



2011 Civil Commitment Conference
The Long and Winding Road
January 28, 2011 / Chapel Hill, NC

ELECTRONIC CONFERENCE MATERIALS*

*This PDF file contains “bookmarks,” which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. “Bookmarks” can be viewed by pressing the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.



2011 Civil Commitment Conference: *The Long and Winding Road*

January 28, 2011 / Chapel Hill, NC

*Cosponsored by the UNC-Chapel Hill School of Government
& the NC Office of Indigent Defense Services*

AGENDA

- 8:00 to 8:45am Check-in
- 8:45 to 9:00am Welcome and Program Overview
Whitney Fairbanks, Civil Defender Educator,
UNC School of Government, Chapel Hill, NC &
Ben M. Turnage, Special Counsel, Cherry Hospital, Goldsboro, NC
- 9:00 to 9:30am **How We Got Here: Detours on the Long and Winding Road**
Gerry Akland, President, National Alliance on Mental Illness, Wake County
- 9:30 to 10:45am **The Seven Day Hold, a panel discussion**
Moderator: Ben Turnage
Panelists: Mark Botts, Associate Professor of Public Law and Government,
UNC School of Government, Chapel Hill, NC
Dr. Graham Snyder, MD, WakeMed, Raleigh, NC
Jody Webster, Screening and Admissions Unit Nurse Supervisor,
Central Regional Hospital, Butner, NC
- Break
- 10:45 to 11:00am **Practical Psychiatry for Lawyers**
Dr. Alan Cook, MD, Dorothea Dix Hospital, Raleigh, NC
- 11:00 to 12:30pm Lunch (*provided in building*)*
- 12:30 to 1:30pm **Practical Psychology for Lawyers**
Dr. Mark Hazelrigg, PhD, Dorothea Dix Hospital, Raleigh, NC
- 1:30 to 2:30pm **What it All Means: An Overview of Recent Case Law**
David Andrews and Kristen Todd, Assistant Appellate Defenders,
Office of the Appellate Defender, Durham NC
- 2:30 to 3:15pm Break (*light snack provided*)
- 3:15 to 3:30pm **Why It All Matters: The Collateral Consequences of Commitment**
(*Ethics*)
- 3:30 to 4:30pm Laura Shivar, Special Counsel, Cherry Hospital, Goldsboro, NC

CLE Hours: 6.0 (Includes 1.0 hours of ethics/professional responsibility)

*IDS employees may not claim reimbursement for lunch

2009 Memorandum to Magistrates¹ Change to Commitment Law and Magistrate Practice

The shortage of suitable 24-hour facilities for persons in need of mental health evaluation and treatment has received significant attention in the past few years. The purpose of this memo is to inform magistrates about recent legislation enacted to address one aspect of this problem, and to caution magistrates to avoid a practice, currently relied upon in some parts of the State, that is not authorized by law.

New Law

Session Law 2009-340 (House Bill 243), effective October 1, 2009, is a legislative acknowledgement that many persons who are found mentally ill and dangerous to self or others at the first commitment examination are not proceeding to the next step in the commitment process in a timely manner. Statutory law requires that these persons (known as “respondents”) be taken to a 24-hour psychiatric facility for a second examination and treatment pending a commitment hearing in district court. This hearing must take place within 10 days from the time the respondent was taken into law enforcement custody at the beginning of the commitment process. Because the state-operated psychiatric hospitals do not have sufficient bed space, many respondents are kept waiting in community hospital emergency rooms for several days. By the time some of these respondents arrive at a state hospital, the clerk of court does not have time to calendar a hearing within the 10-day time frame.

This 10-day hearing requirement is one of North Carolina’s statutory mechanisms for assuring that a respondent is not deprived of liberty without the due process guaranteed by the U.S. Constitution. The new law is a response to the concern that delays in transporting respondents to psychiatric inpatient facilities may deprive some respondents of statutory and constitutional due process. S.L. 2009-340 amends G.S. 122C-261(d) and -263(d) to provide that, with respect to respondents who have been found to meet the inpatient commitment criteria, if a 24-hour facility is not immediately available or medically appropriate seven days after issuance of the custody order, a physician or psychologist must report this fact to the clerk of superior court and the proceedings must be terminated. If this happens, a new commitment proceeding may be initiated by filing a petition for a new custody order, but affidavits filed and examinations conducted as part of the previous commitment proceeding may not be used to support a new commitment. Certainly, some of the facts considered by the magistrate in deciding to issue the first custody order may be relevant when deciding to issue another custody order—and for this reason a new petition may in some cases contain facts that were asserted on the previous petition—but any papers filed and examinations conducted in support of a new proceeding must be new.

In situations where a respondent is temporarily detained at the site of first examination because a 24-hour facility is not immediately available or medically appropriate, S.L. 2009-340

¹ This memorandum differs slightly from the original memorandum issued to magistrates on November 15, 2009. This version more precisely reflects the analysis and opinion of the author, Mark Botts, faculty member of the School of Government, UNC-Chapel Hill.

also permits a physician or psychologist to terminate the inpatient commitment proceeding and discharge the respondent (or recommend outpatient commitment), upon finding that the respondent's condition has improved to the point that he or she no longer meets the criteria for inpatient commitment. Any such finding must be documented in writing and reported to the clerk of superior court.

A Practice to be Avoided

It is not at all surprising that legal and medical professionals confronted with the current crisis presented by a shortage of available 24-hour facilities craft creative responses in an effort to improve the way the system responds to citizens in need of help. One practice currently being employed by some magistrates, however, is inconsistent with the law and presents significant problems for other participants in the system. This practice consists of holding a commitment petition and not issuing a custody order until the availability of a particular 24-hour facility has been confirmed. The result is that the facility performing the first evaluation must hold a respondent for the period—sometimes days, as discussed above— without this hold being authorized by a custody order. Without a custody order, this hold is not authorized by the commitment statutes (subject to an exception not relevant to magistrates), raising serious issues about the due process rights of the respondent as well as questions about the potential liability of the facility exerting custodial control over the respondent without a custody order. Accordingly, magistrates should not engage in this modification of the statutory procedure. When a magistrate receives a petition and makes a determination that reasonable grounds exist to believe that an individual meets the statutory criteria for commitment, the law is clear that a magistrate must issue a custody and transportation order. The commitment statutes do not authorize a magistrate to delay issuance of a custody order pending the receipt of other information. Nor do the statutes permit a magistrate to make his or her decision subject to criteria not identified in the commitment statutes.

In the space on the custody order for designating a 24-hour facility, the magistrate should enter the name of the facility normally used by the jurisdiction, followed by the words "or any state-approved facility." This allows the commitment process to proceed without delay and permits the involuntary detention of the respondent throughout all phases of the commitment process, including during the time it takes following the first examination to identify an available 24-hour facility. Moreover, some 24-hour facilities may not agree to accept an involuntary patient until *after* a custody order has been issued. The magistrate's role in this process is critically important, and it is absolutely essential that magistrates follow the statutory procedure in carrying out their responsibilities.

If you have questions or concerns about any of the information in this memo, contact the School of Government faculty member specializing in mental health law, Mark Botts. Mark can be reached by telephone (919-962-8204) or email (botts@sog.unc.edu).

Trial Strategies for Commitment Hearings Civil Commitment Conference / January 28, 2011

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“[I]t is indisputable that involuntary commitment...can engender adverse social consequences to the individual. Whether we label this phenomena ‘stigma’ or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.”

Addington v. Texas, 441 U.S. 418, 425–26, 60 L. Ed. 2d 323, 331 (1979).

I. Pre-Hearing Considerations

There are two primary issues that you should look for before the commitment hearing. The first issue is whether the affidavit and petition are sufficient to confer subject matter jurisdiction onto the district court. Under N.C. Gen. Stat. § 122C–261, the petition and affidavit must contain facts indicating that the respondent is mentally ill and dangerous to herself or others, or in need of treatment in order to prevent disability or deterioration that would predictably result in dangerousness. Although it is permissible for the petition and affidavit to be based on hearsay, *In re Zollicoffer*, 165 N.C. App. 462, 467, 598 S.E.2d 696, 699 (2004), they must be sworn under oath. N.C. Gen. Stat. § 122C–261. If they are not sworn under oath, the case should be dismissed. *In re Ingram*, 74 N.C. App. 579, 581, 328 S.E.2d 588, 589 (1985).

The second issue is whether the respondent was properly examined after being taken into custody. Under N.C. Gen. Stat. § 122C-263, the respondent must be examined by a doctor or psychologist within 24 hours of arrival at an area facility. Under N.C. Gen. Stat. § 122C-266, the respondent must then be examined by a doctor within 24 hours of arrival at a 24-hour facility. If the State fails to properly complete the examination process, the case is subject to dismissal. See *In re Barnhill*, 72 N.C. App. 530, 532, 325 S.E.2d 308, 309 (1985).

If you determine that there is a defect in the petition and affidavit, or the examination process, consider filing a written motion to dismiss at the beginning of the commitment hearing. A written motion to dismiss enables you to present all possible grounds for relief and ensures that your arguments will be reflected in the record and preserved for appeal.

Finally, be sure to check with the clerk that the commitment hearing will be recorded. A respondent is entitled to a transcript of the commitment hearing under N.C. Gen. Stat. §§ 267(g), 268(i), and 268.1(h). Usually, the clerk makes a recording of the commitment hearing and sends the recording to a court reporter to transcribe after the order of appellate entries is issued.

II. Challenging the State's Evidence

It is imperative to properly object to inadmissible evidence during commitment hearings because if you fail to do so, you will waive your client's right to challenge the evidence on appeal. Please consider incorporating the following principles into your practice during commitment hearings.

First, be sure to object to any testimony that you suspect is inadmissible. Plain error is not allowed in civil appeals. *Durham v. Quincy Mut. Fire Ins. Co.*, 311 N.C. 361, 367, 317 S.E.2d 372, 377 (1984). Thus, if you fail to object to inadmissible evidence, the evidence cannot be challenged on appeal.

Second, be sure to specify the grounds for any objections that you make. A general objection is not sufficient to preserve an error for appeal. *State v.*

Hammett, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006). Possible objections include, but are not limited to, the following:

1. Relevance (Evidence Rules 401–403): In criminal cases, the relevance of evidence is construed “broadly” in favor of admitting the evidence. *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994). In civil cases, by contrast, the relevance of evidence “is to be tested by the pleadings, which define the facts put in issue by the parties.” *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 304, 67 S.E.2d 292, 300 (1951).
2. Lack of Personal Knowledge (Evidence Rule 602): “A witness is not competent to testify to a fact beyond his personal knowledge or to base an opinion upon facts of which he has no knowledge.” *Robbins v. C. W. Myers Trading Post, Inc.*, 251 N.C. 663, 666, 111 S.E.2d 884, 886 (1960).
3. Improper Opinion (Evidence Rules 701–704): Although an expert witness may testify about otherwise inadmissible evidence in order to establish the basis of her opinion, *State v. Allen*, 322 N.C. 176, 184, 367 S.E.2d 626, 630 (1988), such testimony is not without limitations. The witness must be qualified as an expert in order to give an expert opinion. *State v. Goodwin*, 320 N.C. 147, 151, 357 S.E.2d 639, 641 (1987). In addition, the witness may not exceed the scope of her expertise. *State v. Heath*, 316 N.C. 337, 342, 341 S.E.2d 565, 569 (1986). An expert witness also may not testify that a legal standard has been met. *Smith v. Childs*, 112 N.C. App. 672, 680, 437 S.E.2d 500, 506 (1993). Finally, if an expert witness bases her opinion on inadmissible evidence, the evidence itself may not be relied on for its truth. *State v. Jones*, 339 N.C. 114, 146, 451 S.E.2d 826, 846 (1994).
4. Hearsay (Evidence Rule 802): “An assertion of one other than the presently testifying witness is hearsay and inadmissible if offered for the truth of the matter asserted.” *Livermon v. Bridgett*, 77 N.C. App. 533, 540, 335 S.E.2d 753, 757 (1985).

Third, be sure to include statutory and constitutional grounds in your objections. If you fail to do so, such grounds cannot be raised on appeal. See *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (“Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.”).

The overriding constitutional concern during commitment hearings is whether the respondent received due process before being committed to a mental institution. *See In re Mikels*, 31 N.C. App. 470, 474, 230 S.E.2d 155, 158 (1976) (“Chapter 122 was written to provide constitutionally defensible procedural and evidentiary rules.”). Therefore, if you make an evidentiary objection, you should consider asserting that an adverse ruling would violate the respondent’s right to due process.

In addition, a respondent in a civil commitment case has the right to confrontation under N.C. Gen. Stat. § 122C-268(f). If the trial court admits an out-of-court statement by a non-testifying witness, be sure to object on confrontation grounds. *See In re Mackie*, 36 N.C. App. 638, 244 S.E.2d 450 (1978) (reversing a commitment order because the trial court admitted a medical report without any testimony by the doctor who prepared the report.).

Fourth, if the trial court overrules your objection, be sure to ask for a “standing” objection to the line of questions that you deem improper. *See Duke Power Co. v. Winebarger*, 300 N.C. 57, 68, 265 S.E.2d 227, 234 (1980) (authorizing the use of standing objections). Be aware of the following considerations when requesting a standing objection:

1. When you ask the court for a standing objection, you need to specify all of the grounds for your objection.
2. If the State moves on to another line of questioning and then returns to the same objectionable testimony, be sure to object again on the same grounds as your original standing objection.
3. If the court allows your standing objection and you determine during the witness’s testimony that there are additional grounds for an objection, be sure to raise those additional grounds with the court.
4. If the court denies your request for a standing objection, object to every question that you deem improper and state all of the grounds for each objection.

Fifth, when inadmissible evidence is admitted during the hearing, you should also consider making a motion to strike. *See State v. Keen*, 309 N.C. 158, 162,

305 S.E.2d 535, 537 (1983) (“If an unresponsive answer produces irrelevant or incompetent evidence, the evidence should be stricken and withdrawn from the jury.”). The failure to make a motion to strike can be construed as a waiver of the right to challenge the evidence on appeal. *See State v. Adcock*, 310 N.C. 1, 19, 310 S.E.2d 587, 598 (1984) (“When [a] question does not indicate the inadmissibility of the answer, [counsel] should move to strike as soon as the inadmissibility becomes known. Failure to so move constitutes a waiver.”).

III. Presenting Evidence for the Respondent

If the court prohibits you from presenting evidence, be sure to object on evidentiary grounds (e.g., the evidence is relevant or involves non-hearsay) as well as constitutional grounds. Specifically, be sure to assert that excluding the evidence would deprive the respondent of her due process right to present evidence in her defense. *See Vitek v. Jones*, 445 U.S. 480, 496, 63 L.Ed.2d 552, 567 (1980) (holding that an inmate must have an opportunity to challenge a decision to commit him to a mental hospital).

In addition, ask the court to allow you to make an offer of proof. An offer of proof enables you to get testimony or exhibits into the record for appellate review when the court rules that the evidence is inadmissible. If you fail to make an offer of proof, the exclusion of the evidence cannot be challenged on appeal because the appellate court cannot determine if the trial court’s ruling was erroneous. *See State v. Locklear*, 349 N.C. 118, 150, 505 S.E.2d 277, 296 (1998) (by failing to make an offer of proof, the defendant “deprive[d] the Court of the necessary record from which to ascertain if the alleged error is prejudicial.”). The best way to make an offer of proof is by eliciting testimony from the witness or tendering an exhibit to the court. Unfortunately, summarizing what a witness would have said or what an exhibit would have shown is likely not sufficient. *See State v. Long*, 113 N.C. App. 765, 768–69, 440 S.E.2d 576, 578 (1994).

IV. The Motion to Dismiss

After all of the evidence is presented, be sure to make a motion to dismiss the case. As part of your argument, you should address the criteria for involuntary commitment. For inpatient commitment, there must be evidence that the

respondent is (1) mentally ill and (2) dangerous to herself or others. N.C. Gen. Stat. § 122C-268(j). For outpatient commitment, there must be evidence that the respondent is (1) mentally ill, (2) the respondent is capable of surviving safely in the community with available supervision from family, friends, or others; (3) based on the respondent's psychiatric history, the respondent is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness, and (4) the respondent's current mental status or the nature of the respondent's illness limits or negates the respondent's ability to make an informed decision to seek treatment voluntarily or comply with recommended treatment. N.C. Gen. Stat. § 122C-263(d)(1).

If there is any doubt about any of the elements, be sure to challenge those elements during your argument. Otherwise, the respondent will not be able to challenge those elements on appeal. *See State v. Augustine*, 359 N.C. 709, 721, 616 S.E.2d 515, 525 (2005) ("Where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount....").

V. Disposition

When the district court enters disposition in the case, make sure that the commitment period is proper. If the commitment period is too long, you should ask the court to shorten the commitment period so that it is within the proper statutory range. See the attached charts for permissible commitment periods.

As appeals usually take 12-18 months to complete, most commitment periods will expire before the appeal ends. Thus, any challenge to an improper commitment period on appeal will be deemed moot. In addition, if a prior commitment period was too long, it cannot be challenged during a later commitment hearing in district court or an appeal of a later commitment hearing. *In re Webber*, ___ N.C. App. ___, ___, 689 S.E.2d 468, 474 (2009). As a result, if an improper commitment period is not corrected when it is imposed, there is little that can be done at a later time to correct the problem.

VI. Appeal

A respondent has the right to appeal a commitment order under N.C. Gen. Stat. §§ 122C-272 (mental illness) and 122C-288 (substance abuse). The appeal goes to the Court of Appeals; not to superior court.

Notice of appeal in civil commitment cases is governed by Rule 3 of the North Carolina Rules of Appellate Procedure. Under Appellate Rule 3, the notice of appeal:

1. Must be entered within 30 days after entry of judgment.
2. Must be in writing.
3. Must specify the party appealing.
4. Must designate the judgment from which the appeal is taken.
5. Must designate the court to which the appeal is taken.
6. Must be signed by counsel or the party taking the appeal.
7. Must contain proof of service on the opposing party.

A sample notice of appeal is included with this handout. If neither the State nor the petitioner are represented at the commitment hearing, you can serve the notice of appeal on Richard Slipsky or Lisa Corbett at the Mental Health Unit of the North Carolina Department of Justice. Their address is: North Carolina Department of Justice, P.O. Box 629, Raleigh, North Carolina 27602-0629. After you enter notice of appeal, the district court must issue an order of appellate entries, which appoints the Office of the Appellate Defender to handle the appeal and orders a court reporter to transcribe the commitment proceedings. A blank order of appellate entries is attached to this handout.

VII. Summary of Recent Case Law

The biggest thing we have all learned over the last few years of appellate case law in the involuntary commitment arena is that trial courts must make sufficient written findings of fact to support their conclusions of law that a respondent is mentally ill and dangerous. The first opinion on this issue in several years was *In re Booker*, 193 N.C. App. 433, 667 S.E.2d 302 (2008), and there have been a number of cases that have followed in its wake. While this is certainly an important point for district courts to remember, and an issue which gives us much success on appeal, it is not a great help to you as trial attorneys.

On that note, there are two recent cases which, while reversed due to insufficient findings of fact, reach beyond the question of whether the district court's findings of fact are sufficient. Both cases contain important points of law for you to think about in your trial practice because, while they were decided based on insufficient findings of fact, the theories can be translated to sufficiency of the evidence arguments. They are also great reminders of some of the somewhat forgotten points in involuntary commitment practice. Most importantly, the Court of Appeals gave us some great language to work with in crafting our own arguments. Please know that both cases are unpublished. However, as they are the only cases addressing these issues, they can be cited as authority under Rule 30(e) of the North Carolina Rules of Appellate Procedure.

The third case, *In re Webber*, is also more helpful to trial practice, as it highlights the importance of making sure that the commitment period entered by the district court is proper. The Court of Appeals held in *Webber* that an improper commitment period cannot be collaterally attacked. Therefore, if an improper commitment period is imposed, little can be done at a later time to correct the problem.

In the Matter of Church, No. COA09-1058, 2010 N.C. App. LEXIS 1282 (July 20, 2010) – Mr. Church was charged with first-degree murder in connection with the shooting death of his wife. He was found incapable of proceeding to trial and was committed and recommitted to Broughton Hospital four times between October 2007 and March 2009. This appeal was from the March 2009 recommitment order.

The issue in the case was whether the trial court's findings of fact were sufficient to support its conclusion of law that Mr. Church was dangerous to others. The Court of Appeals found that they were not and, therefore, reversed the recommitment order. However, a closer look at the findings reveals some important points to remember when dealing with respondents who have been accused of, and committed based on, a homicide or other violent crime.

The following were the findings made by the trial court: The Court heard from Dr JoAnna Gaworowski, the staff psychiatrist at Broughton Hospital. Dr. Gaworowski stated that she could not say that [Respondent] is not dangerous. She further stated that [Respondent] is mentally ill. [Respondent] is currently charged with first degree murder. Dr Gaworowski stated that without medical attention, [Respondent] would deteriorate which would predictably result in dangerousness to others. The respondent therefore meets the defin[i]tion of dangerousness to others.

The Court of Appeals held that “[t]he trial court's order [was] completely devoid of any indication that Respondent [had] ‘within the relevant past,’ inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or [had] acted in such a way as to create a substantial risk of serious bodily harm to another, or [had] engaged in extreme destruction of property.” It also held that “the fact that Respondent [had] been charged with first degree murder [did] not constitute a finding that he actually committed the homicide with which he [had] been charged. On the contrary ...the fact that he had been indicted for first degree murder simply [established] that the Ashe County grand jury found probable cause to believe that he had committed the offense[.]”

So what should we take away from this case? The Court of Appeals said it best when it held, “[T]he fact that someone has been charged with a crime does not suffice to support a finding of the type required to sustain an involuntary commitment order.” Section 122C-3(11)(b) provides that “clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.” However, as an indictment is only based on “probable cause,” it is not sufficient to meet the higher standard of “clear, cogent, and convincing evidence.”

As an aside, the Court of Appeals also said in its opinion that testimony that it cannot be said that someone is *not* dangerous is *not* the same as saying that they are dangerous. Therefore, the finding that the doctor “could not say that Mr. Church was not dangerous” did not support a conclusion that he was in fact dangerous to others.

In the Matter of McCray, No. COA09-1623, 2010 N.C. App. LEXIS 1086 (July 6, 2010) – Ms. McCray was originally committed to Central Regional Hospital in November 2008. She was then recommitted on December 18, 2008. This appeal was from the recommitment order.

The issue in this case was, again, whether the trial court's findings of fact were sufficient to support its conclusions of law that Ms. McCray was dangerous to both herself and others. The Court of Appeals held that they were not and reversed the recommitment order. Again, the reasons why the Court came to this conclusion are very important and can be applied to sufficiency arguments.

The criteria for dangerousness to self and dangerousness to others both have a second prong which is often overlooked. In order to be found dangerous to others, a respondent must not only have committed some harm, attempted some harm, or threatened some harm, but there must be a "reasonable probability that this conduct will be repeated." Moreover, in order to be found dangerous to himself, a respondent must not only be unable to care for himself, but there must also be a "reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given."

In *McCray*, the Court of Appeals held that the trial court's findings on these second prongs of dangerousness were insufficient. With regards to dangerousness to others, the Court found that the trial court had failed to make any findings that there was a reasonable probability that Ms. McCray's threatening conduct would be repeated. Additionally, in its analysis of the findings for dangerousness to self, it specifically stated that "[a] danger that may not manifest itself for several years does not meet the statutory requirement of a serious risk 'within the near future.'" While Ms. McCray declined to take her medication, there were no findings establishing that the failure to take the medication would create any probability of physical debilitation within the near future.

Even more interestingly, the Court of Appeals addressed a line of cases which stood for the proposition that failure of a respondent to care for her medical

needs, diet, grooming, and general affairs meets the criteria for dangerousness to self. The Court explained that these cases, beginning with *In re Lee*, 35 N.C. App. 655, 242 S.E.2d 211 (1978), and including *In re Medlin*, 59 N.C. App. 33, 295 S.E.2d 604 (1982) and *In Re Lowery*, 110 N.C. App. 67, 428 S.E.2d 861 (1993), were based on the old version of the statute. The statute was amended in 1979 to reflect the current definition of dangerousness to self. However, the Court of Appeals had continued to rely on *Medlin* without realizing that its statutory basis had been removed. Ultimately, the Court of Appeals reversed the commitment order and concluded that *Medlin* provided “no route to bypass the statute’s requirement of a finding ‘that there is a reasonable probability of [Respondent’s] suffering serious physical debilitation within the near future.’”

***In the Matter of Webber*, ___ N.C. App. ___, 689 S.E.2d 468 (2009)** – This appeal was from Mr. Webber’s third 180-day period of involuntary outpatient treatment. Mr. Webber contended that, because his initial commitment order provided for a term of commitment that exceeded the period authorized, the initial commitment period expired as a matter of law, and, therefore, the trial court lacked jurisdiction to enter subsequent commitment orders.

The Court of Appeals held that, because Mr. Webber had failed to appeal from the initial order or request a supplemental hearing, his appeal of the present commitment was an impermissible collateral attack on the prior order. The Court held that in order to challenge the improper commitment period contained in the original order, Mr. Webber was required to appeal that order or to request a supplemental hearing. He could not, however, undo subsequent recommitment orders by challenging a prior order – entered by a court with jurisdiction over the case – that he had elected not to appeal.

Mr. Webber also argued that the doctor’s testimony regarding his history of violence was incompetent evidence because it was based on hearsay. The Court of Appeals ruled, however, that because the doctor was an expert witness, it was appropriate for his testimony to rely both on his personal examination of Mr. Webber and “other information included in [his] official medical records.” Moreover, § 122C–263(d)(1)(c) requires the doctor to rely on the respondent’s psychiatric history. Because the doctor testified that he had

learned of Mr. Webber's history of violence through medical history provided by another doctor, the Court held that the information was "precisely the type that a medical expert may use as the basis for the expert's opinion."

VIII. Oldies but Goodies

***In re Hogan*, 32 N.C. App. 429, 232 S.E.2d 492 (1977) and *In re Mackie*, 36 N.C. App. 638, 244 S.E.2d 450 (1978)** – These two cases stand for the proposition that a respondent in an involuntary commitment proceeding has a right to confront and cross-examine the witnesses against them. This right to confrontation means that if a physician's report is to be admitted into evidence or incorporated by reference into the trial court's order, the physician must testify at the commitment hearing. This right is also directly protected by N.C. Gen. Stat. §122C-268(f), which states that while "certified copies of reports and findings of physicians and psychologists...are admissible in evidence...the respondent's right to confront and cross-examine witnesses *may not be denied.*" The violation of this right is grounds for reversal on appeal.

***In re Barnhill*, 72 N.C. App. 530, 325 S.E.2d 308 (1985)** – Failure to follow the proper procedures for the examination process subjects the case to dismissal.

***In Re Ingram*, 74 N.C. App. 579 (1985)** – Failure of the petition to be signed by oath or affirmation before a duly authorized certifying officer constitutes grounds for dismissal of a petition. Statutory requirements must be "followed diligently" and the failure to do so deprives the respondent of "liberty without legal process."

***In re Reed*, 39 N.C. App. 227, 228, 249 S.E.2d 864, 865 (1978)** – Insufficient facts alleged in a petition, or no facts supporting conclusory statements in a petition, will subject the case to dismissal. "Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp."

IX. Future Opinions

***In the Matter of Ronald Watson*, No. COA10-365** –There were four issues briefed in *Watson*, but the one to watch for is whether Mr. Watson should have

been allowed to represent himself at his district court hearing. The Court might decide the case based on one of the other three issues, but if the Court issues an opinion on the question of self-representation, it will be the first time that it has addressed the issue in a civil commitment case.

In the Matter of Roberto Ramirez, No. COA10-1162 - There were three issues briefed in *Ramirez*, but the one to watch for is whether Mr. Ramirez was deprived of his constitutional and statutory rights to effective appellate review because the State was unable to provide him with a transcript of his commitment hearing. Commitment respondents, like criminal defendants, have a right to appeal and, therefore, a right to a transcript of their proceedings upon request.

4. Under Rule 12(b)(6), this case must be dismissed because the petition and affidavit are not sufficient to state a claim under N.C. Gen. Stat. § 122C-261(a). As described in paragraph 3, there are no facts in the petition and affidavit that indicate that Mr. Respondent is dangerous to himself or others, or in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness.

5. Finally, committing Mr. Respondent to a mental institution based on the petition and affidavit in this case would violate Mr. Respondent's right to due process under N.C. Const. art. I, § 19, and U.S. Const. amend. XIV, because the petition and affidavit do not provide reasonable grounds to believe that Mr. Respondent satisfies the criteria for involuntary commitment. *See In re Reed*, 39 N.C. App. 227, 229, 249 S.E.2d 864, 866 (1978) (holding that proceeding on a petition that fails to establish reasonable grounds for the issuance of a custody order constitutes a deprivation of due process).

WHEREFORE, for the above reasons, Mr. Respondent respectfully requests that this Court dismiss this case with prejudice and order such other relief as is just and proper.

Respectfully submitted, this the 15th day of January, 2011.

Ann Attorney
Attorney at Law
123 Main Street
Chapel Hill, NC 27516

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was served on Ms. Jane Doe, 123 Main Street, Chapel Hill, North Carolina 27516, by deposit in the United States mail, first-class and postage prepaid.

This the 15th day of January, 2011.

Ann Attorney
Attorney at Law

**DISPOSITIONAL ALTERNATIVES FOR
INVOLUNTARY COMMITMENT CASES INVOLVING MENTAL ILLNESS**

INPATIENT COMMITMENT HEARINGS	
Proceeding	Disposition
Initial Commitment Hearing	Up to 90 days inpatient or
	Up to 90 days outpatient or
	A combination of both not to exceed 90 days
First Re-hearing	Up to 180 days inpatient or
	Up to 180 days outpatient or
	A combination of both not to exceed 180 days
Second and Subsequent Re-hearings	Up to 1 year inpatient or
	Up to 180 days outpatient

Source: N.C. Gen. Stat. §§ 122C-271 and 122C-276.

OUTPATIENT COMMITMENT HEARINGS	
Proceeding	Disposition
Initial Commitment Hearing	Up to 90 days outpatient
First and Subsequent Re-hearings	Up to 180 days outpatient

Source: N.C. Gen. Stat §§ 122C-271 and 122C-276.

**DISPOSITIONAL ALTERNATIVES FOR
INVOLUNTARY COMMITMENT CASES INVOLVING SUBSTANCE ABUSE**

Proceeding	Disposition
Initial Commitment Hearing	Up to 180 days of treatment
First and Subsequent Re-hearings	Up to 365 days of treatment

Source: N.C. Gen. Stat. §§ 122C-287 and 122C-292

_____ County

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

**APPELLATE ENTRIES
INVOLUNTARY COMMITMENT**

G.S. 122C-272, -288

Name And Address Of Appealing Respondent

Name And Address Of Appealing Respondent's Attorney in District Court (if respondent did not have an attorney, indicate that fact in this box, e.g. "Respondent Represented Self")

Name And Address Of Petitioner's Attorney

Telephone No.

Respondent 1's Attorney's Email Address (if available)

Petitioner's Attorney's Email Address (if available)

Respondent's Initial Appellate Counsel

The Appellate Defender, 123 W. Main Street, Suite 500
Durham, NC 27701 (919) 560-3334
email: appellatedefender@nccourts.org
(The Appellate Defender is appointed when the respondent is indigent.)

Telephone No.

Name, address, and telephone number of retained appellate counsel

Date(s) Of Hearings(s) On Which Appealed Order(s) Is Based

INITIAL APPEAL ENTRIES

1. Pursuant to G.S. 122C-272 or G.S. 122C-288, the respondent has given Notice of Appeal to the N.C. Court of Appeals from the District Court's Order entered (signed by the judge and filed) on (specify date) _____.
2. The respondent does not read or speak the English language, but reads and/or speaks his or her native language of _____. The Court therefore authorizes the services of a language translator or interpreter during the pendency of the appeal for the purposes of (1) written translation of attorney-client correspondence, list of proposed issues on appeal, appellate briefs filed by the defendant and the State, and appellate opinion(s), and/or (2) verbal interpretation of attorney-client communication at each critical stage of the appellate proceedings.
The Court further Orders that a language translator or interpreter with the necessary knowledge, skill, experience, training and education to perform the above services shall be selected and paid by the Administrative Office of the Courts.
3. Based on the respondent-appellant's affidavit of indigency, the Court finds that
 - The respondent is not indigent.
 - The respondent is indigent. Therefore, it is ORDERED that the respondent is allowed to appeal as an indigent and:
 - a. The Office of Indigent Defense Services shall pay the costs of producing a transcript for the respondent and of reproducing the record and the respondent's brief and other pleadings.
 - b. The Appellate Defender is appointed to perfect the respondent's appeal.
 - c. The Clerk shall furnish to the respondent's appellate counsel a copy of the complete trial division file in the involuntary commitment proceeding and, upon request, any documentary exhibits, unless the clerk has furnished a copy to trial counsel for use in the appeal.
 - d. The Clerk shall duplicate the audio recording of the hearing(s), date(s) listed above, and shall deliver the duplicate recording and two copies of these Appellate Entries to the person designated by the AOC Court Reporter Coordinator to produce a transcript of the hearing(s). No fee shall be charged for the cost of the duplicate recording.
 - e. The Clerk shall deliver to the Office of the Appellate Defender a copy of these Appellate Entries and a copy of the order(s) from which the respondent appeals.
 - f. The Clerk also shall deliver a copy of these Appellate Entries to counsel for all other parties, or to the parties themselves if not represented by counsel.

Date

Name Of Presiding Judge (Type or Print)

Signature Of Presiding Judge Or Chief District Court Judge

ORDER OF TRANSCRIPT

The Clerk of Court hereby designates the person named below to receive a duplicate recording of the hearing(s) in this action. The designated person is authorized to listen to the duplicate recording and to transcribe the proceedings verbatim.

Name, Address And Telephone No. Of Authorized Person (Type Or Print)

The Court orders that the authorized person maintain strict confidentiality of the record(s) in accordance with the statutes. This person shall return the duplicate recording of this proceeding to the custody of the Clerk of Superior Court immediately upon the completion of the transcription of this matter. The Clerk, upon receipt of the duplicate recording of this confidential proceeding, shall erase it.

The Court orders that the authorized person named above shall transmit a copy of the transcript to each of the parties who have made arrangements to pay for the copy.

TRACKING AND RECEIPT

I have transmitted to the authorized person named above the duplicate recording and two copies of these Appellate Entries by personally delivering it to that person. mailing it via the U.S. Postal Service to that person.

Date Transmitted

Signature

Deputy CSC Assistant CSC
 Clerk Of Superior Court

I have received the duplicate recording from the Clerk of Superior Court and have acknowledged receipt by promptly returning to the Clerk this signed copy of the Court's Appellate Entries.

Date Received

Signature Of Person Authorized To Transcribe

The duplicate of the recording has been returned to the Clerk Of Superior Court by the authorized person.

Date Returned

Signature

Deputy CSC Assistant CSC
 Clerk Of Superior Court

THIRTY DAY EXTENSION OF TIME TO PREPARE TRANSCRIPT

Pursuant to Rules 7 and 27 of the N.C. Rules of Appellate Procedure, upon motion of the respondent, and for good cause shown,

It is ORDERED that the time for preparation of the transcript is extended 30 days to and including _____

NOTE: The trial court may grant only one extension of time for a maximum of thirty days to prepare the transcript. A motion for any further extension of time must be made in the Appellate Division. Rules 7(b)(1) and 27(c)(2), N.C. Rules of Appellate Procedure.

Date

Name Of Presiding Judge (Type or Print)

Signature Of Presiding Judge

THIRTY DAY EXTENSION OF TIME TO SERVE PROPOSED RECORD ON APPEAL

Pursuant to Rules 7 and 27, N.C. Rules of Appellate Procedure, upon motion of the respondent, and for good cause shown,

It is ORDERED that the time for service of the proposed record on appeal is extended for 30 days to and including _____

NOTE: The trial court may grant only one extension of time for a maximum of thirty days to serve the proposed record on appeal. A motion for any further extension of time must be made in the Appellate Division. Rules 7(b)(1) and 27(c)(2), N.C. Rules of Appellate Procedure.

Date

Name Of Presiding Judge (Type or Print)

Signature Of Presiding Judge

CERTIFICATION

I certify that this Appellate Entries form is a true and complete copy of the original on file in this case.

Date

Signature And Seal

Deputy CSC Assistant CSC Clerk Of Superior Court

2011 Civil Commitment Conference
School of Government
January 28, 2011

Laura S. Shivar

COLLATERAL CONSEQUENCES OF COMMITMENT

This session will concentrate on advising clients on collateral matters and consequences of commitment both during the inpatient stay and after release. While we will first focus on the state and federal laws in place affecting our clients, we will also discuss the practical applications of these laws and the roles of the attorney, the clerk of court and other persons involved in their administration. Actual case examples will be included and all participants are invited to be prepared to discuss issues they have encountered. Participants are further encouraged to take advantage of the generous offer of the School of Government to purchase the newly revised North Carolina Civil Commitment Manual at a discounted rate as we will be referring to it often during this session. Some handouts of pertinence will be distributed.

TOPICS

- Driving Privileges
- Firearm Ownership and Possession
- Restrictions on Patient Rights
- Expunction of Minor's Record of IVC

DRIVING PRIVILEGE

- Report: pursuant to G.S.20-17.1(b) clerk of court must report to DMV the name of any person involuntarily committed for substance abuse treatment. (*handout*)
- DMV: the DMV must then determine if such person is competent to safely operate a motor vehicle; can include the requirement of a medical evaluation.
- Advising the client: client should be advised of the possible loss of driver's license and what to expect after release from hospital. (discussion of practical matters)
- Strategies to avoid issue: client, with the consent of treating facility, could agree to sign in as a voluntary patient, agree to outpatient mental health treatment or to allow a case to be continued on a weekly basis until discharge.

FIREARM OWNERSHIP AND POSSESSION

-Federal Law: federal statute 18 U.S.C. sec. 922(g) prohibits the ownership or possession of a firearm by a person “who has been adjudicated as a mental defective or who has been committed to a mental institution.”

-State Law: N.C.G.S. 122C-54(d)1 requires the clerk of court to notify the National Instant Criminal Background Check system (NICS) of certain committed individuals. (*handouts*)

-Advising client: as this makes an exception to the confidentiality normally surrounding involuntary commitment, client should be advised of the reporting procedure and the potential future consequences created.

What will be reported by clerk?

- inpatient involuntary commitments for mental health treatment
- outpatient involuntary commitment IF FOUND A DANGER
- NGRI
- Incapable to proceed to criminal trial

-Strategies to avoid issue: with consent of treating facility, client could sign into facility as a voluntary patient (with minors, parent or guardian would sign); case can be continued from week to week in hopes of obtaining direct discharge. Minors should also be advised to expunge commitment record once reaches adulthood, though this would not appear to restore firearm rights.

-Restoration of Rights: pursuant to N.C.G.S. 54.1, individuals may file a request with the district court for removal of the mental health bar when a) the individual no longer suffers from the condition that required involuntary commitment and b) no longer poses a danger to self or others. Petition should be filed in the county where the most recent commitment was entered OR in county of residence. (*handout*) Any commitment must have expired prior to filing and persons adjudicated NGRI cannot petition for restoration.

RESTRICTIONS ON PATIENTS RIGHTS

A general discussion on this topic will be held; participants are encouraged to refer to the appropriate section in the aforementioned Manual.

EXPUNCTION OF MINOR'S RECORDS

-N.C.G.S. 122C-54(e) provides for the expunction of court records regarding the admission or commitment of a minor after the minor has “both been released and reached adulthood”. Client should be advised of this right and that commitment records may exist in more than one county.