

## 8.6 Secure Custody

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## 8.6 Secure Custody

### A. Overview

A juvenile may be held in secure custody during three stages of the proceeding: pre-adjudication; post-adjudication/pre-disposition; and post-disposition. G.S. 7B-1903(b), (c). A secure custody order provides for detention of a juvenile in a secure, or locked, facility. G.S. 7B-1501(8), (9); 7B-1905(b), (c). Secure custody entails significant restriction on the juvenile's freedom of movement because the facility is locked and juveniles do not have the right to bail. The statutes provide procedural protection to ensure that a juvenile is not held in secure custody except under specified circumstances. *See infra* § 8.6C, Criteria for Secure Custody Pending Adjudication. Counsel should be prepared to offer alternatives to the court that provide both protection and supervision for the juvenile and protection of the public.

### B. Shackling

Requiring the juvenile to be shackled and wear jail attire during court proceedings may cause the juvenile humiliation and may prejudice the judge against releasing the juvenile from secure custody. Shackling also may impede the ability of juveniles to communicate with counsel and assist in their defense. *See generally Deck v. Missouri*, 544 U.S. 622, 630–31 (2005) (discussing reasons U.S. Constitution prohibits routine shackling in adult criminal cases). Counsel should make prior contact with the detention facility to determine the facility's plans for transporting the juvenile to court and request that the juvenile be attired in appropriate clothing and be free of shackles when brought into the courtroom.

G.S. 7B-2402.1 was enacted in 2007 to protect a juvenile from unnecessary shackling, allowing the court to order shackling only if "reasonably necessary to maintain order, prevent the juvenile's escape, or provide for the safety of the courtroom." *Id.* The court must give the juvenile and the juvenile's attorney an opportunity to be heard, if practical, and make findings of fact in support of any order. *Id.* If shackling will be an issue,

counsel should make a motion for removal of restraints before the proceeding begins and be prepared to argue that the statutory criteria for restraints are not met.

### **C. Criteria for Secure Custody Pending Adjudication**

When a petition has been filed, the court may enter an order for secure custody pending adjudication if it determines that there is a “reasonable factual basis to believe that the juvenile committed the offense as alleged in the petition” *and* that the juvenile:

- is charged with a felony and is a danger to property or persons;
- is a danger to others and is charged with either a misdemeanor having assault as an element of the offense, or is charged with a misdemeanor alleging that the juvenile used, threatened to use, or displayed a firearm or other deadly weapon;
- has demonstrated that the juvenile is a danger to persons and is charged with a violation of G.S. 20-138.1 (impaired driving) or G.S. 20-138.3 (driving by person less than 21 years old after consuming alcohol or drugs);
- willfully failed to appear on a pending delinquency charge or on charges of violation of probation or post-release supervision after receiving proper notice;
- has a pending delinquency charge and there is reasonable cause to believe that the juvenile will not appear in court;
- is an absconder from a residential facility operated by the Division or a comparable facility in another state; or
- should be detained for the juvenile’s own protection because of recent attempted or actual self-inflicted injury. (The juvenile must have been refused admission by an appropriate hospital. Secure custody is then limited to 24 hours for determination of the need for inpatient hospitalization. Continuous supervision must be provided and a physician must be notified immediately.)

G.S. 7B-1903(b)(1)–(6).

The statute does not give the court discretion to order secure custody for any reasons other than those listed.

### **D. Initial Order for Secure Custody**

The secure custody order must be in writing and direct a law enforcement officer or other authorized person to take the juvenile into custody for transportation to the detention or holdover facility. G.S. 7B-1904. The officer who takes the juvenile into custody must give a copy of the secure custody order to the juvenile’s parent, guardian, or custodian. *Id.* The officer must also give a copy of the petition and secure custody order to the facility. *Id.* Alternatively, the detention facility is authorized to detain the juvenile upon notification by the Department of Public Safety that the petition and secure custody order are on file in the county. *Id.* The petition and secure custody order must then be transmitted to the detention facility within 72 hours of the initial detention of the juvenile. *Id.*

All communications, orders, authorizations, and requests regarding secure custody may be by telephone if other means of communication are “impractical.” G.S. 7B-1907. Any resulting written order must indicate the name and title of the person communicating by telephone, the signature and title of the official entering the order, and the hour and date of the authorization. *Id.*

### **E. Place of Secure Custody**

A juvenile meeting the criteria for secure custody may be detained in an approved detention facility. G.S. 7B-1905(b). The detention facility must be separate from any jail, lockup, prison, or other adult penal institution unless the juvenile is alleged to have committed an offense that would constitute a Class A, B1, B2, C, D, or E felony if committed by an adult. In that circumstance, the juvenile may be held in a holdover facility for up to 72 hours if the court finds, based on information provided by the juvenile court counselor, that there is no acceptable alternative placement and the protection of the public requires that the juvenile be detained. G.S. 7B-1905(b), (c).

### **F. Secure Custody Hearing**

**Time limits.** A juvenile may not be held under a secure custody order for more than five calendar days without either an adjudicatory hearing or an initial hearing to determine the need for continued custody. G.S. 7B-1906(a). If the order was entered by a court counselor pursuant to authority delegated by administrative order of the court, a hearing to review secure custody must be held at the next regularly scheduled court session if it precedes the five-day limit. *Id.* There are no provisions for waiver of the initial secure custody review hearing or of the juvenile’s appearance.

Further hearings to review secure custody must be held at intervals of no more than 10 calendar days. G.S. 7B-1906(b). Counsel should continue to work with the juvenile and others to devise an alternative to secure custody.

After the initial secure custody review hearing, further hearings may be waived by the juvenile through counsel. *Id.* Waiver should occur only with the consent of the juvenile and may provide a basis for a concession by the State, such as an earlier date for adjudication or a plea agreement.

**Counsel for the juvenile.** The court must determine whether the juvenile has retained or been appointed counsel. If the juvenile is not represented, the court must appoint counsel in accordance with the rules of the Office of Indigent Defense Services. G.S. 7B-1906(c); 7B-2000. The juvenile is entitled to representation of counsel at the initial secure custody hearing as well as at subsequent hearings. *Id.*

**Conduct of hearing.** The court must first determine whether there is a “reasonable factual basis to believe that the juvenile committed the offense as alleged in the petition . . . .” G.S. 7B-1903(b). The statute does not define the term “factual basis” or specify the evidence required in support. If the court finds that there is a reasonable factual basis, the

State bears the burden of proving by clear and convincing evidence that secure custody is necessary and that there is “no less intrusive alternative.” G.S. 7B-1906(d). The court must allow the juvenile and the juvenile’s parent, guardian, or custodian to present evidence, testify, and examine witnesses, although the usual rules of evidence do not apply. *Id.*; *see also* “Advocating for release from secure custody,” below. After hearing from all participants, the court must determine whether continued secure custody is warranted based on the criteria in G.S. 7B-1903. G.S. 7B-1906(e). If the court orders the juvenile to remain in secure custody, it must issue a written order with findings that include “the evidence relied upon in reaching the decision and the purposes which continued custody is to achieve.” G.S. 7B-1906(g).

It is permissible for the court to conduct a secure custody hearing by audio and video transmission approved by the Administrative Office of the Courts. G.S. 7B-1906(h). The equipment must enable the juvenile and the court to see and hear each other. *Id.* In addition, the juvenile and the juvenile’s attorney must be able to communicate “fully and confidentially” during the hearing. *Id.* If the court uses audio and video equipment at the custody hearing, counsel should make sure that communication between counsel and the juvenile is confidential.

There is no requirement that the secure custody hearing be recorded. The only hearings that must be recorded are adjudication and dispositional hearings and hearings on probable cause and transfer to superior court. G.S. 7B-2410. However, the court may order that other hearings be recorded. *Id.* Counsel should consider requesting that the proceeding be recorded so that a court reporter can prepare a transcript if one is needed at a later time.

**Advocating for release from secure custody.** Counsel for the juvenile should counter the State’s evidence by demonstrating to the court that either: no legal basis exists for secure custody under G.S. 7B-1903(b)(1)–(6) (criteria for secure custody); or a “less intrusive alternative” to secure custody is available to address the underlying reason secure custody has been requested. G.S. 7B-1906(d). For example, if the juvenile is charged with a felony and the prosecutor asserts that the juvenile is a danger to person or property under G.S. 7B-1903(b)(1), counsel should determine whether there is a demonstrated danger based on the nature of the felony described in the petition. A felony that is not inherently dangerous should not be the basis of a secure custody order. In addition, if the juvenile has failed to appear at past hearings, the court might nevertheless be willing to release the juvenile if counsel presents the testimony of a dependable adult willing to be responsible for the juvenile’s appearance or reasons why the juvenile did not previously appear.

Counsel should discuss alternatives to detention with both the juvenile and the parent before the hearing. The court is unlikely to release a juvenile to the parent unless the parent is willing and able to supervise the juvenile and wants the juvenile to return home. If the parent is resistant, counsel should explain that the court may be less likely to release the juvenile later if the parent argues against release at the initial hearing. Counsel can also ask the parent if there are conditions under which the juvenile could return home, such as a court-ordered curfew, day program, or house arrest.

Counsel should offer the court additional alternatives to secure custody if placement with a parent would be unsuitable. For example, placement with a relative or other responsible adult, or in a temporary shelter, may be a viable alternative to secure custody. Conditions on placement also may make release viable. Electronic house arrest is available in some districts. Some districts also have “alternatives to detention” (ATD) programs that involve daily contact with the juvenile by the juvenile court counselor. If an ATD program is not available, counsel could propose a plan to the court that has those features. See “Release from secure custody,” below.

Counsel should take advantage of the relaxed rules of evidence to present positive aspects of the juvenile’s life. Such information might include little or no prior juvenile court involvement, strong family support or other support in the community, good school attendance or grades, and the availability of services. It may be important to inform the court if the juvenile is receiving services such as special school assistance, mental health treatment, or services through the Department of Social Services that negate the need for secure custody.

**Release from secure custody.** The court must release the juvenile if the criteria for secure custody are not met. “Appropriate restrictions” to ensure the juvenile’s appearance at subsequent hearings may be imposed by the order of release from secure custody. G.S. 7B-1906(f). See *supra* § 8.4, Release.

**Continuation of secure custody.** If the court does not allow release, it must enter a written order finding that there is a reasonable factual basis to believe that the allegations in the petition are true and stating the grounds for secure custody under G.S. 7B-1903(b) (criteria for secure custody). G.S. 7B-1906(g). The findings of fact must set forth the evidence supporting the decision and the purposes of continuing secure custody. *Id.*

Subsequent hearings to review secure custody must be held every 10 calendar days. G.S. 7B-1906(b). Counsel should continue to confer with the juvenile and others in pursuit of an alternative to secure custody.

After the initial hearing to review secure custody, the juvenile may waive further custody hearings. *Id.* The waiver must be made through the juvenile’s attorney and may be conditioned on a concession by the State, such as an earlier date for adjudication or a plea agreement.

**Credit for time served.** In 2010, the Supreme Court of North Carolina held that juveniles are not entitled to credit for time served in secure custody. *In re D.L.H.*, 364 N.C. 214, 216 (2010). The decision overruled older decisions issued by the court of appeals, such as *In re R.T.L.*, 183 N.C. App. 299 (2007) (unpublished), and *In re Allison*, 143 N.C. App. 586 (2001), in which the court held that it was proper for trial courts to give juveniles credit for time served. Although juveniles are no longer entitled to credit for time spent in secure custody, there is no bar to the court taking such time into account at the dispositional hearing. The court has a great deal of latitude at the dispositional hearing. See G.S. 7B-2501 (granting the court authority to select the “most appropriate

disposition” for the juvenile). In addition, according to G.S. 7B-2500, a dispositional order should promote public safety, emphasize accountability and responsibility, and provide the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a responsible and productive member of the community. If the juvenile has spent a significant amount of time in secure custody or received services while in secure custody, counsel should argue that many of the purposes of disposition have already been met.

### **G. Secure Custody Following Adjudication of Delinquency**

**When secure custody may be ordered.** After an adjudication of delinquency, the court may continue the dispositional hearing pursuant to G.S. 7B-2406 and order that the juvenile be held in secure custody pending the dispositional hearing. G.S. 7B-1903(c). The most common reason judges continue dispositional hearings is because the juvenile court counselor has not completed the predisposition report and risks and needs assessment. However, the judge might also grant a continuance to permit the juvenile to obtain an evaluation or gather other evidence for the hearing.

**Criteria for secure custody.** Secure custody orders issued after an adjudication of delinquency are governed by a less stringent standard than secure custody orders issued after the initial accusation. The court of appeals has held that G.S. 7B-1906(g), which requires the court to specify the evidence on which it bases an order of secure custody after the initial accusation, does not apply to secure custody orders issued after the juvenile has been adjudicated delinquent. *In re Z.T.W.*, 238 N.C. App. 365, 374 (2014). Rather, G.S. 7B-1903(c) allows the court to hold a juvenile in secure custody pending disposition or placement when “the juvenile has been adjudicated delinquent.” The decision is reviewed for abuse of discretion. *See id.* at 374–75 (holding that trial court was justified in ordering secure custody pending out-of-home placement based on various aspects of court counselor’s report); *see also In re R.D.R.*, 175 N.C. App. 397, 401 (2006) (upholding post-adjudication secure custody under G.S. 7B-1903(c) based on trial court’s finding that juvenile had been adjudicated delinquent on three different charges and should be in secure custody pending disposition hearing a week later).

**Advocating for release from secure custody.** After adjudication, the court may proceed without a predisposition report if one is not available and the court makes a written finding that one is not needed. G.S. 7B-2413. If the prosecutor or court counselor requests a continuance and an order for secure custody even though a predisposition report is not needed, counsel should object and ask the court to deny the continuance and make a finding that a predisposition report is not needed. Counsel should determine the highest permissible period of confinement, if any, allowed at disposition for the offense adjudicated and the juvenile’s delinquency history. If continued secure custody would exceed the amount of time the juvenile could be confined pursuant to a dispositional order, counsel should argue for reduction or termination of secure custody.

**Review of secure custody following adjudication.** For several years, there was some confusion about whether judges should hold review hearings after the juvenile was

adjudicated delinquent. Although G.S. 7B-1906(b) stated that review hearings were required “[a]s long as the juvenile remains in secure or nonsecure custody,” some judges declined to hold review hearings. In 2009, the court of appeals held that juveniles are entitled to review hearings after adjudication. *In re D.L.H.*, 198 N.C. App. 286, 294 (2009), *overruled on other grounds*, 364 N.C. 214 (2010). The General Assembly amended G.S. 7B-1903 in 2015 to codify the holding in *D.L.H.* See 2015 N.C. Sess. Laws Ch. 58 (H 879). Under current G.S. 7B-1903(c), the court must hold review hearings every 10 calendar days for juveniles in secure custody after adjudication. The juvenile may waive further hearings for no more than 30 calendar days. *Id.*

If the court places the juvenile in secure custody after the adjudication hearing, counsel should monitor the progress toward completion of the predisposition report, risk and needs assessment, and any evaluations needed for disposition, and argue for release from secure custody if there are unreasonable delays. Counsel should offer the court alternatives to detention and reasons supporting release at each review.

#### **H. Secure Custody Pending Placement Pursuant to Dispositional Order**

The court may order secure custody following the dispositional hearing but before placement pursuant to the dispositional order. G.S. 7B-1903(c). The period between the dispositional hearing and the juvenile’s placement may be lengthy if the placement facility has a long waiting list. This period may also be harmful to the juvenile if the juvenile lacks necessary services or counseling that might occur once the placement begins. The juvenile retains the same right to review hearings and release from secure custody as in other stages of the case. G.S. 7B-1906(b). Counsel should present the court with alternatives to detention and reasons for release at each hearing.