

CRIMINAL CODE

CHAPTER 116

SENATE BILL NO. 2040

(Freed, Jones)

(From Legislative Council Study)

CRIMINAL CODE AMENDMENTS

AN ACT to create and enact subsection 32 of section 12.1-01-04, subsection 6 of section 12.1-32-01, section 12.1-32-01.1, subsection 7 of section 12.1-32-02, and section 12.1-32-03.1 of the North Dakota Century Code; to amend and reenact subsections 6, 25, and 27 of section 12.1-01-04, section 12.1-01-05, subdivision b of subsection 1 of section 12.1-03-01, subsection 1 of section 12.1-08-01, subsection 1 of section 12.1-08-02, subsection 1 of section 12.1-08-03, subdivision d of subsection 2 of section 12.1-11-02, subdivision b of subsection 1 of section 12.1-11-05, sections 12.1-11-06, 12.1-13-01, 12.1-13-04, and 12.1-14-03, subsection 3 of section 12.1-16-01, subsection 2 of section 12.1-17-01, sections 12.1-17-07 and 12.1-22-05, subdivision b of subsection 2 of section 12.1-23-05, section 12.1-23-06, subsection 1 of section 12.1-23-09, subsection 1 of section 12.1-25-02, subsection 1 of section 12.1-29-05, subsection 1 of section 12.1-32-02, subsection 6 of section 12.1-32-02, subsection 1 of section 12.1-32-08, subdivision c of subsection 1 of section 12.1-32-09, section 12.1-32-11, and the introductory language of section 12.1-32-12 of the North Dakota Century Code and all as contained in chapter 104 or chapter 116 of the 1973 Session Laws of the state of North Dakota, relating to definitions of terms, definitions of offenses, sentencing alternatives, defenses to criminal charges, justifications on the use of force, classifications of offenses, and providing penalties; and to repeal subsections 9 and 20 of section 12.1-01-04 of the North Dakota Century Code as contained in section 1 of chapter 116 of the 1973 Session Laws of the state of North Dakota, and section 12.1-02-04 of the North Dakota Century Code as contained in section 2 of chapter 116 of the 1973 Session Laws of the state of North Dakota, defining certain terms, and setting forth instances where mistake of fact or law is a defense.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE
STATE OF NORTH DAKOTA:

SECTION 1. AMENDMENT.) Subsections 6, 25, and 27 of section 12.1-01-04 of the North Dakota Century Code as contained in section 1 of chapter 116 of the 1973 Session Laws of the state of North

Dakota are hereby amended and reenacted to read as follows:

6. "Dangerous weapon" means, but is not limited to, any switch blade or gravity knife, machete, scimitar, stiletto, sword, or dagger; any billy, blackjack, sap, bludgeon, cudgel, metal knuckles, or sand club; any slungshot; any bow and arrow, crossbow, or spear; any weapon which will expel, or is readily capable of expelling, a projectile by the action of a spring, compressed air, or compressed gas including any such weapon, loaded or unloaded, commonly referred to as a b.b. gun, air rifle, or CO₂ gun; and any projector of a bomb or any object containing or capable of producing and emitting any noxious liquid, gas, or substance;
25. As used in this title and in sections outside this title which define offenses, "person" includes, where relevant, a corporation, partnership, unincorporated association, or other legal entity. When used to designate a party whose property may be the subject of action constituting an offense, the word "person" includes a government which may lawfully own property in this state;
27. "Public servant" as used in this title and in any statute outside this title which defines an offense means any officer or employee of government, including law enforcement officers, whether elected or appointed, and any person participating in the performance of a governmental function, but the term does not include witnesses;

SECTION 2.) Subsection 32 of section 12.1-01-04 of the North Dakota Century Code as contained in section 1 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby created and enacted to read as follows:

32. "Political subdivision" as used in this title and in any statute outside this title which defines an offense means a county, city, school district, township, and any other local governmental entity created by law;

SECTION 3. AMENDMENT.) Section 12.1-01-05 of the North Dakota Century Code as contained in section 1 of chapter 104 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

12.1-01-05. CRIMES DEFINED BY STATE LAW SHALL NOT BE SUPERSEDED BY CITY ORDINANCE OR BY HOME RULE CITY'S CHARTER OR ORDINANCE.) No offense defined in this title or elsewhere by law shall be superseded by any city ordinance, or city home rule charter, or by an ordinance adopted pursuant to such a charter, and all such offense definitions shall have full force and effect within the territorial limits and other jurisdiction of home rule cities. This section shall not preclude any city from enacting any ordinance containing penal language when otherwise authorized to do so by law.

SECTION 4. AMENDMENT.) Subdivision b of subsection 1 of section 12.1-03-01 of the North Dakota Century Code as contained in section 3 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

- b. With intent that an offense be committed, he commands, induces, procures, or aids the other to commit it, or, having a statutory duty to prevent its commission, he fails to make proper effort to do so; or

SECTION 5. AMENDMENT.) Subsection 1 of section 12.1-08-01 of the North Dakota Century Code as contained in section 8 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

1. A person is guilty of a class A misdemeanor if he intentionally obstructs, impairs, impedes, hinders, prevents, or perverts the administration of law or other governmental function.

SECTION 6. AMENDMENT.) Subsection 1 of section 12.1-08-02 of the North Dakota Century Code as contained in section 8 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

1. A person is guilty of a class A misdemeanor if, with intent to prevent a public servant from effecting an arrest of himself or another for a misdemeanor or infraction, or from discharging any other official duty, he creates a substantial risk of bodily injury to the public servant or to anyone except himself, or employs means justifying or requiring substantial force to overcome resistance to effecting the arrest or the discharge of the duty. A person is guilty of a class C felony if, with intent to prevent a public servant from effecting an arrest of himself or another for a class A, B, or C felony, he creates a substantial risk of bodily injury to the public servant or to anyone except himself, or employs means justifying or requiring substantial force to overcome resistance to affecting such an arrest.

SECTION 7. AMENDMENT.) Subsection 1 of section 12.1-08-03 of the North Dakota Century Code as contained in section 8 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

1. A person is guilty of hindering law enforcement if he intentionally interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution, conviction, or punishment of another for an offense by:
 - a. Harboring or concealing the other;
 - b. Providing the other with a weapon, money, transportation, disguise, or other means of avoiding discovery or apprehension;

- c. Concealing, altering, mutilating, or destroying a document or thing, regardless of its admissibility in evidence;
- d. Warning the other of impending discovery or apprehension other than in connection with an effort to bring another into compliance with the law; or
- e. Giving false information or a false report to a law enforcement officer knowing such information or report to be false.

SECTION 8. AMENDMENT.) Subdivision d of subsection 2 of section 12.1-11-02 of the North Dakota Century Code as contained in section 11 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

- d. Submits or invites reliance on any sample, specimen, map, boundarymark, or other object which he knows to be false in a material respect; or

SECTION 9. AMENDMENT.) Subdivision b of subsection 1 of section 12.1-11-05 of the North Dakota Century Code as contained in section 11 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

- b. Knowingly, without lawful authority, destroys, conceals, removes, or otherwise impairs the verity or availability of a government record.

SECTION 10. AMENDMENT.) Section 12.1-11-06 of the North Dakota Century Code as contained in section 11 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

12.1-11-06. PUBLIC SERVANT REFUSING TO PERFORM DUTY.) Any public servant who knowingly refuses to perform any duty imposed upon him by law is guilty of a class A misdemeanor.

SECTION 11. AMENDMENT.) Section 12.1-13-01 of the North Dakota Century Code as contained in section 13 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

12.1-13-01. DISCLOSURE OF CONFIDENTIAL INFORMATION PROVIDED TO GOVERNMENT.) A person is guilty of a class C felony if, in knowing violation of a statutory duty imposed on him as a public servant, he discloses any confidential information which he has acquired as a public servant. "Confidential information" means information made available to the government under a governmental assurance of confidence as provided by statute.

SECTION 12. AMENDMENT.) Section 12.1-13-04 of the North Dakota Century Code as contained in section 13 of chapter 116 of the

1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

12.1-13-04. IMPERSONATING OFFICIALS.)

1. A person is guilty of an offense if he falsely pretends to be:
 - a. A public servant, other than a law enforcement officer, and acts as if to exercise the authority of such public servant;
 - b. A public servant or a former public servant and thereby obtains a thing of value; or
 - c. A law enforcement officer.
2. It is no defense to prosecution under this section that the pretended capacity did not exist or the pretended authority could not legally or otherwise have been exercised or conferred.
3. An offense under subdivision b or subdivision c of subsection 1 is a class A misdemeanor. An offense under subdivision a of subsection 1 is a class B misdemeanor.

SECTION 13. AMENDMENT.) Section 12.1-14-03 of the North Dakota Century Code as contained in section 14 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

12.1-14-03. SAFEGUARDING ELECTIONS.) A person is guilty of a class A misdemeanor if, in connection with any election, he:

1. Makes or induces any false voting registration;
2. Offers, gives, or agrees to give a thing of pecuniary value to another as consideration for the recipient's voting or withholding his vote or voting for or against any candidate or issue or for such conduct by another;
3. Solicits, accepts, or agrees to accept a thing of pecuniary value as consideration for conduct prohibited under subsections 1 or 2; or
4. Otherwise obstructs or interferes with the lawful conduct of such election or registration therefor.

As used in this section, "thing of pecuniary value" shall include alcoholic beverages, by the drink or in any other container.

SECTION 14. AMENDMENT.) Subsection 3 of section 12.1-16-01 of the North Dakota Century Code as contained in section 16 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

3. Acting either alone or with one or more other persons, commits or attempts to commit treason, robbery, burglary, kidnapping, felonious restraint, arson, rape, aggravated involuntary sodomy, or escape and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of any person; except that in any prosecution under this subsection in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:
 - a. Did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid the commission thereof; and
 - b. Was not armed with a firearm, destructive device, dangerous weapon, or other weapon which under the circumstances indicated a readiness to inflict serious bodily injury; and
 - c. Reasonably believed that no other participant was armed with such a weapon; and
 - d. Reasonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily injury.

SECTION 15. AMENDMENT.) Subsection 2 of section 12.1-17-01 of the North Dakota Century Code as contained in section 17 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

2. Simple assault is a class B misdemeanor except when the victim is a peace officer acting in an official capacity, and the actor knows that to be a fact, in which case the offense is a class C felony.

SECTION 16. AMENDMENT.) Section 12.1-17-07 of the North Dakota Century Code as contained in section 17 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

12.1-17-07. HARASSMENT.)

1. A person is guilty of an offense if, with intent to frighten or harass another, he:
 - a. Communicates in writing or by telephone a threat to inflict injury on any person, to any person's reputation, or to any property;
 - b. Makes a telephone call anonymously or in offensively coarse language;
 - c. Makes repeated telephone calls, whether or not a conversation ensues, with no purpose of legitimate communication; or

- d. Communicates a falsehood in writing or by telephone and causes mental anguish.
2. The offense is a class A misdemeanor if it is under subdivision a of subsection 1. Otherwise it is a class B misdemeanor.
3. Any offense defined herein and committed by use of a telephone may be deemed to have been committed at either the place at which the telephone call or calls were made, or at the place where the telephone call or calls were received.

SECTION 17. AMENDMENT.) Section 12.1-22-05 of the North Dakota Century Code as contained in section 21 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

12.1-22-05. STOWING AWAY.) A person is guilty of a class A misdemeanor if, knowing that he is not licensed or privileged to do so, he surreptitiously remains aboard a vehicle, train, vessel, or aircraft with intent to obtain transportation.

SECTION 18. AMENDMENT.) Subdivision b of subsection 2 of section 12.1-23-05 of the North Dakota Century Code as contained in section 22 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

- b. The property or services stolen are acquired or retained by threat and (1) are required or retained by a public servant by a threat to take or withhold official action, or (2) exceed fifty dollars in value;

SECTION 19. AMENDMENT.) Section 12.1-23-06 of the North Dakota Century Code as contained in section 22 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

12.1-23-06. UNAUTHORIZED USE OF A VEHICLE.)

1. A person is guilty of an offense if, knowing that he does not have the consent of the owner, he takes, operates, or exercises control over an automobile, train, aircraft, motorcycle, motorboat, or other motor-propelled vehicle of another.
2. It is a defense to a prosecution under this section that the actor reasonably believed that the owner would have consented had he known of the conduct on which the prosecution was based.
3. The offense is a class C felony if the vehicle is an aircraft or if the value of the use of the vehicle and the cost of retrieval and restoration exceeds five hundred dollars. Otherwise the offense is a class A misdemeanor.

SECTION 20. AMENDMENT.) Subsection 1 of section 12.1-23-09 of the North Dakota Century Code as contained in section 22 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

1. It is a defense to a prosecution under this chapter that:
 - a. The actor honestly believed that he had a claim to the property or services involved which he was entitled to assert in the manner which forms the basis for the charge against him; or
 - b. The victim is the actor's spouse, but only when the property involved constitutes household or personal effects or other property normally accessible to both spouses and the parties involved are living together. The term "spouse", as used in this section, includes persons living together as husband and wife.

SECTION 21. AMENDMENT.) Subsection 1 of section 12.1-25-02 of the North Dakota Century Code as contained in section 24 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

1. A person is guilty of a class C felony if he:
 - a. Knowingly supplies a firearm, dangerous weapon, or destructive device for use in a riot;
 - b. Teaches another to prepare or use a firearm, dangerous weapon, or destructive device with intent that any such thing be used in a riot; or
 - c. While engaging in a riot, is knowingly armed with a firearm, dangerous weapon, or destructive device.

SECTION 22. AMENDMENT.) Subsection 1 of section 12.1-29-05 of the North Dakota Century Code as contained in section 28 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

1. "Sexual activity" means sexual act or sexual contact as those terms are defined in section 12.1-20-02.

SECTION 23.) Subsection 6 of section 12.1-32-01 of the North Dakota Century Code as contained in section 31 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby created and enacted to read as follows:

6. Infraction, for which a maximum fine of five hundred dollars may be imposed. Any person convicted of an infraction who has, within one year prior to commission of the infraction of which he was convicted, been previously convicted of an offense classified as an infraction may be sentenced as though convicted of a class B misdemeanor.

If the prosecution contends that the infraction is punishable as a class B misdemeanor, the complaint shall specify that the offense is a misdemeanor.

SECTION 24.) Section 12.1-32-01.1 of the North Dakota Century Code is hereby created and enacted to read as follows:

12.1-32-01.1. ORGANIZATIONAL FINES.) Any organization, as defined in section 12.1-03-04, shall, upon conviction, be subject to a maximum fine in accordance with the following classification:

1. For a class A felony, a maximum fine of fifty thousand dollars.
2. For a class B felony, a maximum fine of thirty-five thousand dollars.
3. For a class C felony, a maximum fine of twenty-five thousand dollars.
4. For a class A misdemeanor, a maximum fine of fifteen thousand dollars.
5. For a class B misdemeanor, a maximum fine of ten thousand dollars.

Nothing in this section shall be construed as preventing the imposition of the sanction provided for in section 12.1-32-03, nor as preventing the prosecution of agents of the organization under section 12.1-03-03.

SECTION 25. AMENDMENT.) Subsection 1 of section 12.1-32-02 of the North Dakota Century Code as contained in section 31 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

1. Every person convicted of an offense who is sentenced by the court shall be sentenced to one or a combination of the following alternatives, unless the sentencing alternatives are otherwise specifically provided in the statute defining the offense:
 - a. Payment of the reasonable costs of his prosecution.
 - b. Probation.
 - c. A term of imprisonment, including intermittent imprisonment:
 - (1) In the penitentiary or a regional detention facility approved by the director of institutions, or in the state farm in accordance with section 12-51-07, if convicted of a felony.
 - (2) In a county jail, in the state farm, or in a

regional detention facility approved by the director of institutions, if convicted of a misdemeanor.

- d. A fine.
- e. Restitution for damages resulting from the commission of the offense.
- f. Restoration of damaged property, or other appropriate work detail.
- g. Commitment to an appropriate licensed public or private institution for treatment of alcoholism, drug addiction, or mental disease or defect.

Sentences imposed under this subsection shall not exceed in duration the maximum sentences of imprisonment provided by section 12.1-32-01, section 12.1-32-09, or as provided specifically in a statute defining an offense. This subsection shall not be construed as not permitting the unconditional discharge of an offender following conviction. Sentences under subdivisions e or f shall be imposed in the manner provided in section 12.1-32-08. This subsection shall not be construed to prohibit utilization of sections 12-53-13 through 12-53-19, relating to suspension of imposition of sentence, nor shall this subsection limit the conditions which can be imposed on a probationer under section 12-53-14.

SECTION 26. AMENDMENT.) Subsection 6 of section 12.1-32-02 of the North Dakota Century Code as contained in section 31 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

6. If an offender is sentenced to a term of imprisonment, that term of imprisonment commences at the time of sentencing, unless, upon motion of the defendant, the court orders the term to commence at some other time.

SECTION 27. Subsection 7 of section 12.1-32-02 of the North Dakota Century Code as contained in section 31 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby created and enacted to read as follows:

7. Unless otherwise specifically authorized in the statute defining the offense, no court shall include a minimum term of imprisonment as part of its sentence.

SECTION 28.) Section 12.1-32-03.1 of the North Dakota Century Code is hereby created and enacted to read as follows:

- 12.1-32-03.1. PROCEDURE FOR TRIAL OF INFRACTION - INCIDENTS.)

1. Except as provided in this subsection, all procedural provisions relating to the trial of criminal cases as provided in the statutes or rules relating to criminal procedure shall apply to the trial of a person charged with an infraction. A person charged with an infraction is not entitled to be furnished counsel at public expense nor to have a trial by jury unless he may be subject to a sentence of imprisonment under subsection 6 of section 12.1-32-01.
2. Except as provided in this title, all provisions of law and rules of criminal procedure relating to misdemeanors shall apply to infractions, including, but not limited to, the powers of law enforcement officers, the jurisdiction of courts, the periods for commencing action and bringing a case to trial, and the burden of proof.
3. Following conviction of an infraction, the offender may be sentenced in accordance with subsection 1 of section 12.1-32-02, except that a term of imprisonment may not be imposed except in accordance with subsection 3 of section 12.1-32-05, or subsection 6 of section 12.1-32-01.
4. If a statute provides that conduct is an infraction without specifically including a requirement of culpability, no culpability is required.

SECTION 29. AMENDMENT.) Subsection 1 of section 12.1-32-08 of the North Dakota Century Code as contained in section 31 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

1. Prior to imposing restitution or reparation as a sentence or condition of probation, the court shall hold a hearing on the matter with notice to the prosecuting attorney and to the defendant as to the nature and amount thereof. At or following the hearing, the court shall make determinations as to:
 - a. The reasonable damages sustained by the victim or victims of the criminal offense, which damages shall be limited to fruits of the criminal offense and expenses actually incurred as a direct result of the defendant's criminal action;
 - b. The ability of the defendant to restore the fruits of the criminal action or to pay monetary reparations, or to otherwise take action to restore the victim's property; and
 - c. The likelihood that attaching a condition relating to restitution or reparation will serve a valid rehabilitational purpose in the case of the particular offender considered.

The court shall fix the amount of restitution or reparation, which shall not exceed an amount the defendant can or will be able to pay, and shall fix the manner of performance of any condition or conditions of probation established pursuant to this subsection. Any payments made pursuant to such order shall be deducted from damages awarded in a civil action arising from the same incident. An order that a defendant make restitution or reparation as a sentence or condition of probation may, if the court so directs, be filed, transcribed, and enforced by the person entitled to the restitution or reparation in the same manner as civil judgments rendered by the courts of this state may be enforced.

SECTION 30. AMENDMENT.) Subdivision c of subsection 1 of section 12.1-32-09 of the North Dakota Century Code as contained in section 31 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

- c. The convicted offender is a persistent offender. The court shall 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 B or above, or of one class B felony or above plus two offenses potentially punishable by imprisonment classified below class B felony, 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 B or above if it is punishable by a maximum term of imprisonment of ten years or more.

SECTION 31. AMENDMENT.) Section 12.1-32-11 of the North Dakota Century Code as contained in section 31 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

12.1-32-11. MERGER OF SENTENCES - SENTENCING FOR MULTIPLE OFFENSES.)

1. Unless the court otherwise orders, when a person serving a term of commitment imposed by a court of this state is committed for another offense or offenses, the shorter term or the shorter remaining term shall be merged in the other term. When a person on probation or parole for an offense committed in this state is sentenced for another offense or offenses, the period still to be served on probation or parole shall be merged in any new sentence of commitment or probation. A court merging sentences under this subsection shall forthwith furnish each of the other courts previously involved and the penal facility in which the defendant is confined under sentence with authenticated copies of its sentence, which shall cite the sentences being merged. A court which imposed a sentence which is merged pursuant to this subsection shall

modify such sentence in accordance with the effect of the merger.

2. If sentences for multiple offenses are imposed to run consecutively, the aggregate total term of imprisonment resulting from such consecutive sentences shall not exceed the maximum term allowable under section 12.1-32-08 for the highest classification of offense for which the defendant is being sentenced.
3. When sentenced only for misdemeanors, a defendant may not be consecutively sentenced to more than one year, except that a defendant being sentenced for two or more class A misdemeanors may be subject to an aggregate maximum not exceeding that authorized by section 12.1-32-01 for a class C felony if each class A misdemeanor was committed as part of a different course of conduct or each involved a substantially different criminal objective.

SECTION 32. AMENDMENT.) The introductory language of section 12.1-32-12 of the North Dakota Century Code as contained in section 31 of chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby amended and reenacted to read as follows:

Where an offense is defined by a statute or by the Constitution without specification of its classification pursuant to section 12.1-32-01, the offense shall be punishable as provided in the statute or constitutional provision defining it, or:

SECTION 33. REPEAL.) Subsections 9 and 20 of section 12.1-01-04 as contained in section 1 of chapter 116 of the 1973 Session Laws of the state of North Dakota and section 12.1-02-04 as contained in section 2 of chapter 116 of the 1973 Session Laws of the state of North Dakota are hereby repealed.

Approved April 8, 1975

CHAPTER 117

HOUSE BILL NO. 1045

(Rau)

(From Legislative Council Study)

DISPLAY OF CERTAIN FLAGS

AN ACT to prohibit the carrying or display of certain flags, ensigns, or banners, and to provide penalties; and to repeal sections 12-07-07, 12-07-08, and 12-07-09 of the North Dakota Century Code, prohibiting the carrying or display of certain flags and providing a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF NORTH DAKOTA:

SECTION 1. CARRYING IN PARADE OR THE DISPLAY OF CERTAIN FLAGS, ENSIGNS, BANNERS, AND STANDARDS PROHIBITED.) No flag of any nation, state, country, or territory other than the flag of the United States or a state flag, or the flag of a friendly foreign nation, or the dependencies of such nations, shall be:

1. Carried in parade on any public street or highway within this state;
2. Exhibited in any hall or public place; or
3. Displayed or exhibited:
 - a. On any vehicle;
 - b. On any building or premises; or
 - c. In any other manner in public within the state.

SECTION 2. RED OR BLACK FLAGS PROHIBITED.) No red or black flag, and no banner, ensign, or sign having upon it any inscription opposed or antagonistic to the existing government of the United States, or of the state of North Dakota, or the use or display of which would tend to occasion a breach of the public peace, shall be:

1. Carried or displayed in any parade on any public street or highway in the state of North Dakota; or
2. Exhibited in any hall or public place or upon any vehicle or any building or premises or in any other manner in public within the state.

SECTION 3. PENALTY.) Any person who violates any of the provisions of sections 1 or 2 is guilty of a class B misdemeanor.

SECTION 4. REPEAL.) Sections 12-07-07, 12-07-08, and 12-07-09 of the North Dakota Century Code are hereby repealed.

Approved March 17, 1975

CHAPTER 118

HOUSE BILL NO. 1595
(Royle, Watkins, Hensrud, Wentz)

REPUTATION OF COMPLAINING WITNESS IN SEX CRIMES

AN ACT relating to the admissibility of certain evidence regarding the character of complaining witnesses in criminal prosecutions for gross sexual imposition or sexual imposition, and to certain procedures to be followed in such proceedings.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE
STATE OF NORTH DAKOTA:

SECTION 1. ADMISSIBILITY OF EVIDENCE CONCERNING REPUTATION OF COMPLAINING WITNESS - GROSS SEXUAL IMPOSITION AND SEXUAL IMPOSITION.)

1. In any prosecution for a violation of section 12.1-20-03 or section 12.1-20-04, or for an attempt to commit an offense defined in either of those sections, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of such evidence, is not admissible on behalf of the defendant to prove consent by the complaining witness. This subsection shall not be applicable to evidence of the complaining witness' sexual conduct with the defendant.
2. If the prosecuting attorney introduces evidence, including testimony of a witness, or the complaining witness gives testimony as a witness, and such evidence or testimony relates to the complaining witness' sexual conduct, the defendant may cross-examine the witness who gives such testimony and offer relevant evidence limited specifically to the rebuttal of such evidence introduced by the prosecuting attorney or given by the complaining witness.
3. This section shall not be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness in the manner authorized by law, by rule of procedure, or by the court in the interests of justice in accordance with the procedure provided in section 2 of this Act.
4. As used in this Act, "complaining witness" means the alleged victim of the offense charged, the prosecution

of which is the subject of the application of this Act.

SECTION 2. CREDIBILITY OF COMPLAINING WITNESS ATTACKED - PROCEDURE.) In any prosecution for a violation of section 12.1-20-03 or section 12.1-20-04, or for an attempt to commit an offense defined in either of those sections, if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness, the following procedure shall be followed:

1. A written motion shall be made by the defendant to the court and prosecuting attorney stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.
2. The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.
3. If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at such hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.
4. At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant in accordance with section 1 of this Act and is not legally inadmissible, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

Approved March 17, 1975

CHAPTER 119

HOUSE BILL NO. 1043
(Murphy, Rau)
(From Legislative Council Study)

OBSCENITY CONTROL

AN ACT to provide for control of obscene materials and performances; to repeal chapter 12.1-27 of the North Dakota Century Code as contained in section 26 of chapter 116 of the 1973 Session Laws of the state of North Dakota and subsection 62 of section 40-05-01 of the North Dakota Century Code, relating to controls on dissemination of obscene materials; and providing penalties; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE
STATE OF NORTH DAKOTA:

SECTION 1. OBSCENITY - DEFINITIONS - DISSEMINATION -
CLASSIFICATION OF OFFENSES.)

1. A person is guilty of a class A misdemeanor if, knowing of its character, he disseminates obscene material, or if he produces, transports, or sends obscene material with intent that it be disseminated.
2. A person is guilty of a class A misdemeanor if he presents or directs an obscene performance for pecuniary gain, or participates in any portion of a performance which contributes to the obscenity of the performance as a whole.
3. A person is guilty of a class A misdemeanor if he, as owner or manager of an establishment licensed under section 5-02-01, permits an obscene performance in his establishment. A person is guilty of a class A misdemeanor if he participates, whether or not for compensation, in an obscene performance in an establishment licensed under section 5-02-01.
4. As used in this Act, the terms "obscene material" and "obscene performance" mean material or a performance which:
 - a. Taken as a whole, the average person, applying contemporary North Dakota standards, would find predominantly appeals to a prurient interest;

- b. Depicts or describes in a patently offensive manner sexual conduct as described in subsection 8 of this section; and
- c. Taken as a whole, lacks serious literary, artistic, political, or scientific value.

That material or a performance is obscene shall be judged with reference to ordinary adults, unless it appears from the character of the material or the circumstances of its dissemination to be designed for minors or other specially susceptible audience, in which case, the material or performance shall be judged with reference to that type of audience.

- 5. As used in this Act, the term "disseminate" means to sell, lease, advertise, broadcast, exhibit, or distribute for pecuniary gain.
- 6. As used in this Act, the term "material" means any physical object, including, but not limited to, any type of book, sound recording, film, or picture used as a means of presenting or communicating information, knowledge, sensation, image, or emotion to or through a human being's receptive senses.
- 7. As used in this Act, the term "performance" means any play, dance, or other exhibition presented before an audience.
- 8. As used in this Act, the term "sexual conduct" means actual or simulated:
 - a. Sexual intercourse,
 - b. Sodomy,
 - c. Sexual bestiality,
 - d. Masturbation,
 - e. Sadomasochistic abuse,
 - f. Excretion,

or a lewd exhibition of the male or female genitals. As used in this subsection, the term "sodomy" means contact between the penis and the anus, the mouth and the penis, the mouth and the vulva, or the mouth and the anus. As used in this subsection, the term "sadomasochistic abuse" means a depiction or description of flagellation or torture by or upon a person who is nude or clad in undergarments or in a bizarre or revealing costume; or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

9. As used in this Act, the term "book" means any book, magazine, pamphlet, newspaper, or other article made out of paper and containing printed, typewritten, or handwritten words.

SECTION 2. PROMOTING OBSCENITY TO MINORS - DEFINITIONS.)
As used in this section and in section 12.1-27-03:

1. "Promote" means to produce, direct, manufacture, issue, sell, lend, mail, publish, distribute, exhibit, or advertise.
2. "Harmful to minors" means that quality of any description or representation, in whatever form of sexual conduct or sexual excitement, when such description or representation:
 - a. Considered as a whole, appeals to the prurient sexual interest of minors;
 - b. Is patently offensive to prevailing standards in the adult community in North Dakota as a whole with respect to what is suitable material for minors; and
 - c. Considered as a whole, lacks serious literary, artistic, political, or scientific value for minors.
3. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

SECTION 3. PROMOTING OBSCENITY TO MINORS - MINOR PERFORMING
IN OBSCENE PERFORMANCE - CLASSIFICATION OF OFFENSES.)

1. It shall be a class C felony for a person to knowingly promote to a minor any material or performance which is harmful to minors, or to admit a minor to premises where a performance harmful to minors is exhibited or takes place.
2. It shall be a class C felony to permit a minor to participate in a performance which is harmful to minors.

SECTION 4. DEFINITIONS.) As used in sections 5 through 11,
unless the context otherwise requires:

1. "Actual defendant" means any party or intervenor in civil proceedings commenced under this Act whose interest was in showing that material was not obscene.
2. "Constructive defendant" means any person, other than an actual defendant, who is given actual prior notice in writing of the initiation of a civil pro-

ceeding under this Act, and who is also given actual notice in writing of the final judgment resulting from that civil proceeding, where that judgment is that certain material is obscene and the commercial interest of the person receiving notice will be adversely affected by the judgment.

3. "Law enforcement officer" means the attorney general, a state's attorney, or a sheriff, or any deputy or assistant of any of the named officers.

SECTION 5. CIVIL PROCEEDING A PREREQUISITE TO CRIMINAL LIABILITY.) A criminal prosecution for violation of section 1 or section 3 of this Act relating to the dissemination or promotion of material may be commenced only against a person who subsequently disseminates material previously adjudged obscene in a civil proceeding in accordance with sections 6 through 8 of this Act.

SECTION 6. COMMENCEMENT OF CIVIL PROCEEDING - INTERVENTION - SEIZURE OF MATERIALS.)

1. Whenever any law enforcement officer believes that a person is disseminating, or will disseminate, obscene material, the officer may institute a civil proceeding in the district court for the county wherein the alleged dissemination is taking place, or is about to take place. The civil proceeding will be for the purpose of determining whether a particular piece of material is or is not obscene material, and the district court, at the close of the proceeding, shall enter its declaratory judgment determining that question. The civil proceeding shall be brought in the name of the state of North Dakota and at the expense of the state of North Dakota, in the event the attorney general commences the proceeding, or the county, in the event the civil proceeding is commenced by the state's attorney or his assistant, or a sheriff or his deputy.
2. Any person about to disseminate material challenged in a civil proceeding under this chapter may intervene in that civil proceeding as a matter of right, and thereupon shall have all the rights of an original party to the proceeding, and will be bound by any judgment entered in the proceeding.
3. The appropriate law enforcement officer must give actual prior written notice that he is about to institute a civil proceeding to any person about to disseminate said materials if said person is to be a constructive defendant.
4. Upon issuance of a search warrant by a district judge, the appropriate legal officer may seize a single copy of the allegedly obscene material to secure and preserve evidence for the civil, and

any possible criminal, proceedings under this Act, subject to the following provisions:

- a. If only a single copy of the material is available within the jurisdiction, the defendant shall either provide a duplicate or make the original available for duplication, at the county's expense, by the court during time periods when the material is not on sale or exhibition.
- b. If only a single copy of such materials is available within the jurisdiction and circumstances make duplication either impossible or impractical, the defendant shall immediately make the single copy available for viewing by the court and subsequently available for viewing at trial.

SECTION 7. PROCEDURES - EXPANDED DISTRICT COURT - APPEAL.)

1. Any party shall have the right to a trial by the court, or by an expanded district court consisting of three district judges, chosen as provided in this subsection. When an expanded district court is demanded by a party, the district judge shall notify the chief justice of the supreme court of that fact, and the chief justice, within five days after receiving the notice, shall appoint two other district judges to sit with the district judge before whom the proceeding was originally brought. The decision of an expanded district court may be rendered by any two of the three judges sitting. A court, including an expanded district court, shall give priority to proceedings brought under section 6 of this Act.
2. Either party, or an intervenor, may, if aggrieved by the court's decision, appeal to the supreme court in the manner provided in the rules of appellate procedure.

SECTION 8. JUDGMENT - EFFECT - NOTICE TO CONSTRUCTIVE DEFENDANTS - USE IN CRIMINAL PROSECUTIONS.)

1. If the court finds the material not to be obscene, the court shall enter said declaration in the judgment and dismiss the suit. If the court finds the material to be obscene, it shall so declare and enter that declaration in the judgment.
2. If the court finds the material to be obscene, the court may in the judgment or subsequent order of enforcement enter a permanent injunction, in the manner provided in chapter 32-06, against any party or intervenor in the civil proceedings prohibiting said party or intervenor from disseminating the materials declared to be obscene. Disobedience of

an injunction issued under this section shall be punished as provided in section 12.1-10-01.

3. The declaration obtained pursuant to this section may be used as evidence to establish scienter in a subsequent criminal prosecution under sections 1 or 3.
4. The declaration obtained pursuant to this section may be used for the purposes stated in subsection 2 and 3 and for no other purposes.
5. The appropriate law enforcement officer must give actual written notice of the final judgment to any person who is, or is about to, disseminate material declared obscene in order to perfect his status as a constructive defendant.

SECTION 9. PRELIMINARY INJUNCTION - LIMITATIONS.)

1. The appropriate law enforcement officer may seek a preliminary injunction on notice to all the parties and intervenors. The district court may grant the application for a preliminary injunction, if, in the discretion of the court, the material itself or the manner in which it is being disseminated poses a clear and present danger to minors.
2. The appropriate law enforcement officer may seek a preliminary injunction on notice to all the parties and intervenors. The district court may grant the application for a preliminary injunction, if, in the discretion of the court, the material itself or the manner in which it is being disseminated poses a clear and present danger to the public.
3. Except as provided in this section, no temporary or preliminary injunction, ex parte or otherwise, shall be issued in proceedings brought under this Act.

SECTION 10. CONFLICTING DECISIONS - RESOLUTION.) In the event the same material is declared to be obscene in one jurisdiction in the state and not obscene in another jurisdiction, there shall be no criminal prosecution based on the declaration of obscenity until the matter shall have been finally resolved by application to the supreme court of this state. Any party, including constructive defendants, shall have the right, at any time such a conflict exists, to petition the supreme court to review such conflicting decisions and to finally determine the question.

SECTION 11. EXCEPTIONS TO CRIMINAL LIABILITY.) Sections 1 and 3 shall not apply to the possession or distribution of material in the course of law enforcement, judicial, or legislative activities; or to the possession of material by a bona fide school, college, university, museum, or public library

for limited access for educational research purposes carried on at such an institution by adults only. Sections 1 and 3 shall also not apply to a person who is returning material, found to be obscene, to the distributor or publisher initially delivering it to the person returning it.

SECTION 12. STATE PREEMPTION OF LOCAL LAWS REGULATING OBSCENITY.) This Act shall be applicable and uniform throughout the state, and no political subdivision shall enact new, or enforce existing, ordinances or resolutions regulating or prohibiting the dissemination of obscene materials, or controlling obscene performances.

SECTION 13. REPEAL.) Chapter 12.1-27 of the North Dakota Century Code as contained in section 26 of chapter 116 of the 1973 Session Laws of the state of North Dakota and subsection 62 of section 40-05-01 of the North Dakota Century Code are hereby repealed.

SECTION 14. SAVINGS CLAUSE.) If any section, subsection, subdivision, sentence, or clause of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the Act.

SECTION 15. EMERGENCY.) This Act is hereby declared to be an emergency measure and shall be in full force and effect from and after its passage and approval.

Approved April 8, 1975

CHAPTER 120

SENATE BILL NO. 2353
(Hoffner)

COMMUNITY PROGRAMS AS
SENTENCING ALTERNATIVES

AN ACT to create and enact a new subdivision to subsection 1 of section 12.1-32-02 of the North Dakota Century Code, as contained in section 31 of chapter 116 of the 1973 Session Laws of the state of North Dakota, relating to sentencing alternatives.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE
STATE OF NORTH DAKOTA:

SECTION 1.) A new subdivision to subsection 1 of section 12.1-32-02 of the North Dakota Century Code, as contained in section 31 of chapter 116 of the 1973 Session Laws of the state of North Dakota, is hereby created and enacted to read as follows:

Commitment to any other facility or program deemed appropriate for the treatment of the individual offender, including available community-based programs.

Approved March 22, 1975

CHAPTER 121

SENATE BILL NO. 2220
(Nothing)

**MANDATORY SENTENCES
FOR CRIMINAL MISCHIEF**

AN ACT to create and enact a new section to chapter 12.1-32 of the North Dakota Century Code as contained in chapter 116 of the 1973 Session Laws of the state of North Dakota, requiring mandatory sentences for persons convicted of criminal mischief.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE
STATE OF NORTH DAKOTA:

SECTION 1.) A new section to chapter 12.1-32 of the North Dakota Century Code as contained in chapter 116 of the 1973 Session Laws of the state of North Dakota is hereby created and enacted to read as follows:

RESTORATION OF PROPERTY OR OTHER WORK TO BE REQUIRED OF CERTAIN OFFENDERS.) Other provisions of this chapter notwithstanding, whenever a person convicted of criminal mischief shall be placed on probation pursuant to section 12.1-32-02 or section 12.1-32-07, the court shall include as a condition of that probation the requirement that the person perform restoration or other assigned work as specified in subdivision e of subsection 2 of section 12.1-32-07.

Approved March 13, 1975