

# Case Law Update: Lessons from Recent Commitment Appeals

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## Four Topics

- Affidavits and petitions
- The examination process
- Confrontation
- Judges as (unwilling) litigators

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## A quick word about appeals

- If you have a case in which you know the client will want to appeal, have the notice of appeal ready to file
- File the notice of appeal with the judge at the end of the hearing and have the judge sign the appellate entries
- This will significantly cut down on delays that happen at the beginning of appeals

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## Part I: Affidavits & Petitions

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## Black Letter Law

- “A court’s subject matter jurisdiction over a particular case is invoked by the pleading.” *Boseman v. Jarrell*, 364 N.C. 537 (2010)
- In involuntary commitment cases, the pleading is the petition. N.C. Gen. Stat. § 122C-261

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## Black Letter Law

- “It is elementary that the jurisdiction of the court over the subject matter of the action is the most critical aspect of the court’s authority to act.” *In re Green*, 67 N.C. App. 501 (1984)
- Without subject matter jurisdiction, the court “lacks any power to proceed; therefore, a defense based upon this lack cannot be waived and may be asserted at any time.” *Id.*

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## Slippery Slopes

- "We find that the requirements for a custody order under N.C. Gen. Stat. § 122C-261 are analogous to those where a criminal suspect is subject to loss of liberty through the issuance of a warrant for arrest." *In re Zollicoffer*, 165 N.C. App. 462 (2004)
- Which leads us to *In re Moore*, 234 N.C. App. 37 (2014)

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## *In re Moore*

- *Moore* involved a challenge to the original petition in an appeal from a re-commitment order
- "[A] custody order . . . is analogous to a criminal proceeding, like the issuance of an arrest warrant . . ."

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## *In re Moore*

- "When there is a problem with a warrant, a defendant may waive his objection to the sufficiency of the warrant if he does not object before he enters a plea of not guilty. *State v. Green*, 251 N.C. 40, 43, 110 S.E.2d 609, 611-12 (1959) . . ."

- "Based on the procedure for challenging a warrant in the criminal context, respondent should have raised his concerns about the affidavit's sufficiency during his first involuntary commitment hearing."

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## Really?



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## Waiver



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## *In re Moore*

- The Court of Appeals misunderstood *Green*
- *Green* involving the timing of the arrest warrant
- *Green*: "There is no contention . . . that the warrant under which the defendant was tried was not regular on its face and did not properly charge each and every element of the alleged offense."

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## *In re Moore*

- *Moore* failed to base its reasoning on the law of collateral attacks.
- “Because a jurisdictional challenge may only be raised when an appeal is otherwise proper . . . we hold that a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order revoking his probation and activating his sentence.” *State v. Pennell*, 367 N.C. 466 (2014)

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## *In re Moore*

- *Moore* has since been followed in *In re K.J.*, 828 S.E.2d 753 (2019), an appeal from an *initial* commitment order
- The reasoning that the Court of Appeals used in *Moore* contradicts decades of case law and singles out the mentally ill from protection

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## Black Letter Law

- “A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.” *Burgess v. Gibbs*, 262 N.C. 462 (1964)
- “Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to object to the jurisdiction is immaterial.” *In re T.R.P.*, 360 N.C. 588 (2006)

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## Who is protected by subject matter jurisdiction?

- Adult criminal defendants
- Juveniles in delinquency proceedings
- Parents in abuse, neglect, and dependency proceedings
- Divorces, equitable distributions, alimony, child custody, child support, adoptions, caveats and probates, foreclosures, worker’s compensation, wrongful death claims, shareholder suits, breaches of contract
- **Respondents in voluntary admission cases**

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## Who is **not** protected by subject matter jurisdiction?

- Respondents in involuntary commitment cases

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## *In re Moore*

- The Court of Appeals reached the right result for the wrong reason
- The Court then applied that reasoning in *In re K.J.*
- OAD sought review in *Moore* and *K.J.*, but the NCSC denied review in both cases

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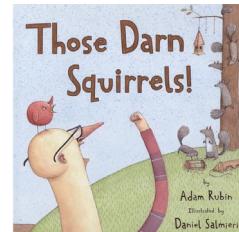
## In the meantime . . .

- If the petition is not filed under oath or does not sufficiently allege mental illness or dangerousness, you must **object**



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## Also, this . . .



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## Remember that analogy?

- “[A] custody order . . . is analogous to a criminal proceeding, like the issuance of an arrest warrant . . .”

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## Remember that analogy?

- “A warrant of arrest is sufficient if it clearly gives the defendant **notice** of the charge against him, so that he may prepare his defense . . .” *State v. Teasley*, 9 N.C. App. 477 (1970)

- In criminal cases, the State is “bound by its allegations, even as other litigants are bound by theirs.” *State v. Loudner*, 77 N.C. App. 453 (1985)

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## No Allegata, No Probata

- “There must be allegata and probata and **the two must correspond to each other.**” *Bowen v. Darden*, 233 N.C. 443 (1951)

- “Proof without allegation is no better than allegation without proof . . . [The plaintiff] cannot recover **except on the case made by his pleading.**” *Hall v. Poteat*, 257 N.C. 458 (1962)

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## No Allegata, No Probata

- If the evidence is different from the allegations in the petition, be sure to object on **notice** and **due process** grounds during the argument

- Raise the *Bowen v. Darden* and *Hall v. Poteat* cases to argue that the court is not permitted to commit the respondent for conduct **not alleged in the petition**

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## Part II: The Examination Process

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### A long time ago in a galaxy far, far away . . .

▪ *In re Barnhill*, 72 N.C. App. 530 (1985)

▪ There was no evidence of a second examination

▪ “Because the record shows that the statutory requirements were not complied with, we hold the order entered by the court must be vacated”

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### More recently . . .

▪ *In re E.D.*, 372 N.C. 111 (2019)

▪ A violation of N.C. Gen. Stat. § 122C-266(a) is not automatically preserved

▪ The respondent “failed to preserve the issue when she did not raise it during the district court hearing on her involuntary commitment”

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### *In re E.D.*, 372 N.C. 111 (2019)

▪ A statutory mandate that automatically preserves an issue for appellate review is one that (1) requires a specific act by a trial judge or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial

▪ N.C. Gen. Stat. § 122C-266(a) “does not require a specific act by a trial judge”

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### Again

▪ If there is a defect in the examination process, you must **object**



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### And again



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## Good news, though

- If there is no second examination, the respondent “is not required to make a showing of prejudice . . .” *In re E.D.*, 258 N.C. App. 435 (2018)

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## Part III: Confrontation

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### What is confrontation?

- The “primary object” of the Sixth Amendment right to confrontation was to “prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination.” *California v. Green*, 399 U.S. 149 (1970)

- A “primary interest” secured by the Confrontation Clause is “the right of cross-examination.” *Douglas v. Alabama*, 380 U.S. 415 (1965)

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### What is confrontation?

**Confrontation = Cross-Examination**

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### N.C. Gen. Stat. § 122C-268(f)

- Certified copies of reports and findings of commitment examiners and previous and current medical records are admissible in evidence, but **the respondent's right to confront and cross-examine witnesses may not be denied**

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### Two Problems

- Preservation of the issue
- Subversion / corruption of the right to confrontation

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## Preservation

- “Respondent’s interpretation of the statute – that she has a non-waivable right for the physician to appear and testify – is the opposite of what the statute allows.” *In re J.C.D.*, 828 S.E.2d 186 (2019)
- “Since respondent **did not object to admission of the report**, and she did not assert her right to have Dr. Ijaz appear to testify, the trial court did not err by admitting and considering the report”

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## Waiver (again?!)



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## But not really

- *J.C.D.* is inconsistent with case law from the Supreme Court of North Carolina on statutory mandates

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## Statutory Mandates

- Use of the phrase “may not” in a statute is “**clearly mandatory**” and serves as an “unambiguous” command. *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805 (1999)
- “[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, **the right to appeal the court’s action is preserved, notwithstanding defendant’s failure to object at trial.**” *State v. Ashe*, 314 N.C. 28 (1985)

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## Statutory Mandates

- “When a statute ‘is clearly mandatory, and its mandate is directed to the trial court,’ the statute automatically preserves statutory violations as issues for appellate review.” *In re E.D.*, 372 N.C. 111 (2019)
- “While the statute does not expressly say that the trial judge must have the jurors conducted to the courtroom, **we have no doubt that the legislature intended to place this responsibility on the judge presiding at the trial.**” *State v. Ashe*, 314 N.C. 28 (1985)

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## N.C. Gen. Stat. § 122C-268(f)

- “Certified copies of reports and findings of commitment examiners and previous and current medical records are admissible in evidence, but the respondent’s right to confront and cross-examine witnesses **may not be denied**”

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## Denied by whom?

- "It is the duty of the trial judge to supervise and control the trial." *State v. Carter*, 357 N.C. 345 (2003)
- "[A]lthough cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of **the court**." *State v. Coffey*, 326 N.C. 268 (1990)

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## Denied by whom?

- N.C. Gen. Stat. § 122C-268(f) is clearly directed at **trial judges**

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## For the time being . . .

- You must **object** in order to preserve the client's right to confrontation



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## Objecting is not a bad thing

- Judges need to be reminded that your clients have rights
- IVC cases don't involve as many rights as criminal cases
- Confrontation is one of the most important tools that you have at commitment hearings

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## A lawyer is not a potted plant



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## So be sure to object!



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## Subpoena ≠ Confrontation

- The power to subpoena witnesses “is no substitute for the right of confrontation.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009)
- The value of confrontation is “not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.” *Id.*

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## Part IV: Judges as (unwilling) litigators

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## Sometimes it's just you and the judge

- Most facilities hire attorneys to prosecute commitment hearings
- The NC Department of Justice deploys attorneys at state facilities
- But there are occasions or hearings where no one represents the petitioner or the facility

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## Without opposing counsel, the judge must elicit evidence



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## What to do?

- “There is no such provision guaranteeing counsel for the State or the petitioner for hearings held away from the centers.” *In re Jackson*, 60 N.C. App. 581 (1983)
- “We are aware of no *per se* constitutional right to opposing counsel.” *In re Perkins*, 60 N.C. App. 592 (1983)

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## What to do?

- There are multiple commitment appeals involving this issue that are pending in the Court of Appeals

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## This is an important issue

- “Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.” *In re Murchison*, 349 U.S. 133 (1955)
- The “dual role” of judge and prosecutor does not “measure up to the essentials of due process.” *In re Thomas*, 45 N.C. App. 525 (1980)

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## For the time being: Object

- Object at the beginning of the hearing under the US and NC constitutions
- Specify that the objection is based on: (1) the right to due process, (2) the right to a fair trial, (3) the right to an impartial tribunal, and (4) the prohibition on the adjudicator taking on the role of prosecutor

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## For the time being: Object

- Renew the objection just before the judge begins to examine each witness
- Renew the objection during closing argument
- Renew the objection when the judge orders the respondent to be committed at the end of the hearing

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## Goodbye!



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