Chapter 7
Automatic Commitment—Not Guilty by Reason of Insanity

7.1 Overview

A defendant found not guilty by reason of insanity is not subject to further criminal proceedings related to the charges adjudicated. North Carolina statutes require, however, that a defendant found not guilty by reason of insanity (NGRI) be automatically committed to a state facility for the treatment of mental illness. The defendant, now a respondent in the mental health treatment system, cannot be discharged by either the attending physician or the court during the first fifty days.

Defendants who were charged with a crime *not* involving allegations that the defendant inflicted or attempted to inflict serious injury or death are committed to a state facility for the treatment of mental illness. Defendants charged with a crime involving allegations that the defendant inflicted or attempted to inflict serious injury or death must be committed to a forensic unit operated by the Department of Health and Human Services. The only such facility currently is the forensic unit at Central Regional Hospital (formerly Dorothea Dix Hospital).

Upon the automatic commitment of the defendant by the criminal court, the statutory provisions for involuntary commitment for treatment of mental illness, contained in Chapter 122C of the North Carolina General Statutes (hereinafter G.S.), apply. Procedures under Chapter 122C, including a hearing in district or superior court, determine whether the individual will remain under commitment and, if so, the term of the commitment.

Respondents found not guilty by reason of insanity in criminal district court are represented by Special Counsel. Respondents found not guilty by reason of insanity in criminal superior court are typically represented by assigned counsel in the civil commitment proceedings.

7.2 Terminology Used in this Chapter

"Forensic Unit" means a separate unit within a state facility for treatment of mental illness, reserved exclusively for individuals entering through the criminal justice system. These individuals may include those being evaluated for capacity to stand trial, those found incapable of proceeding to trial, and those found not guilty by reason of insanity. The only forensic unit currently in North Carolina is located at Central Regional Hospital (formerly Dorothea Dix Hospital).

"Not guilty by reason of insanity (NGRI)" is the verdict resulting from a finding that the defendant committed the acts alleged by the state, but is not guilty because the defendant did not know the nature or quality of the act or could not distinguish between right and wrong.

"State 24-hour facility" means a facility operated by the Department of Health and Human Services that "provides a structured living environment and services for a period of 24 consecutive hours or more." G.S. 122C-3(14)f., g.

7.3 Characterization of Offense

A. No Definition by Statute or Case Law

A defendant found not guilty by reason of insanity faces a different statutory disposition if the crime charged alleges that the defendant inflicted or attempted to inflict serious physical injury or death. G.S. 15A-1321. There is, however, no statutory definition or case law outlining which crimes fall into this category. The characterization of the crime is important because more restrictions are placed on an involuntarily committed defendant who has been determined to have committed such an act. These defendants must be committed to a forensic unit of a state facility, rather than to the general population.

No statutory provision exists for commitment counsel to challenge the categorization of the respondent's alleged crime. For example, a defendant may have been charged with armed robbery but did not harm or attempt to harm the victim in any way. The criminal court judge might nevertheless commit the defendant as one who inflicted or attempted to inflict serious physical injury or death.

Counsel for the respondent could raise the issue at the commitment hearing but might be unsuccessful because the initial commitment order was entered by the criminal court judge. Counsel might seek the assistance of the respondent's defense attorney. The defense attorney might be able to make a motion in criminal court that the nature of the crime be re-categorized.

B. Crime Charged Does Not Allege Defendant Inflicted or Attempted to Inflict Serious Physical Injury or Death, and Defendant Found NGRI: Judge Must Order Commitment to State 24-Hour Facility

A defendant who is charged with a crime where it is not alleged that the defendant inflicted or attempted to inflict serious injury or death and who is found not guilty by reason of insanity must be committed by the criminal court judge to a state 24-hour facility. The court also must order the defendant into the custody of a law enforcement officer for transport directly to the facility. All subsequent proceedings are to be conducted pursuant to Chapter 122C, which governs involuntary commitment. G.S. 15A-1321(a); *see infra* Appendix A, Form AOC-SP-910M.

C. Crime Charged Does Allege Defendant Inflicted or Attempted to Inflict Serious Physical Injury or Death, and Defendant Found NGRI: Judge Must Order Commitment to DHHS Forensic Unit

A defendant who is charged with a crime where it is alleged that the defendant inflicted or attempted to inflict serious injury or death and who is found not guilty by reason of insanity must be committed by the criminal court judge to a forensic unit operated by the Department of Health and Human Services. Currently the only such unit is at Central Regional Hospital (formerly Dorothea Dix Hospital).

The court also must order the defendant into the custody of a law enforcement officer for transport directly to the forensic unit. All subsequent proceedings are to be conducted pursuant to Chapter 122C, which governs involuntary commitment. G.S. 15A-1321(b).

7.4 Temporary Restraint Pending 15A-1321 Proceedings

The criminal court judge "may order the respondent be held under appropriate restraint pending proceedings under G.S. 15A-1321" if there are reasonable grounds to believe that the respondent is mentally ill and dangerous to self or others as defined in Chapter 122C. G.S. 15A-1322.

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.

7.6 Disposition

Respondent prevails. If the court finds by a preponderance of the evidence that the respondent is either no longer mentally ill or is no longer dangerous to others, the respondent must be "discharged and released." G.S. 122C-271(c)(2).

Respondent does not prevail. If the court does not find that the respondent has carried the burden of proof, it must order inpatient treatment for up to ninety days at a 24-hour facility. G.S. 122C-271(c)(1).

7.7 Rehearings

A. Hearing Procedures

Rehearings for NGRI commitments follow the procedures for the initial hearing set forth in G.S. 122C-268.1. G.S. 122C-276.1(b). These procedures are discussed *supra* in § 7.5A through J. As with the initial hearing, the respondent may waive the right to a rehearing. G.S. 122C-276.1(a).

B. Clerk of Court to Calendar and Give Notice

The clerk of court must calendar a rehearing at least fifteen days before the end of any inpatient commitment resulting from an NGRI verdict. Notice is to be given by the clerk according to the same provisions governing the initial hearing. G.S. 122C-276.1(a), (d); *see also supra* § 7.5F.

C. Disposition

As at the initial 122C commitment hearing, the respondent bears the burden of proof at each rehearing. G.S. 122C-276.1(c); *see also supra* § 7.5I. If the respondent carries the burden of proof, the court must order discharge and release. If the burden is not carried, the court may commit the respondent for up to 180 days of inpatient treatment at the first rehearing and for up to one year at each subsequent rehearing. G.S. 122C-276.1(c), (d).

7.8 Discharge or Conditional Release

A. No Discharge or Conditional Release Except Upon Order of Court

A respondent committed as a result of an NGRI verdict may not be discharged except upon order of the court having jurisdiction over the commitment proceedings. G.S. 122C-277(b1). The respondent may not be discharged during the period of automatic commitment ordered by the criminal court. *Id.*

If the attending physician determines that the commitment criteria no longer exist, rather than discharging the respondent, the physician must request a court hearing to present the recommendation to the court. Discharge is not automatic, however, as the burden of proof remains on the respondent.

B. Notice to Clerk of Proposed Discharge or Conditional Release

The attending physician must notify the clerk of superior court fifteen days before the proposed discharge or conditional release. G.S. 122C-277(b1). Notice must be provided so that the clerk may schedule and give notice of the required hearing.

C. Clerk to Calendar Hearing and Give Notice

Upon receiving notice of the proposed discharge or conditional release, the clerk must calendar a hearing before the court with jurisdiction over the commitment. The clerk also must give notice to the same people entitled to notice of the initial hearing and rehearings, within the same time limits. G.S. 122C-277(b1), 122C-264(d1); *see supra* § 7.5F.

D. District Attorney May Represent State's Interests

The district attorney for the criminal trial may represent the state's interests at the commitment hearing regarding discharge or conditional release. G.S. 122C-277(b1); *see supra* § 7.5B.

E. Hearing Procedures

The hearing is conducted according to the same procedures as at the initial hearing and rehearings under Chapter 122C. G.S. 122C-277(b1), 122C-268.1; *see supra* § 7.5.

F. Burden of Proof

The hearing is held according to the same standard of proof as the initial hearing and rehearings under Chapter 122C. G.S. 122C-277(b1). The respondent must prove by a preponderance of the evidence that the respondent no longer has a

mental illness *or* no longer is dangerous to others. G.S. 122C-268.1(i); *see supra* § 7.5I.

G. Disposition

There are no dispositional alternatives set out in the statutory section on request for discharge or conditional release. If the respondent prevails, then clearly the court must discharge or conditionally release the respondent. G.S. 122C-271(c)(2), 122C-268.1(i). It is less clear what choices are available to the court if the respondent does not prevail. For example, if the respondent was committed for 180 days at the first rehearing and does not prevail at a hearing on discharge occurring 60 days into the term, may the court commit the respondent for one year? Or does the respondent continue with the remainder of the 180 days and have a rehearing 120 days later? There is a good argument for the latter because the respondent should not be penalized by a longer commitment as a result of the attending physician's request for a discharge hearing.

The trial court on rehearing may order any disposition allowed by Chapter 122C regardless of the specific relief requested by the treating physician. *In re Hayes*, ___ N.C. App. ___, 681 S.E.2d 395 (2009). Therefore, commitment counsel would be well advised to be creative in making recommendations that provide the least restriction on the respondent's liberty as long as the recommendations are within the dispositional alternatives allowed by statute. As always, counsel should advise the respondent of the alternatives available and obtain the respondent's consent before offering dispositional alternatives to the court.