

**CHAPTER 12.1-04.1**  
**CRIMINAL RESPONSIBILITY AND POST-TRIAL RESPONSIBILITY ACT**

**12.1-04.1-01. Standard for lack of criminal responsibility.**

1. An individual is not criminally responsible for criminal conduct if, as a result of mental disease or defect existing at the time the conduct occurs:
  - a. The individual lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual's capacity to recognize reality; and
  - b. It is an essential element of the crime charged that the individual act willfully.
2. For purposes of this chapter, repeated criminal or similar antisocial conduct, or impairment of mental condition caused primarily by voluntary use of alcoholic beverages or controlled substances immediately before or contemporaneously with the alleged offense, does not constitute in itself mental illness or defect at the time of the alleged offense. Evidence of the conduct or impairment may be probative in conjunction with other evidence to establish mental illness or defect.

**12.1-04.1-02. Court authorization of state-funded mental health services for certain defendants.**

A defendant who is unable to pay for the services of a tier 1a mental health professional, and to whom those services are not otherwise available, may apply to the court for assistance. Upon a showing of a likely need for examination on the question of lack of criminal responsibility or lack of requisite state of mind as a result of the defendant's mental condition, the court shall authorize reasonable expenditures from public funds for the defendant's retention of the services of one or more tier 1a mental health professionals. Upon request by the defendant, the application and the proceedings on the application must be ex parte and in camera, but any order under this section authorizing expenditures must be made part of the public record.

**12.1-04.1-03. Notice of defense of lack of criminal responsibility.**

1. If the defendant intends to assert the defense of lack of criminal responsibility, the defendant shall notify the prosecuting attorney in writing and file a copy of the notice with the court. The notice must indicate whether the defendant intends to introduce at trial evidence obtained from examination of the defendant by a tier 1a mental health professional after the time of the alleged offense.
2. The defendant shall file the notice within the time prescribed for pretrial motions or at such earlier or later time as the court directs. For cause shown, the court may allow late filing of the notice and grant additional time to the parties to prepare for trial or may make other appropriate orders.
3. If the defendant fails to give notice in accordance with this section, lack of criminal responsibility may not be asserted as a defense.

**12.1-04.1-04. Notice regarding expert testimony on lack of state of mind as element of alleged offense.**

1. If the defendant intends to introduce at trial evidence obtained from examination of the defendant by a tier 1a mental health professional after the time of the alleged offense to show the defendant lacked the state of mind required for the alleged offense, the defendant shall notify the prosecuting attorney in writing and file a copy of the notice with the court.
2. The defendant shall file the notice within the time prescribed for pretrial motions or at such earlier or later time as the court directs. For cause shown, the court may allow late filing of the notice and grant additional time to the parties to prepare for trial or may make other appropriate orders.

**12.1-04.1-05. Examination at request of prosecuting attorney.**

1. If the defendant has given notice under section 12.1-04.1-03 or 12.1-04.1-04 of intent to introduce evidence obtained from examination of the defendant by a tier 1a mental health professional after the time of the alleged offense, the court, upon application by the prosecuting attorney and after opportunity for response by the defendant, shall order the defendant be examined by one or more tier 1a mental health professionals retained by the prosecuting attorney. The court shall include in the order provisions as to the time, place, and conditions of the examination.
2. If the parties agree to examination of the defendant by a tier 1a mental health professional retained by the prosecuting attorney without order of the court, sections 12.1-04.1-06, 12.1-04.1-07, 12.1-04.1-08, 12.1-04.1-10, 12.1-04.1-11, 12.1-04.1-12, 12.1-04.1-13, 12.1-04.1-14, and 12.1-04.1-15 apply to that examination.

**12.1-04.1-06. Explanation to defendant.**

At the beginning of each examination conducted under section 12.1-04.1-05, the tier 1a mental health professional shall inform the defendant the examination is being made at the request of the prosecuting attorney; the purpose of the examination is to obtain information about the defendant's mental condition at the time of the alleged offense; and information obtained from the examination may be used at trial and, if the defendant is found not guilty by reason of lack of criminal responsibility, in subsequent proceedings concerning commitment or other disposition.

**12.1-04.1-07. Scope of examination.**

An examination of the defendant conducted under section 12.1-04.1-05 may consist of such interviewing, clinical evaluation, and psychological testing the tier 1a mental health professional considers appropriate, within the limits of nonexperimental, generally accepted medical, psychiatric, or psychological practices.

**12.1-04.1-08. Recording of examination.**

1. An examination of the defendant conducted under section 12.1-04.1-05 must be audio-recorded and, if ordered by the court, video-recorded. The manner of recording may be specified by rule or by court order in individual cases.
2. Within seven days after completion of an examination conducted under section 12.1-04.1-05, the tier 1a mental health professional conducting the examination shall deliver a copy of the recording of the examination, under seal, to the court and a copy of the recording to the defendant. The recording may not be disclosed except in accordance with this chapter.

**12.1-04.1-09. Consequence of deliberate failure of defendant to cooperate.**

If the defendant without just cause deliberately fails to participate or to respond to questions in an examination conducted under section 12.1-04.1-05, the prosecuting attorney may apply before trial to the court for appropriate relief. The court may consider the recording of the examination as evidence on the application, but proceedings under this section involving consideration of the recording must be in camera and out of the presence of counsel.

**12.1-04.1-10. Reports by tier 1a mental health professionals and expert witnesses.**

A tier 1a mental health professional retained by the prosecuting attorney and a tier 1a mental health professional whom the defendant intends to call to testify at trial shall prepare a written report concerning any examination of the defendant and other pretrial inquiry by or under the supervision of the tier 1a mental health professional. Any other individual whom either party intends to call at trial as an expert witness on any aspect of the defendant's mental condition shall prepare a written report. A report under this section must contain:

1. The specific issues addressed.
2. The identity of individuals interviewed and records or other information used.
3. The procedures, tests, and techniques used.

4. The date and time of examination of the defendant, the explanation concerning the examination given to the defendant, and the identity of each individual present during an examination.
5. The relevant information obtained and findings made.
6. Matters concerning which the mental health professional was unable to obtain relevant information and the reasons therefor.
7. The conclusions reached and the reasoning on which the conclusions were based.

**12.1-04.1-11. Exchange of reports and production of documents.**

Not less than fifteen days before trial, the prosecuting attorney shall furnish to the defendant reports prepared pursuant to section 12.1-04.1-10, and the defendant shall furnish to the prosecuting attorney reports by each tier 1a mental health professional or other expert on any aspect of the defendant's mental condition whom the defendant intends to call at trial. Upon application by either party and after hearing, the court may require production of documents prepared, completed, or used in the examination or inquiry by the tier 1a mental health professional or other expert.

**12.1-04.1-12. Use of reports at trial.**

Use at trial of a report prepared by a tier 1a mental health professional or other expert is governed by the North Dakota Rules of Evidence. A report of a tier 1a mental health professional or other expert furnished by the defendant pursuant to section 12.1-04.1-10 may not be used at trial unless the tier 1a mental health professional or other expert who prepared the report has been called to testify by the defendant.

**12.1-04.1-13. Notice of expert witnesses.**

Not less than twenty days before trial, each party shall give written notice to the other of the name and qualifications of each tier 1a mental health professional or other individual the respective party intends to call as an expert witness at trial on the issue of lack of criminal responsibility or requisite state of mind as an element of the crime charged. For good cause shown, the court may permit later addition to or deletion from the list of individuals designated as expert witnesses.

**12.1-04.1-14. Use of evidence obtained from examination.**

1. Except as provided in subsection 2 and in sections 12.1-04.1-09 and 12.1-04.1-26, information obtained as a result of examination of a defendant by a tier 1a mental health professional conducted under section 12.1-04.1-05 is not admissible over objection of the defendant in any proceeding against the defendant.
2. Subject to the limitation in section 12.1-04.1-15, information obtained from an examination of the defendant by a tier 1a mental health professional conducted under section 12.1-04.1-05 is admissible at trial to rebut evidence introduced by the defendant obtained from an examination of the defendant by a tier 1a mental health professional or to impeach the defendant on the defendant's testimony as to mental condition at the time of the alleged offense.

**12.1-04.1-15. Use of recording of examination.**

Except as provided in section 12.1-04.1-09, recording of an examination of the defendant concerning the defendant's mental condition at the time of the alleged offense may be referred to or otherwise used only on cross-examination for the purpose of impeachment of the tier 1a mental health professional who conducted the examination and then on redirect examination of that witness to the extent permitted by the North Dakota Rules of Evidence. The defendant must make the recording available to the prosecuting attorney before any use of it pursuant to this section. If the recording is so used, this section does not preclude its use for the purpose of impeachment of the defendant in any other criminal, civil, or administrative proceeding.

**12.1-04.1-16. Bifurcation of issue of lack of criminal responsibility.**

Upon application of the defendant, the court may order that issues as to the commission of the alleged offense be tried separately from the issue of lack of criminal responsibility.

**12.1-04.1-17. Jury instruction on disposition following verdict of lack of criminal responsibility.**

On request of the defendant in a trial by jury of the issue of lack of criminal responsibility for the alleged offense, the court shall instruct the jury as to the dispositional provisions applicable to the defendant if the jury returns a verdict of not guilty by reason of lack of criminal responsibility.

**12.1-04.1-18. Form of verdict or finding.**

If the issue of lack of criminal responsibility is submitted to the trier of fact:

1. In a unitary trial, the trier of fact must first determine whether the prosecuting attorney has proven that the defendant committed the crime charged. In a bifurcated trial, the trier of fact must first determine whether the prosecuting attorney has proven that the defendant committed the crime charged and, if so, whether the defendant is criminally responsible. Each determination must be made at the conclusion of the phase of the trial at which the respective issue is tried. If the trier of fact concludes that the prosecuting attorney failed to prove that the defendant committed the crime charged, the appropriate verdict or finding is "not guilty".
2. If the trier of fact determines that the defendant committed the crime charged and the defendant was criminally responsible for that crime, the appropriate verdict or finding is "guilty".
3. If the trier of fact determines that the defendant committed the crime charged, but was not criminally responsible for that crime, the appropriate verdict or finding is a statement that the defendant committed the crime charged but that the defendant is "not guilty by reason of lack of criminal responsibility".

**12.1-04.1-19. Post-trial motions and appeal from verdict or finding of not guilty by reason of lack of criminal responsibility.**

1. A defendant found not guilty by reason of lack of criminal responsibility may seek post-trial relief in the trial court and may appeal to the supreme court on issues pertaining to the verdict or finding that the defendant committed the crime charged.
2. If the verdict or finding is not guilty by reason of lack of criminal responsibility, and a new trial is ordered on the issue of whether the defendant committed the crime charged, unless defendant elects to waive the defense, the verdict or finding of lack of criminal responsibility is conclusive on that issue in the retrial.

**12.1-04.1-20. Jurisdiction of court.**

1. Unless earlier discharged by order of the court pursuant to section 12.1-04.1-22, 12.1-04.1-24, or 12.1-04.1-25, an individual found not guilty by reason of lack of criminal responsibility is subject to the jurisdiction of the court for a period equal to the maximum term of imprisonment that could have been imposed for the most serious crime of which the individual was charged but found not guilty by reason of lack of criminal responsibility.
2. Upon expiration of its jurisdiction under this chapter or earlier discharge by its order, the court may order that a proceeding for involuntary commitment be initiated pursuant to chapter 25-03.1.

**12.1-04.1-21. Proceeding following verdict or finding.**

After entry of a verdict, finding, or an unresisted plea, that an individual committed the crime charged, but is not guilty by reason of lack of criminal responsibility, the court shall:

1. Make a finding, based upon the verdict or finding provided in section 12.1-04.1-18, of the expiration date of the court's jurisdiction; and

2. Order the individual committed to a treatment facility, as defined under chapter 25-03.1, for examination. The order of the court may set terms of custody during the period of examination.

**12.1-04.1-22. Initial order of disposition - Commitment to treatment facility - Conditional release - Discharge.**

1. The court shall conduct a dispositional hearing within ninety days after an order of commitment pursuant to section 12.1-04.1-21 is entered, unless the court, upon application of the prosecuting attorney or the individual committed, for cause shown, extends the time for the hearing. The court shall enter an initial order of disposition within ten days after the hearing is concluded.
2. In a proceeding under this section, unless excused by order of the court, defense counsel at the trial shall represent the individual committed.
3. If the court finds the individual lacks sufficient financial resources to retain the services of a tier 1a mental health professional and that those services are not otherwise available, the court shall authorize reasonable expenditures from public funds for the individual's retention of the services of one or more tier 1a mental health professionals to examine the individual and make other inquiry concerning the individual's mental condition.
4. In a proceeding under this section, the individual committed has the burden of proof by a preponderance of the evidence. The court shall enter an order in accordance with the following requirements:
  - a. If the court finds the individual is not mentally ill or defective or that there is not a substantial risk, as a result of mental illness or defect, that the individual will commit a criminal act, the court shall order the individual discharged from further constraint under this chapter.
  - b. If the court finds the individual is mentally ill or defective and there is a substantial risk, as a result of mental illness or defect, that the individual will commit a criminal act of violence threatening another individual with bodily injury or inflicting property damage and that the individual is not a proper subject for conditional release, the court shall order the individual committed to a treatment facility for custody and treatment. If the court finds the risk the individual will commit an act of violence threatening another individual with bodily injury or inflicting property damage will be controlled adequately with supervision and treatment if the individual is conditionally released and that necessary supervision and treatment are available, the court shall order the individual released subject to conditions it considers appropriate for the protection of society.
  - c. If the court finds the individual is mentally ill or defective and there is a substantial risk, as a result of mental illness or defect, that the individual will commit a criminal act not included in subdivision b, the court shall order the individual to report to a treatment facility for noncustodial evaluation and treatment and to accept nonexperimental, generally accepted medical, psychiatric, or psychological treatment recommended by the treatment facility.

**12.1-04.1-23. Terms of commitment - Periodic review of commitment.**

1. Unless an order of commitment of an individual to a treatment facility provides for special terms as to custody during commitment, the director or superintendent of the treatment facility may determine from time to time the nature of the constraints necessary within the treatment facility to carry out the court's order. In an order of commitment, the court may authorize the director or superintendent to allow the individual a limited leave of absence from the treatment facility on terms the court may direct.
2. In an order of commitment of an individual to a treatment facility under this chapter, the court shall set a date for review of the status of the individual. The date set must be within one year after the date of the order.

3. At least sixty days before a date for review fixed in a court order, the director or superintendent of the treatment facility shall inquire as to whether the individual is presently represented by counsel and file with the court a written report of the facts ascertained. If the individual is not represented by counsel, counsel must be provided at public expense to consult with the individual and, if the individual is indigent, to seek arrangement of counsel at public expense to represent the individual in a proceeding for conditional release or discharge.
4. If the court finds in a review the individual lacks sufficient financial resources to retain the services of a tier 1a mental health professional and those services are otherwise not available, the court shall authorize reasonable expenditures from public funds for the individual's retention of the services of one or more tier 1a mental health professionals to examine the individual and make other inquiry concerning the individual's mental condition. In proceedings brought before the next date for review, the court may authorize expenditures from public funds for that purpose.
5. If an application for review of the status of the individual has not been filed by the date for review, the director or superintendent shall file a motion for a new date for review to be set by the court. The date set must be within one year after the previous date for review.

**12.1-04.1-24. Modification of order of commitment - Conditional release or discharge - Release plan.**

1. After commitment of an individual to a treatment facility under this chapter, the director or superintendent may apply to the court for modification of the terms of an order of commitment or for an order of conditional release or discharge. The application must be accompanied by a report setting forth the facts supporting the application and, if the application is for conditional release, a plan for supervision and treatment of the individual.
2. An individual who has been committed to a treatment facility under this chapter, or another person acting on the individual's behalf, may apply to the court for modification of the terms of a commitment order or for an order of conditional release or discharge. If the application is being considered by the court at the time of the review of the order of commitment, the court shall require a report from the director or superintendent of the treatment facility.
3. The court shall consider and dispose of an application under this section promptly. In a proceeding under this section, the applicant has the burden of proof by a preponderance of the evidence. The court shall enter an order in accordance with the following requirements:
  - a. If the court finds that the individual committed is not mentally ill or defective or that there is not a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act, it shall order the individual discharged from further constraint under this chapter.
  - b. If the court finds that the individual is mentally ill or defective, but that there is not a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act of violence threatening another individual with bodily injury or inflicting property damage, it shall vacate the order committing the individual to a treatment facility. If the court finds that there is a substantial risk that the individual will commit, as a result of mental illness or defect, a nonviolent criminal act, it may order the individual to report to any treatment facility for noncustodial evaluation and treatment and to accept nonexperimental, generally accepted medical, psychiatric, or psychological treatment recommended by the treatment facility.
  - c. If the court finds that the individual is mentally ill or defective, but that the risk that the individual will commit, as a result of mental illness or defect, a criminal act of violence threatening another individual with bodily injury or inflicting property damage will be controlled adequately with supervision and treatment and that necessary supervision and treatment are available, it shall order the individual

released subject to conditions it considers appropriate for the protection of society.

4. In any proceeding for modification of an order of commitment to a treatment facility, if the individual has been represented by counsel and the application for modification of the order of commitment is denied after a plenary hearing, the court shall set a new date for periodic review of the status of the individual. The date set must be within one year after the date of the order.

**12.1-04.1-25. Conditional release - Modification - Revocation - Discharge.**

1. In an order for conditional release of an individual, the court shall designate a treatment facility or a person to be responsible for supervision of the individual.
2. As a condition of release, the court may require the individual released to report to any treatment facility for evaluation and treatment, require the individual to accept nonexperimental, generally accepted medical, psychiatric, or psychological treatment recommended by the treatment facility, and impose other conditions reasonably necessary for protection of society.
3. The person or the director or superintendent of a treatment facility responsible for supervision of an individual released shall furnish reports to the court, at intervals prescribed by the court, concerning the mental condition of the individual. Copies of reports submitted to the court must be furnished to the individual and to the prosecuting attorney.
4. If there is reasonable cause to believe that the individual released presents an imminent threat to cause bodily injury to another, the person or the director or superintendent of the treatment facility responsible for supervision of the individual pursuant to an order of conditional release may take the individual into custody or request that the individual be taken into custody. An individual taken into custody under this subsection must be accorded an emergency hearing before the court not later than the next court day to determine whether the individual should be retained in custody pending a further order pursuant to subsection 5.
5. Upon application by an individual conditionally released, by the director or superintendent of the treatment facility or person responsible for supervision of an individual pursuant to an order of conditional release, or by the prosecuting attorney, the court shall determine whether to continue, modify, or terminate the order. The court shall consider and dispose of an application promptly. In a proceeding under this section, the applicant has the burden of proof by a preponderance of the evidence. The court shall enter an order in accordance with the following requirements:
  - a. If the court finds that the individual is not mentally ill or defective or that there is not a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act, it shall order that the individual be discharged from further constraint under this chapter.
  - b. If the court finds that the individual is mentally ill or defective, but that there is not a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act of violence threatening another individual with bodily injury or inflicting property damage, it may modify the conditions of release as appropriate for the protection of society.
  - c. If the court finds that the individual is mentally ill or defective and that there is a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act of violence threatening another individual with bodily injury or inflicting property damage and that the individual is no longer a proper subject for conditional release, it shall order the individual committed to a treatment facility for custody and treatment. If the court finds that the individual is mentally ill or defective and that there is a substantial risk that the individual, as a result of mental illness or defect, will commit a nonviolent criminal act, it may order the individual to report to any treatment facility for noncustodial evaluation and treatment and to accept nonexperimental, generally accepted medical, psychiatric, or psychological treatment recommended by the treatment facility.

**12.1-04.1-26. Procedures.**

1. An applicant for a court order under sections 12.1-04.1-20 through 12.1-04.1-25 shall deliver a copy of the application and any accompanying documents to the individual committed, the prosecuting attorney, the director or superintendent of the treatment facility to which the individual has been committed, or the person or the director or superintendent of a treatment facility responsible for supervision of an individual conditionally released. The North Dakota Rules of Civil Procedure, adapted by the court to the circumstances of a postverdict proceeding, apply to a proceeding under sections 12.1-04.1-20 through 12.1-04.1-25.
2. In a proceeding under sections 12.1-04.1-20 through 12.1-04.1-25 for an initial order of disposition, in a proceeding for modification or termination of an order of commitment to a treatment facility initiated by the individual at the time of a review, or in a proceeding in which the status of the individual might be adversely affected, the individual has a right to counsel. If the court finds that the individual is indigent and that counsel is not otherwise available, counsel must be provided at public expense to represent the individual.
3. In a proceeding under sections 12.1-04.1-20 through 12.1-04.1-25, the North Dakota Rules of Evidence do not apply. If relevant, evidence adduced in the criminal trial of the individual and information obtained by court-ordered examinations of the individual pursuant to section 12.1-04.1-04 or 12.1-04.1-22 are admissible.
4. A final order of the court is appealable to the supreme court.