CASE LAW UPDATE: WHAT'S NEW IN COMMITMENT APPEALS

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ROADMAP

- Introduction
- Overview
- Due Process
- Danger to Self / Others
- Confrontation
- Expert Witnesses

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INTRODUCTION

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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

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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

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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

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OVERVIEW

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DAILY HEADLINES

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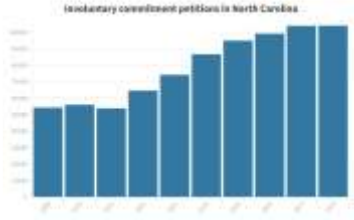
OVERRELIANCE ON IVC



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2022

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 . . . ."

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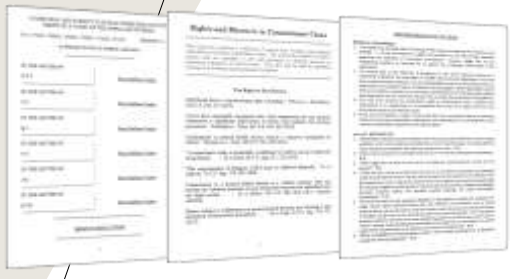
HANDOUTS



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DUE PROCESS

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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)

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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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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

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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

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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

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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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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

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ORAL ARGUMENT AT SCONC

September 20, 2022

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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."

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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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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"

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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

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DANGER TO SELF OR OTHERS

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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."

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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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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

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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.

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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.

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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.

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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

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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.

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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.

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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.

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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

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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

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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

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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)

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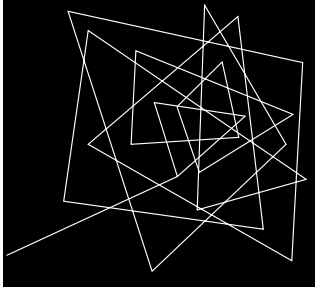

CONFRONTATION

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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)

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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

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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)

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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

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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."

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EXPERT WITNESSES

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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?

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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.*

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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

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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

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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)

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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)"

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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?

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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)

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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)

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