

7.5 Commitment Hearing Under Chapter 122C

A. Attorney for Respondent

Entitlement to counsel. If committed following an NGRI verdict, the respondent is entitled to be represented at subsequent commitment proceedings by counsel of choice if financially able. *See supra* § 2.5A. If the respondent is indigent or refuses to retain counsel, the statute provides that counsel is to be appointed in accord with rules adopted by the Office of Indigent Defense Services. G.S. 122C-268.1(d).

The current practice is for Special Counsel to represent respondents for most hearings held at the facility. Assigned counsel represent respondents at hearings held in counties outside the state facilities and for respondents in high-profile criminal cases regardless of where the hearing is held.

Notice of admission. Special Counsel routinely receives notice of the admission of a respondent to the state facility pursuant to an automatic commitment. Special Counsel should receive a copy of the order finding the respondent not guilty by reason of insanity and the order of automatic commitment. Because the statute provides that the commitment hearing must be within fifty days of the date of the custody order (*see* G.S. 122C-268.1(a)) rather than within the ten-day limit for non-NGRI mental health commitments, preparation for the hearing does not have to begin immediately. It is good practice, however, to meet with the client soon after admission to explain the commitment procedure and answer any questions.

Notice of hearing. The respondent's counsel must receive notice of each commitment hearing from the clerk of superior court at least seventy-two hours prior to the hearing. G.S. 122C-264(d1); *see infra* Appendix A, Form AOC-SP-301. Although not required by statute, the practice is for the attending physician to prepare a Qualified Physician's Examination report, which is the Department of Health and Human Services form completed by the attending physician that accompanies a request for a rehearing on commitment in non-NGRI cases. *See supra* § 2.2 (describing a Qualified Physician's Examination report) and *infra* Appendix A, Form DMH 5-72-01. Counsel should receive a copy of the report.

B. Attorney for State

The district attorney in the county in which the respondent was found NGRI may represent the state's interest at the commitment hearing. If the district attorney opts not to represent the state, then the state's interest is represented by the attorney assigned to the state facility or, in the Attorney General's discretion, a staff attorney designated by the Attorney General. G.S. 122C-268.1(b).

C. Trial Division and Venue

The commitment hearing is held in the trial division in which the original criminal trial

was held. G.S. 122C-268.1(g). For example, if the criminal trial was held in superior court, the commitment hearing will also take place in superior court.

Venue is initially in the county in which the 24-hour facility is located. If the district attorney chooses to represent the state's interest at the commitment hearing, however, the district attorney may move to change venue to the county in which the respondent was found NGRI. Upon such a motion, the venue for the hearing, rehearings, and supplemental hearings must be moved to that county. G.S. 122C-268.1(b). There is no provision for the respondent to request a change of venue.

D. Waiver of Hearing

An NGRI respondent has the option of waiving the Chapter 122C commitment hearing. G.S. 122C-268.1(a). The current practice is for the court to treat a waiver of hearing as if the respondent is not contesting recommitment. Because the respondent has the burden of proof, this results in an order of recommitment for the maximum statutory term. *See infra* § 7.5I.

E. Not Contesting/Not Resisting

Although not addressed by statute, the respondent may choose not to contest being recommitted. Because the respondent has the burden of proof, choosing not to present evidence will result in recommitment.

A respondent who is too mentally ill to be able to discuss the commitment proceeding or to communicate a decision on how to proceed with counsel may be termed "not resisting." Although unable to state agreement with being recommitted, the respondent is "not resisting" by presenting no evidence supporting release. For a discussion of these issues in non-NGRI involuntary commitment cases, see *supra* § 2.6F.

F. Clerk of Court to Calendar and Give Notice

The commitment hearing under Chapter 122C must occur within fifty days of the date of commitment under G.S. 15A-1321. G.S. 122C-268.1(a). The clerk of superior court is responsible for calendaring the hearing. G.S. 122C-264(d1).

After calendaring the hearing, the clerk must notify the respondent, the respondent's attorney, counsel for the State, and the district attorney involved in the original trial. The respondent must receive notice at least seventy-two hours before the hearing by personal service, by registered or certified mail, return receipt requested, or by other method permitted under Rule 4(j) of the North Carolina Rules of Civil Procedure. The other individuals must receive notice at least seventy-two hours before the hearing by first-class mail, postage prepaid. G.S. 122C-264(d1); *see infra* Appendix A, Form AOC-SP-301.

The district attorney must notify "any persons he deems appropriate," in addition to

persons who have filed a request for notification with the district attorney's office. The notice must be sent by first-class mail to the person's last known address. G.S. 122C-264(d1).

G. Waiver of Appearance

The respondent's counsel may waive the respondent's presence with the consent of the court. G.S. 122C-268.1(e). For a discussion of waiver of appearance in non-NGRI cases, see *supra* § 2.6G.

H. Hearing Open to Public

The commitment hearing resulting from the NGRI verdict is open to the public, just as the criminal trial is. G.S. 122C-268.1(g). This means that anyone may attend the commitment hearing.

I. Burden of Proof

The *respondent* has the burden of proving by a preponderance of the evidence that the respondent:

no longer has a mental illness as defined in G.S. 122C-3(21), *or*
no longer is dangerous to others as defined in G.S. 122C-3(11)b.

G.S. 122C-268.1(i).

This standard reverses the burden applicable in other commitment proceedings. Ordinarily, the State has to prove mental illness *and* danger to self or others by clear, cogent, and convincing evidence. Note that the respondent's standard is "preponderance of the evidence." Also, the respondent needs to prove only one of the prongs listed above—either lack of mental illness or lack of danger to others.

Case law: Acts committed by a respondent more than a decade earlier could be considered to be "in the relevant past" in determining whether the respondent currently is "dangerous to others."

In re Hayes, 151 N.C. App. 27 (2002). The North Carolina Court of Appeals in *Hayes* addressed the interpretation of the statutory definition of "danger to others" in G.S. 122C-3(11)b., particularly the meaning of the phrase "in the relevant past" in regard to past acts of the respondent in assessing current danger to others. In *Hayes*, the respondent was found not guilty by reason of insanity for homicides and felonious assaults committed in July of 1988. The recommitment hearing being reviewed on appeal was held in January 2001. The court of appeals found that the standard of review on appeal is "whether there is competent evidence to support the trial court's factual findings and whether these findings support the court's ultimate conclusion that respondent still has a mental illness and is dangerous to others." 151 N.C. App. at 29–30. Despite the lapse of time between

the respondent's acts and the hearing, the appellate court held that evidence supported the finding of the lower court that:

“The four homicides and seven felonious assaults committed by the respondent on July 17, 1988, are episodes of dangerousness to others *in the relevant past* which in combination with his past and present mental condition, his multiple mental illnesses, and his conduct since admission to Dorothea Dix Hospital since 1989, and up to and including his conduct in the hospital during the previous year indicates there is a reasonable probability that the respondent's seriously violent conduct will be repeated and that he will be dangerous to others in the future if unconditionally released with no supervision at this time.”

Id. at 31 (emphasis added).

In so holding, the court rejected the respondent's argument that under this interpretation of “in the relevant past,” a homicide defendant found not guilty by reason of insanity would never be released from psychiatric inpatient commitment. The court noted that even though the respondent would be “presumed dangerous to others” and that this was a “high hurdle for the respondent to overcome,” this burden was proper and the lower court's findings and conclusions must be upheld. *Id.* at 38–39.

J. Evidence

Certified copies of reports and findings of physicians and psychologists, as well as previous and current medical records, are admissible in evidence. The respondent, however, retains the right to confront and cross-examine witnesses. G.S. 122C-268.1(f). This may require counsel to object when documents are offered by the State without the testimony of the authors or other qualified witnesses.

The respondent has the right to employ an independent expert to conduct an examination. G.S. 122C-62(a)(2). This is at the respondent's expense and will not be paid by the state unless counsel has obtained a prior court order approving the expenditure.

K. Preparation for Hearing

Because of the interrelationship between the criminal trial and the commitment proceeding, it might be helpful for the respondent's attorney to contact the criminal defense attorney. It is not a breach of confidentiality to contact the defense attorney, who is aware of the commitment. It is usually better practice, however, to consult the client before making contact. The defense attorney may provide more information about the alleged crime and be able to suggest helpful witnesses in the community.

Although the burden of proof is by “preponderance of the evidence,” because the burden is on the respondent it may be difficult for the respondent to win release by the court. The criminal defense attorney should have conveyed to the defendant the possibility of a long

stay in an inpatient facility. Counsel for the respondent at post-NGRI proceedings may need to reiterate this to the client in discussing possible outcomes.