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CIVIL COMMITMENT OF SEXUALLY DANGEROUS INDIVIDUALS - TREATMENT REQUIREMENTS

This memorandum addresses the issue of the nature of the state's responsibility for providing treatment to individuals who have been civilly committed as sexually dangerous individuals.

NORTH DAKOTA'S CIVIL COMMITMENT OF SEXUALLY DANGEROUS INDIVIDUALS STATUTES

In 1997 the North Dakota Legislative Assembly enacted legislation that created a procedure for the civil commitment of sexually dangerous individuals. That legislation, codified as North Dakota Century Code (NDCC) Chapter 25-03.3, establishes a judicial procedure for the civil commitment of sexually dangerous individuals similar to the procedure for the commitment of mentally ill individuals. North Dakota Century Code Section 25-03.3-01 defines a sexually dangerous individual as one who has:

[S]hown 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, mental retardation is not a sexual disorder, personality disorder, or other mental disorder or dysfunction.

Under NDCC Chapter 25-03.3, sexually predatory conduct is conduct that is similar to the conduct required for the crime of gross sexual imposition. Chapter 25-03.3 provides that the burden of proof for commitment is clear and convincing evidence and that the person to be committed has the right to counsel, to be present, to testify, and to present and cross-examine witnesses. Section 25-03.3-17 provides that if a person is found to be a sexually dangerous individual, the court commits that person to the care, custody, and control of the executive director of the Department of Human Services.

On the issue of the responsibility of the state to provide treatment to the civilly committed individual, NDCC Section 25-03.3-17 provides that the executive director has the duty to place the sexually dangerous individual in an appropriate facility or program at which treatment is available. This section provides that the appropriate treatment facility or program must be the least restrictive available treatment facility or

program necessary to achieve the purposes of Chapter 25-03.3. The executive director is not required to create a less restrictive treatment facility or treatment program specifically for the respondent or committed individual. Unless the sexually dangerous individual is already in the custody of the Department of Corrections and Rehabilitation, the executive director may not place the individual at the State Penitentiary or affiliated penal facilities. Section 25-03.3-17 also provides that the committed individual must have an examination of that individual's mental condition at least once a year and that the individual has the right to have an expert conduct the examination. This section provides that the Department of Human Services is responsible for the cost of the expert's time and expenses. This section also provides that the executive director only may discharge a sexually dangerous individual from commitment pursuant to a court order and that the court must release the individual once the individual is no longer sexually dangerous.

In 2005 the Legislative Assembly enacted NDCC Section 25-03.3-24, which provides that following the commitment of a sexually dangerous individual, the executive director of the Department of Human Services is authorized to 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.

North Dakota Century Code Section 25-03.3-21 authorizes the Department of Human Services to seek civil recovery of the expended sums or provided services from the committed individual. The department is required to commence the action within six years after the department expended the funds or provided the services to the committed individual.

CONSTITUTIONAL STANDARDS REGARDING TREATMENT OF CIVILLY COMMITTED SEX OFFENDERS

The involuntary commitment of sex offenders began in the 1930s when state legislatures first introduced procedures for the confinement and incapacitation of sexual offenders and sexually dangerous persons. Michigan was the first state to pass such legislation in 1937. Many of the laws required evidence of mental illnesses and personality disorders as well as a likelihood of sexual reoffending. From 1940 to 1992, the United States Supreme Court decided a number of cases addressing the constitutional parameters of involuntary psychiatric commitment.

By 1960 the majority of states had sexual predator legislation. By the end of the 1980s, the number of states with sexual predator legislation had been cut in half due to concerns about the violation of constitutional rights and about whether such treatment programs were successful in diminishing sex offending once the offender is released.

In the 1990s a number of notorious sexually violent criminal cases in various states led state legislatures to reinstate modern versions of these laws. Enacted in 1990, the Washington Sexually Violent Predator Law was the first revised sexual predator law passed in the United States. By 2005 approximately 17 states had implemented the new civil commitment of sex offender statutes.

There are many constitutional arguments, particularly involving due process claims, the double jeopardy clause, and the ex post facto clause, that have been raised in recent United States Supreme Court cases concerning civil commitment of sexually dangerous individuals.

In the first major case challenging the civil commitment laws passed in the 1990s, the United States Supreme Court upheld the constitutionality of civil commitment laws for sexually violent predators in *Kansas v. Hendricks*, 521 U.S. 346 (1997). The Court determined that the Kansas law neither imposed punishment nor had a punitive purpose. The Court held that the Kansas law did not violate the ex post facto clause. The Court said the Kansas law was not intended to be used for retribution or deterrence--the two primary objectives of the criminal system. The Court concluded that civilly committed patients, whether sex offenders or mentally ill and dangerous offenders, were not being punished and that civil commitment at such institutions did not constitute punishment.

The United States Supreme Court addressed the issue of treatment as a necessary component of the civil commitment process in *Seling v. Young*, 531 U.S. 250 (2001). In *Seling*, the Court upheld the Washington civil commitment law for sexually violent offenders as being civil rather than criminal in nature. The Supreme Court assumed that the Washington civil commitment law for sex offenders was civil in nature because it provided offenders with the right to "adequate care and individualized treatment." The Court concluded that because due process requires that the conditions and duration of confinement bear some relation to the purpose for which offenders are committed, the Washington law met those requirements because the law was designed to incapacitate and treat violent sex offenders.

In *Turay v. Weston*, 108 F. Supp. 2d 1148 (W.D. Wash. 2000) and *Sharp v. Seling*, 233 F.3d 1166 (9th Cir. 1999), the cases that led to the United States Supreme Court decision in *Seling v. Young*, the federal district and circuit court of appeals specifically addressed the issue of adequate treatment. In *Turay v. Weston*, the court found the state to be in contempt for failing to comply with the terms of an

injunction issued in 1994 which required the state to provide adequate mental health treatment to civilly committed sexual predators. In this case the court stated "[t]he Fourteenth Amendment Due Process Clause of the United States Constitution requires state officials to provide civilly committed persons . . . with access to mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined. This rule applies to sex offenders, and the lack of funds, staff or facilities cannot justify the State's failure to provide [those confined] with that treatment necessary for rehabilitation." The court went on to note that those offenders civilly committed under the statute are not prisoners, and therefore "they are entitled by law to 'more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.' " The Ninth Circuit Court of Appeals upheld this reasoning in the appeal of the district court's injunction. The circuit court held that the district court had properly found that the state had failed to remedy several specific areas, including providing adequate mental health treatment.

CONCLUSION

North Dakota Century Code Chapter 25-03.3 establishes a judicial procedure for the civil commitment of sexually dangerous individuals similar to the procedure for the commitment of mentally ill individuals. This chapter provides that it is the responsibility of the executive director of the Department of Human Services to place the sexually dangerous individual in an appropriate facility or program at which treatment is available. The chapter also provides that the committed individual has a right to an examination of that individual's mental condition at least once a year and that the individual has the right to have an expert conduct the examination. The Department of Human Services is responsible for the cost of the expert's time and expenses expended in conducting the examination.

The federal courts have addressed the constitutionality of state laws that provide for the civil commitment of sexually dangerous individuals. The courts have upheld those state laws that did not impose punishment or have a punitive purpose and which were not intended to be used for retribution or deterrence. The federal courts have also addressed the issue of treatment as a necessary component of the civil commitment process by upholding state laws that provide offenders with the right to adequate care and individualized treatment. The courts have held that the lack of funds, staff, or facilities cannot justify a state's failure to provide a civilly committed individual with the treatment necessary for rehabilitation. Thus, based upon the statutory requirements provided for in the North Dakota Century Code and the federal decisions that have resulted from challenges to various states' laws regarding the civil commitment of sexually dangerous individuals, it appears that a

state's responsibility to provide treatment for those individuals may not be based upon whether adequate funds have been appropriated.