody, education, treatment, or any other services from the state or any political subdivision, any confidential information about a respondent or committed individual must be released to a state's attorney for proceedings pursuant to this chapter unless release results in the loss of federal funds. The physician-patient privilege and psychotherapist-patient privilege do not apply to communications relevant to an issue in proceedings to commit an individual as a sexually dangerous person if the physician or psychotherapist in the course of diagnosis or treatment determines the patient is in need of commitment and to communications with a committed individual. The provision of any confidential or privileged information to the state's attorney does not render the state, any political subdivision, or any state or political subdivision official or employee, or other person liable pursuant to any criminal or civil law relating to confidentiality or privilege.
2. For purposes of this chapter, the disclosure of individually identifiable health information by a treating facility or mental health professional to the state hospital or a mental health professional, including an expert examiner, is a disclosure for treatment. A retained or appointed counsel has the right to obtain individually identifiable health information regarding a respondent in a proceeding under this chapter. In any other case, the right of an inmate or a patient to obtain protected health information must be in accordance with title 45, Code of Federal Regulations, part 164.

25-03.3-06. Use of confidential records.

Upon request, any confidential records provided to the state's attorney pursuant to this chapter must be made available to the respondent or committed individual, the attorney of the respondent or committed individual, a qualified expert charged with examining the respondent or committed individual, the court, and any treatment facility in which the respondent or committed individual is being evaluated or treated pursuant to this chapter.

25-03.3-07. Appointment of guardian ad litem.

At any stage of a proceeding under this chapter, on application of any individual or on its own motion, the court may appoint a guardian ad litem for a minor or an individual with an intellectual disability who is a respondent or witness or otherwise involved in the proceeding, if the minor or an individual with an intellectual disability has no parent, guardian, or custodian appearing on behalf of the minor or the individual with an intellectual disability or the interests of those persons conflict with those of the minor or an individual with an intellectual disability. The department of health and human services shall pay the expense of the guardian ad litem fee as established by the court.

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 or local correctional facility to be held for subsequent hearing pursuant to this chapter. Under this section, the department of health and 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 an intellectual disability, 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 an intellectual disability 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.

25-03.3-09. Right to counsel - Waiver.

1. Every respondent is entitled to legal counsel. Unless an appearance has been entered on behalf of the respondent, the court, within twenty-four hours from the time the petition was filed, exclusive of weekends or holidays, shall appoint counsel to represent the respondent. If a respondent retains counsel, the retained counsel immediately shall notify the court of that fact.
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 the respondent's counsel 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 an intellectual disability.
3. If the court determines that the respondent is indigent, the court shall appoint counsel and order that appointed counsel be compensated by the county that is the respondent's place of residence in a reasonable amount based upon time and expenses.

4. The state's attorney of a county that has expended sums pursuant to subsection 3 may seek civil recovery of those sums from property of the respondent. Commencement of the action must occur within six years after the date the sums were paid. After notice and hearing, the court may order an individual to reimburse the county for expenditures made on that individual's behalf pursuant to this chapter.

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 an intellectual disability, the state's attorney also shall give notice to the respondent's attorney, guardian, and guardian ad litem, if any.

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 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. 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 an intellectual disability may be evaluated under this chapter at a facility only if that facility provides care and treatment to individuals with an intellectual disability.

25-03.3-12. Sexually dangerous individual - Evaluation.

The evaluation must be conducted by one or more experts chosen by the commissioner. 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 an intellectual disability 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 health and 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.

25-03.3-13. Sexually dangerous individual - Commitment proceeding - Report of findings.

Within 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 expert evidence is admitted establishing that 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. 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 commissioner. The commissioner 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 commissioner 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.

25-03.3-14. Interagency placement.

If a committed individual also has been committed to the legal and physical custody of the department of corrections and rehabilitation, the director of the department of corrections and rehabilitation and the commissioner may consult one another and determine the appropriate placement of the individual and may transfer the individual between placements.

25-03.3-15. Evidence of prior acts.

Notwithstanding any other provision of law, in any proceeding pursuant to this chapter, evidence of prior sexually predatory conduct or criminal conduct, including a record of the juvenile court, is admissible.

25-03.3-16. Limitation on findings as evidence in criminal proceedings.

Any determination made pursuant to this chapter regarding whether a respondent is a sexually dangerous individual or has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction is inadmissible in any criminal proceeding against the respondent, including any criminal proceeding to determine whether the respondent is fit to stand trial, incapable of forming requisite intent, or not guilty by reason of lack of responsibility because of mental disease or defect.

25-03.3-17. Postcommitment proceeding, discharge, and further disposition.

1. A committed individual must remain in the care, custody, and control of the commissioner until, in the opinion of the commissioner, the individual is safe to be at large.
2. Each committed individual must have an examination of that individual's mental condition at least once a year. A report regarding the examination must be provided to the court that committed the individual. At the time of the annual examination, the committed individual has the right to have an expert examine the individual, and, upon the request of an indigent committed individual, the court shall appoint a qualified expert to examine the committed individual and report to the court. The department of

health and human services shall compensate a qualified expert appointed by the court in a reasonable amount based on time and expenses. That expert must have reasonable access to the committed individual and to all records relating to the committed individual, including confidential records.

3. If a committed individual has been committed to an out-of-state facility by the commissioner for purposes of treatment, an expert from that state may be appointed by the court as a qualified expert for an indigent committed individual for any postcommitment proceeding.
4. After any report pursuant to this section is provided to the court, the court may order further examination and investigation of the committed individual as the court considers necessary. The court may set the matter for a hearing. At the hearing, the committed individual is entitled to be present and to the benefit of the protections afforded at the commitment proceeding. The state's attorney shall represent the state at the hearing. After the hearing, the court shall determine whether the committed individual is to be discharged or to be retained as a sexually dangerous individual in the care, custody, and control of the commissioner.
5. The commissioner may only discharge a sexually dangerous individual from commitment pursuant to a court order. The commissioner may petition the committing court at any time for the discharge of the committed individual. The commissioner shall give the state's attorney notice of any petition for discharge the commissioner files with the court. Before the petition is granted, the state's attorney has the right to be heard by the court on the petition. The state's attorney may waive this right.
6. If the commissioner 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 health and human services.

25-03.3-18. Petition for discharge - Notice.

1. Annually, the commissioner 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 commissioner shall forward a copy of the notice to the committing court. If the committed individual is an individual with an intellectual disability, the commissioner shall also provide the written notice to the individual's attorney, guardian, and guardian ad litem, if any.
2. If the committed individual files a petition for discharge and has not had a hearing pursuant to section 25-03.3-17 or this section during the preceding twelve months, the committed individual has a right to a hearing on the petition.
3. At the hearing on the petition for discharge, the committed individual is entitled to be present and to the benefit of the protections afforded at the commitment proceeding. The state's attorney shall represent the state and may have the committed individual evaluated by experts chosen by the state. The committed individual is entitled to have an expert of the committed individual's choice conduct an evaluation. The court shall appoint a qualified expert if the committed individual is indigent and requests an appointment. The department of health and human services shall compensate a qualified expert appointed by the court in a reasonable amount based on time and expenses. That expert must have reasonable access to the committed individual and to all records relating to the committed individual, including confidential records.
4. At any hearing held pursuant to a petition for discharge, the burden of proof is on the state to show by clear and convincing evidence that the committed individual remains a sexually dangerous individual.

25-03.3-18.1. Annual review - Petition for discharge - Inapplicability during periods of imprisonment.

Sections 25-03.3-17 and 25-03.3-18 do not apply if a respondent, during a period of commitment under this chapter, is transferred to the custody of the department of corrections and rehabilitation in accordance with section 29-27-07 or is serving a term of imprisonment in a county jail or regional corrections center. Upon release from imprisonment, the respondent must be retransferred to the care, custody, and control of the commissioner. Upon retransfer, the respondent is entitled to a review to determine whether continued commitment under this chapter is warranted.

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 an individual with an intellectual disability, the court shall provide notice of the right to appeal to the respondent's attorney, the respondent's guardian, and guardian ad litem.

25-03.3-20. Limitation of liability.

A person acting in good faith upon either actual knowledge or reliable information, who provides information to the state's attorney or the court pursuant to this chapter, is not subject to civil or criminal liability.

25-03.3-21. Recovery of expense.

The department of health and human services, to the extent it has expended sums or provided services pursuant to this title, may seek civil recovery from the property of the respondent or committed individual. The department of health and human services must commence the action within six years after the department paid the sums or provided the services to the respondent or committed individual. After notice and hearing, the court may order an individual to reimburse the department of health and human services for all or part of the expenditures made for that individual pursuant to this chapter. In establishing the amount of reimbursement ordered under this section, the court shall consider the ability of the respondent or committed individual to pay.

25-03.3-22. Rules.

The department of health and 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.

25-03.3-23. 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.

25-03.3-24. Postcommitment community placement - Penalty.

1. Following commitment of a sexually dangerous individual, the commissioner may conduct a risk management assessment of the committed individual for the purpose of determining whether the individual may be treated safely in the community on an outpatient basis. The commissioner may place a committed individual in the

community for treatment on an outpatient basis only pursuant to a court order. The commissioner may petition the court at any time for community placement. The commissioner shall give the state's attorney of the county of community placement notice of any petition for community placement the commissioner files with the court. Before the petition is granted, the state's attorney has the right to be heard by the court. The state's attorney may waive this right. At any hearing held pursuant to a petition by the commissioner for the community placement of a committed individual, the burden of proof required of the commissioner is a preponderance of the evidence. The court's order of community placement must contain appropriate restrictions and requirements for the committed individual, including:

a. Participation and compliance with a specific course of treatment;
b. Submission to electronic monitoring and any other appropriate supervision;
c. Prohibition of the individual changing place of residency or leaving the state without prior authorization of the court;
d. Establishment of safety zones, and compliance by the committed individual with those safety zones;
e. Requirement that the committed individual notify the court within twenty-four hours of any change in the individual's status that affects proper treatment or supervision;
f. Contact with victims is prohibited independent of a supervised treatment plan; and
g. Any other restriction or requirement deemed necessary by the court to assure public safety and proper treatment of the committed individual.

2. Violation by a committed individual of a court order issued pursuant to this section is a class C felony.