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Suffering in Limbo: Systemic Flaws Force Hundreds of People to Languish in NC County Jails

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INTRODUCTION

Hundreds of people with serious mental illness are languishing in North Carolina jails, charged but not convicted of crimes, found Incapable to Proceed (ITP), and referred for Involuntary Commitment (IVC), which is also known as forced treatment. They have no legal representation and no scheduled court date. They have been charged with crimes ranging from misdemeanors to felonies, but have not been found guilty. Many have been stuck in jail for months, some for years.

Many of these ITP defendants were initially confined in jail due to manifestations of their mental illness and remain in jail because of their ITP status. They cannot be tried, as the law does not allow the trial of someone who is too mentally incapacitated to assist in their own defense. As a result of being found ITP, many are referred to a state psychiatric hospital (SPH) for treatment to restore capacity (restoration treatment). However, there is a long wait list for admission to state psychiatric hospitals. As a result, hundreds of people are in NC jails awaiting treatment, often for months to years. These people are at serious risk of injury, mental decompensation, and death as they languish in jail facilities that are ill-equipped to provide adequate healthcare to people with serious mental health issues. [1] While waiting in jail the person is left with no legal representation, no scheduled court date, and no way to move their case forward – all violations of their constitutional rights.

DRNC has coordinated with the Pitt County Sheriff's Office to study these systemic problems [[DRNC and Pitt County Sheriff's Office Presentation on ITP/IVC Issues \(https://docs.google.com/presentation/d/e/2PACX-1vQ7IxbqHOCZiZifIlaCQca35j76ypbGLAjAGXL10VIJEzxiEQ087b-cyTE79kiYQ/pub?start=false&loop=false&delayms=3000\)\] \[2\]. We found several causes of the current human and legal rights concerns and have suggested both long-term legal changes as well as short-term solutions for moving people who are ITP out of inappropriate and unconstitutional jail settings. While we try to identify steps that stakeholders can take to alleviate the damage done to ITP defendants, we stress that a systemic change is needed to avoid the hazards of the current ITP](https://docs.google.com/presentation/d/e/2PACX-1vQ7IxbqHOCZiZifIlaCQca35j76ypbGLAjAGXL10VIJEzxiEQ087b-cyTE79kiYQ/pub?start=false&loop=false&delayms=3000)

process that keeps hundreds of ITP defendants languishing in limbo waiting for adequate healthcare, their day in court, or both. Longer-term solutions must address overreliance on jails and overstretched hospitals to address mental health needs and should include alternatives like community-based restoration or diversion.

HISTORY and OVERVIEW

To understand the current problems with how NC courts handle ITP cases, it is important to first note the differences between a finding of ITP and a finding that a person should be involuntarily committed through the IVC process. IVC and ITP have two very different standards. To be found ITP, a person must have a mental illness or “defect” that renders them unable to understand the proceedings, their own situation in reference to the proceedings, or to rationally and reasonably assist in their defense^[3]. In contrast, to be involuntarily committed a person must have a mental illness and be determined to be dangerous to themselves or others^[4]. These are two different standards, with ITP concerning a person’s ability to stand trial and IVC attempting to assess the person’s potential need for commitment.

The seed of our current ITP/IVC system starts with a US Supreme Court decision from 1972, *Jackson v. Indiana*. See 406 U.S. 715, 738 (1972). In that decision, the Court held that:

“[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen or release the defendant.”^[5]

After *Jackson*, North Carolina drafted statutes that attempted to apply the Court’s reasoning to the day-to-day operation of criminal courts. In their Official Commentary to the statutes governing ITP proceedings, the legislature stated that:

“[W]hen the trial court determines that the defendant does not have capacity to proceed, it will direct the initiation of civil commitment proceedings. This will eliminate the possibility that a defendant suffers extended commitment simply because he has been accused of a crime. Thus, the defendant who is not dangerous, but who lacks capacity for trial, can be released. That result is required by the *Jackson* case.”^[6]

Both the Supreme Court and the legislature were abundantly clear on one key point – a person should not suffer extended commitment or imprisonment just because they do not have the capacity to stand trial. How, then, does North Carolina end up keeping hundreds of people jailed indefinitely because of their ITP status?

FORM PROBLEMS

One problem is the form that NC judges use after finding someone incapable to proceed, the AOC-SP-304(B) form, or a 304(B). This form is designed to be used at the close of an ITP hearing when the judge has found the person ITP and believes the criteria for involuntary commitment (dangerous to self or others) has been met. At this point, the defendant has usually already been assessed by a mental health professional regarding their ITP status. There are several problems with the 304(B) form and how it is commonly used:

Appropriate Use

The 304(B) form should only be used when the judge has already found the person ITP *and* made a determination that there are reasonable grounds to believe the person meets the criteria for IVC. After a finding of ITP, the statutes are clear that it is within the judge’s discretion to determine whether or not reasonable grounds for IVC exist.^[7] Only after finding both that the person is ITP and that reasonable grounds for IVC exist should the 304(B) be used.

Naming Only One Hospital

In practical use, the 304(B) form is often filled out to require that the person to be sent to a particular state psychiatric hospital. This can lead to long wait times if that particular hospital has no available beds. However, statutes allow the judge’s order to send the person to any facility that meets the definition of a “24-hour facility”^[8]. By filling out the 304(B) to name “any 24-hour facility” instead of just one hospital, judges can allow defendants to be taken to an appropriate facility that may have open beds if their assigned state psychiatric hospital has a long backlog of people waiting for a treatment bed.

Pre-release ITP Assessment Requirement

For those charged with violent crimes, the 304(B) form requires that hospital staff perform an ITP assessment before release back into law enforcement custody. An ITP assessment is statutorily required before being released from hospital custody [9], however there is no requirement that the assessment be performed *by the hospital* – just that it be completed. While state psychiatric hospitals (SPHs) often have staff qualified to perform ITP assessments, not all 24-hour facilities have that same capability. One non-SPH hospital stated they were reluctant to admit ITP defendants for IVC as they lacked the forensic psychiatric capabilities to fulfill the pre-release ITP assessment required in the language of the 304(B) form. Judges can avoid this barrier to hospital access by ordering that the pre-release ITP assessment be performed by a court-appointed forensic evaluator instead of the hospital staff.

TRANSPORT ISSUES

Whether using a 304(B) form or not, an order committing a person charged with a violent crime to a hospital for treatment must include, by law, a requirement that law enforcement take the person *directly* to a 24-hour facility for assessment and treatment[10]. This requirement is not at the judge's discretion, as direct transportation is mandated by both criminal and civil statutes[11].

A common law enforcement practice is to contact the hospital named on the custody order before transporting the ITP defendant to that hospital. At that point, the sheriffs are often instructed by the hospital not to transport the person to the hospital until their turn comes up on the hospital bed waitlist.

This waitlist system not only leads to people languishing in the jail waiting for a bed but may also put the Sheriff at risk of violating the transport order. While there is no bright-line time limit on the transfer (e.g., "transfer must occur within 24 hours"), there is also no statutory requirement that the law enforcement agency defer to the hospital regarding whether, or when, to carry out their duty to transport the person to the hospital. Indeed, keeping a person in jail on a waitlist delays transportation and likely contravenes the directive in the judge's order to directly transport the person to the hospital.

LEGAL LIMBO

The current practice of allowing ITP defendants to languish in jail waiting for hospital beds likely also violates defendants' due process rights. People charged with a crime are constitutionally entitled to legal representation and a trial without unnecessary delays and prolonged detention. However, in our current system a person who is ITP and referred for an IVC commitment hearing is often denied their constitutional rights as a result of being found ITP.

When a person is found ITP and referred for an IVC hearing through a custody order (usually a 304(B)), their case is designated as an SPC or "special proceedings confidential" case. The SPC case is then handled according to civil IVC law, and the criminal case is left pending until capacity is restored or the case is closed.[12] This often means that once the 304(B) custody order is signed, the criminal case is essentially paused until the civil IVC process is completed. No future criminal hearing is set on the court calendar, and criminal defense attorneys often pause their representation in the case until the IVC matter is resolved.

Ideally, the SPC designation would not lead to a lack of representation or lengthy delay in the criminal case. Under IVC statutes, a person considered for IVC is entitled to representation through the Special Counsel's office, and there are strict deadlines and notification requirements ensuring that counsel is appointed and hearings are held in a timely manner during the IVC process. According to current laws, an indigent person is entitled to representation as soon as feasible after being taken into custody.[13] Further, a hearing must be scheduled in district court within 10 days of the person being taken into law enforcement custody.[14] However, because of the process dictated by statute, these constitutional protections and guarantees are not triggered until the person is physically present at the hospital.

IVC statutes are clear that the procedures for assignment of counsel, clerk notification, and court deadlines are all dependent upon the ITP defendant being physically present at the hospital[15]. If the person is instead held in jail awaiting a hospital bed, none of those protections are triggered. This leaves the person with their criminal case and corresponding legal representation paused because the 304(B) order has been filed, and without representation or a hearing date in their civil IVC matter because they have not been transported to the hospital. In this situation, the case falls into a legal limbo leaving the ITP defendant without counsel, a court date, or proper medical care as they sit in the jail waiting for a hospital to find space for them – the exact unconstitutional situation that the *Jackson* court and the NC legislature intended to avoid.

CONCLUSION

While we have proposed some short-term stopgaps in this article as well as in the more detailed PowerPoint [DRNC and Pitt County Sheriff's Office Presentation on ITP/IVC Issues \(https://docs.google.com/presentation/d/e/2PACX-1vQ7IxbqHOCZiZifllaCQca35j76ypbGLAjAGXL10VIJEzxiEQ087b-cyTE79kiYQ/pub?start=false&loop=false&delayms=3000\)](https://docs.google.com/presentation/d/e/2PACX-1vQ7IxbqHOCZiZifllaCQca35j76ypbGLAjAGXL10VIJEzxiEQ087b-cyTE79kiYQ/pub?start=false&loop=false&delayms=3000), structural and systemic problems are the root of this constitutional violation. These include the underutilization of diversion and community-based alternatives to the current cycle of incarceration and hospitalization. While short-term solutions and workarounds can help alleviate the damage done to these defendants, a solution to this problem can only come from systemic reforms to the process and the development of alternatives to jailing people in need of mental health treatment found ITP. Until that happens, some of our State's most vulnerable people will continue to languish, untried and without recourse, in North Carolina's jails.

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ENDNOTES

[1] As DRNC has reported, death rates in NC jails have skyrocketed in recent years, with 90 deaths reported in 2022 – more than double the number of deaths reported in 2019.

[2] DRNC and Pitt Co Sheriff recently prepared and presented this power point presentation [DRNC and Pitt County Sheriff's Office Presentation on ITP/IVC Issues \(https://docs.google.com/presentation/d/e/2PACX-1vQ7IxbqHOCZiZifllaCQca35j76ypbGLAjAGXL10VIJEzxiEQ087b-cyTE79kiYQ/pub?start=false&loop=false&delayms=3000\)](https://docs.google.com/presentation/d/e/2PACX-1vQ7IxbqHOCZiZifllaCQca35j76ypbGLAjAGXL10VIJEzxiEQ087b-cyTE79kiYQ/pub?start=false&loop=false&delayms=3000) on the issue.

[3] N.C.G.S. 15A-1001

[4] N.C.G.S. 122-C 261(b), UNC School of Government – *North Carolina Superior Court Judge's Handbook, Capacity to Proceed* (2015), p. 24 sec VII(B).

[5] *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

[6] N.C.G.S. 15A Article 56 Official Commentary, p. 772

[7] N.C.G.S. 15A-1003(a)

[8] *Id.*, N.C.G.S. 122C-263(b)

[9] N.C.G.S. 15A-1004(c), N.C.G.S. 122C-278

[10] N.C.G.S. 15A-1003(a)

[11] *Id.*, N.C.G.S. 122C-263(b)

[12] State of North Carolina Records of the Clerks of Superior Court, Rules of Recordkeeping, Sec VII Rule 8.11(A)

[13] N.C.G.S. 122C-268(d), 7A-451(a)(6), 7A-451 (b)

[14] N.C.G.S. 122C-268(a)

[15] See [DRNC and Pitt County Sheriff's Office Presentation on ITP/IVC Issues \(https://docs.google.com/presentation/d/e/2PACX-1vQ7IxbqHOCZiZifllaCQca35j76ypbGLAjAGXL10VIJEzxiEQ087b-cyTE79kiYQ/pub?start=false&loop=false&delayms=3000\)](https://docs.google.com/presentation/d/e/2PACX-1vQ7IxbqHOCZiZifllaCQca35j76ypbGLAjAGXL10VIJEzxiEQ087b-cyTE79kiYQ/pub?start=false&loop=false&delayms=3000), slide 18-19, N.C.G.S. 122C-264, 266(c), 266(a), 270(a)

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