UNC SCHOOL OF GOVERNMENT

2023 Civil Commitment Conference

January 20, 2023/ Chapel Hill, NC

Co-sponsored by UNC School of Government
& NC Office of Indigent Defense Services

AGENDA

8:50 to 9:00	**Welcome** *Timothy Heinle, Teaching Assistant Professor, Civil Defender Educator* UNC School of Government, Chapel Hill, NC
9:00 to 10:00	**IVC Trial Advocacy** *Jason Lunsford, Special Counsel* Central Regional Hospital, Durham, NC
10:00 to 11:00	**Restoring Firearm Rights After an Involuntary Commitment** *Keith Williams, Attorney* Law Office of Keith A. Williams, P.A., Greenville, NC
11:00 to 11:15	Break
11:15 to 11:45	**Special Issues for Juveniles in DSS Custody** *Sara DePasquale, Associate Professor of Public Law and Government* UNC School of Government, Chapel Hill, NC
11:45 to 12:45	Lunch
12:45 to 1:00	**Update from the Office of Special Counsel** *Chad Perry, Chief Attorney* Office of Special Counsel, Durham, NC
1:00 to 2:00	**Case Law Update: What's New in Commitment Appeals** *David Andrews, Assistant Appellate Defender* Office of the Appellate Defender, Durham, NC
2:00 to 2:15	Break
2:15 to 3:45	**Evidence—or not—of Dangerousness: What the Statutory Definitions Require** *Mark Botts, Associate Professor of Public Law and Government* UNC School of Government, Chapel Hill, NC
3:45	End of program

Estimated 5.00 hours of CLE, pending bar approval.

Case Scenario

There is a 36-year-old woman, Paula, who lives in your county. She lives on the street but has family in the county, including her grandmother, who she refuses to live with. She was adjudicated incompetent by the clerk three years ago. Another GAL attorney was appointed and served as Paula's counsel in that proceeding. The clerk originally appointed Paula's aunt as the guardian of her person but after one year Paula's aunt petitioned to resign as GOP. The clerk then appointed the county department of social services to serve as Paula's GOP who has been serving as GOP for the last two years. Paula is diagnosed with schizophrenia and substance use disorder for alcohol and drugs. She has no assets. Paula has been subject of two IVC orders in the recent months. Her grandmother files a motion in the cause with the clerk indicating her concerns about Paula's condition and the lack of care she is receiving. Her grandmother is very worried that Paula continues to live on the street and does not appear to be receiving any regular mental health or substance use treatment. She also includes in her motion her concerns that that Paula has been engaging in sexual activity in exchange for drugs. In response to the motion in the cause, you are appointed by the clerk as Paula's GAL in the proceeding.

CASE LAW UPDATE: WHAT'S NEW IN COMMITMENT APPEALS

David Andrews, Assistant Appellate Defender

INTRODUCTION

ROADMAP

Introduction

Overview

Due Process

Danger to Self / Others

Confrontation

Expert Witnesses

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- Appeals include criminal, capital, juvenile delinquency, involuntary commitment

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- Notable Cases: *McKoy v. North Carolina*, 494 U.S. 433 (1990); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011)

OAD OFFICE OF THE APPELLATE DEFENDER

OVERVIEW

MY WORK

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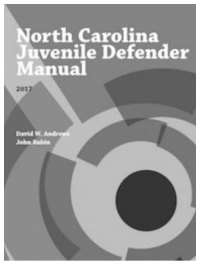
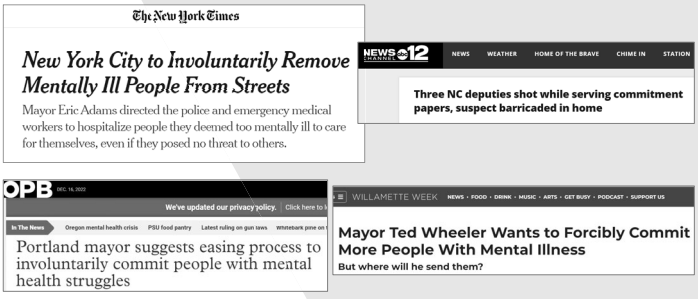
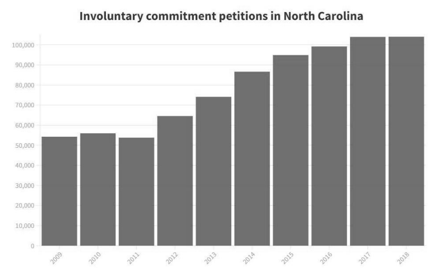
- Co-author of the 2017 edition of the Juvenile Defender Manual
- Started handling IVC appeals in 2008



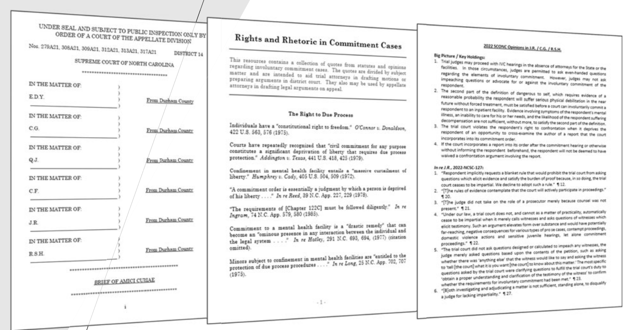
DAILY HEADLINES



OVERRELIANCE ON IVC



HANDOUTS



O'CONNOR V. DONALDSON, 422 U.S. 563 (1975)

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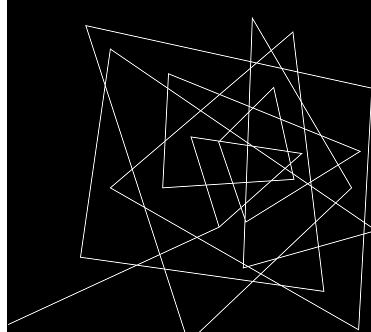


DUE PROCESS

FIRST PRINCIPLES

- Due Process requires the state to justify confinement in an involuntary commitment case by clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418 (1979).
- Due Process also requires an inquiry by a "neutral factfinder" before a court may involuntarily commit a respondent to a treatment facility. *Parham v. J.R.*, 442 U.S. 584 (1979)

ONCE UPON A TIME IN DISTRICT COURT

- In 2019, the Durham County District Attorney's Office stopped sending prosecutors to IVC hearings
- This meant that there were no attorneys to prosecute the cases in district court
- Nevertheless, at least one judge continued to hold IVC hearings and commit respondents

ONCE UPON A TIME IN DISTRICT COURT

- A defense attorney began objecting, asserting that the judge's decision to elicit evidence and proceed with IVC hearings violated Due Process
- Some of the respondents appealed. The Office of the Appellate Defender was assigned to represent them
- The first appeal was *In re J.R.*, 2021-NCCOA-366, but several others followed

ONCE UPON A TIME IN DISTRICT COURT

- In July 2021, the Court of Appeals issued opinions denying the Due Process argument
- But there was a catch
- One judge dissented, which gave the respondents the right to seek review in the Supreme Court of North Carolina

ONCE UPON A TIME IN DISTRICT COURT

- The majority in the Court of Appeals held that while IVC cases involve the deprivation of liberty, the proceedings were "inquisitorial" and "not adversarial." *In re C.G.*, 278 N.C. App. 416, 426 n.2 (2021)
- The majority also held that the trial court did not advocate "for or against either petitioner or Respondent." *Id*. at 427

ONCE UPON A TIME IN DISTRICT COURT

- The respondents appealed (there were six in all)
- Two of them sought discretionary review on other arguments
- The Supreme Court granted discretionary review of the two additional issues

ONCE UPON A TIME IN DISTRICT COURT

- The cases were heard for oral argument in September 2022
- On December 16, 2022, the Supreme Court issued opinions in the cases

ORAL ARGUMENT AT SCONC

September 20, 2022

IN RE J.R., 2022-NCSC-127

- "It is true, as respondent argues, that . . . the U.S. Supreme Court concluded that involuntary commitment proceedings are adversarial in nature."
- "By calling the witness from DUMC to testify and asking even-handed questions, the trial court did not advocate for or against the involuntary commitment of respondent; it merely heard evidence in conjunction with contents of the petition and applied the law to the facts as presented."

STRATEGIES MOVING FORWARD

- Object on Due Process grounds if the trial court asks impeaching questions or anything other than clarifying questions
- Object under Rule 702 if the doctor provides a diagnosis for the respondent without being qualified as an expert
- If the court asks questions to qualify the doctor as an expert, assert that the court is taking on the role of an advocate

STRATEGIES MOVING FORWARD

- Object on Due Process grounds if the trial court admits the doctor's report. If an attorney is not there to authenticate the report, the court arguably should not do so itself
- Remind the court that the Official Commentary to Evidence Rule 614 says the following: "It is anticipated that the court will exercise its authority to call or interrogate a witness only in extraordinary circumstances"

STRATEGIES MOVING FORWARD

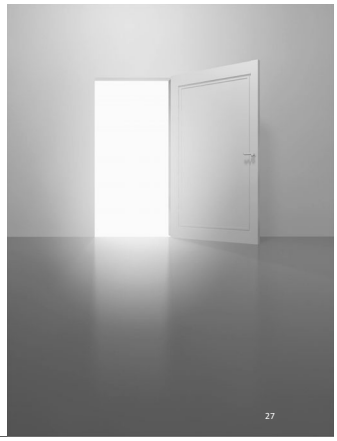
- Object on hearsay grounds to any out-of-court statements the testifying doctor relies describes
- Remind the court that while the doctor can testify about hearsay that informs the doctor's opinion, the court may not rely on hearsay statements to commit the client

DANGER TO SELF OR OTHERS

THE RIGHT TO FREEDOM

Individuals have a "constitutional right to freedom." *O'Connor v. Donaldson*, 422 U.S. 563 (1975)

Respondents are "presumed to be sane and [are] entitled to . . . liberty and [the] right to be free of restraint." *In re E.B.*, 2022-NCCOA-839



O'CONNOR V. DONALDSON, 422 U.S. 563 (1975)

"May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."

DANGER TO SELF

- Prong I: The individual would be unable without help to exercise self-control or satisfy basic needs
- Prong II: There is a reasonable probability the respondent would suffer serious physical debilitation in the near future without treatment

IN RE C.G., 278 N.C. APP. 416 (2021)

- The trial court's finding that the respondent's ACT team was unable to care for the respondent's dental and nourishment needs "created the nexus between Respondent's mental illness and future harm to himself. Accordingly, the trial court satisfied the requirement it find a reasonable probability of future harm absent treatment." ¶ 35.

IN RE C.G., 2022-NCSC-123

- The "trial court's findings that an individual suffers from a mental illness, exhibits symptoms associated with that mental illness, and may not be able to take care of his or her needs are not sufficient to satisfy the second prong of the statutory test for the presence of a 'danger to self.'" ¶ 38.

IN RE C.G., 278 N.C. APP. 416 (2021)

- "Here, the trial court heard evidence of actions Respondent was unable to control and of Respondent's severely impaired insight as to his own condition. As such, the evidence supported the prima facie inference Respondent could not care for himself. Consequently, the trial court did not err in finding Respondent was a danger to himself." ¶ 35.

IN RE C.G., 2022-NCSC-123

- "In addition, the trial court's finding that respondent's 'active psychosis causes him to be a danger to himself' fails to explain how respondent's psychosis precludes him from attending to his physical needs or causes him to face a risk of serious physical debilitation in the near future." ¶ 39

IN RE C.G., 2022-NCSC-123

- The term "decompensation" is a term of art defined as "a breakdown in an individual's defense mechanisms, resulting in a progressive loss of normal functioning or worsening of psychiatric symptoms." Evidence or findings regarding the likelihood of decompensation, without more, do not "demonstrate the existence of a 'reasonable probability of [respondent] suffering serious physical debilitation within the near future' absent treatment." ¶ 39 n.9.

IN RE C.G., 2022-NCSC-123

- "While the record does contain evidence tending to show that respondent suffered from active psychosis, was at a risk of decompensation, and had shown a level of decompensation in the recent past, that generalized evidence, without more, does not tend to show that respondent is at a risk of substantial debilitation in the near term in the event that he is released from involuntary commitment." ¶ 39 n.10.

IN RE C.G., 2022-NCSC-123

- "[A]n inference that someone is 'unable to care for himself' does not necessarily mean that that person is at risk of 'suffering serious physical debilitation within the near future' in the absence of inpatient mental health treatment . . . ." ¶ 41.

DANGER TO OTHERS

- Prong I: The respondent has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another within the relevant past
- Prong II: There is a reasonable probability the respondent's conduct will be repeated

IN RE A.S., 280 N.C. APP. 149 (2021)

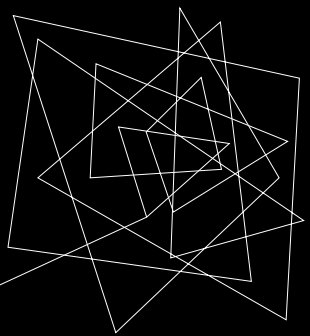
- The respondent (1) constantly interrupted proceedings, (2) was non-compliant with medicine, (3) was verbally abusive towards staff, and (4) told his doctor he would take her to court to "shut her up"
- Holding: "[T]hese findings of fact, while cryptic and bare boned, are sufficient to support" the court's commitment order

DANGER TO OTHERS

- "Despite public perceptions to the contrary, the vast majority of the mentally ill are not violent or are no more violent than the general population and thus, such rigid measures as involuntary commitment are rarely a necessity." *Williamson v. Liptzin*, 141 N.C. App. 1 (2000)

IN RE A.S., 280 N.C. APP. 149 (2021)

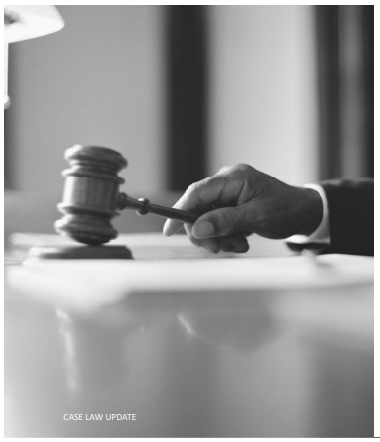
- The procedures under Chapter 122C "must be followed diligently." *In re Barnhill*, 72 N.C. App. 530 (1985)
- IVC procedures must be followed with "care and exactness." *Samons v. Meymandi*, 9 N.C. App. 490 (1970)
- If courts are required to carefully follow the procedures in Chapter 122C, they should also be required to carefully comply with the statutory criteria that govern IVC orders



CONFRONTATION

FUNDAMENTALS

- The respondent's right to confront and cross-examine witnesses "may not be denied." N.C. Gen. Stat. § 122C-268(f)
- "The statute could hardly be more explicit in preserving respondent's right of confrontation." *In re Benton*, 26 N.C. App. 294 (1975)



THE BURDEN OF OBJECTING

"[A] review of the Record reveals Respondent did not object to the admission of Dr. Zarzar's testimony on any basis, including impermissible hearsay. As such, Respondent failed to preserve this issue for appellate review, and the testimony must be considered competent evidence."

In re A.J.D., 283 N.C. App. 1 (2022)

A LONG LINE OF PRECEDENT

- *In re Benton*, 26 N.C. App. 294 (1975)
- *In re Hogan*, 32 N.C. App. 429 (1977)
- *In re Mackie*, 36 N.C. App. 638(1978)
- *In re C.W.F.*, 232 N.C. App. 213 (2014)
- *In re A.S.*, 280 N.C. App. 149 (2021)
- *In re R.S.H.*, 2022-NCSC-131

THE OPPORTUNITY TO OBJECT

"We hold that Respondent has failed to preserve any argument concerning the admissibility of reports relied upon by the trial court and the testifying doctor in this matter, as she failed to object appropriately at the hearing."

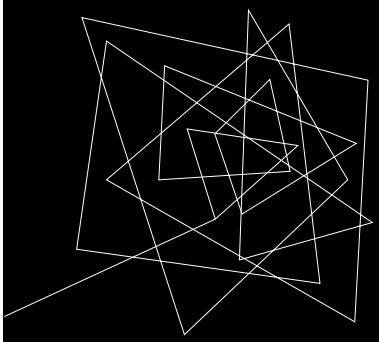
In re R.S.H., 2021-NCCOA-369

IN RE R.S.H., 2022-NCSC-131

"Here the trial court incorporated Dr. Kirk's report after the hearing concluded. Dr. Kirk did not testify at the hearing; the report was not formally offered or admitted into evidence; and the trial court did not inform respondent that it was incorporating the report into its findings of fact. Accordingly, respondent could not cross-examine Dr. Kirk, challenge the findings in the report, or otherwise assert her confrontation right. The trial court thus violated respondent's confrontation right by incorporating Dr. Kirk's report into its findings of fact."

ARE THESE QUESTIONS PROPER?

- Do you believe the respondent would be a danger to self or others if released from this facility?
- Do you believe the respondent would suffer serious physical debilitation without treatment?



EXPERT WITNESSES

LEGAL CONCLUSIONS

- "Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable." *State v. Parker*, 354 N.C. 268 (2001)
- "For example, an expert may not testify regarding specific legal terms of art including whether a defendant deliberated before committing a crime . . . Additionally, a medical expert may not testify as to the 'proximate cause' of a victim's death." *Id*.

EXPERT TESTIMONY

- Evidence Rule 702 permits the testimony of expert witnesses who are qualified by "knowledge, skill, experience, training, or education"
- However, the witness may not give an opinion unless "all of the following" apply

EXPERT TESTIMONY

1) The testimony is based upon sufficient facts or data
2) The testimony is the product of reliable principles and methods
3) The witness has applied the principles and methods reliably to the facts of the case

EXPERT TESTIMONY

- Trial courts "must now perform a more rigorous gatekeeping function when determining the admissibility of opinion testimony by expert witnesses than was the case under the prior version of Rule 702." *State v. Daughtridge*, 248 N.C. App. 707 (2016)

STATE V. MCGRADY, 368 N.C. 880 (2016)

- "In each case, the trial court has discretion in determining how to address the three prongs of the reliability test"
- "Whatever the type of expert testimony, the trial court must assess the reliability of the testimony to ensure that it complies with the three-pronged test in Rule 702(a)(1) to (a)(3)"

IS THE OPINION RELIABLE OR SPECULATION?

- What is the opinion based on?
- Has the respondent suffered serious physical debilitation in the past?
- How would failing to take medication lead to serious physical debilitation in the near future?

PREDICTIONS OF FUTURE DANGER

- "Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous." *Addington v. Texas*, 441 U.S. 418 (1979)
- Mental illness "is not a unitary concept, but varies in degree, can vary over time, and interferes with an individual's functioning at different times in different ways . . . ." *Indiana v. Edwards*, 554 U.S. 164 (2008)

PREDICTIONS OF FUTURE DANGER

- "Manifestations of mental illness may be sudden, and past behavior may not be an adequate predictor of future actions. Prediction of future behavior is complicated as well by the difficulties inherent in diagnosis of mental illness . . . It is thus no surprise that many psychiatric predictions of future violent behavior by the mentally ill are inaccurate." *Heller v. Doe*, 509 U.S. 312 (1993)

THANK YOU

David Andrews

David.W.Andrews@nccourts.org

ncappellatedefender.org/

CASE LAW UPDATE: WHAT'S NEW IN COMMITMENT APPEALS

David Andrews, Assistant Appellate Defender

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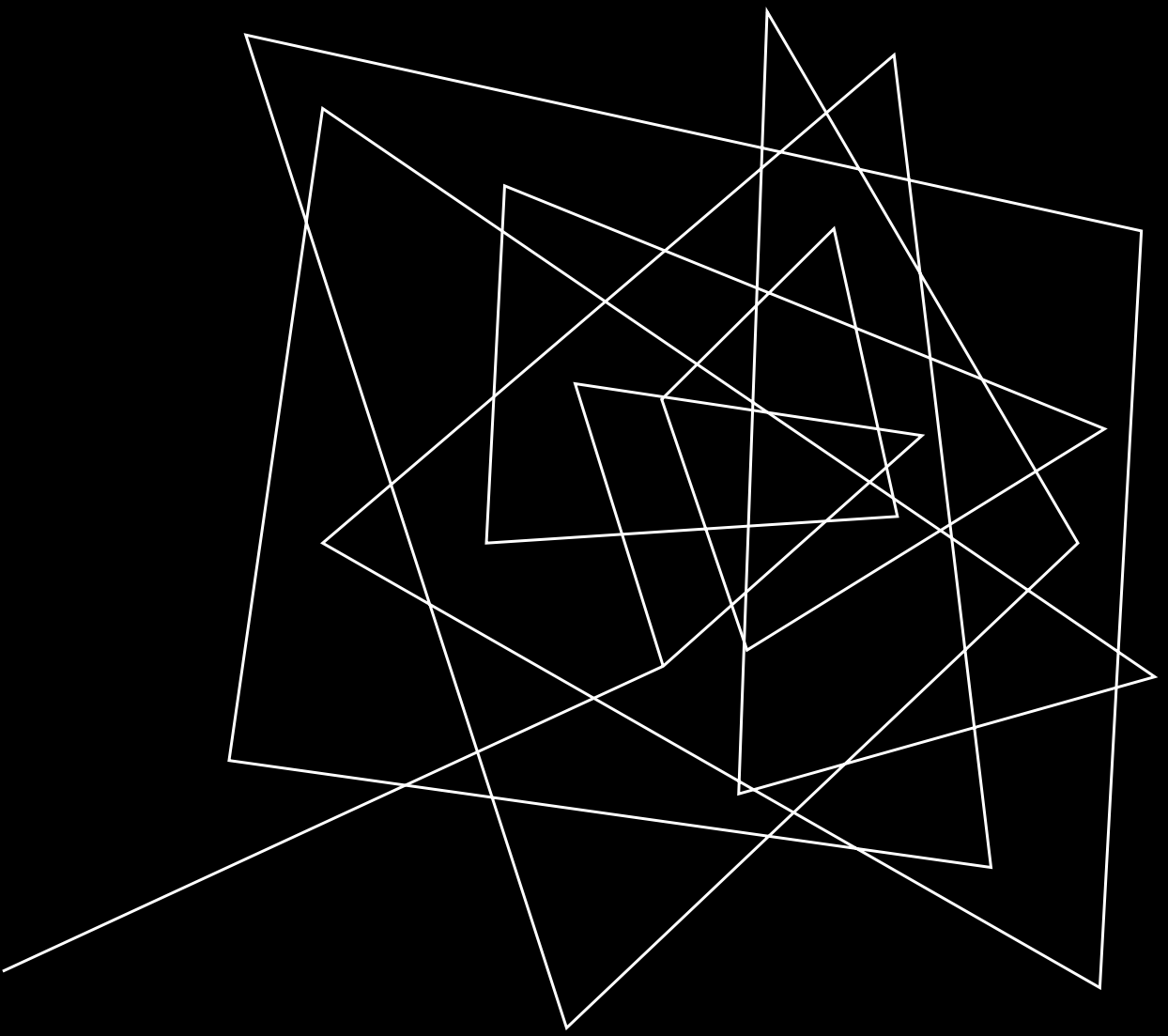

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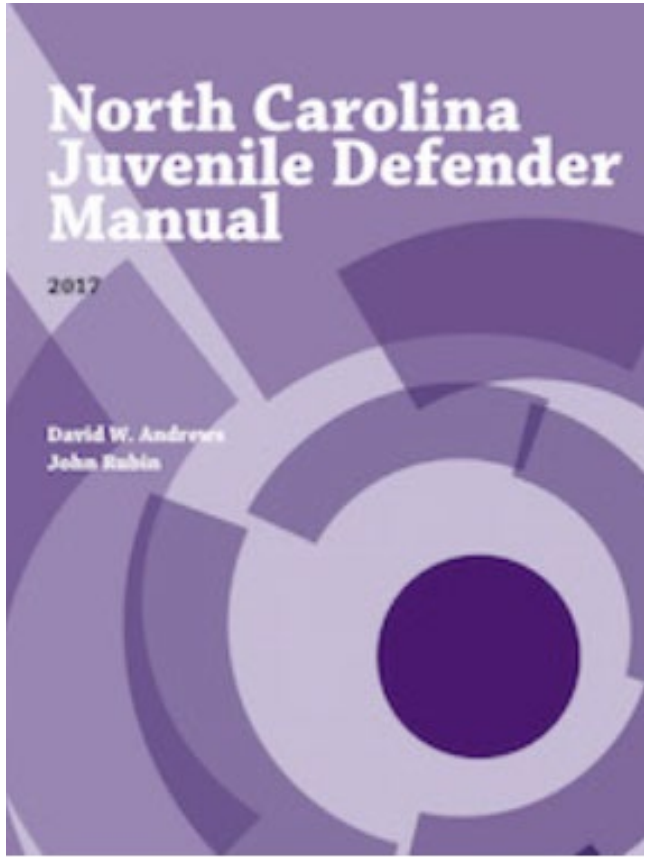

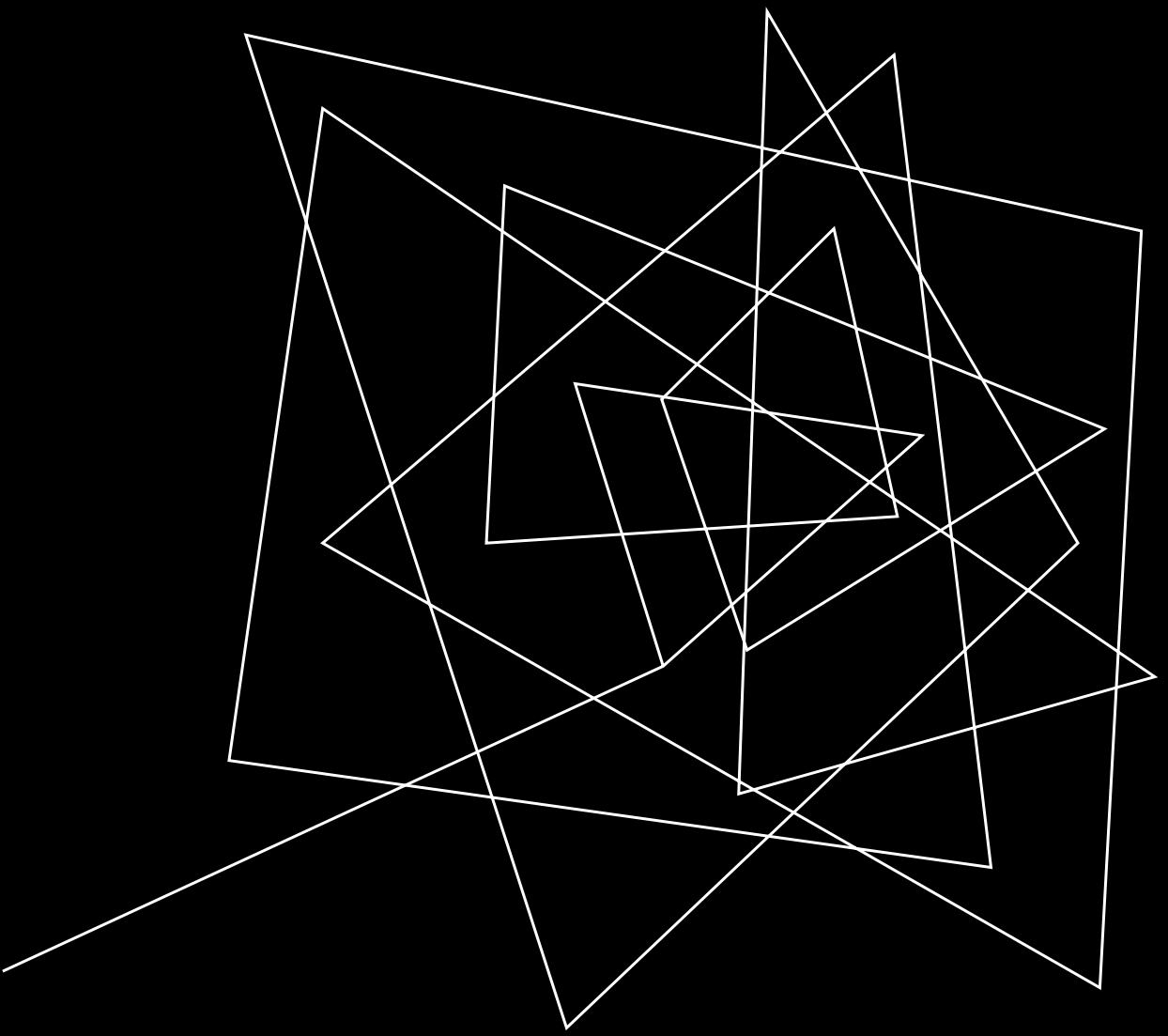

OVERVIEW

DAILY HEADLINES


The New York Times

New York City to Involuntarily Remove Mentally Ill People From Streets

Mayor Eric Adams directed the police and emergency medical workers to hospitalize people they deemed too mentally ill to care for themselves, even if they posed no threat to others.


NEWS CHANNEL abc 12 NEWS WEATHER HOME OF THE BRAVE CHIME IN STATION

Three NC deputies shot while serving commitment papers, suspect barricaded in home


OPB DEC. 16, 2022

We've updated our privacy policy. Click here to l

In The News | Oregon mental health crisis | PSU food pantry | Latest ruling on gun laws | Whitebark pine on t

Portland mayor suggests easing process to involuntarily commit people with mental health struggles


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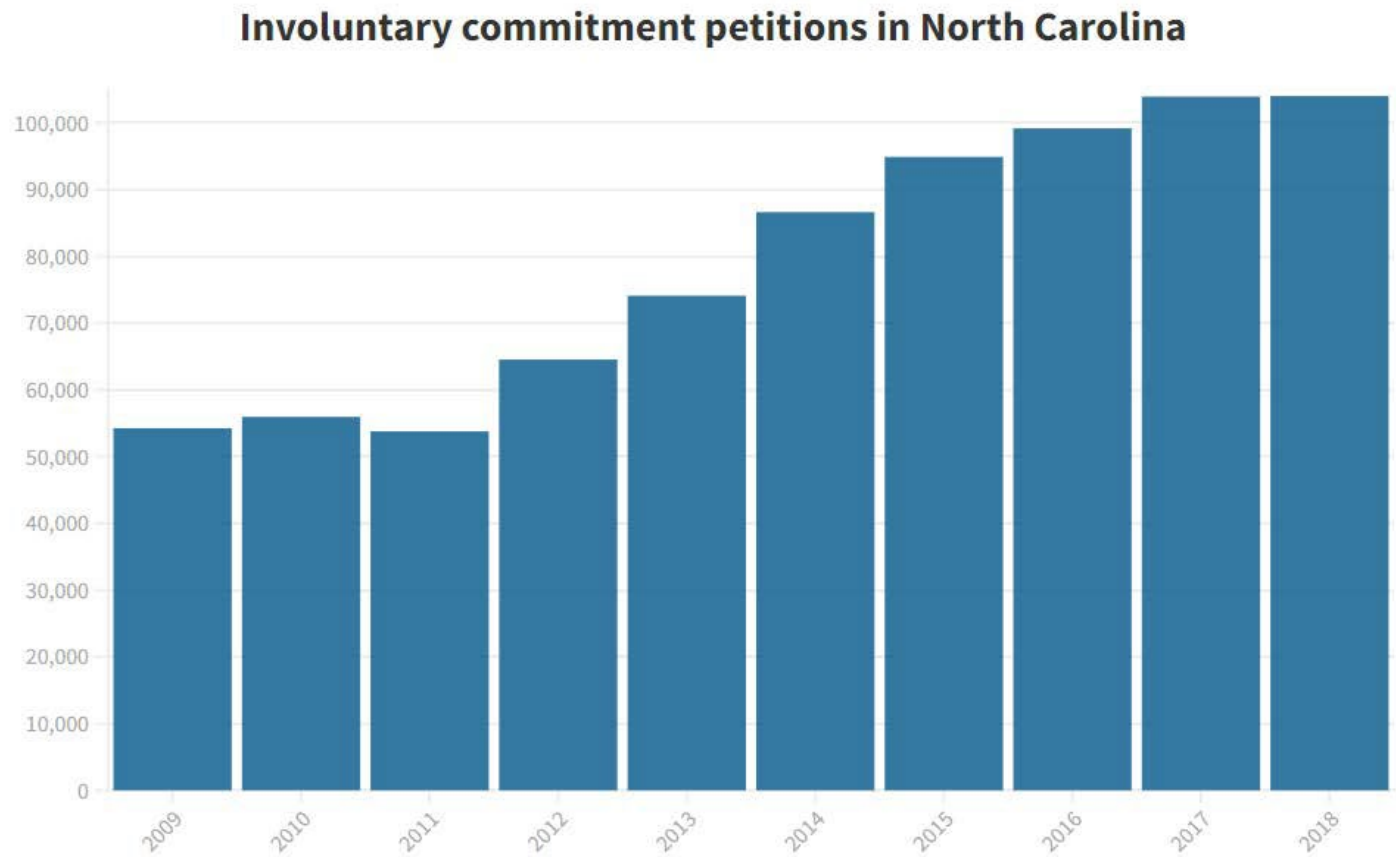
Mayor Ted Wheeler Wants to Forcibly Commit More People With Mental Illness

But where will he send them?

OVERRELIANCE ON IVC



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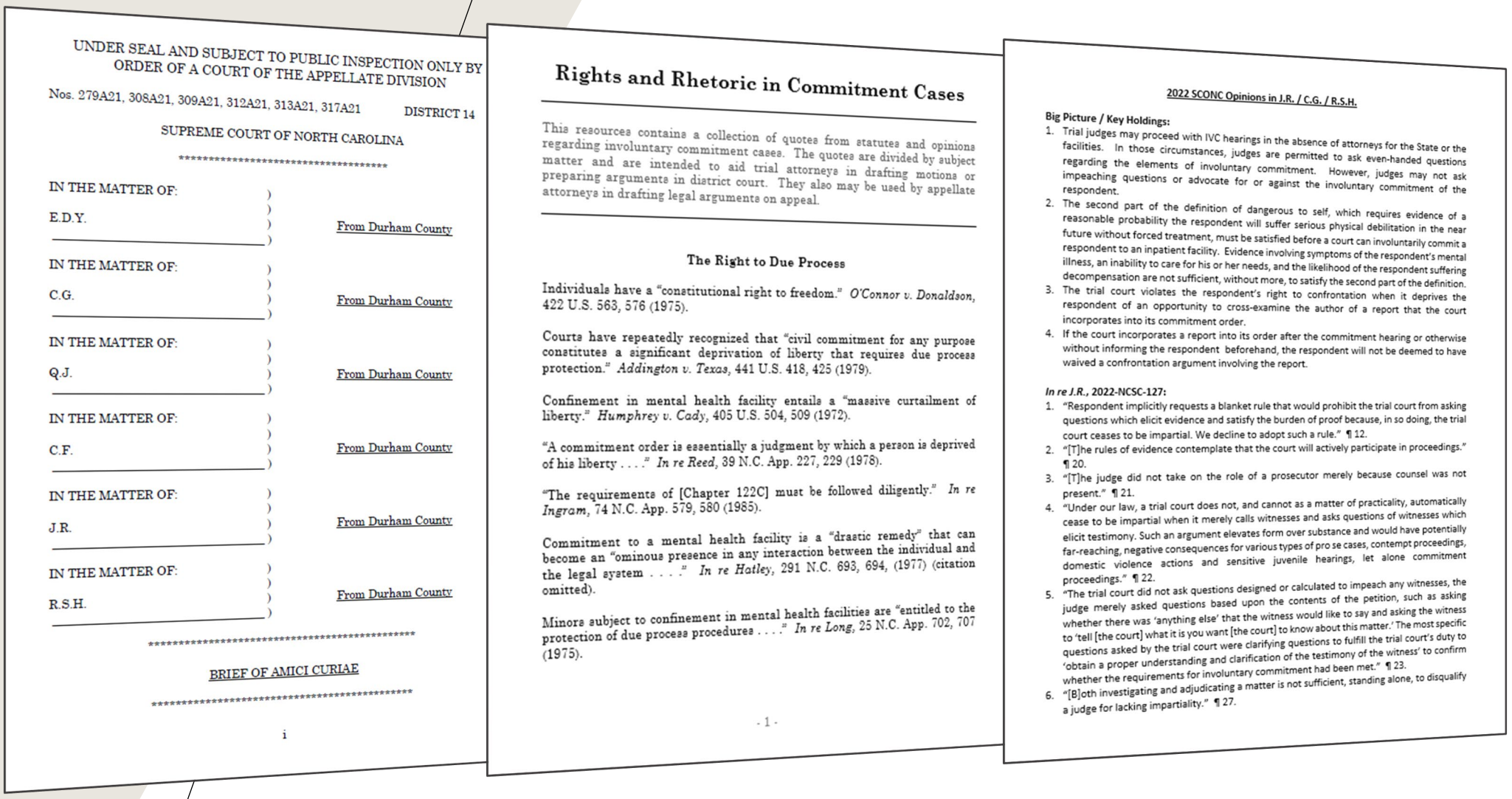

UNDER SEAL AND SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION

Nos. 279A21, 308A21, 309A21, 312A21, 313A21, 317A21 DISTRICT 14

SUPREME COURT OF NORTH CAROLINA

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IN THE MATTER OF:
E.D.Y. From Durham County

IN THE MATTER OF:
C.G. From Durham County

IN THE MATTER OF:
Q.J. From Durham County

IN THE MATTER OF:
C.F. From Durham County

IN THE MATTER OF:
J.R. From Durham County

IN THE MATTER OF:
R.S.H. From Durham County

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BRIEF OF AMICI CURIAE

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i

Rights and Rhetoric in Commitment Cases

This resources contains a collection of quotes from statutes and opinions regarding involuntary commitment cases. The quotes are divided by subject matter and are intended to aid trial attorneys in drafting motions or preparing arguments in district court. They also may be used by appellate attorneys in drafting legal arguments on appeal.

The Right to Due Process

Individuals have a "constitutional right to freedom." *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

Courts have repeatedly recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979).

Confinement in mental health facility entails a "massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

"A commitment order is essentially a judgment by which a person is deprived of his liberty . . . ." *In re Reed*, 39 N.C. App. 227, 229 (1978).

"The requirements of [Chapter 122C] must be followed diligently." *In re Ingram*, 74 N.C. App. 579, 580 (1985).

Commitment to a mental health facility is a "drastic remedy" that can become an "ominous presence in any interaction between the individual and the legal system . . . ." *In re Hatley*, 291 N.C. 693, 694, (1977) (citation omitted).

Minors subject to confinement in mental health facilities are "entitled to the protection of due process procedures . . . ." *In re Long*, 25 N.C. App. 702, 707 (1975).

- 1 -

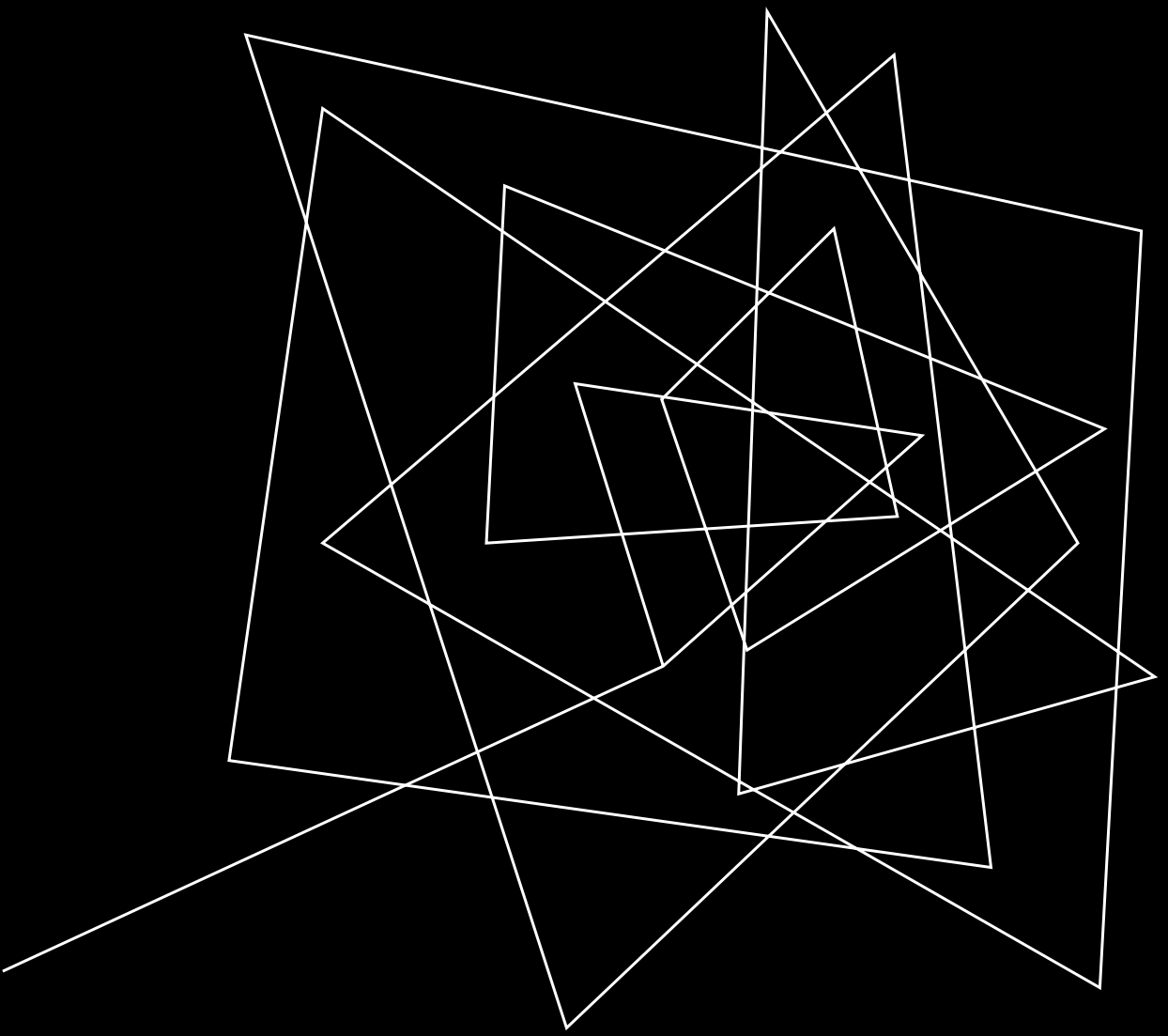
2022 SCONC Opinions in J.R. / C.G. / R.S.H.

Big Picture / Key Holdings:

1. Trial judges may proceed with IVC hearings in the absence of attorneys for the State or the facilities. In those circumstances, judges are permitted to ask even-handed questions regarding the elements of involuntary commitment. However, judges may not ask impeaching questions or advocate for or against the involuntary commitment of the respondent.
2. The second part of the definition of dangerous to self, which requires evidence of a reasonable probability the respondent will suffer serious physical debilitation in the near future without forced treatment, must be satisfied before a court can involuntarily commit a respondent to an inpatient facility. Evidence involving symptoms of the respondent's mental illness, an inability to care for his or her needs, and the likelihood of the respondent suffering decompensation are not sufficient, without more, to satisfy the second part of the definition.
3. The trial court violates the respondent's right to confrontation when it deprives the respondent of an opportunity to cross-examine the author of a report that the court incorporates into its commitment order.
4. If the court incorporates a report into its order after the commitment hearing or otherwise without informing the respondent beforehand, the respondent will not be deemed to have waived a confrontation argument involving the report.

***In re J.R.*, 2022-NCSC-127:**

1. "Respondent implicitly requests a blanket rule that would prohibit the trial court from asking questions which elicit evidence and satisfy the burden of proof because, in so doing, the trial court ceases to be impartial. We decline to adopt such a rule." ¶ 12.
2. "[T]he rules of evidence contemplate that the court will actively participate in proceedings." ¶ 20.
3. "[T]he judge did not take on the role of a prosecutor merely because counsel was not present." ¶ 21.
4. "Under our law, a trial court does not, and cannot as a matter of practicality, automatically cease to be impartial when it merely calls witnesses and asks questions of witnesses which elicit testimony. Such an argument elevates form over substance and would have potentially far-reaching, negative consequences for various types of pro se cases, contempt proceedings, domestic violence actions and sensitive juvenile hearings, let alone commitment proceedings." ¶ 22.
5. "The trial court did not ask questions designed or calculated to impeach any witnesses, the judge merely asked questions based upon the contents of the petition, such as asking whether there was 'anything else' that the witness would like to say and asking the witness to 'tell [the court] what it is you want [the court] to know about this matter.' The most specific questions asked by the trial court were clarifying questions to fulfill the trial court's duty to 'obtain a proper understanding and clarification of the testimony of the witness' to confirm whether the requirements for involuntary commitment had been met." ¶ 23.
6. "[B]oth investigating and adjudicating a matter is not sufficient, standing alone, to disqualify a judge for lacking impartiality." ¶ 27.



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- Due Process requires the state to justify confinement in an involuntary commitment case by clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418 (1979).

- Due Process also requires an inquiry by a "neutral factfinder" before a court may involuntarily commit a respondent to a treatment facility. *Parham v. J.R.*, 442 U.S. 584 (1979)

ONCE UPON A TIME IN DISTRICT COURT

- In 2019, the Durham County District Attorney's Office stopped sending prosecutors to IVC hearings
- This meant that there were no attorneys to prosecute the cases in district court
- Nevertheless, at least one judge continued to hold IVC hearings and commit respondents

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- A defense attorney began objecting, asserting that the judge's decision to elicit evidence and proceed with IVC hearings violated Due Process

- Some of the respondents appealed. The Office of the Appellate Defender was assigned to represent them

- The first appeal was *In re J.R.*, 2021-NCCOA-366, but several others followed

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- In July 2021, the Court of Appeals issued opinions denying the Due Process argument
- But there was a catch
- One judge dissented, which gave the respondents the right to seek review in the Supreme Court of North Carolina

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- The majority in the Court of Appeals held that while IVC cases involve the deprivation of liberty, the proceedings were "inquisitorial" and "not adversarial." *In re C.G.*, 278 N.C. App. 416, 426 n.2 (2021)

- The majority also held that the trial court did not advocate "for or against either petitioner or Respondent." *Id*. at 427

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- The respondents appealed (there were six in all)
- Two of them sought discretionary review on other arguments
- The Supreme Court granted discretionary review of the two additional issues

ONCE UPON A TIME IN DISTRICT COURT

- The cases were heard for oral argument in September 2022
- On December 16, 2022, the Supreme Court issued opinions in the cases

ORAL ARGUMENT AT SCONC

September 20, 2022

IN RE J.R., 2022-NCSC-127

- “It is true, as respondent argues, that . . . the U.S. Supreme Court concluded that involuntary commitment proceedings are adversarial in nature.”

- “By calling the witness from DUMC to testify and asking even-handed questions, the trial court did not advocate for or against the involuntary commitment of respondent; it merely heard evidence in conjunction with contents of the petition and applied the law to the facts as presented.”

STRATEGIES MOVING FORWARD

- Object on Due Process grounds if the trial court asks impeaching questions or anything other than clarifying questions
- Object under Rule 702 if the doctor provides a diagnosis for the respondent without being qualified as an expert
- If the court asks questions to qualify the doctor as an expert, assert that the court is taking on the role of an advocate

STRATEGIES MOVING FORWARD

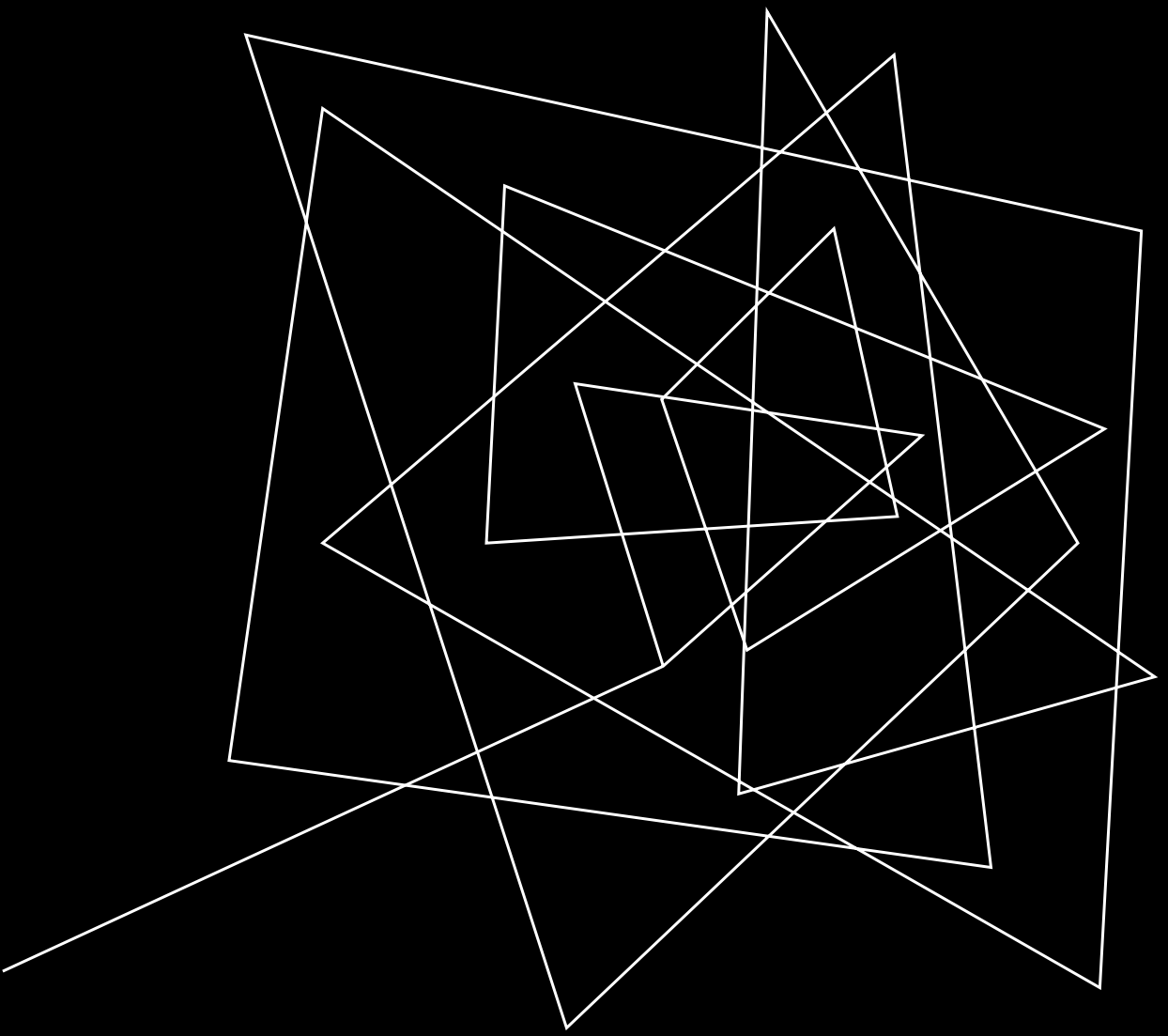
- Object on Due Process grounds if the trial court admits the doctor's report. If an attorney is not there to authenticate the report, the court arguably should not do so itself

- Remind the court that the Official Commentary to Evidence Rule 614 says the following: "It is anticipated that the court will exercise its authority to call or interrogate a witness only in extraordinary circumstances"

STRATEGIES MOVING FORWARD

- Object on hearsay grounds to any out-of-court statements the testifying doctor relies describes

- Remind the court that while the doctor can testify about hearsay that informs the doctor's opinion, the court may not rely on hearsay statements to commit the client



DANGER TO SELF OR OTHERS

O'CONNOR V. DONALDSON, 422 U.S. 563 (1975)

"May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."

THE RIGHT TO FREEDOM

Individuals have a “constitutional right to freedom.” *O’Connor v. Donaldson*, 422 U.S. 563 (1975)

Respondents are “presumed to be sane and [are] entitled to . . . liberty and [the] right to be free of restraint.” *In re E.B.*, 2022-NCCOA-839

DANGER TO SELF

- Prong I: The individual would be unable without help to exercise self-control or satisfy basic needs

- Prong II: There is a reasonable probability the respondent would suffer serious physical debilitation in the near future without treatment

IN RE C.G., 278 N.C. APP. 416 (2021)

- The trial court's finding that the respondent's ACT team was unable to care for the respondent's dental and nourishment needs "created the nexus between Respondent's mental illness and future harm to himself. Accordingly, the trial court satisfied the requirement it find a reasonable probability of future harm absent treatment." ¶ 35.

IN RE C.G., 278 N.C. APP. 416 (2021)

- "Here, the trial court heard evidence of actions Respondent was unable to control and of Respondent's severely impaired insight as to his own condition. As such, the evidence supported the prima facie inference Respondent could not care for himself. Consequently, the trial court did not err in finding Respondent was a danger to himself." ¶ 35.

IN RE C.G., 2022-NCSC-123

- The "trial court's findings that an individual suffers from a mental illness, exhibits symptoms associated with that mental illness, and may not be able to take care of his or her needs are not sufficient to satisfy the second prong of the statutory test for the presence of a 'danger to self.'" ¶ 38.

IN RE C.G., 2022-NCSC-123

- “In addition, the trial court’s finding that respondent’s ‘active psychosis causes him to be a danger to himself’ fails to explain how respondent’s psychosis precludes him from attending to his physical needs or causes him to face a risk of serious physical debilitation in the near future.” ¶ 39

IN RE C.G., 2022-NCSC-123

- The term “decompensation” is a term of art defined as “a breakdown in an individual’s defense mechanisms, resulting in a progressive loss of normal functioning or worsening of psychiatric symptoms.” Evidence or findings regarding the likelihood of decompensation, without more, do not “demonstrate the existence of a ‘reasonable probability of [respondent] suffering serious physical debilitation within the near future’ absent treatment.” ¶ 39 n.9.

IN RE C.G., 2022-NCSC-123

- “[W]hile the record does contain evidence tending to show that respondent suffered from active psychosis, was at a risk of decompensation, and had shown a level of decompensation in the recent past, that generalized evidence, without more, does not tend to show that respondent is at a risk of substantial debilitation in the near term in the event that he is released from involuntary commitment.” ¶ 39 n.10.

IN RE C.G., 2022-NCSC-123

- “[A]n inference that someone is ‘unable to care for himself’ does not necessarily mean that that person is at risk of ‘suffering serious physical debilitation within the near future’ in the absence of inpatient mental health treatment . . . .” ¶ 41.

DANGER TO OTHERS

- Prong I: The respondent has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another within the relevant past

- Prong II: There is a reasonable probability the respondent's conduct will be repeated

IN RE A.S., 280 N.C. APP. 149 (2021)

- The respondent (1) constantly interrupted proceedings, (2) was non-compliant with medicine, (3) was verbally abusive towards staff, and (4) told his doctor he would take her to court to "shut her up"

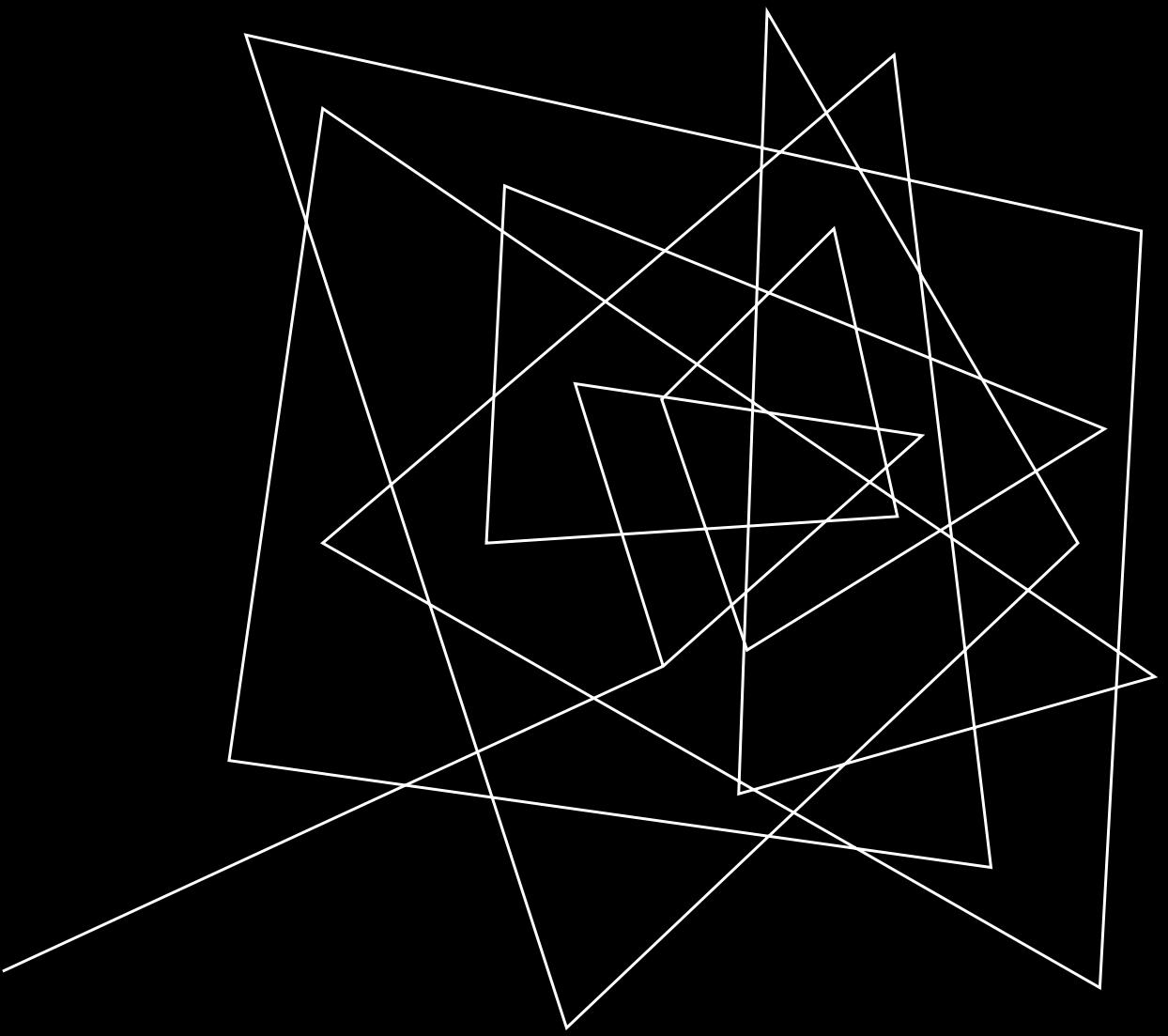
- Holding: "[T]hese findings of fact, while cryptic and bare boned, are sufficient to support" the court's commitment order

IN RE A.S., 280 N.C. APP. 149 (2021)

- The procedures under Chapter 122C "must be followed diligently." *In re Barnhill*, 72 N.C. App. 530 (1985)
- IVC procedures must be followed with "care and exactness." *Samons v. Meymandi*, 9 N.C. App. 490 (1970)
- If courts are required to carefully follow the procedures in Chapter 122C, they should also be required to carefully comply with the statutory criteria that govern IVC orders

DANGER TO OTHERS

- “Despite public perceptions to the contrary, the vast majority of the mentally ill are not violent or are no more violent than the general population and thus, such rigid measures as involuntary commitment are rarely a necessity.” *Williamson v. Liptzin*, 141 N.C. App. 1 (2000)



CONFRONTATION

FUNDAMENTALS

- The respondent's right to confront and cross-examine witnesses "may not be denied." N.C. Gen. Stat. § 122C-268(f)

- "The statute could hardly be more explicit in preserving respondent's right of confrontation." *In re Benton*, 26 N.C. App. 294 (1975)

A LONG LINE OF PRECEDENT

- *In re Benton*, 26 N.C. App. 294 (1975)
- *In re Hogan*, 32 N.C. App. 429 (1977)
- *In re Mackie*, 36 N.C. App. 638(1978)
- *In re C.W.F.*, 232 N.C. App. 213 (2014)
- *In re A.S.*, 280 N.C. App. 149 (2021)
- *In re R.S.H.*, 2022-NCSC-131

THE BURDEN OF OBJECTING

"[A] review of the Record reveals Respondent did not object to the admission of Dr. Zarzar's testimony on any basis, including impermissible hearsay. As such, Respondent failed to preserve this issue for appellate review, and the testimony must be considered competent evidence."

In re A.J.D., 283 N.C. App. 1 (2022)

THE OPPORTUNITY TO OBJECT

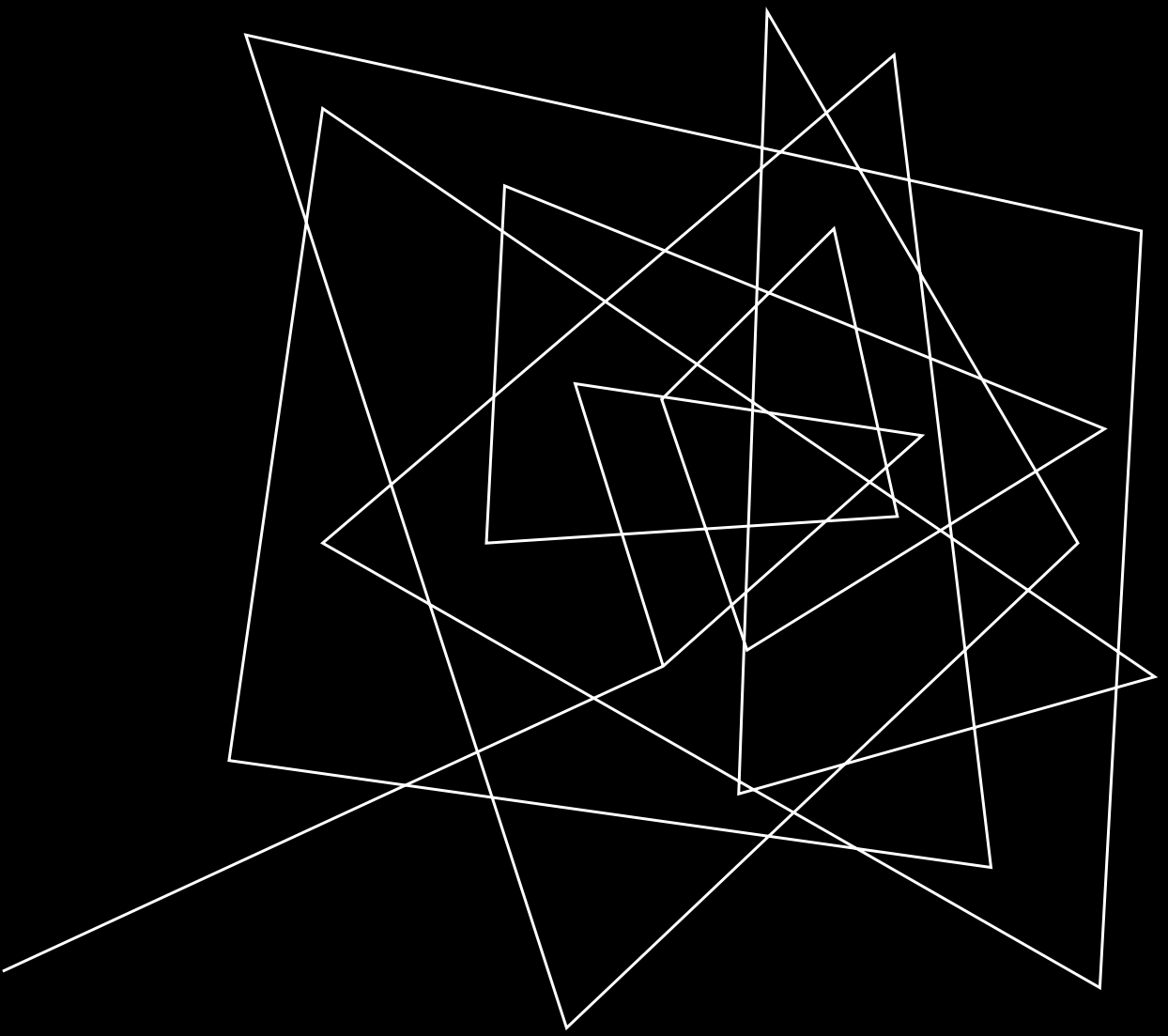
44

"We hold that Respondent has failed to preserve any argument concerning the admissibility of reports relied upon by the trial court and the testifying doctor in this matter, as she failed to object appropriately at the hearing."

In re R.S.H., 2021-NCCOA-369

IN RE R.S.H., 2022-NCSC-131

"Here the trial court incorporated Dr. Kirk's report after the hearing concluded. Dr. Kirk did not testify at the hearing; the report was not formally offered or admitted into evidence; and the trial court did not inform respondent that it was incorporating the report into its findings of fact. Accordingly, respondent could not cross-examine Dr. Kirk, challenge the findings in the report, or otherwise assert her confrontation right. The trial court thus violated respondent's confrontation right by incorporating Dr. Kirk's report into its findings of fact."



EXPERT WITNESSES

ARE THESE QUESTIONS PROPER?

- Do you believe the respondent would be a danger to self or others if released from this facility?
- Do you believe the respondent would suffer serious physical debilitation without treatment?

LEGAL CONCLUSIONS

- "Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable." *State v. Parker*, 354 N.C. 268 (2001)

- "For example, an expert may not testify regarding specific legal terms of art including whether a defendant deliberated before committing a crime . . . Additionally, a medical expert may not testify as to the 'proximate cause' of a victim's death." *Id*.

EXPERT TESTIMONY

- Evidence Rule 702 permits the testimony of expert witnesses who are qualified by “knowledge, skill, experience, training, or education”

- However, the witness may not give an opinion unless “all of the following” apply

EXPERT TESTIMONY

1) The testimony is based upon sufficient facts or data

2) The testimony is the product of reliable principles and methods

3) The witness has applied the principles and methods reliably to the facts of the case

EXPERT TESTIMONY

- Trial courts “must now perform a more rigorous gatekeeping function when determining the admissibility of opinion testimony by expert witnesses than was the case under the prior version of Rule 702.” *State v. Daughtridge*, 248 N.C. App. 707 (2016)

STATE V. MCGRADY, 368 N.C. 880 (2016)

- "In each case, the trial court has discretion in determining how to address the three prongs of the reliability test"

- "Whatever the type of expert testimony, the trial court must assess the reliability of the testimony to ensure that it complies with the three-pronged test in Rule 702(a)(1) to (a)(3)"

IS THE OPINION RELIABLE OR SPECULATION?

- What is the opinion based on?
- Has the respondent suffered serious physical debilitation in the past?
- How would failing to take medication lead to serious physical debilitation in the near future?

PREDICTIONS OF FUTURE DANGER

- “Manifestations of mental illness may be sudden, and past behavior may not be an adequate predictor of future actions. Prediction of future behavior is complicated as well by the difficulties inherent in diagnosis of mental illness . . . It is thus no surprise that many psychiatric predictions of future violent behavior by the mentally ill are inaccurate.” *Heller v. Doe*, 509 U.S. 312 (1993)

PREDICTIONS OF FUTURE DANGER

- "Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous." *Addington v. Texas*, 441 U.S. 418 (1979)

- Mental illness "is not a unitary concept, but varies in degree, can vary over time, and interferes with an individual's functioning at different times in different ways . . . ." *Indiana v. Edwards*, 554 U.S. 164 (2008)

THANK YOU

David Andrews

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Children in DSS Custody Who Need Treatment in a PRTF: There's a Disconnect

I recently finished a 2-day course for district court judges that focused on children with significant mental health needs. There were lots of questions about the admission and discharge process for a child who is in a county department's (DSS) custody and who needs treatment in a psychiatric residential treatment facility (PRTF). It's complicated because there are **two separate but simultaneously occurring court actions:**

1. the abuse, neglect, or dependency (A/N/D) action that addresses a child's custody, placement, and services; and
2. the judicial review of a child's voluntary admission to a secure psychiatric treatment facility that was made with the consent of the child's legally responsible person.

The two actions involve different parties, courts, purposes, and laws, and they are often not coordinated even though they directly impact each other.

Placement in a PRTF

North Carolina requires a judicial review when a child is admitted to a 24-hour mental health or substance abuse facility that has the same or similar restrictions on the child's freedom of movement as a state-operated psychiatric hospital. G.S. 122C-224. A "24-hour facility" provides a structured living environment and services to a patient for at least 24 consecutive hours and includes state psychiatric hospitals, public or private facilities providing acute inpatient care, and PRTFs. G.S. 122C-3(14)g. PRTFs provide treatment to children who are mentally ill or substance abusers in need of care in a non-acute inpatient setting and whose removal from home or a community based residential setting is essential for treatment. 10A NCAC 27G.1901. Round the clock supervision and therapeutic interventions are provided with the goal of facilitating the child's transition to a less intensive and structured community setting. *Id.* For children insured by Medicaid, **prior approval** that the child's treatment in a PRTF is **medically necessary** must be obtained from the local management entity/managed care organization (**LME/MCO**). NC Div. of Medical Assistance, PRTF, Clinical Coverage Policy 8-D-1, 5.0; *see* G.S. 122C-3(20c).

When a child needs treatment in a PRTF, the placement is made by the child's **legally responsible person:** a parent, guardian, person standing in loco parentis, or legal custodian other than a parent who is specifically authorized by law or a court order to consent to medical care, including psychiatric treatment. G.S. 122C-3(20)(ii); -221(a).

The Role of the A/N/D Court and DSS in a Child's Admission

When a child has been adjudicated abused, neglected, or dependent, DSS recommends a

treatment plan that addresses the child's needs. G.S. 7B-808(b). The court may order that the child receive a mental health evaluation by a qualified professional. G.S. 7B-903(d). When the court finds the child is mentally ill, it may order DSS to coordinate with the LME/MCO to develop the child's treatment plan. G.S. 7B-903(e). The court does not have authority to order the child's placement in a PRTF. *See* G.S. 7B-903(a), (e). If the child needs treatment in a 24-hour facility, the admission must be made by the child's legally responsible person. When the court orders a child into DSS custody, DSS is the child's legally responsible person if the court also authorizes DSS to consent to the child's mental health care or treatment pursuant to G.S. 7B-505.1(c). *See* G.S. 7B-903.1(e). Otherwise, the child's parent, guardian, or person acting in loco parentis is the child's legally responsible person for admission purposes. G.S. 122C-3(20)(ii).

Judicial Review of a Voluntary Admission

Although a child's admission to a PRTF is voluntarily made with the consent of the minor's legally responsible person, NC law requires judicial review of the minor's "voluntary admission." G.S. 122C, Article 5, Part 2. The purpose of the judicial review is to protect the child's liberty interest by ensuring that the child is not improperly admitted or improperly remains in the facility. G.S. 122-221(b); *In re* A.N.B., 232 N.C. App. 406 (2014).

The judicial review is heard by the **district court in the county where the facility is located**. G.S. 122C-224(a). If the PRTF is in a different county from where the A/N/D case is pending, a different court will conduct the judicial review.

The judicial review **process begins within 24 hours** of when the child is admitted to the PRTF when the facility notifies the clerk of court of the child's admission and need for a hearing. G.S. 122C-224(c). The facility also notifies the clerk of the names and addresses of the child's legally responsible person and responsible professional (the person in the facility who is designated to be responsible for and is qualified to provide the child's care and treatment). *Id*.; G.S. 122C-3(32).

Within 48 hours of receiving the notice from the facility, the clerk must **appoint an attorney for the child,** who is presumed indigent. G.S. 122C-224.1(a); AOC-SP-912M. This attorney is not the GAL/attorney advocate appointed to represent the child in the A/N/D proceeding. *See* G.S. 7B-601. This newly appointed attorney represents the child in the judicial review proceeding and continues to represent the child until the judge relieves him or her of the appointment. G.S. 122C-224.2(c). The attorney meets with the child within 10 days of the appointment and at least 48 hours before the hearing. G.S. 122C-224.2(a).

The **hearing must be held within 15 days** of the child's admission to the facility. G.S. 122C-224(a), -224.1(b). At least 72 hours before the hearing, **notice of the hearing** is sent to the child's attorney, the child's legally responsible person, and the responsible professional. G.S. 122C-224.1(b). The hearing is closed to the public unless the child's attorney requests otherwise. G.S. 122C-224.3(d). The hearing is **held at the facility** unless the judge determines the

court calendar will be disrupted by holding the hearing there. G.S. 122C-224.3(a). In that case, the hearing may be held in a different location, such as the judge's chambers, but it should not be conducted in a courtroom if the child's attorney objects and there is a more suitable place available. *Id*. The child has a right to be present at the hearing and to testify, but he or she may waive that right or limit his or her appearance to when testifying. G.S. 122C-224.2(b), -224.3(b). Certified copies of medical records, including a psychologist's or other professional's findings and reports, are admissible in evidence so long as the child's right to confront and cross-examine witnesses is not denied. G.S. 122C-224.3(c); *In re* C.W.F., 232 N.C. App. 213 (2014).

It is unclear if a legally responsible person who receives notice of the hearing is a **party** to the proceeding. *In re* M.B., 771 S.E.2d 615 (2015). Unlike the Juvenile Code, which explicitly states that a person who has a right to notice and to be heard in certain A/N/D hearings is not a party, the statutes authorizing the judicial review of a voluntary admission are silent about the legally responsible person's role in the judicial review. *Compare* G.S. 7B-906.1(b), -908(b)(1), -1112.1 *to* 122C-224.1(b). Because a judicial review hearing is a civil proceeding, the court may look to the Rules of Civil Procedure to determine if a party should be joined or allowed to intervene if a motion is filed. *See* G.S. 1A-1, Rules 19, 20, 24; *In re* A.N.B.

The Order

There are **three possible dispositional orders.**

1. The court **concurs** in the child's continued admission and **authorizes a treatment period for up to 90 days** if the court finds by **clear, cogent, and convincing evidence**
    - the child is mentally ill or a substance abuser,
    - the child is in need of further treatment at the 24-hour facility, and
    - less restrictive measures will be insufficient. When the court is determining if less restrictive measures will be insufficient, it may look at whether those lesser measures are actually available (e.g., is there an available bed in a less restrictive facility). G.S. 122C-2; *In re* M.B.

2. The court orders a **one-time 15-day additional stay** when the court believes there are reasonable grounds to believe the child is mentally ill or a substance abuser and is in need of treatment at the facility but additional diagnoses and evaluations are needed for the court to make a determination, or

3. The court orders the **child's release**.

G.S. 122C-224.3(f), (g); AOC-SP-913M.

Additional Judicial Reviews

If the court concurs and orders continued admission for up to 90 days, the child is entitled to another judicial review before that additional treatment period ends. G.S. 122C-224.4(b). At subsequent judicial reviews, the court may order the **child's release or continued admission for up to 180 days**. *Id.* Judicial reviews will be held prior to the expiration of each subsequently authorized admission period when the responsible professional recommends a continued stay. G.S. 122C-224.4(b), (c). The responsible professional notifies the clerk at least 15 days before the admission period expires that an additional stay is recommended. G.S. 122C-224.4(c).

Discharge

Discharge planning to a less restrictive treatment setting starts at the child's admission and is part of a child's treatment plan. 10A NCAC 27G.1903(c). Legally responsible persons (e.g., parent or DSS social worker) and/or family members must be involved in the development and implementation of the child's treatment plans. 10A NCAC 27G.1903(e). Before a child is discharged, the facility should meet with the child and family team, including the DSS social worker, and make service planning decisions. 10A NCAC 27G.1904.

A child is discharged when

- the court orders the child's release,
- the responsible professional determines the child is no longer mentally ill or a substance abuser or in need of treatment at the facility,
- the legally responsible person files a written request for the child's discharge with the facility (however, the facility may hold the child for 72 hours and seek an involuntary commitment if appropriate), or
- the child turns 18 and does not consent to the treatment.

G.S. 122C-224.7; -224.3(g)(3).

What About the A/N/D Court?

The A/N/D court does not hear the judicial review of a child's voluntary admission and will not be aware of what was decided at that judicial review unless evidence of what was ordered is introduced in the A/N/D proceeding. If the A/N/D court wants to timely coordinate its hearings with the judicial review of the child's voluntary admission or with the child's discharge, it may consider ordering

- the legally responsible person (e.g., parent or DSS) notify the clerk of the date for the judicial review of voluntary admission so that the clerk may schedule a review hearing in the A/N/D proceeding shortly afterwards. *See* G.S. 7B-906.1(a); -1000.
- the legally responsible person make efforts to obtain the permission of the court deciding the voluntary admission to release information from that court file, such as the court order,

for the purpose of admitting a copy in the A/N/D proceeding. *See* G.S. 122C-54(d).

- DSS to participate in the child's treatment and discharge planning and to work with the PRTF to make timely efforts to secure a child's post-discharge placement. *See In re* M.B.
- the legally responsible person notify the clerk of a need for a review hearing if that person files a written request with the PRTF for the child's discharge.

Case Scenario

There is a 36-year-old woman, Paula, who lives in your county. She lives on the street but has family in the county, including her grandmother, who she refuses to live with. She was adjudicated incompetent by the clerk three years ago. Another GAL attorney was appointed and served as Paula's counsel in that proceeding. The clerk originally appointed Paula's aunt as the guardian of her person but after one year Paula's aunt petitioned to resign as GOP. The clerk then appointed the county department of social services to serve as Paula's GOP who has been serving as GOP for the last two years. Paula is diagnosed with schizophrenia and substance use disorder for alcohol and drugs. She has no assets. Paula has been subject of two IVC orders in the recent months. Her grandmother files a motion in the cause with the clerk indicating her concerns about Paula's condition and the lack of care she is receiving. Her grandmother is very worried that Paula continues to live on the street and does not appear to be receiving any regular mental health or substance use treatment. She also includes in her motion her concerns that that Paula has been engaging in sexual activity in exchange for drugs. In response to the motion in the cause, you are appointed by the clerk as Paula's GAL in the proceeding.

CASE LAW UPDATE: WHAT'S NEW IN COMMITMENT APPEALS

David Andrews, Assistant Appellate Defender

INTRODUCTION

ROADMAP

Introduction

Overview

Due Process

Danger to Self / Others

Confrontation

Expert Witnesses

OFFICE OF THE APPELLATE DEFENDER

- Founded in 1980, formalized as a state office in 1981
- Governed by N.C.G.S. § 7A-498.8: Represent indigent clients in the North Carolina Appellate Division
- Appeals include criminal, capital, juvenile delinquency, involuntary commitment

OFFICE OF THE APPELLATE DEFENDER

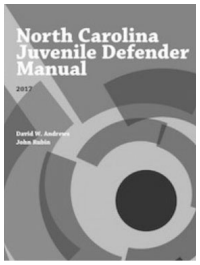
- Notable Alums: James Wynn, Robin Hudson
- Notable Cases: *McKoy v. North Carolina*, 494 U.S. 433 (1990); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011)

OAD OFFICE OF THE APPELLATE DEFENDER

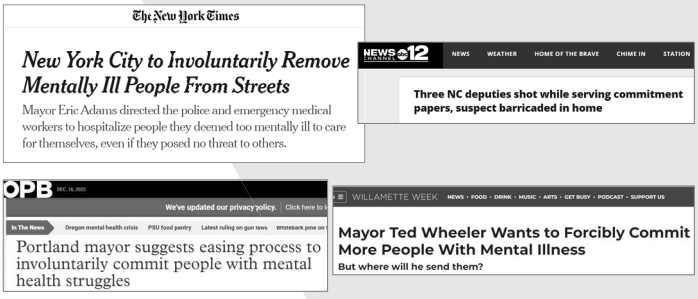
OVERVIEW

MY WORK

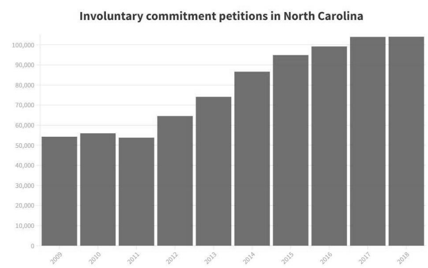
- Handle juvenile LWOP, probation, and delinquency appeals
- Co-author of the 2017 edition of the Juvenile Defender Manual
- Started handling IVC appeals in 2008



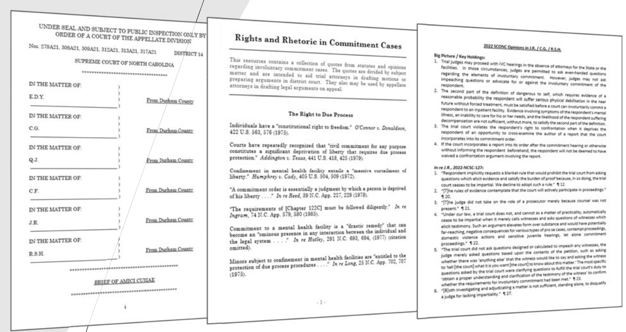
DAILY HEADLINES



OVERRELIANCE ON IVC



HANDOUTS



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- On December 16, 2022, the Supreme Court issued opinions in the cases

ORAL ARGUMENT AT SCONC

September 20, 2022

IN RE J.R., 2022-NCSC-127

- "It is true, as respondent argues, that . . . the U.S. Supreme Court concluded that involuntary commitment proceedings are adversarial in nature."
- "By calling the witness from DUMC to testify and asking even-handed questions, the trial court did not advocate for or against the involuntary commitment of respondent; it merely heard evidence in conjunction with contents of the petition and applied the law to the facts as presented."

STRATEGIES MOVING FORWARD

- Object on Due Process grounds if the trial court asks impeaching questions or anything other than clarifying questions
- Object under Rule 702 if the doctor provides a diagnosis for the respondent without being qualified as an expert
- If the court asks questions to qualify the doctor as an expert, assert that the court is taking on the role of an advocate

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- Object on Due Process grounds if the trial court admits the doctor's report. If an attorney is not there to authenticate the report, the court arguably should not do so itself
- Remind the court that the Official Commentary to Evidence Rule 614 says the following: "It is anticipated that the court will exercise its authority to call or interrogate a witness only in extraordinary circumstances"

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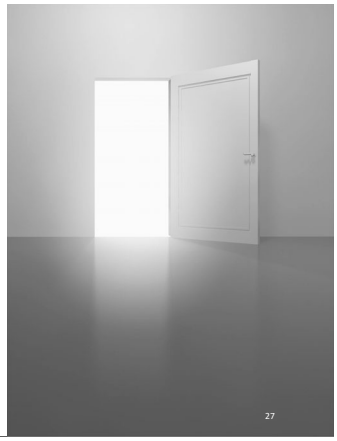
- Object on hearsay grounds to any out-of-court statements the testifying doctor relies describes
- Remind the court that while the doctor can testify about hearsay that informs the doctor's opinion, the court may not rely on hearsay statements to commit the client

DANGER TO SELF OR OTHERS

THE RIGHT TO FREEDOM

Individuals have a "constitutional right to freedom." *O'Connor v. Donaldson*, 422 U.S. 563 (1975)

Respondents are "presumed to be sane and [are] entitled to . . . liberty and [the] right to be free of restraint." *In re E.B.*, 2022-NCCOA-839



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- Prong I: The individual would be unable without help to exercise self-control or satisfy basic needs
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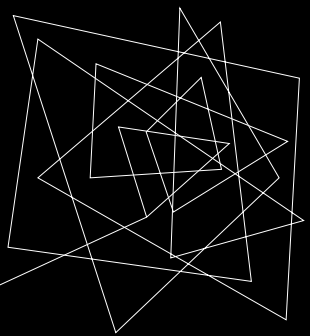
- Holding: "[T]hese findings of fact, while cryptic and bare boned, are sufficient to support" the court's commitment order

DANGER TO OTHERS

- "Despite public perceptions to the contrary, the vast majority of the mentally ill are not violent or are no more violent than the general population and thus, such rigid measures as involuntary commitment are rarely a necessity." *Williamson v. Liptzin*, 141 N.C. App. 1 (2000)

IN RE A.S., 280 N.C. APP. 149 (2021)

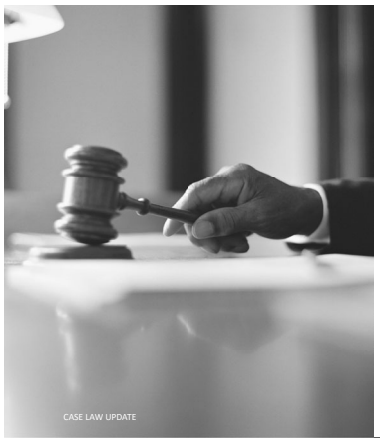
- The procedures under Chapter 122C "must be followed diligently." *In re Barnhill*, 72 N.C. App. 530 (1985)
- IVC procedures must be followed with "care and exactness." *Samons v. Meymandi*, 9 N.C. App. 490 (1970)
- If courts are required to carefully follow the procedures in Chapter 122C, they should also be required to carefully comply with the statutory criteria that govern IVC orders



CONFRONTATION

FUNDAMENTALS

- The respondent's right to confront and cross-examine witnesses "may not be denied." N.C. Gen. Stat. § 122C-268(f)
- "The statute could hardly be more explicit in preserving respondent's right of confrontation." *In re Benton*, 26 N.C. App. 294 (1975)



THE BURDEN OF OBJECTING

"[A] review of the Record reveals Respondent did not object to the admission of Dr. Zarzar's testimony on any basis, including impermissible hearsay. As such, Respondent failed to preserve this issue for appellate review, and the testimony must be considered competent evidence."

In re A.J.D., 283 N.C. App. 1 (2022)

A LONG LINE OF PRECEDENT

- *In re Benton*, 26 N.C. App. 294 (1975)
- *In re Hogan*, 32 N.C. App. 429 (1977)
- *In re Mackie*, 36 N.C. App. 638(1978)
- *In re C.W.F.*, 232 N.C. App. 213 (2014)
- *In re A.S.*, 280 N.C. App. 149 (2021)
- *In re R.S.H.*, 2022-NCSC-131

THE OPPORTUNITY TO OBJECT

"We hold that Respondent has failed to preserve any argument concerning the admissibility of reports relied upon by the trial court and the testifying doctor in this matter, as she failed to object appropriately at the hearing."

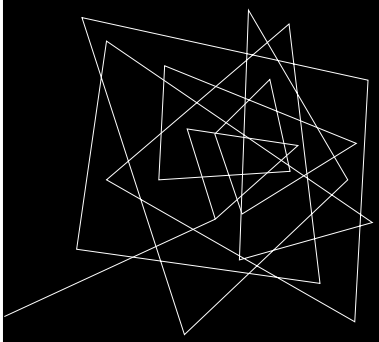
In re R.S.H., 2021-NCCOA-369

IN RE R.S.H., 2022-NCSC-131

"Here the trial court incorporated Dr. Kirk's report after the hearing concluded. Dr. Kirk did not testify at the hearing; the report was not formally offered or admitted into evidence; and the trial court did not inform respondent that it was incorporating the report into its findings of fact. Accordingly, respondent could not cross-examine Dr. Kirk, challenge the findings in the report, or otherwise assert her confrontation right. The trial court thus violated respondent's confrontation right by incorporating Dr. Kirk's report into its findings of fact."

ARE THESE QUESTIONS PROPER?

- Do you believe the respondent would be a danger to self or others if released from this facility?
- Do you believe the respondent would suffer serious physical debilitation without treatment?



EXPERT WITNESSES

LEGAL CONCLUSIONS

- "Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable." *State v. Parker*, 354 N.C. 268 (2001)
- "For example, an expert may not testify regarding specific legal terms of art including whether a defendant deliberated before committing a crime . . . Additionally, a medical expert may not testify as to the 'proximate cause' of a victim's death." *Id*.

EXPERT TESTIMONY

- Evidence Rule 702 permits the testimony of expert witnesses who are qualified by "knowledge, skill, experience, training, or education"
- However, the witness may not give an opinion unless "all of the following" apply

EXPERT TESTIMONY

1) The testimony is based upon sufficient facts or data
2) The testimony is the product of reliable principles and methods
3) The witness has applied the principles and methods reliably to the facts of the case

EXPERT TESTIMONY

- Trial courts "must now perform a more rigorous gatekeeping function when determining the admissibility of opinion testimony by expert witnesses than was the case under the prior version of Rule 702." *State v. Daughtridge*, 248 N.C. App. 707 (2016)

STATE V. MCGRADY, 368 N.C. 880 (2016)

- "In each case, the trial court has discretion in determining how to address the three prongs of the reliability test"
- "Whatever the type of expert testimony, the trial court must assess the reliability of the testimony to ensure that it complies with the three-pronged test in Rule 702(a)(1) to (a)(3)"

IS THE OPINION RELIABLE OR SPECULATION?

- What is the opinion based on?
- Has the respondent suffered serious physical debilitation in the past?
- How would failing to take medication lead to serious physical debilitation in the near future?

PREDICTIONS OF FUTURE DANGER

- "Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous." *Addington v. Texas*, 441 U.S. 418 (1979)
- Mental illness "is not a unitary concept, but varies in degree, can vary over time, and interferes with an individual's functioning at different times in different ways . . . ." *Indiana v. Edwards*, 554 U.S. 164 (2008)

PREDICTIONS OF FUTURE DANGER

- "Manifestations of mental illness may be sudden, and past behavior may not be an adequate predictor of future actions. Prediction of future behavior is complicated as well by the difficulties inherent in diagnosis of mental illness . . . It is thus no surprise that many psychiatric predictions of future violent behavior by the mentally ill are inaccurate." *Heller v. Doe*, 509 U.S. 312 (1993)

THANK YOU

David Andrews

David.W.Andrews@nccourts.org

ncappellatedefender.org/

CASE LAW UPDATE: WHAT'S NEW IN COMMITMENT APPEALS

David Andrews, Assistant Appellate Defender

ROADMAP

Introduction

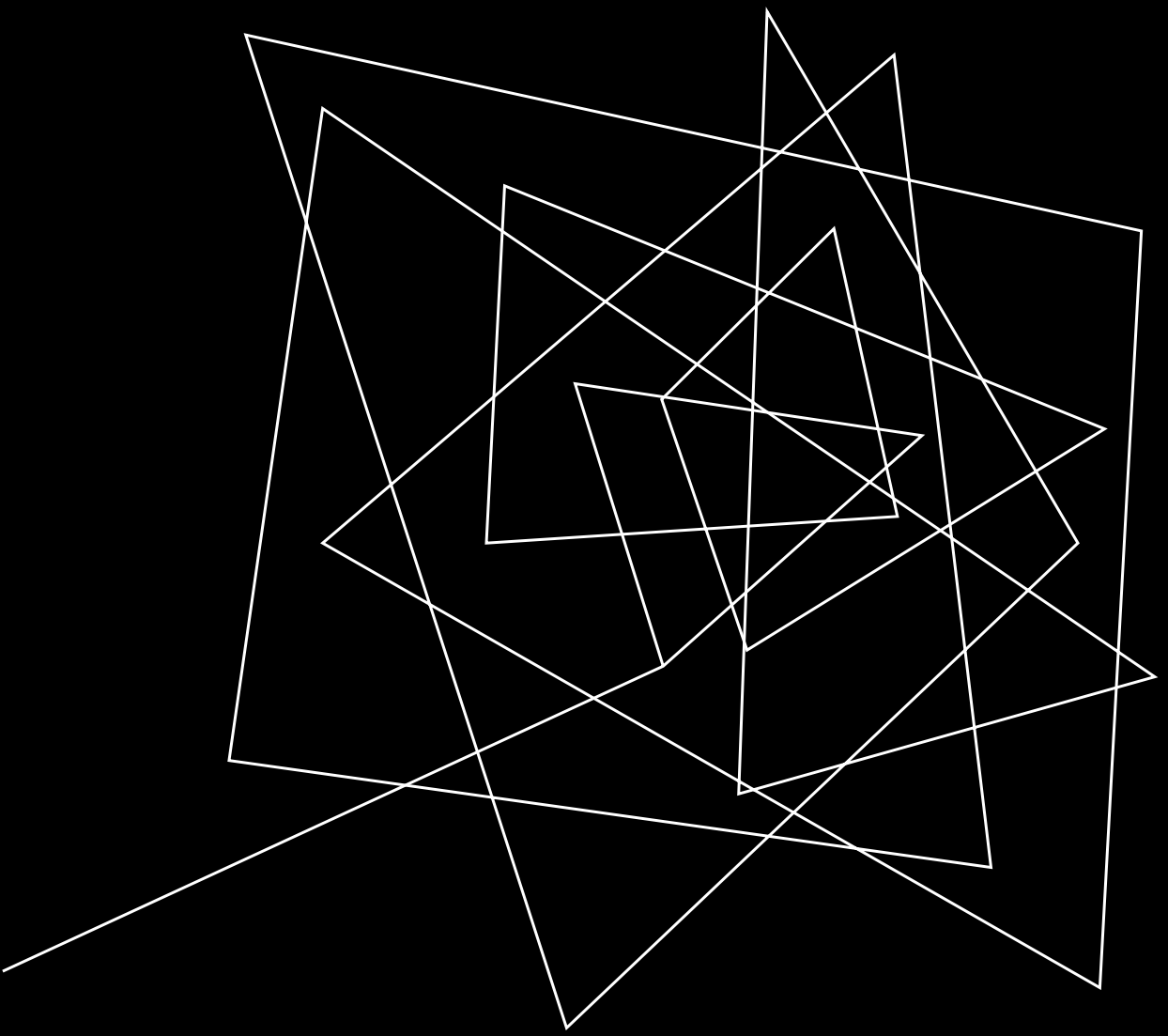
Overview

Due Process

Danger to Self / Others

Confrontation

Expert Witnesses



INTRODUCTION

OFFICE OF THE APPELLATE DEFENDER

- Founded in 1980, formalized as a state office in 1981
- Governed by N.C.G.S. § 7A-498.8: Represent indigent clients in the North Carolina Appellate Division
- Appeals include criminal, capital, juvenile delinquency, involuntary commitment

OFFICE OF THE APPELLATE DEFENDER

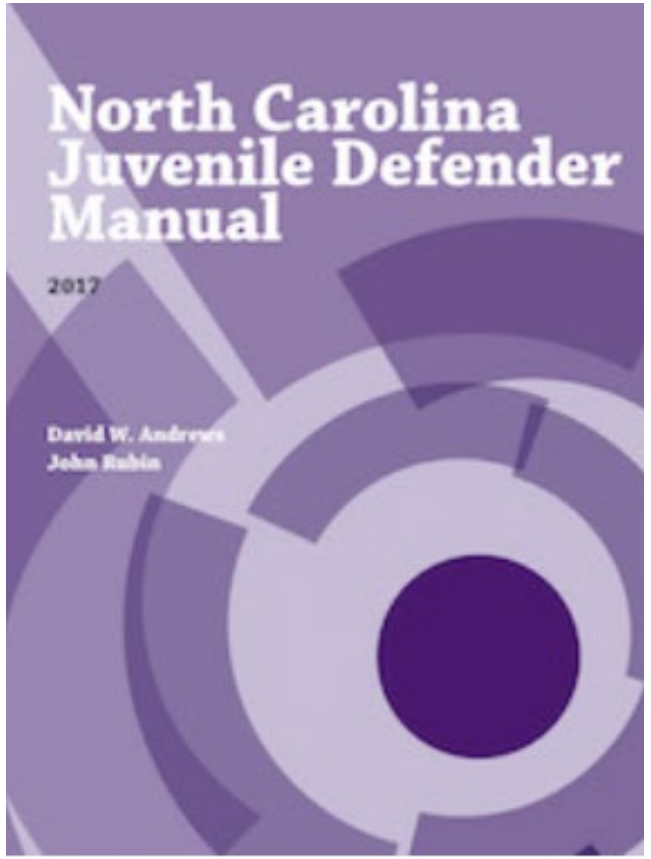
- Notable Alums: James Wynn, Robin Hudson

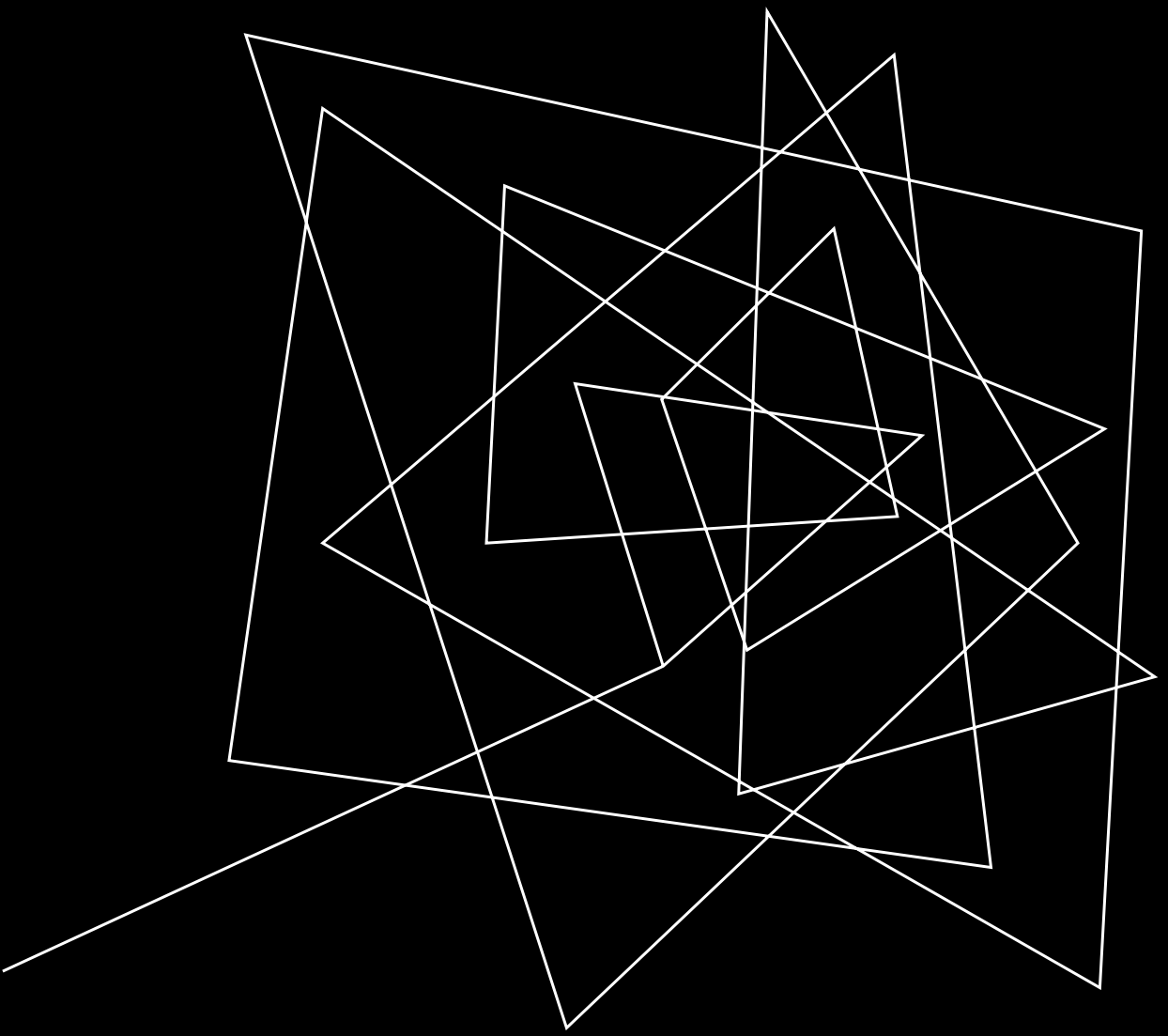
- Notable Cases: *McKoy v. North Carolina*, 494 U.S. 433 (1990); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011)

OAD OFFICE OF THE APPELLATE DEFENDER

MY WORK

- Handle juvenile LWOP, probation, and delinquency appeals
- Co-author of the 2017 edition of the Juvenile Defender Manual
- Started handling IVC appeals in 2008





OVERVIEW

DAILY HEADLINES


The New York Times

New York City to Involuntarily Remove Mentally Ill People From Streets

Mayor Eric Adams directed the police and emergency medical workers to hospitalize people they deemed too mentally ill to care for themselves, even if they posed no threat to others.


NEWS CHANNEL abc 12 NEWS WEATHER HOME OF THE BRAVE CHIME IN STATION

Three NC deputies shot while serving commitment papers, suspect barricaded in home


OPB DEC. 16, 2022

We've updated our privacy policy. Click here to l

In The News | Oregon mental health crisis | PSU food pantry | Latest ruling on gun laws | Whitebark pine on t

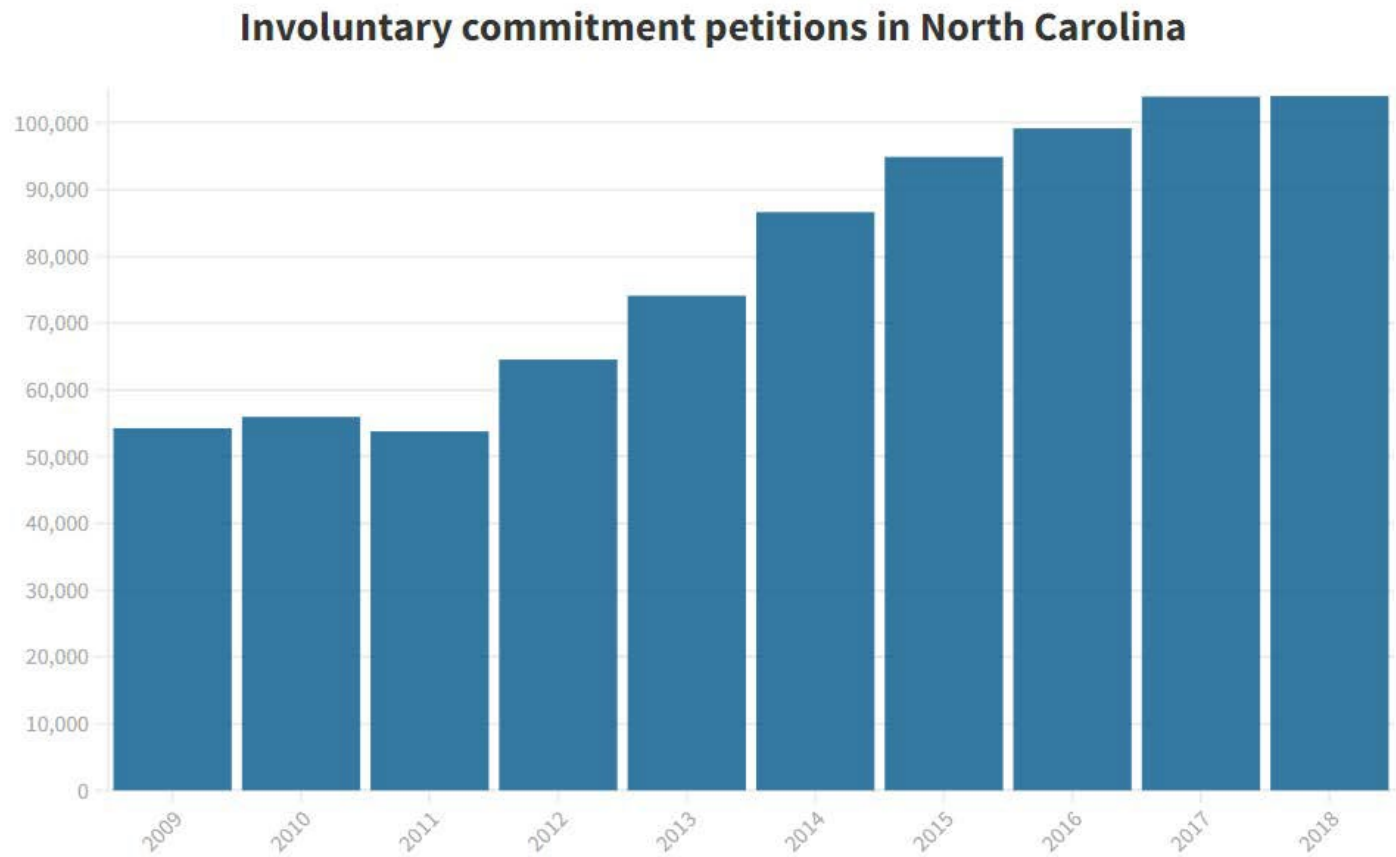
Portland mayor suggests easing process to involuntarily commit people with mental health struggles


WILLAMETTE WEEK NEWS • FOOD • DRINK • MUSIC • ARTS • GET BUSY • PODCAST • SUPPORT US

Mayor Ted Wheeler Wants to Forcibly Commit More People With Mental Illness

But where will he send them?

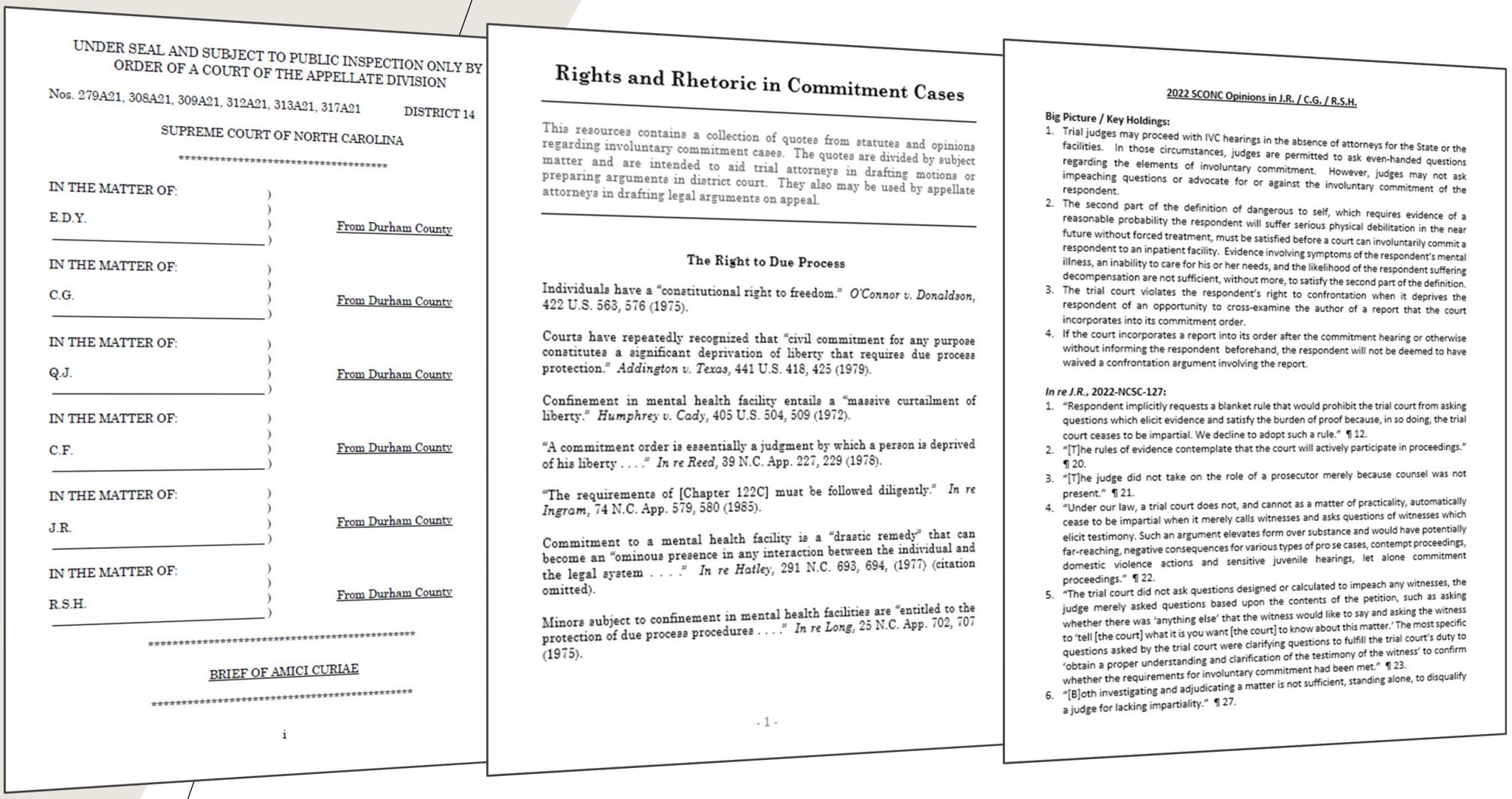
OVERRELIANCE ON IVC



O'CONNOR V. DONALDSON, 422 U.S. 563 (1975)

A State "cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself . . . ."

HANDOUTS



UNDER SEAL AND SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION

Nos. 279A21, 308A21, 309A21, 312A21, 313A21, 317A21 DISTRICT 14

SUPREME COURT OF NORTH CAROLINA

****

IN THE MATTER OF:
E.D.Y. From Durham County

IN THE MATTER OF:
C.G. From Durham County

IN THE MATTER OF:
Q.J. From Durham County

IN THE MATTER OF:
C.F. From Durham County

IN THE MATTER OF:
J.R. From Durham County

IN THE MATTER OF:
R.S.H. From Durham County

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BRIEF OF AMICI CURIAE

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i

Rights and Rhetoric in Commitment Cases

This resources contains a collection of quotes from statutes and opinions regarding involuntary commitment cases. The quotes are divided by subject matter and are intended to aid trial attorneys in drafting motions or preparing arguments in district court. They also may be used by appellate attorneys in drafting legal arguments on appeal.

The Right to Due Process

Individuals have a "constitutional right to freedom." *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

Courts have repeatedly recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979).

Confinement in mental health facility entails a "massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

"A commitment order is essentially a judgment by which a person is deprived of his liberty . . . ." *In re Reed*, 39 N.C. App. 227, 229 (1978).

"The requirements of [Chapter 122C] must be followed diligently." *In re Ingram*, 74 N.C. App. 579, 580 (1985).

Commitment to a mental health facility is a "drastic remedy" that can become an "ominous presence in any interaction between the individual and the legal system . . . ." *In re Hatley*, 291 N.C. 693, 694, (1977) (citation omitted).

Minors subject to confinement in mental health facilities are "entitled to the protection of due process procedures . . . ." *In re Long*, 25 N.C. App. 702, 707 (1975).

- 1 -

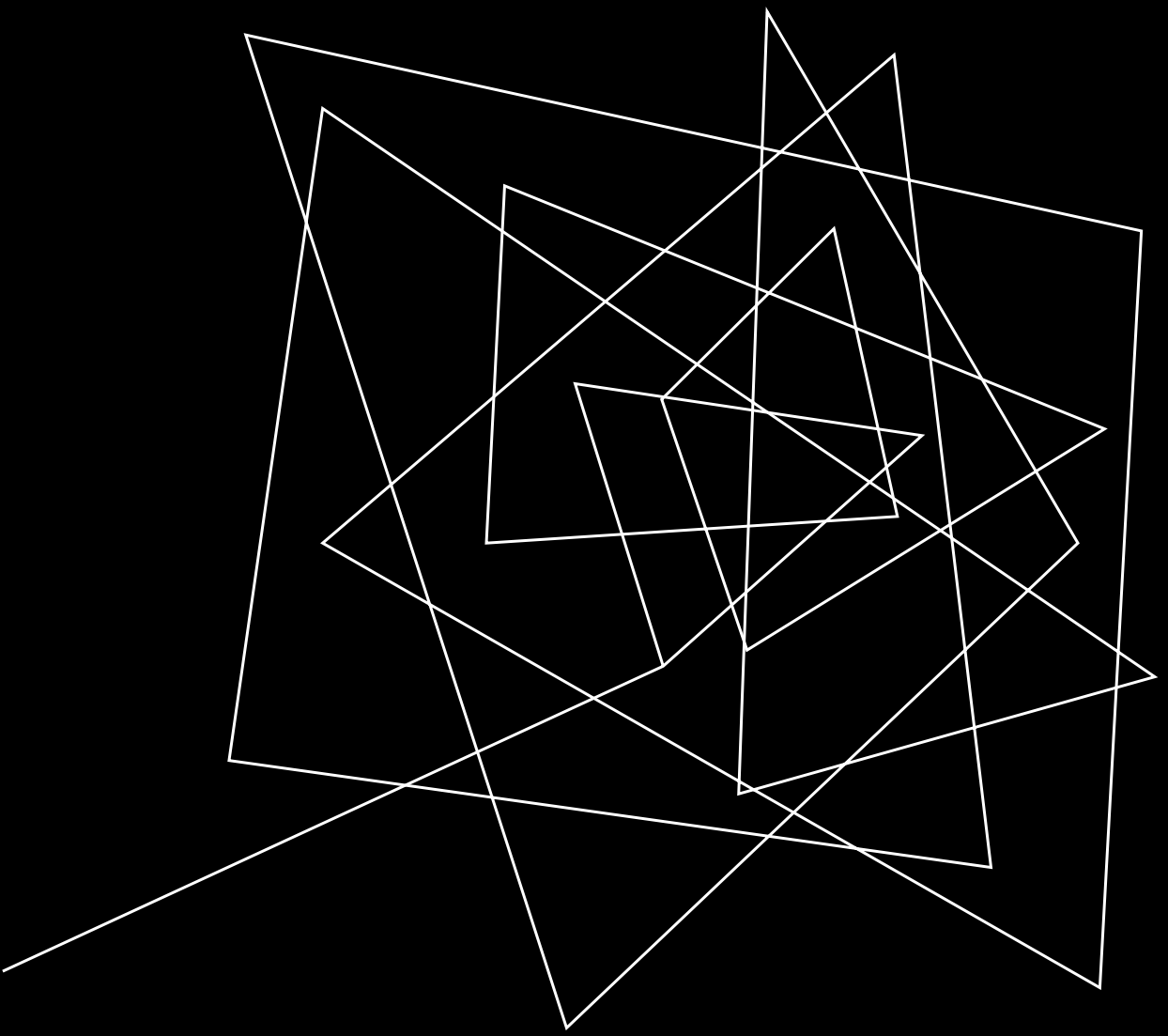
2022 SCONC Opinions in J.R. / C.G. / R.S.H.

Big Picture / Key Holdings:

1. Trial judges may proceed with IVC hearings in the absence of attorneys for the State or the facilities. In those circumstances, judges are permitted to ask even-handed questions regarding the elements of involuntary commitment. However, judges may not ask impeaching questions or advocate for or against the involuntary commitment of the respondent.
2. The second part of the definition of dangerous to self, which requires evidence of a reasonable probability the respondent will suffer serious physical debilitation in the near future without forced treatment, must be satisfied before a court can involuntarily commit a respondent to an inpatient facility. Evidence involving symptoms of the respondent's mental illness, an inability to care for his or her needs, and the likelihood of the respondent suffering decompensation are not sufficient, without more, to satisfy the second part of the definition.
3. The trial court violates the respondent's right to confrontation when it deprives the respondent of an opportunity to cross-examine the author of a report that the court incorporates into its commitment order.
4. If the court incorporates a report into its order after the commitment hearing or otherwise without informing the respondent beforehand, the respondent will not be deemed to have waived a confrontation argument involving the report.

***In re J.R.*, 2022-NCSC-127:**

1. "Respondent implicitly requests a blanket rule that would prohibit the trial court from asking questions which elicit evidence and satisfy the burden of proof because, in so doing, the trial court ceases to be impartial. We decline to adopt such a rule." ¶ 12.
2. "[T]he rules of evidence contemplate that the court will actively participate in proceedings." ¶ 20.
3. "[T]he judge did not take on the role of a prosecutor merely because counsel was not present." ¶ 21.
4. "Under our law, a trial court does not, and cannot as a matter of practicality, automatically cease to be impartial when it merely calls witnesses and asks questions of witnesses which elicit testimony. Such an argument elevates form over substance and would have potentially far-reaching, negative consequences for various types of pro se cases, contempt proceedings, domestic violence actions and sensitive juvenile hearings, let alone commitment proceedings." ¶ 22.
5. "The trial court did not ask questions designed or calculated to impeach any witnesses, the judge merely asked questions based upon the contents of the petition, such as asking whether there was 'anything else' that the witness would like to say and asking the witness to 'tell [the court] what it is you want [the court] to know about this matter.' The most specific questions asked by the trial court were clarifying questions to fulfill the trial court's duty to 'obtain a proper understanding and clarification of the testimony of the witness' to confirm whether the requirements for involuntary commitment had been met." ¶ 23.
6. "[B]oth investigating and adjudicating a matter is not sufficient, standing alone, to disqualify a judge for lacking impartiality." ¶ 27.



DUE PROCESS

FIRST PRINCIPLES

- Due Process requires the state to justify confinement in an involuntary commitment case by clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418 (1979).

- Due Process also requires an inquiry by a "neutral factfinder" before a court may involuntarily commit a respondent to a treatment facility. *Parham v. J.R.*, 442 U.S. 584 (1979)

ONCE UPON A TIME IN DISTRICT COURT

- In 2019, the Durham County District Attorney's Office stopped sending prosecutors to IVC hearings
- This meant that there were no attorneys to prosecute the cases in district court
- Nevertheless, at least one judge continued to hold IVC hearings and commit respondents

ONCE UPON A TIME IN DISTRICT COURT

- A defense attorney began objecting, asserting that the judge's decision to elicit evidence and proceed with IVC hearings violated Due Process

- Some of the respondents appealed. The Office of the Appellate Defender was assigned to represent them

- The first appeal was *In re J.R.*, 2021-NCCOA-366, but several others followed

ONCE UPON A TIME IN DISTRICT COURT

- In July 2021, the Court of Appeals issued opinions denying the Due Process argument
- But there was a catch
- One judge dissented, which gave the respondents the right to seek review in the Supreme Court of North Carolina

ONCE UPON A TIME IN DISTRICT COURT

- The majority in the Court of Appeals held that while IVC cases involve the deprivation of liberty, the proceedings were "inquisitorial" and "not adversarial." *In re C.G.*, 278 N.C. App. 416, 426 n.2 (2021)

- The majority also held that the trial court did not advocate "for or against either petitioner or Respondent." *Id*. at 427

ONCE UPON A TIME IN DISTRICT COURT

- The respondents appealed (there were six in all)
- Two of them sought discretionary review on other arguments
- The Supreme Court granted discretionary review of the two additional issues

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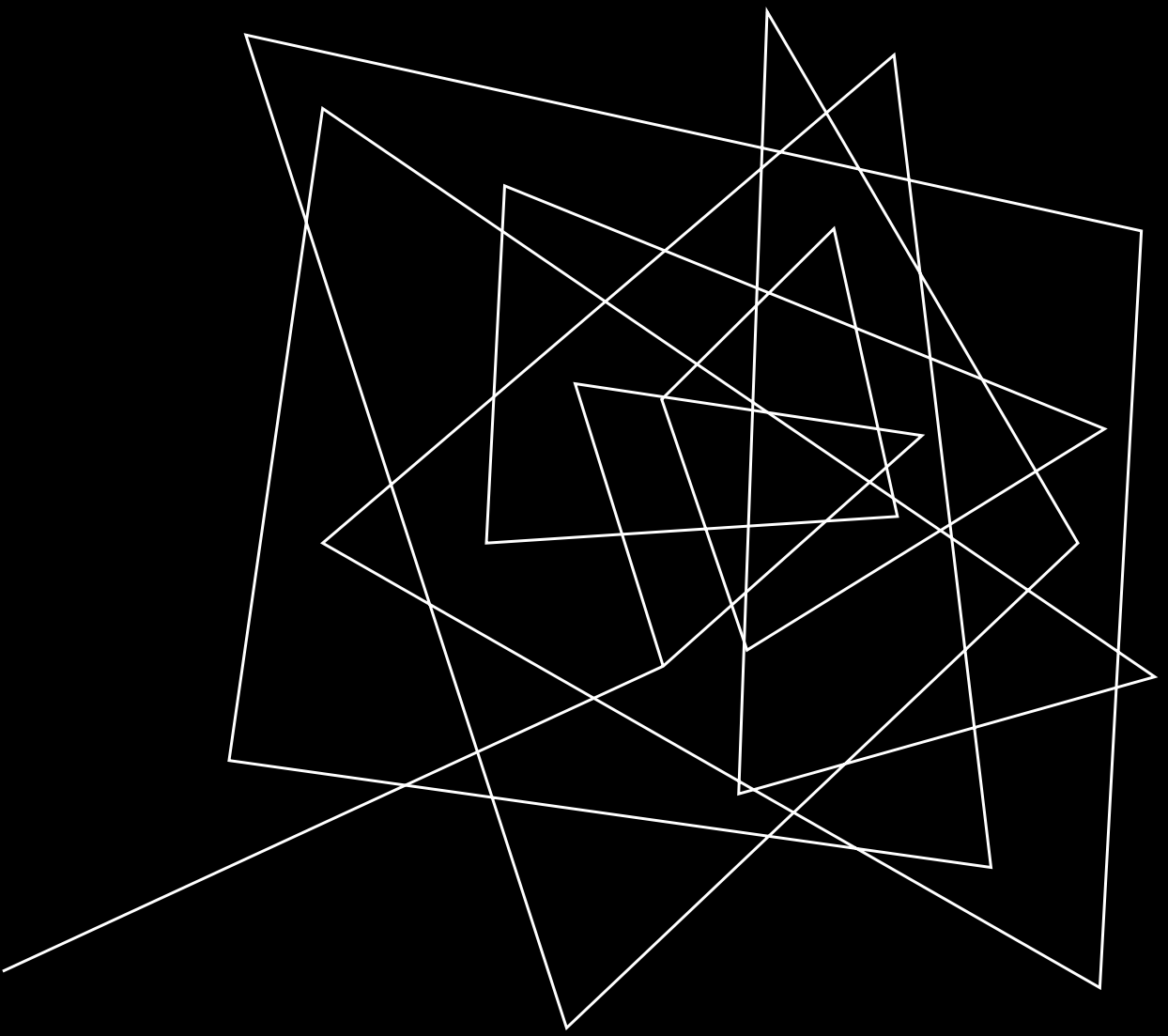

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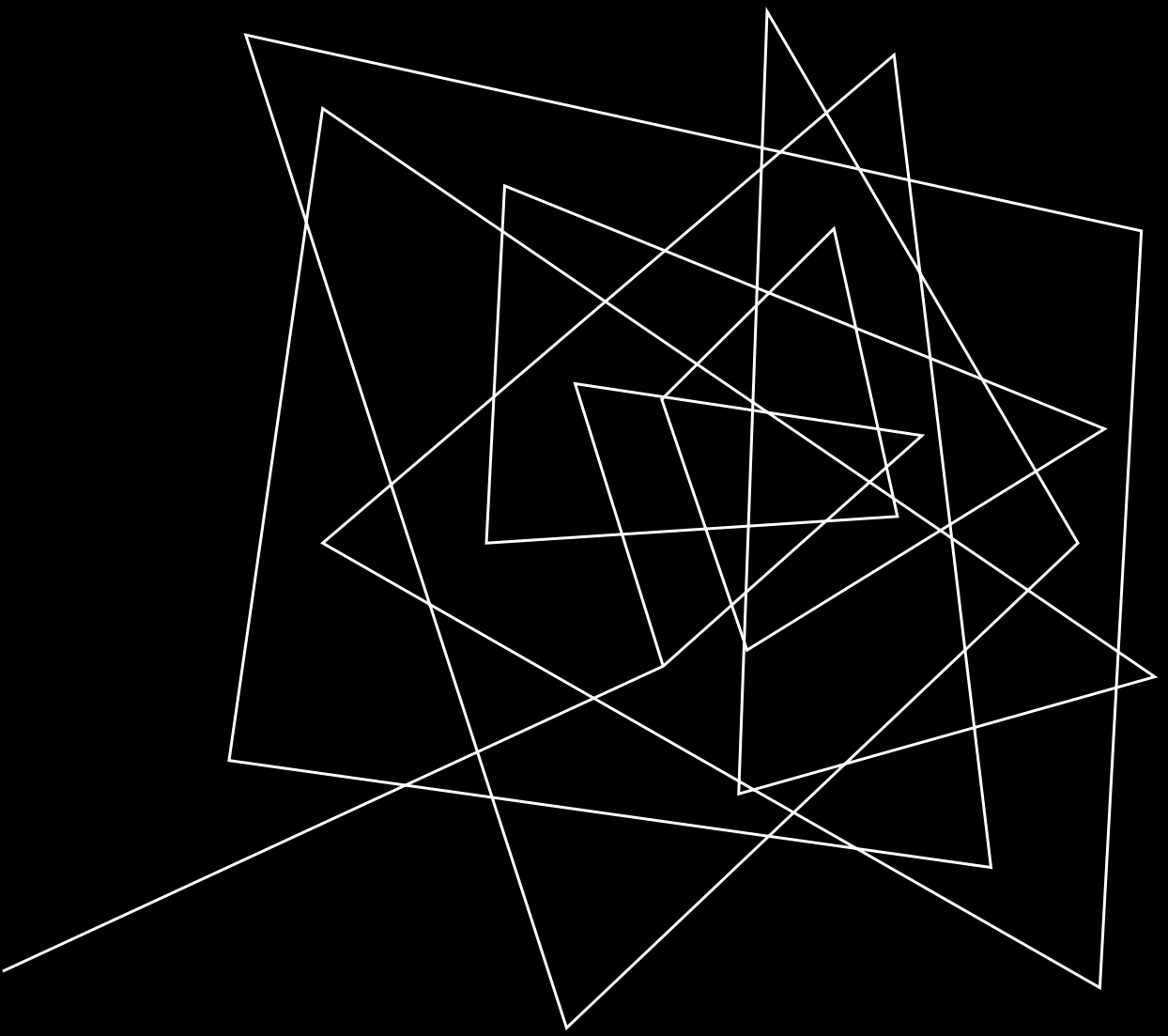
- The procedures under Chapter 122C "must be followed diligently." *In re Barnhill*, 72 N.C. App. 530 (1985)
- IVC procedures must be followed with "care and exactness." *Samons v. Meymandi*, 9 N.C. App. 490 (1970)
- If courts are required to carefully follow the procedures in Chapter 122C, they should also be required to carefully comply with the statutory criteria that govern IVC orders

DANGER TO OTHERS

- “Despite public perceptions to the contrary, the vast majority of the mentally ill are not violent or are no more violent than the general population and thus, such rigid measures as involuntary commitment are rarely a necessity.” *Williamson v. Liptzin*, 141 N.C. App. 1 (2000)



CONFRONTATION

FUNDAMENTALS

- The respondent's right to confront and cross-examine witnesses "may not be denied." N.C. Gen. Stat. § 122C-268(f)

- "The statute could hardly be more explicit in preserving respondent's right of confrontation." *In re Benton*, 26 N.C. App. 294 (1975)

A LONG LINE OF PRECEDENT

- *In re Benton*, 26 N.C. App. 294 (1975)
- *In re Hogan*, 32 N.C. App. 429 (1977)
- *In re Mackie*, 36 N.C. App. 638(1978)
- *In re C.W.F.*, 232 N.C. App. 213 (2014)
- *In re A.S.*, 280 N.C. App. 149 (2021)
- *In re R.S.H.*, 2022-NCSC-131

THE BURDEN OF OBJECTING

"[A] review of the Record reveals Respondent did not object to the admission of Dr. Zarzar's testimony on any basis, including impermissible hearsay. As such, Respondent failed to preserve this issue for appellate review, and the testimony must be considered competent evidence."

In re A.J.D., 283 N.C. App. 1 (2022)

THE OPPORTUNITY TO OBJECT

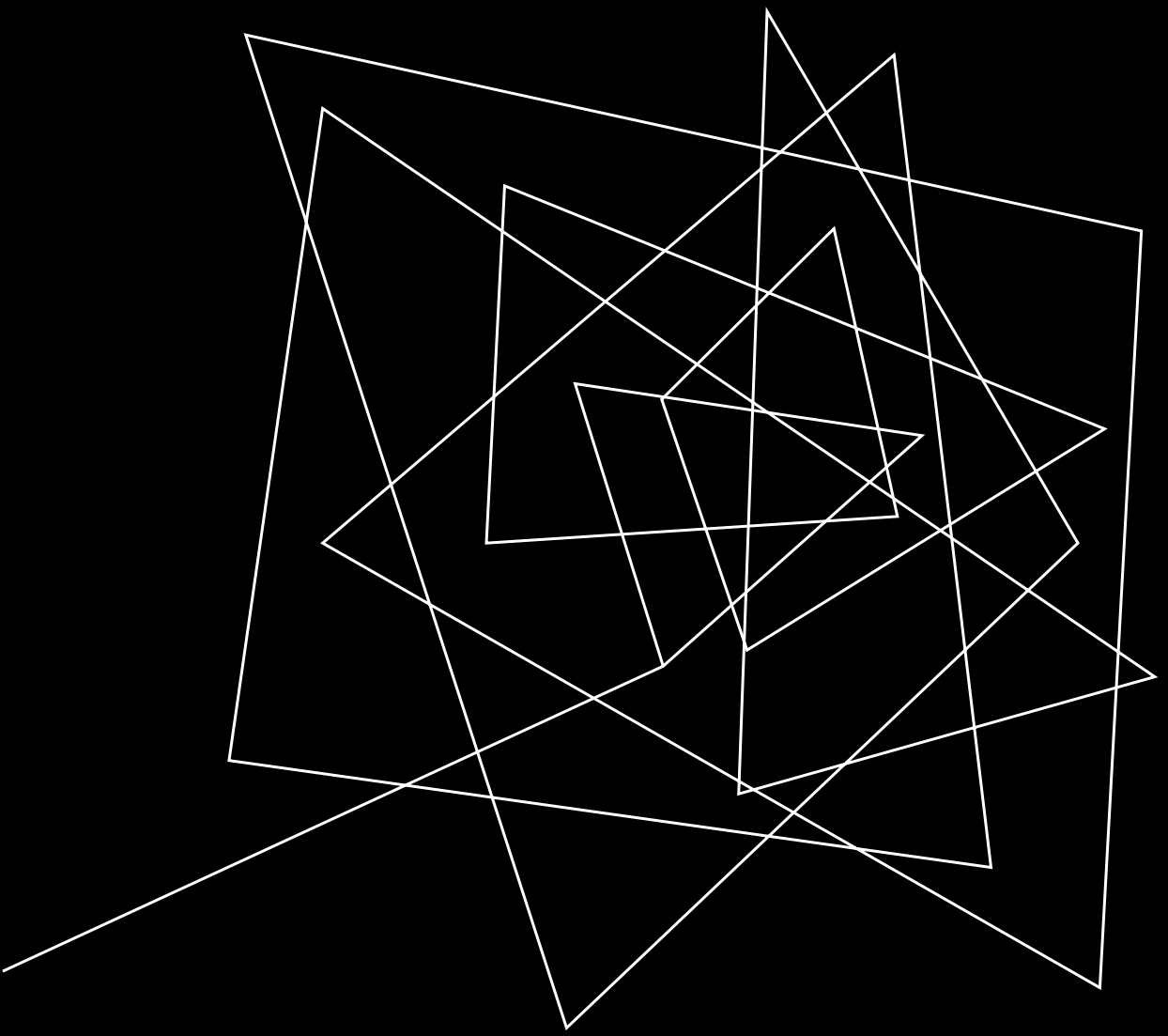
44

"We hold that Respondent has failed to preserve any argument concerning the admissibility of reports relied upon by the trial court and the testifying doctor in this matter, as she failed to object appropriately at the hearing."

In re R.S.H., 2021-NCCOA-369

IN RE R.S.H., 2022-NCSC-131

"Here the trial court incorporated Dr. Kirk's report after the hearing concluded. Dr. Kirk did not testify at the hearing; the report was not formally offered or admitted into evidence; and the trial court did not inform respondent that it was incorporating the report into its findings of fact. Accordingly, respondent could not cross-examine Dr. Kirk, challenge the findings in the report, or otherwise assert her confrontation right. The trial court thus violated respondent's confrontation right by incorporating Dr. Kirk's report into its findings of fact."



EXPERT WITNESSES

ARE THESE QUESTIONS PROPER?

- Do you believe the respondent would be a danger to self or others if released from this facility?
- Do you believe the respondent would suffer serious physical debilitation without treatment?

LEGAL CONCLUSIONS

- "Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable." *State v. Parker*, 354 N.C. 268 (2001)

- "For example, an expert may not testify regarding specific legal terms of art including whether a defendant deliberated before committing a crime . . . Additionally, a medical expert may not testify as to the 'proximate cause' of a victim's death." *Id*.

EXPERT TESTIMONY

- Evidence Rule 702 permits the testimony of expert witnesses who are qualified by “knowledge, skill, experience, training, or education”

- However, the witness may not give an opinion unless “all of the following” apply

EXPERT TESTIMONY

1) The testimony is based upon sufficient facts or data

2) The testimony is the product of reliable principles and methods

3) The witness has applied the principles and methods reliably to the facts of the case

EXPERT TESTIMONY

- Trial courts “must now perform a more rigorous gatekeeping function when determining the admissibility of opinion testimony by expert witnesses than was the case under the prior version of Rule 702.” *State v. Daughtridge*, 248 N.C. App. 707 (2016)

STATE V. MCGRADY, 368 N.C. 880 (2016)

- "In each case, the trial court has discretion in determining how to address the three prongs of the reliability test"

- "Whatever the type of expert testimony, the trial court must assess the reliability of the testimony to ensure that it complies with the three-pronged test in Rule 702(a)(1) to (a)(3)"

IS THE OPINION RELIABLE OR SPECULATION?

- What is the opinion based on?
- Has the respondent suffered serious physical debilitation in the past?
- How would failing to take medication lead to serious physical debilitation in the near future?

PREDICTIONS OF FUTURE DANGER

- “Manifestations of mental illness may be sudden, and past behavior may not be an adequate predictor of future actions. Prediction of future behavior is complicated as well by the difficulties inherent in diagnosis of mental illness . . . It is thus no surprise that many psychiatric predictions of future violent behavior by the mentally ill are inaccurate.” *Heller v. Doe*, 509 U.S. 312 (1993)

PREDICTIONS OF FUTURE DANGER

- "Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous." *Addington v. Texas*, 441 U.S. 418 (1979)

- Mental illness "is not a unitary concept, but varies in degree, can vary over time, and interferes with an individual's functioning at different times in different ways . . . ." *Indiana v. Edwards*, 554 U.S. 164 (2008)

THANK YOU

David Andrews

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Children in DSS Custody Who Need Treatment in a PRTF: There's a Disconnect

I recently finished a 2-day course for district court judges that focused on children with significant mental health needs. There were lots of questions about the admission and discharge process for a child who is in a county department's (DSS) custody and who needs treatment in a psychiatric residential treatment facility (PRTF). It's complicated because there are **two separate but simultaneously occurring court actions:**

1. the abuse, neglect, or dependency (A/N/D) action that addresses a child's custody, placement, and services; and
2. the judicial review of a child's voluntary admission to a secure psychiatric treatment facility that was made with the consent of the child's legally responsible person.

The two actions involve different parties, courts, purposes, and laws, and they are often not coordinated even though they directly impact each other.

Placement in a PRTF

North Carolina requires a judicial review when a child is admitted to a 24-hour mental health or substance abuse facility that has the same or similar restrictions on the child's freedom of movement as a state-operated psychiatric hospital. G.S. 122C-224. A "24-hour facility" provides a structured living environment and services to a patient for at least 24 consecutive hours and includes state psychiatric hospitals, public or private facilities providing acute inpatient care, and PRTFs. G.S. 122C-3(14)g. PRTFs provide treatment to children who are mentally ill or substance abusers in need of care in a non-acute inpatient setting and whose removal from home or a community based residential setting is essential for treatment. 10A NCAC 27G.1901. Round the clock supervision and therapeutic interventions are provided with the goal of facilitating the child's transition to a less intensive and structured community setting. *Id.* For children insured by Medicaid, **prior approval** that the child's treatment in a PRTF is **medically necessary** must be obtained from the local management entity/managed care organization (**LME/MCO**). NC Div. of Medical Assistance, PRTF, Clinical Coverage Policy 8-D-1, 5.0; *see* G.S. 122C-3(20c).

When a child needs treatment in a PRTF, the placement is made by the child's **legally responsible person:** a parent, guardian, person standing in loco parentis, or legal custodian other than a parent who is specifically authorized by law or a court order to consent to medical care, including psychiatric treatment. G.S. 122C-3(20)(ii); -221(a).

The Role of the A/N/D Court and DSS in a Child's Admission

When a child has been adjudicated abused, neglected, or dependent, DSS recommends a

treatment plan that addresses the child's needs. G.S. 7B-808(b). The court may order that the child receive a mental health evaluation by a qualified professional. G.S. 7B-903(d). When the court finds the child is mentally ill, it may order DSS to coordinate with the LME/MCO to develop the child's treatment plan. G.S. 7B-903(e). The court does not have authority to order the child's placement in a PRTF. *See* G.S. 7B-903(a), (e). If the child needs treatment in a 24-hour facility, the admission must be made by the child's legally responsible person. When the court orders a child into DSS custody, DSS is the child's legally responsible person if the court also authorizes DSS to consent to the child's mental health care or treatment pursuant to G.S. 7B-505.1(c). *See* G.S. 7B-903.1(e). Otherwise, the child's parent, guardian, or person acting in loco parentis is the child's legally responsible person for admission purposes. G.S. 122C-3(20)(ii).

Judicial Review of a Voluntary Admission

Although a child's admission to a PRTF is voluntarily made with the consent of the minor's legally responsible person, NC law requires judicial review of the minor's "voluntary admission." G.S. 122C, Article 5, Part 2. The purpose of the judicial review is to protect the child's liberty interest by ensuring that the child is not improperly admitted or improperly remains in the facility. G.S. 122-221(b); *In re* A.N.B., 232 N.C. App. 406 (2014).

The judicial review is heard by the **district court in the county where the facility is located**. G.S. 122C-224(a). If the PRTF is in a different county from where the A/N/D case is pending, a different court will conduct the judicial review.

The judicial review **process begins within 24 hours** of when the child is admitted to the PRTF when the facility notifies the clerk of court of the child's admission and need for a hearing. G.S. 122C-224(c). The facility also notifies the clerk of the names and addresses of the child's legally responsible person and responsible professional (the person in the facility who is designated to be responsible for and is qualified to provide the child's care and treatment). *Id*.; G.S. 122C-3(32).

Within 48 hours of receiving the notice from the facility, the clerk must **appoint an attorney for the child,** who is presumed indigent. G.S. 122C-224.1(a); AOC-SP-912M. This attorney is not the GAL/attorney advocate appointed to represent the child in the A/N/D proceeding. *See* G.S. 7B-601. This newly appointed attorney represents the child in the judicial review proceeding and continues to represent the child until the judge relieves him or her of the appointment. G.S. 122C-224.2(c). The attorney meets with the child within 10 days of the appointment and at least 48 hours before the hearing. G.S. 122C-224.2(a).

The **hearing must be held within 15 days** of the child's admission to the facility. G.S. 122C-224(a), -224.1(b). At least 72 hours before the hearing, **notice of the hearing** is sent to the child's attorney, the child's legally responsible person, and the responsible professional. G.S. 122C-224.1(b). The hearing is closed to the public unless the child's attorney requests otherwise. G.S. 122C-224.3(d). The hearing is **held at the facility** unless the judge determines the

court calendar will be disrupted by holding the hearing there. G.S. 122C-224.3(a). In that case, the hearing may be held in a different location, such as the judge's chambers, but it should not be conducted in a courtroom if the child's attorney objects and there is a more suitable place available. *Id*. The child has a right to be present at the hearing and to testify, but he or she may waive that right or limit his or her appearance to when testifying. G.S. 122C-224.2(b), -224.3(b). Certified copies of medical records, including a psychologist's or other professional's findings and reports, are admissible in evidence so long as the child's right to confront and cross-examine witnesses is not denied. G.S. 122C-224.3(c); *In re* C.W.F., 232 N.C. App. 213 (2014).

It is unclear if a legally responsible person who receives notice of the hearing is a **party** to the proceeding. *In re* M.B., 771 S.E.2d 615 (2015). Unlike the Juvenile Code, which explicitly states that a person who has a right to notice and to be heard in certain A/N/D hearings is not a party, the statutes authorizing the judicial review of a voluntary admission are silent about the legally responsible person's role in the judicial review. *Compare* G.S. 7B-906.1(b), -908(b)(1), -1112.1 *to* 122C-224.1(b). Because a judicial review hearing is a civil proceeding, the court may look to the Rules of Civil Procedure to determine if a party should be joined or allowed to intervene if a motion is filed. *See* G.S. 1A-1, Rules 19, 20, 24; *In re* A.N.B.

The Order

There are **three possible dispositional orders.**

1. The court **concurs** in the child's continued admission and **authorizes a treatment period for up to 90 days** if the court finds by **clear, cogent, and convincing evidence**
    - the child is mentally ill or a substance abuser,
    - the child is in need of further treatment at the 24-hour facility, and
    - less restrictive measures will be insufficient. When the court is determining if less restrictive measures will be insufficient, it may look at whether those lesser measures are actually available (e.g., is there an available bed in a less restrictive facility). G.S. 122C-2; *In re* M.B.

2. The court orders a **one-time 15-day additional stay** when the court believes there are reasonable grounds to believe the child is mentally ill or a substance abuser and is in need of treatment at the facility but additional diagnoses and evaluations are needed for the court to make a determination, or

3. The court orders the **child's release**.

G.S. 122C-224.3(f), (g); AOC-SP-913M.

Additional Judicial Reviews

If the court concurs and orders continued admission for up to 90 days, the child is entitled to another judicial review before that additional treatment period ends. G.S. 122C-224.4(b). At subsequent judicial reviews, the court may order the **child's release or continued admission for up to 180 days**. *Id.* Judicial reviews will be held prior to the expiration of each subsequently authorized admission period when the responsible professional recommends a continued stay. G.S. 122C-224.4(b), (c). The responsible professional notifies the clerk at least 15 days before the admission period expires that an additional stay is recommended. G.S. 122C-224.4(c).

Discharge

Discharge planning to a less restrictive treatment setting starts at the child's admission and is part of a child's treatment plan. 10A NCAC 27G.1903(c). Legally responsible persons (e.g., parent or DSS social worker) and/or family members must be involved in the development and implementation of the child's treatment plans. 10A NCAC 27G.1903(e). Before a child is discharged, the facility should meet with the child and family team, including the DSS social worker, and make service planning decisions. 10A NCAC 27G.1904.

A child is discharged when

- the court orders the child's release,
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- the child turns 18 and does not consent to the treatment.

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The A/N/D court does not hear the judicial review of a child's voluntary admission and will not be aware of what was decided at that judicial review unless evidence of what was ordered is introduced in the A/N/D proceeding. If the A/N/D court wants to timely coordinate its hearings with the judicial review of the child's voluntary admission or with the child's discharge, it may consider ordering

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- the legally responsible person make efforts to obtain the permission of the court deciding the voluntary admission to release information from that court file, such as the court order,

for the purpose of admitting a copy in the A/N/D proceeding. *See* G.S. 122C-54(d).

- DSS to participate in the child's treatment and discharge planning and to work with the PRTF to make timely efforts to secure a child's post-discharge placement. *See In re* M.B.
- the legally responsible person notify the clerk of a need for a review hearing if that person files a written request with the PRTF for the child's discharge.

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- the legally responsible person notify the clerk of a need for a review hearing if that person files a written request with the PRTF for the child's discharge.

Juveniles in DSS Custody Presenting at Hospital ED for Mental Health Treatment: New Laws and New Court Hearing Possible

Perhaps it is not surprising that juveniles who experience abuse, neglect, or dependency have a higher risk of suffering from mental health issues. These children have experienced trauma, and when they are removed from their homes and families, they further experience loss, separation, and disruption. **The National Conference of State Legislatures reports that "[u[p to** 80 percent **of children in foster care have significant mental health issues, compared to approximately** 18-22 percent **of the general population."* According to the American Academy of Pediatrics, "[m]ental and behavioral health is the largest unmet health need for children and teens in foster care."****

Some North Carolina laws set forth in the Juvenile Code address the issue of children in DSS custody who experience mental health issues. For example, G.S. 7B-505.1(c) addresses the need for DSS to obtain a court order to consent to non-routine and non-emergency medical treatment for a juvenile in its custody – such treatment includes mental health treatment requiring informed consent. And, G.S. 7B-903(d) authorizes the court to order a juvenile to receive a psychological or other necessary examination to determine the juvenile's needs. Other laws, such as those in G.S. Chapter 122C, address mental health treatment generally and include provisions specific to juveniles. **Laws specifically addressing treatment and the coordination of services between a DSS with a juvenile in its custody and managed care organization (MCO) or prepaid health plans (PHP) were lacking, until the enactment of S.L. 2021-132.**

This post focuses on two new laws that were included in S.L. 2021-132 that specifically address situations where a juvenile who is in DSS custody presents to a hospital emergency department for mental health treatment. **Effective October 1, 2021**, a new statute in G.S. Chapter 122C was enacted to address care coordination for the juvenile by DSS, the LME/MCO or prepaid health plan (PHP), the hospital, and the North Carolina Department of Human Services (DHHS): **G.S. 122C-142.2. Effective January 1, 2022**, a new statute in the Juvenile Code, **G.S. 7B-903.2**, was enacted to authorize an emergency motion and hearing to address compliance with the requirements of G.S. 122C-142.2.

Juvenile presenting at hospital for mental health treatment. When a juvenile who is in DSS custody presents to a hospital emergency department for mental health treatment and it is determined that the juvenile should not remain at the hospital and there is no immediately available appropriate placement for the juvenile, the DSS director must contact the appropriate LME/MCO or PHP within twenty-four hours of that determination. The director requests an assessment of the juvenile. G.S. 122C-142.2(b). Within five business days of the director's request, the LME/MCO or PHP must, when applicable or required by their contract with DHHS, arrange for an assessment of the juvenile by the juvenile's clinical home provider, the hospital (if able or willing), or another

qualified clinician. G.S. 122C-142.2(c). Depending on the level of care recommended by the assessment, DSS and the LME/MCO or PHP must act as provided for in the following table. G.S. 122C-142.2(d).

Recommendation	DSS	LME/MCO or PHP

IVC Trial Advocacy

Jason Lunsford
Office of Special Counsel

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What Necessitates Commitment

- Mental Illness – DSM V
- Dangerousness – 122C-3(11)
  - Danger to Self (this is generally very broad)
  - Danger to Others
  - Or Both
  - Plus "The future element"
    - "Although the trial court need not say the magic words 'reasonable probability of future harm,' it must draw a nexus between past conduct and future danger." In re J.P.S., 264 N.C. App. 58 (2019).

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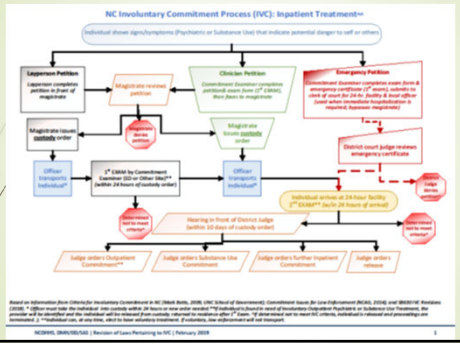
IVC Process



DHHS Flow Chart (2019) https://www.ncdhhs.gov/media/8756/open

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Initial Process and Concerns

- With all IVC patients, it is their right to go to court and challenge for their release.
- An attorney may, however, chose not to go to court if the patient clearly does not understand and needs continued treatment.
- Patients control the decision making in all other circumstances

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Initial Process and Concerns Cont.

- Seeking voluntary care for mental health
- Seeking care voluntarily for seemingly unrelated issues
- Police, Family, Friends.
- An Emergency Certificate

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Danger to Self Defined

- 122C-3

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Danger to Others Defined

- 122C-3

7

Break Down of Procedure

- **Affidavit/ Petition**
- **Custody Order**
- **Initial Qualified Physician's Exam (QPE)**
- **Transport to 24hr Facility**
- **Second QPE within 24hrs**
- **Commitment rights attach**
  - Attorney is appointed (Office of Special Counsel)
  - Right to a court hearing within 10 days

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Affidavit/Petition- AOC-SP-300


STATE OF NORTH CAROLINA

County

IN THE MATTER OF

AFFIDAVIT AND PETITION FOR INVOLUNTARY COMMITMENT

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Affidavit and Petition

- **122C-261 – Affidavit and petition before clerk or magistrate when immediate hospitalization is not necessary; custody order.**
  - A (a) "Anyone who has knowledge of an individual who is mentally ill and either (i) **dangerous to self**, as defined in Gen. Stat. 122C-3(aa)a.,
  - or **dangerous to others** as defined in Gen. Stat. 122C-3(11)b.,
  - or . . . to prevent further disability or deterioration . . .
  - **and execute an affidavit**, and petition the clerk or magistrate for
  - **issuance of an order to take the respondent into custody for examination** . . . .
  - The affidavit shall include the facts . . . .

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Initial Attack – Affidavit for Custody

- **N.C. Gen. Stat. 122C-261 – Affidavit and Petition Before Clerk or Magistrate When Immediate Hospitalization is not Necessary, Custody Order**
  - This is a long statute but the focus is on the "facts" contained in the affidavit presented before the magistrate and not on "conclusions."

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In re Reed, 39 N.C. App. 227 (1978)

- "The affidavit shall include the facts on which the affiant's opinion is based." *Id.* at 228.
- Here, the affidavit provided only conclusions.

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In re Ingram, 74 N.C. App. 579 (1985)

- If the affidavit is insufficient, so too is the custody order that relied on the affidavit and you never reach the actual findings.

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Affidavit and Petition Cont.

- **122C-261 – Affidavit and petition before clerk or magistrate when immediate hospitalization is not necessary; custody order.**
  - B (d) "If the affiant is a physician or eligible psychologist, . . .
    - (4) the clerk or magistrate **shall issue an order for transportation to or custody at a 24-hour facility**
    - provided **that if a 24-hour facility is not immediately available or appropriate** to the respondent's medical condition,
    - **the respondent may be temporarily detained** under appropriate supervision and, upon further examination,
    - [Respondent could be] released in accordance with Gen. Stat. 122C-263(d)(2).
  - Practice Note: Pay attention to the initial hospital and for how long the patient was there.

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Improper Paperwork and Evaluations

Paperwork must indicate the time and reason for requesting the order.

The hospital must still transfer the patient to a 24 hour facility.

- The ER does not constitute a 24 hour facility.
- The 24hr facility must perform the second evaluation within 24 hours.
- Exception is if it is the same facility

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7 Day Limit After First Evaluation

- **N.C. Gen. Stat. 122C-263(d)(2)**
  - "If the respondent is temporarily detained **and a 24-hour facility is not available** or medically appropriate
  - **seven days after the issuance of the custody order**,
  - The proceedings shall be terminated.
  - New IVC paperwork may still be initiated

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Breaking down the 7-day Rule

- It is specific to that petition and order and those proceedings are terminated.
- The ER physician may initiate new proceedings prior to expiration of the first 7-day period as long as Respondent continues to meet criteria.
- Prior Affidavits cannot be used as a basis for future commitment
- Physicians must rely on new information and not prior information when petitioning under new paperwork

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Evaluation Procedure (1st Eval)

- **122C-263 – Duties of law-enforcement officer, first examination by physician or eligible psychologist.**
  - A. (c) "The physician or eligible psychologist . . . shall examine . . . the respondent within 24 hours after the respondent is presented for examination."
  - Initial assessment:
    - (1) Current and previous mental illness, IDD, and/or previous treatment history
    - (2) Dangerousness to self, others or both
    - (3) Ability to survive safely without availability of supervision from family, friends or others; and
    - (4) Capacity to make informed treatment/medication decisions

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DHHS Form – QPE Example

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Evaluation Procedure (1st Eval) Cont.

- **122C-263 – Duties of law-enforcement officer, first examination by physician or eligible psychologist.**
- This subsection opens the door for some challenges to be made in that the doctor must note the nature and reason for the involuntary commitment.

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In re Woodie

- Failure to check a box by itself is not sufficient so long as there is additional supporting evidence/testimony from the doctor.

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Findings and Custody Order

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Findings and Custody Order Clinician

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Evaluation Procedure (2nd Eval)

- **122C-266 – Inpatient commitment; second examination and treatment pending hearing.**
  - within 24 hours of arrival at a 24-hour facility
  - the respondent shall be examined by a physician.
  - This physician **shall not be the same physician** who completed the certificate or examination (1st QPE)

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DHHS Form – 2nd QPE 24hr Facility

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Evaluation Procedure (2nd Eval) Exception

- (e) "If the 24-hour facility described in Gen. Stat. 122C-252 or Gen. Stat. 122C-262 is the facility in which the first examination by a physician or eligible psychologist occurred and is the same facility in which the respondent is held, the second examination shall occur not later than the following regular working day."

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122C-268(j)

- **§ 122C-268. Inpatient commitment; district court hearing.**
- (j) To support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is
- mentally ill and
- dangerous to self, or
- dangerous to others
- The court shall record the facts that support its findings.

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Court Hearings

- The Petitioner has the burden of proof and thus presents first. Generally, the hospital will send a doctor that is familiar with Respondent.
- Respondent may choose to testify on his/her own behalf or to call any witnesses.
- Challenges should be made to Petitioner's expert for preservation of the record.
- A motion to dismiss should also be made at the end of Petitioner's evidence and at the end of all evidence for purposes of appeal.

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Expert Witnesses

- All doctors must meet the requirements under the *Daubert* Standard and Rule 702. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
- NC Rule 702
  - (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
    - (1) The testimony is based upon sufficient facts or data.
    - (2) The testimony is the product of reliable principles and methods.
    - (3) The witness has applied the principles and methods reliably to the facts of the case.

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NC Incorporates the *Daubert* Test

- *State v. McGrady*, 368 N.C. 880 (2016), establishes that qualification of experts in NC aligns with the federal rules and incorporates the standard from *Daubert*.
- Expert testimony is required for IVC.
- What steps should you take once the State has moved to tender a doctor as an expert?
  - Move for voir dire

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Court Hearings and Hearsay

- The Petitioner is allowed to present [c]ertified copies of reports and findings of physicians and psychologists and previous and current medical records. *See* Gen. Stat. 122C-268(f).
- However, Petitioner may not offer any evidence regarding a voluntary admission for purposes of an involuntary commitment. *See* Gen. Stat. 122C-208

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Court Hearings and Hearsay

- A physician may be allowed to testify to hearsay contained in the medical records as part of the basis of a psychiatric diagnosis.
  - "*State v. Huffstetler*, 312 N.C. 92, 107 (1984).
- However, it is advisable to challenge all hearsay or potential hearsay statements in order to preserve the record on appeal.
- *See also* *In re O.L.* (2020)

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Confrontation Clause and Court Hearings

- The Confrontation clause exists in a limited capacity. 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.**"
- **Other Considerations:**
  - A physician may complete an evaluation but a different physician may testify about Respondent without such testimony being in violation of the Confrontation Clause.
  - However, Petitioner may not introduce a physician's report without that physician being present to testify to the report. *See In re Mackie*, 36 N.C. App. 638 (1978).

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Ineffective Assistance of Counsel

- Caution: In re: J.C.D., No. COA18-957, 2019
- "Respondent argues that 'she was denied effective counsel when her attorney conceded that [she] should be involuntarily committed, an argument which was in stark contrast to her wishes.'"

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Duration of Commitment - Disposition

- 122C-271 – Disposition
  - A (b) "If the respondent has been held in a 24-hour facility pending the district court hearing pursuant to Gen. Stat. 122C-268, the court may make one of the following dispositions:
    - (1) "If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill; that the respondent is capable of surviving safely in the community with available supervision . . . it may order **outpatient commitment** for a period **not in excess of 90 days**."
    - (2) "If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill and is dangerous to self, as defined in Gen. Stat. 122C-3(11)a., or others, as defined in Gen. Stat. 122C-3(11)b., it may **order inpatient commitment** at a 24-hour facility described in Gen. Stat. 122C-252 for a period **not in excess of 90 days**.

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Continued Hospitalization and Rehearings

- A rehearing is the same as the initial hearing but should only focus on the facts and reason(s) for why Respondent continues to be a danger to self or others or both and not on the initial reason for treatment.
- If the judge is satisfied that Respondent needs further treatment, the judge may order the Respondent to remain for up to 180 days for a second rehearing and 365 for a third or subsequent rehearing.

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Rehearings – Timeframes

- 122C-276 – Inpatient commitment; rehearings for respondents other than insanity acquittees.
  - (a) "**Fifteen days before** the end of the initial inpatient commitment period if the attending physician determines that commitment of a respondent beyond the initial period will be necessary, he shall so notify the clerk of superior court of the county in which the facility is located. The clerk, **at least 10 days before** the end of the initial period, on order of a district court judge . . . shall calendar the rehearing.
  - (d) "Notice and proceedings of rehearings are governed by the same procedures as initial hearings and the respondent has the same rights he had at the initial hearing including the right to appeal."

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Questions

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Restoring Firearm Rights after an Involuntary Commitment

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Greenville, NC
williamslawonline.com

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Introduction

- Backstory
- Involuntary Commitment (IVC) and NICS
- Restoration Procedure

2

Backstory

- 1934 National Firearms Act
  - first major federal legislation on firearms
  - nothing about involuntary commitments

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- 1968 Gun Control Act
  - added 18 USC 922(g)(4): "It shall be unlawful for any person . . . who has been committed to a mental institution . . . to ***ship or transport [or to receive]*** any firearm or ammunition in interstate or foreign commerce"
  - 1986 added express ban on ***possession*** (unlawful to "possess in or affecting commerce")

4

- Applied as per regulations from ATF
- 27 CFR 478.11: "committed to a mental institution" means involuntary commitment
  - does *not* include voluntary commitment
  - "The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution"

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- Legal effect: lifetime federal ban on possessing any firearms or ammunition following involuntary commitment
- Part of same statute as federal felon in possession, 18 USC 922
- Crime punishable to same extent as felon in possession

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- For example: *United States v. Dorsch*, 363 F.3d 784 (8th Cir. 2004)
  - 27 months in prison
  - Rare but possible

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IVC and NICS

- National Instant Criminal Background Check System (NICS)
- Created 1993
- Database maintained by FBI
- Law enforcement and gun sellers check to be sure person who wants a gun is allowed to have a gun

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- Per 18 USC 922(g)(4), IVC's should have been in there
- But they were largely absent
  - Confidential files gathering dust on courthouse shelves across the country
- Then: 2007 Virginia Tech shooting
  - Shooter was able to buy firearm because his mental health history was not in NICS

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- The fix: NICS Improvement Amendments Act of 2007
- $72 million to states to put their mental health records in NICS
- It worked: two graphs from search.org (National Consortium for Justice Information and Statistics)

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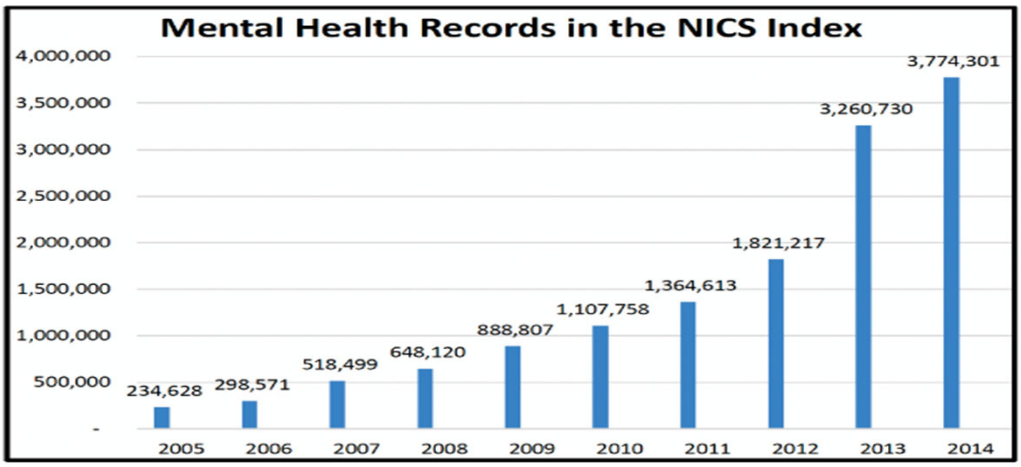
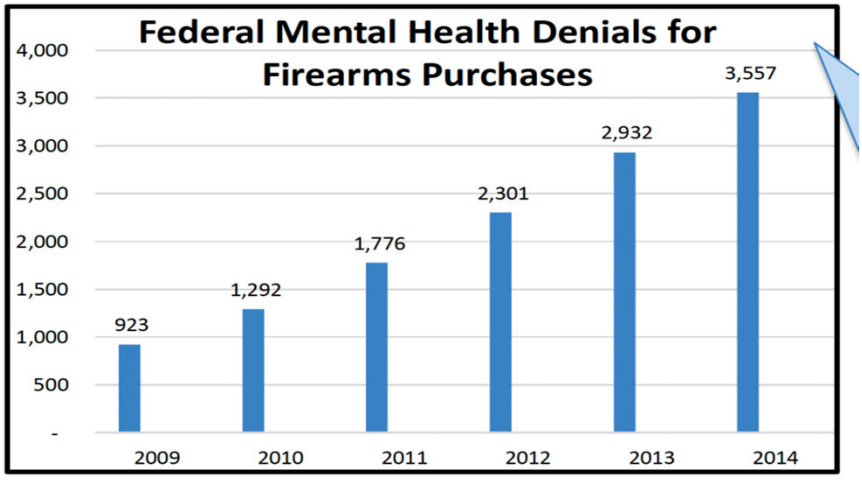

Mental Health Records in the NICS Index
4,000,000
3,500,000
3,000,000
2,500,000
2,000,000
1,500,000
1,000,000
500,000
-
234,628
298,571
518,499
648,120
888,807
1,107,758
1,364,613
1,821,217
3,260,730
3,774,301
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014

11


Federal Mental Health Denials for Firearms Purchases
4,000
3,500
3,000
2,500
2,000
1,500
1,000
500
-
923
1,292
1,776
2,301
2,932
3,557
2009
2010
2011
2012
2013
2014

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- North Carolina did its part
- Former G.S. § 122C-54(d1), now § 14-409.43
- Requires clerk to report IVC's to NICS "not later than 48 hours after receiving notice" of the IVC

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Restoration Procedure

- IVC firearm prohibition is permanent, unless rights are restored
- Regardless of person's age, i.e., even if IVC was done prior to age 18
- Restoration of rights made possible in 2007 by NICS Improvement Amendments Act

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(b) AUTHORITY TO PROVIDE RELIEF FROM CERTAIN DISABILITIES WITH RESPECT TO FIREARMS.—If, under a State relief from disabilities program implemented in accordance with this section, an application for relief referred to in subsection (a)(1) of this section is granted with respect to an adjudication or a commitment to a mental institution or based upon a removal of a record under section 102(c)(1)(B), the adjudication or commitment, as the case may be, is deemed not to have occurred for purposes of subsections (d)(4) and (g)(4) of section 922 of title 18, United States Code.

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- In other words: Congress authorized *state* law that restores the *federal* right to possess firearms
- State statute has to be approved by ATF
- North Carolina's statute has been approved

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Subject: ATF Response
From: <Edward.C.Courtney@usdoj.gov>
Date: 1/3/18, 1:17 PM
To: <keith@williamslawonline.com>

Mr. Williams: Thank you for your recent inquiry to ATF. Attached are two documents: the first is your actual request and our response to it. The second is a document showing NC as a certified State Relief Program. Thank you for your inquiry and I trust our answer is responsive. Thank you.

Ed Courtney

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- No other way to restore firearm rights following IVC
- Specifically: NC's expunction statute for under-18 IVC's does *not* restore firearm rights (G.S. 122C-54(e))
  - ATF will not accept because NICS improvement act did not expressly mention or authorize restoration by expungement
  - Compare: state expunction of state felony conviction does restore federal firearm right because Congress expressly allowed it (18 USC 921(a)(20))

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- Our IVC restoration statute is 14-409.42
- Form AOC-SP-211
- Must be at least 18 at time of filing
- Can file upon expiration of IVC
  - no waiting period required

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- Must show by preponderance "that the petitioner will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest"
  - Language taken straight from NICS improvement act
- District Attorney should present any "relevant" information to the contrary
- Petitioner must submit character evidence (character witness affidavits)

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- Hearing sometimes adversarial, sometimes not
- Hearing is closed unless the court orders otherwise
- Filed in District Court; if denied, you can take *de novo* appeal to Superior Court

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- If denied, you can reapply but only after a one-year waiting period
- If granted, Clerk makes appropriate entry into NICS
  - 14-409.42(d): "Upon a judicial determination to grant a petition under this section, the clerk of superior court in the county where the petition was granted shall forward the order to [NICS]"
- Can sometimes take a few weeks to take effect

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- ATF Form 4473 required to purchase firearm from federally licensed firearm dealer
- Page 5 of the fine print recognizes the restoration:

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EXCEPTION: Under the NICS Improvement Amendments Act of 2007, a person who has been adjudicated as a mental defective or committed to a mental institution in a State proceeding is not prohibited by the adjudication or commitment if the person has been granted relief by the adjudicating/committing State pursuant to a qualifying mental health relief from disabilities program. Also, a person who

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Conclusion

- Glad to talk if you have any questions
- 252-931-9362
- keith@williamslawonline.com

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Children in DSS Custody Who Need Treatment in a PRTF: There's a Disconnect

I recently finished a 2-day course for district court judges that focused on children with significant mental health needs. There were lots of questions about the admission and discharge process for a child who is in a county department's (DSS) custody and who needs treatment in a psychiatric residential treatment facility (PRTF). It's complicated because there are **two separate but simultaneously occurring court actions:**

1. the abuse, neglect, or dependency (A/N/D) action that addresses a child's custody, placement, and services; and
2. the judicial review of a child's voluntary admission to a secure psychiatric treatment facility that was made with the consent of the child's legally responsible person.

The two actions involve different parties, courts, purposes, and laws, and they are often not coordinated even though they directly impact each other.

Placement in a PRTF

North Carolina requires a judicial review when a child is admitted to a 24-hour mental health or substance abuse facility that has the same or similar restrictions on the child's freedom of movement as a state-operated psychiatric hospital. G.S. 122C-224. A "24-hour facility" provides a structured living environment and services to a patient for at least 24 consecutive hours and includes state psychiatric hospitals, public or private facilities providing acute inpatient care, and PRTFs. G.S. 122C-3(14)g. PRTFs provide treatment to children who are mentally ill or substance abusers in need of care in a non-acute inpatient setting and whose removal from home or a community based residential setting is essential for treatment. 10A NCAC 27G.1901. Round the clock supervision and therapeutic interventions are provided with the goal of facilitating the child's transition to a less intensive and structured community setting. *Id.* For children insured by Medicaid, **prior approval** that the child's treatment in a PRTF is **medically necessary** must be obtained from the local management entity/managed care organization (**LME/MCO**). NC Div. of Medical Assistance, PRTF, Clinical Coverage Policy 8-D-1, 5.0; *see* G.S. 122C-3(20c).

When a child needs treatment in a PRTF, the placement is made by the child's **legally responsible person:** a parent, guardian, person standing in loco parentis, or legal custodian other than a parent who is specifically authorized by law or a court order to consent to medical care, including psychiatric treatment. G.S. 122C-3(20)(ii); -221(a).

The Role of the A/N/D Court and DSS in a Child's Admission

When a child has been adjudicated abused, neglected, or dependent, DSS recommends a

treatment plan that addresses the child's needs. G.S. 7B-808(b). The court may order that the child receive a mental health evaluation by a qualified professional. G.S. 7B-903(d). When the court finds the child is mentally ill, it may order DSS to coordinate with the LME/MCO to develop the child's treatment plan. G.S. 7B-903(e). The court does not have authority to order the child's placement in a PRTF. *See* G.S. 7B-903(a), (e). If the child needs treatment in a 24-hour facility, the admission must be made by the child's legally responsible person. When the court orders a child into DSS custody, DSS is the child's legally responsible person if the court also authorizes DSS to consent to the child's mental health care or treatment pursuant to G.S. 7B-505.1(c). *See* G.S. 7B-903.1(e). Otherwise, the child's parent, guardian, or person acting in loco parentis is the child's legally responsible person for admission purposes. G.S. 122C-3(20)(ii).

Judicial Review of a Voluntary Admission

Although a child's admission to a PRTF is voluntarily made with the consent of the minor's legally responsible person, NC law requires judicial review of the minor's "voluntary admission." G.S. 122C, Article 5, Part 2. The purpose of the judicial review is to protect the child's liberty interest by ensuring that the child is not improperly admitted or improperly remains in the facility. G.S. 122-221(b); *In re* A.N.B., 232 N.C. App. 406 (2014).

The judicial review is heard by the **district court in the county where the facility is located**. G.S. 122C-224(a). If the PRTF is in a different county from where the A/N/D case is pending, a different court will conduct the judicial review.

The judicial review **process begins within 24 hours** of when the child is admitted to the PRTF when the facility notifies the clerk of court of the child's admission and need for a hearing. G.S. 122C-224(c). The facility also notifies the clerk of the names and addresses of the child's legally responsible person and responsible professional (the person in the facility who is designated to be responsible for and is qualified to provide the child's care and treatment). *Id*.; G.S. 122C-3(32).

Within 48 hours of receiving the notice from the facility, the clerk must **appoint an attorney for the child,** who is presumed indigent. G.S. 122C-224.1(a); AOC-SP-912M. This attorney is not the GAL/attorney advocate appointed to represent the child in the A/N/D proceeding. *See* G.S. 7B-601. This newly appointed attorney represents the child in the judicial review proceeding and continues to represent the child until the judge relieves him or her of the appointment. G.S. 122C-224.2(c). The attorney meets with the child within 10 days of the appointment and at least 48 hours before the hearing. G.S. 122C-224.2(a).

The **hearing must be held within 15 days** of the child's admission to the facility. G.S. 122C-224(a), -224.1(b). At least 72 hours before the hearing, **notice of the hearing** is sent to the child's attorney, the child's legally responsible person, and the responsible professional. G.S. 122C-224.1(b). The hearing is closed to the public unless the child's attorney requests otherwise. G.S. 122C-224.3(d). The hearing is **held at the facility** unless the judge determines the

court calendar will be disrupted by holding the hearing there. G.S. 122C-224.3(a). In that case, the hearing may be held in a different location, such as the judge's chambers, but it should not be conducted in a courtroom if the child's attorney objects and there is a more suitable place available. *Id*. The child has a right to be present at the hearing and to testify, but he or she may waive that right or limit his or her appearance to when testifying. G.S. 122C-224.2(b), -224.3(b). Certified copies of medical records, including a psychologist's or other professional's findings and reports, are admissible in evidence so long as the child's right to confront and cross-examine witnesses is not denied. G.S. 122C-224.3(c); *In re* C.W.F., 232 N.C. App. 213 (2014).

It is unclear if a legally responsible person who receives notice of the hearing is a **party** to the proceeding. *In re* M.B., 771 S.E.2d 615 (2015). Unlike the Juvenile Code, which explicitly states that a person who has a right to notice and to be heard in certain A/N/D hearings is not a party, the statutes authorizing the judicial review of a voluntary admission are silent about the legally responsible person's role in the judicial review. *Compare* G.S. 7B-906.1(b), -908(b)(1), -1112.1 *to* 122C-224.1(b). Because a judicial review hearing is a civil proceeding, the court may look to the Rules of Civil Procedure to determine if a party should be joined or allowed to intervene if a motion is filed. *See* G.S. 1A-1, Rules 19, 20, 24; *In re* A.N.B.

The Order

There are **three possible dispositional orders.**

1. The court **concurs** in the child's continued admission and **authorizes a treatment period for up to 90 days** if the court finds by **clear, cogent, and convincing evidence**
    - the child is mentally ill or a substance abuser,
    - the child is in need of further treatment at the 24-hour facility, and
    - less restrictive measures will be insufficient. When the court is determining if less restrictive measures will be insufficient, it may look at whether those lesser measures are actually available (e.g., is there an available bed in a less restrictive facility). G.S. 122C-2; *In re* M.B.

2. The court orders a **one-time 15-day additional stay** when the court believes there are reasonable grounds to believe the child is mentally ill or a substance abuser and is in need of treatment at the facility but additional diagnoses and evaluations are needed for the court to make a determination, or

3. The court orders the **child's release**.

G.S. 122C-224.3(f), (g); AOC-SP-913M.

Additional Judicial Reviews

If the court concurs and orders continued admission for up to 90 days, the child is entitled to another judicial review before that additional treatment period ends. G.S. 122C-224.4(b). At subsequent judicial reviews, the court may order the **child's release or continued admission for up to 180 days**. *Id.* Judicial reviews will be held prior to the expiration of each subsequently authorized admission period when the responsible professional recommends a continued stay. G.S. 122C-224.4(b), (c). The responsible professional notifies the clerk at least 15 days before the admission period expires that an additional stay is recommended. G.S. 122C-224.4(c).

Discharge

Discharge planning to a less restrictive treatment setting starts at the child's admission and is part of a child's treatment plan. 10A NCAC 27G.1903(c). Legally responsible persons (e.g., parent or DSS social worker) and/or family members must be involved in the development and implementation of the child's treatment plans. 10A NCAC 27G.1903(e). Before a child is discharged, the facility should meet with the child and family team, including the DSS social worker, and make service planning decisions. 10A NCAC 27G.1904.

A child is discharged when

- the court orders the child's release,
- the responsible professional determines the child is no longer mentally ill or a substance abuser or in need of treatment at the facility,
- the legally responsible person files a written request for the child's discharge with the facility (however, the facility may hold the child for 72 hours and seek an involuntary commitment if appropriate), or
- the child turns 18 and does not consent to the treatment.

G.S. 122C-224.7; -224.3(g)(3).

What About the A/N/D Court?

The A/N/D court does not hear the judicial review of a child's voluntary admission and will not be aware of what was decided at that judicial review unless evidence of what was ordered is introduced in the A/N/D proceeding. If the A/N/D court wants to timely coordinate its hearings with the judicial review of the child's voluntary admission or with the child's discharge, it may consider ordering

- the legally responsible person (e.g., parent or DSS) notify the clerk of the date for the judicial review of voluntary admission so that the clerk may schedule a review hearing in the A/N/D proceeding shortly afterwards. *See* G.S. 7B-906.1(a); -1000.
- the legally responsible person make efforts to obtain the permission of the court deciding the voluntary admission to release information from that court file, such as the court order,

for the purpose of admitting a copy in the A/N/D proceeding. *See* G.S. 122C-54(d).

- DSS to participate in the child's treatment and discharge planning and to work with the PRTF to make timely efforts to secure a child's post-discharge placement. *See In re* M.B.
- the legally responsible person notify the clerk of a need for a review hearing if that person files a written request with the PRTF for the child's discharge.

Juveniles in DSS Custody Presenting at Hospital ED for Mental Health Treatment: New Laws and New Court Hearing Possible

Perhaps it is not surprising that juveniles who experience abuse, neglect, or dependency have a higher risk of suffering from mental health issues. These children have experienced trauma, and when they are removed from their homes and families, they further experience loss, separation, and disruption. **The National Conference of State Legislatures reports that "[u[p to** 80 percent **of children in foster care have significant mental health issues, compared to approximately** 18-22 percent **of the general population."* According to the American Academy of Pediatrics, "[m]ental and behavioral health is the largest unmet health need for children and teens in foster care."****

Some North Carolina laws set forth in the Juvenile Code address the issue of children in DSS custody who experience mental health issues. For example, G.S. 7B-505.1(c) addresses the need for DSS to obtain a court order to consent to non-routine and non-emergency medical treatment for a juvenile in its custody – such treatment includes mental health treatment requiring informed consent. And, G.S. 7B-903(d) authorizes the court to order a juvenile to receive a psychological or other necessary examination to determine the juvenile's needs. Other laws, such as those in G.S. Chapter 122C, address mental health treatment generally and include provisions specific to juveniles. **Laws specifically addressing treatment and the coordination of services between a DSS with a juvenile in its custody and managed care organization (MCO) or prepaid health plans (PHP) were lacking, until the enactment of S.L. 2021-132.**

This post focuses on two new laws that were included in S.L. 2021-132 that specifically address situations where a juvenile who is in DSS custody presents to a hospital emergency department for mental health treatment. **Effective October 1, 2021**, a new statute in G.S. Chapter 122C was enacted to address care coordination for the juvenile by DSS, the LME/MCO or prepaid health plan (PHP), the hospital, and the North Carolina Department of Human Services (DHHS): **G.S. 122C-142.2. Effective January 1, 2022**, a new statute in the Juvenile Code, **G.S. 7B-903.2**, was enacted to authorize an emergency motion and hearing to address compliance with the requirements of G.S. 122C-142.2.

Juvenile presenting at hospital for mental health treatment. When a juvenile who is in DSS custody presents to a hospital emergency department for mental health treatment and it is determined that the juvenile should not remain at the hospital and there is no immediately available appropriate placement for the juvenile, the DSS director must contact the appropriate LME/MCO or PHP within twenty-four hours of that determination. The director requests an assessment of the juvenile. G.S. 122C-142.2(b). Within five business days of the director's request, the LME/MCO or PHP must, when applicable or required by their contract with DHHS, arrange for an assessment of the juvenile by the juvenile's clinical home provider, the hospital (if able or willing), or another

qualified clinician. G.S. 122C-142.2(c). Depending on the level of care recommended by the assessment, DSS and the LME/MCO or PHP must act as provided for in the following table. G.S. 122C-142.2(d).

Recommendation	DSS	LME/MCO or PHP

IVC Trial Advocacy

Jason Lunsford
Office of Special Counsel

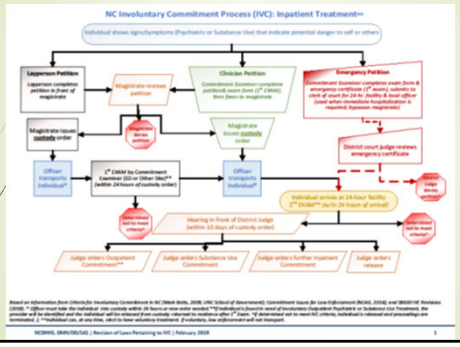
1

What Necessitates Commitment

- Mental Illness – DSM V
- Dangerousness – 122C-3(11)
  - Danger to Self (this is generally very broad)
  - Danger to Others
  - Or Both
  - Plus "The future element"
    - "Although the trial court need not say the magic words 'reasonable probability of future harm,' it must draw a nexus between past conduct and future danger." In re J.P.S., 264 N.C. App. 58 (2019).

2

IVC Process



DHHS Flow Chart (2019) https://www.ncdhhs.gov/media/8756/open

3

Initial Process and Concerns

- With all IVC patients, it is their right to go to court and challenge for their release.
- An attorney may, however, chose not to go to court if the patient clearly does not understand and needs continued treatment.
- Patients control the decision making in all other circumstances

4

Initial Process and Concerns Cont.

- Seeking voluntary care for mental health
- Seeking care voluntarily for seemingly unrelated issues
- Police, Family, Friends.
- An Emergency Certificate

5

Danger to Self Defined

- 122C-3

6

Danger to Others Defined

- 122C-3

7

Break Down of Procedure

- **Affidavit/ Petition**
- **Custody Order**
- **Initial Qualified Physician's Exam (QPE)**
- **Transport to 24hr Facility**
- **Second QPE within 24hrs**
- **Commitment rights attach**
  - Attorney is appointed (Office of Special Counsel)
  - Right to a court hearing within 10 days

8

Affidavit/Petition- AOC-SP-300


STATE OF NORTH CAROLINA

County

IN THE MATTER OF

AFFIDAVIT AND PETITION FOR INVOLUNTARY COMMITMENT

9

Affidavit and Petition

- **122C-261 – Affidavit and petition before clerk or magistrate when immediate hospitalization is not necessary; custody order.**
  - A (a) "Anyone who has knowledge of an individual who is mentally ill and either (i) **dangerous to self**, as defined in Gen. Stat. 122C-3(aa)a.,
  - or **dangerous to others** as defined in Gen. Stat. 122C-3(11)b.,
  - or . . . to prevent further disability or deterioration . . .
  - **and execute an affidavit**, and petition the clerk or magistrate for
  - **issuance of an order to take the respondent into custody for examination** . . . .
  - The affidavit shall include the facts . . . .

10

Initial Attack – Affidavit for Custody

- **N.C. Gen. Stat. 122C-261 – Affidavit and Petition Before Clerk or Magistrate When Immediate Hospitalization is not Necessary, Custody Order**
  - This is a long statute but the focus is on the "facts" contained in the affidavit presented before the magistrate and not on "conclusions."

11

In re Reed, 39 N.C. App. 227 (1978)

- "The affidavit shall include the facts on which the affiant's opinion is based." *Id.* at 228.
- Here, the affidavit provided only conclusions.

12

In re Ingram, 74 N.C. App. 579 (1985)

- If the affidavit is insufficient, so too is the custody order that relied on the affidavit and you never reach the actual findings.

13

Affidavit and Petition Cont.

- **122C-261 – Affidavit and petition before clerk or magistrate when immediate hospitalization is not necessary; custody order.**
  - B (d) "If the affiant is a physician or eligible psychologist, . . .
    - (4) the clerk or magistrate **shall issue an order for transportation to or custody at a 24-hour facility**
    - provided **that if a 24-hour facility is not immediately available or appropriate** to the respondent's medical condition,
    - **the respondent may be temporarily detained** under appropriate supervision and, upon further examination,
    - [Respondent could be] released in accordance with Gen. Stat. 122C-263(d)(2).
  - Practice Note: Pay attention to the initial hospital and for how long the patient was there.

14

Improper Paperwork and Evaluations

Paperwork must indicate the time and reason for requesting the order.

The hospital must still transfer the patient to a 24 hour facility.

- The ER does not constitute a 24 hour facility.
- The 24hr facility must perform the second evaluation within 24 hours.
- Exception is if it is the same facility

15

7 Day Limit After First Evaluation

- **N.C. Gen. Stat. 122C-263(d)(2)**
  - "If the respondent is temporarily detained **and a 24-hour facility is not available** or medically appropriate
  - **seven days after the issuance of the custody order**,
  - The proceedings shall be terminated.
  - New IVC paperwork may still be initiated

16

Breaking down the 7-day Rule

- It is specific to that petition and order and those proceedings are terminated.
- The ER physician may initiate new proceedings prior to expiration of the first 7-day period as long as Respondent continues to meet criteria.
- Prior Affidavits cannot be used as a basis for future commitment
- Physicians must rely on new information and not prior information when petitioning under new paperwork

17

Evaluation Procedure (1st Eval)

- **122C-263 – Duties of law-enforcement officer, first examination by physician or eligible psychologist.**
  - A. (c) "The physician or eligible psychologist . . . shall examine . . . the respondent within 24 hours after the respondent is presented for examination."
  - Initial assessment:
    - (1) Current and previous mental illness, IDD, and/or previous treatment history
    - (2) Dangerousness to self, others or both
    - (3) Ability to survive safely without availability of supervision from family, friends or others; and
    - (4) Capacity to make informed treatment/medication decisions

18

DHHS Form – QPE Example

19

Evaluation Procedure (1st Eval) Cont.

- **122C-263 – Duties of law-enforcement officer, first examination by physician or eligible psychologist.**
- This subsection opens the door for some challenges to be made in that the doctor must note the nature and reason for the involuntary commitment.

20

In re Woodie

- Failure to check a box by itself is not sufficient so long as there is additional supporting evidence/testimony from the doctor.

21

Findings and Custody Order

22

Findings and Custody Order Clinician

23

Evaluation Procedure (2nd Eval)

- **122C-266 – Inpatient commitment; second examination and treatment pending hearing.**
  - within 24 hours of arrival at a 24-hour facility
  - the respondent shall be examined by a physician.
  - This physician **shall not be the same physician** who completed the certificate or examination (1st QPE)

24

DHHS Form – 2nd QPE 24hr Facility

25

Evaluation Procedure (2nd Eval) Exception

- (e) "If the 24-hour facility described in Gen. Stat. 122C-252 or Gen. Stat. 122C-262 is the facility in which the first examination by a physician or eligible psychologist occurred and is the same facility in which the respondent is held, the second examination shall occur not later than the following regular working day."

26

122C-268(j)

- **§ 122C-268. Inpatient commitment; district court hearing.**
- (j) To support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is
- mentally ill and
- dangerous to self, or
- dangerous to others
- The court shall record the facts that support its findings.

27

Court Hearings

- The Petitioner has the burden of proof and thus presents first. Generally, the hospital will send a doctor that is familiar with Respondent.
- Respondent may choose to testify on his/her own behalf or to call any witnesses.
- Challenges should be made to Petitioner's expert for preservation of the record.
- A motion to dismiss should also be made at the end of Petitioner's evidence and at the end of all evidence for purposes of appeal.

28

Expert Witnesses

- All doctors must meet the requirements under the *Daubert* Standard and Rule 702. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
- NC Rule 702
  - (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
    - (1) The testimony is based upon sufficient facts or data.
    - (2) The testimony is the product of reliable principles and methods.
    - (3) The witness has applied the principles and methods reliably to the facts of the case.

29

NC Incorporates the *Daubert* Test

- *State v. McGrady*, 368 N.C. 880 (2016), establishes that qualification of experts in NC aligns with the federal rules and incorporates the standard from *Daubert*.
- Expert testimony is required for IVC.
- What steps should you take once the State has moved to tender a doctor as an expert?
  - Move for voir dire

30

Court Hearings and Hearsay

- The Petitioner is allowed to present [c]ertified copies of reports and findings of physicians and psychologists and previous and current medical records. *See* Gen. Stat. 122C-268(f).
- However, Petitioner may not offer any evidence regarding a voluntary admission for purposes of an involuntary commitment. *See* Gen. Stat. 122C-208

31

Court Hearings and Hearsay

- A physician may be allowed to testify to hearsay contained in the medical records as part of the basis of a psychiatric diagnosis.
  - "*State v. Huffstetler*, 312 N.C. 92, 107 (1984).
- However, it is advisable to challenge all hearsay or potential hearsay statements in order to preserve the record on appeal.
- *See also* *In re O.L.* (2020)

32

Confrontation Clause and Court Hearings

- The Confrontation clause exists in a limited capacity. 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.**"
- **Other Considerations:**
  - A physician may complete an evaluation but a different physician may testify about Respondent without such testimony being in violation of the Confrontation Clause.
  - However, Petitioner may not introduce a physician's report without that physician being present to testify to the report. *See In re Mackie*, 36 N.C. App. 638 (1978).

33

Ineffective Assistance of Counsel

- Caution: In re: J.C.D., No. COA18-957, 2019
- "Respondent argues that 'she was denied effective counsel when her attorney conceded that [she] should be involuntarily committed, an argument which was in stark contrast to her wishes.'"

34

Duration of Commitment - Disposition

- 122C-271 – Disposition
  - A (b) "If the respondent has been held in a 24-hour facility pending the district court hearing pursuant to Gen. Stat. 122C-268, the court may make one of the following dispositions:
    - (1) "If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill; that the respondent is capable of surviving safely in the community with available supervision . . . it may order **outpatient commitment** for a period **not in excess of 90 days**."
    - (2) "If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill and is dangerous to self, as defined in Gen. Stat. 122C-3(11)a., or others, as defined in Gen. Stat. 122C-3(11)b., it may **order inpatient commitment** at a 24-hour facility described in Gen. Stat. 122C-252 for a period **not in excess of 90 days**.

35

Continued Hospitalization and Rehearings

- A rehearing is the same as the initial hearing but should only focus on the facts and reason(s) for why Respondent continues to be a danger to self or others or both and not on the initial reason for treatment.
- If the judge is satisfied that Respondent needs further treatment, the judge may order the Respondent to remain for up to 180 days for a second rehearing and 365 for a third or subsequent rehearing.

36

Rehearings – Timeframes

- 122C-276 – Inpatient commitment; rehearings for respondents other than insanity acquittees.
  - (a) "**Fifteen days before** the end of the initial inpatient commitment period if the attending physician determines that commitment of a respondent beyond the initial period will be necessary, he shall so notify the clerk of superior court of the county in which the facility is located. The clerk, **at least 10 days before** the end of the initial period, on order of a district court judge . . . shall calendar the rehearing.
  - (d) "Notice and proceedings of rehearings are governed by the same procedures as initial hearings and the respondent has the same rights he had at the initial hearing including the right to appeal."

37

Questions

38

Restoring Firearm Rights after an Involuntary Commitment

Keith Williams
Greenville, NC
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1

Introduction

- Backstory
- Involuntary Commitment (IVC) and NICS
- Restoration Procedure

2

Backstory

- 1934 National Firearms Act
  - first major federal legislation on firearms
  - nothing about involuntary commitments

3

- 1968 Gun Control Act
  - added 18 USC 922(g)(4): "It shall be unlawful for any person . . . who has been committed to a mental institution . . . to ***ship or transport [or to receive]*** any firearm or ammunition in interstate or foreign commerce"
  - 1986 added express ban on ***possession*** (unlawful to "possess in or affecting commerce")

4

- Applied as per regulations from ATF
- 27 CFR 478.11: "committed to a mental institution" means involuntary commitment
  - does *not* include voluntary commitment
  - "The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution"

5

- Legal effect: lifetime federal ban on possessing any firearms or ammunition following involuntary commitment
- Part of same statute as federal felon in possession, 18 USC 922
- Crime punishable to same extent as felon in possession

6

- For example: *United States v. Dorsch*, 363 F.3d 784 (8th Cir. 2004)
  - 27 months in prison
  - Rare but possible

7

IVC and NICS

- National Instant Criminal Background Check System (NICS)
- Created 1993
- Database maintained by FBI
- Law enforcement and gun sellers check to be sure person who wants a gun is allowed to have a gun

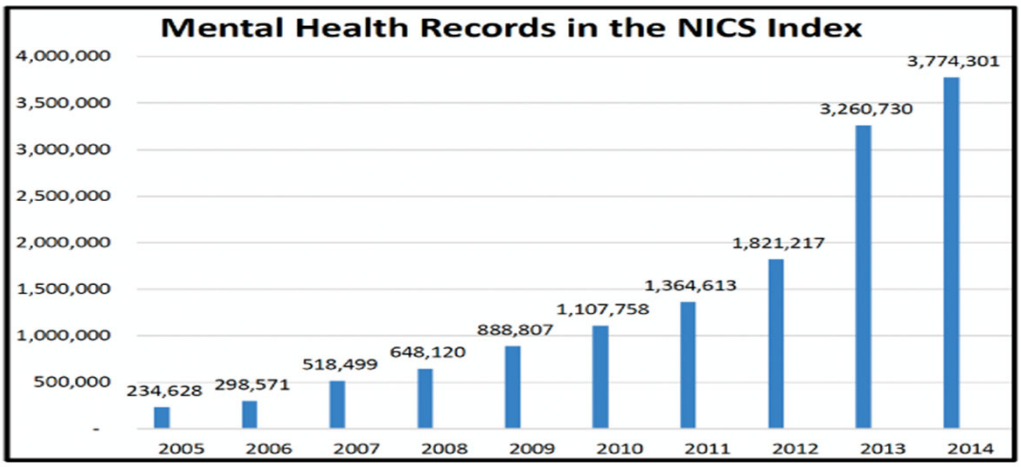
8

- Per 18 USC 922(g)(4), IVC's should have been in there
- But they were largely absent
  - Confidential files gathering dust on courthouse shelves across the country
- Then: 2007 Virginia Tech shooting
  - Shooter was able to buy firearm because his mental health history was not in NICS

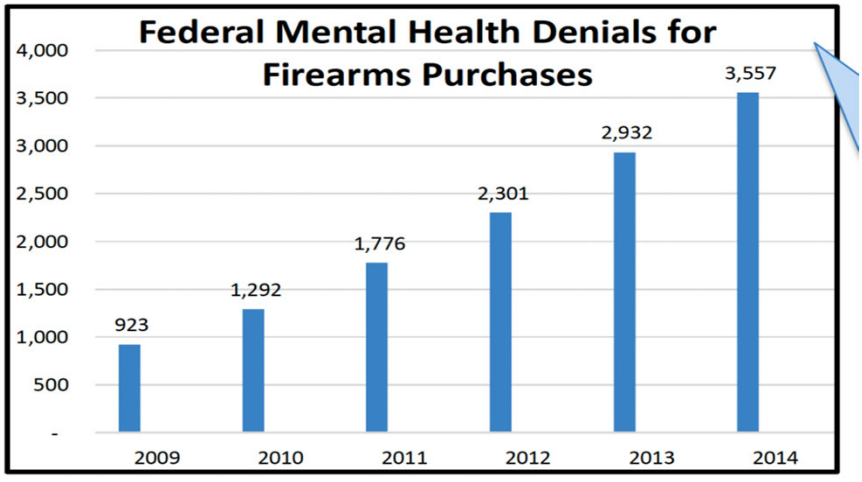
9

- The fix: NICS Improvement Amendments Act of 2007
- $72 million to states to put their mental health records in NICS
- It worked: two graphs from search.org (National Consortium for Justice Information and Statistics)

10


Mental Health Records in the NICS Index
4,000,000
3,500,000
3,000,000
2,500,000
2,000,000
1,500,000
1,000,000
500,000
-
234,628
298,571
518,499
648,120
888,807
1,107,758
1,364,613
1,821,217
3,260,730
3,774,301
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014

11


Federal Mental Health Denials for Firearms Purchases
4,000
3,500
3,000
2,500
2,000
1,500
1,000
500
-
923
1,292
1,776
2,301
2,932
3,557
2009
2010
2011
2012
2013
2014

12

- North Carolina did its part
- Former G.S. § 122C-54(d1), now § 14-409.43
- Requires clerk to report IVC's to NICS "not later than 48 hours after receiving notice" of the IVC

13

14

Restoration Procedure

- IVC firearm prohibition is permanent, unless rights are restored
- Regardless of person's age, i.e., even if IVC was done prior to age 18
- Restoration of rights made possible in 2007 by NICS Improvement Amendments Act

15

(b) AUTHORITY TO PROVIDE RELIEF FROM CERTAIN DISABILITIES WITH RESPECT TO FIREARMS.—If, under a State relief from disabilities program implemented in accordance with this section, an application for relief referred to in subsection (a)(1) of this section is granted with respect to an adjudication or a commitment to a mental institution or based upon a removal of a record under section 102(c)(1)(B), the adjudication or commitment, as the case may be, is deemed not to have occurred for purposes of subsections (d)(4) and (g)(4) of section 922 of title 18, United States Code.

16

- In other words: Congress authorized *state* law that restores the *federal* right to possess firearms
- State statute has to be approved by ATF
- North Carolina's statute has been approved

17

Subject: ATF Response
From: <Edward.C.Courtney@usdoj.gov>
Date: 1/3/18, 1:17 PM
To: <keith@williamslawonline.com>

Mr. Williams: Thank you for your recent inquiry to ATF. Attached are two documents: the first is your actual request and our response to it. The second is a document showing NC as a certified State Relief Program. Thank you for your inquiry and I trust our answer is responsive. Thank you.

Ed Courtney

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- No other way to restore firearm rights following IVC
- Specifically: NC's expunction statute for under-18 IVC's does *not* restore firearm rights (G.S. 122C-54(e))
  - ATF will not accept because NICS improvement act did not expressly mention or authorize restoration by expungement
  - Compare: state expunction of state felony conviction does restore federal firearm right because Congress expressly allowed it (18 USC 921(a)(20))

19

- Our IVC restoration statute is 14-409.42
- Form AOC-SP-211
- Must be at least 18 at time of filing
- Can file upon expiration of IVC
  - no waiting period required

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- Must show by preponderance "that the petitioner will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest"
  - Language taken straight from NICS improvement act
- District Attorney should present any "relevant" information to the contrary
- Petitioner must submit character evidence (character witness affidavits)

21

- Hearing sometimes adversarial, sometimes not
- Hearing is closed unless the court orders otherwise
- Filed in District Court; if denied, you can take *de novo* appeal to Superior Court

22

- If denied, you can reapply but only after a one-year waiting period
- If granted, Clerk makes appropriate entry into NICS
  - 14-409.42(d): "Upon a judicial determination to grant a petition under this section, the clerk of superior court in the county where the petition was granted shall forward the order to [NICS]"
- Can sometimes take a few weeks to take effect

23

- ATF Form 4473 required to purchase firearm from federally licensed firearm dealer
- Page 5 of the fine print recognizes the restoration:

24

EXCEPTION: Under the NICS Improvement Amendments Act of 2007, a person who has been adjudicated as a mental defective or committed to a mental institution in a State proceeding is not prohibited by the adjudication or commitment if the person has been granted relief by the adjudicating/committing State pursuant to a qualifying mental health relief from disabilities program. Also, a person who

25

Conclusion

- Glad to talk if you have any questions
- 252-931-9362
- keith@williamslawonline.com

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