UNC SCHOOL OF GOVERNMENT

2018 Spring Public Defender Attorney & Investigator Conference PLENARY SESSIONS

May 16-18, 2018 – Charlotte, 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. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click 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.

Filed 1/25/18

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re KENNETH HUMPHREY, on Habeas Corpus.	A152056 (San Francisco City and County Super. Ct. No. 17007715)

Nearly forty years ago, during an earlier incarnation, the present Governor of this state declared in his State of the State Address that it was necessary for the Legislature to reform the bail system, which he said constituted an unfair "tax on poor people in California. Thousands and thousands of people languish in the jails of this state even though they have been convicted of no crime. Their only crime is that they cannot make the bail that our present law requires." Proposing that California move closer to the federal system, the Governor urged that we find "a way that more people who have not been found guilty and who can meet the proper standards can be put on a bail system that is as just and as fair as we can make it." (Governor Edmund G. Brown Jr., State of the State Address, Jan. 16, 1979.) The Legislature did not respond.

Undaunted, our Chief Justice, in her 2016 State of the Judiciary Address, told the Legislature it cannot continue to ignore "the question whether or not bail effectively serves its purpose, or does it in fact penalize the poor." Questioning whether money bail genuinely ensures public safety or assures arrestees appear in court, the Chief Justice suggested that better risk assessment programs would achieve the purposes of bail more fairly and effectively. (Chief Justice Tani Cantil-Sakauye, State of the Judiciary Address, Mar. 8, 2016.) The Chief Justice followed up her address to the Legislature by

establishing the Pretrial Detention Reform Workgroup in October 2016 to study the current system and develop recommendations for reform.[1]

This time the Legislature initiated action. Senate Bill No. 10, the California Money Bail Reform Act of 2017, was introduced at the commencement of the current state legislative session. The measure, still before the Legislature, opens with the declaration that "modernization of the pretrial system is urgently needed in California, where thousands of individuals held in county jails across the state have not been convicted of a crime and are awaiting trial simply because they cannot afford to post money bail or pay a commercial bail bond company." We hope sensible reform is enacted, but if so it will not be in time to help resolve this case.

Meanwhile, as this case demonstrates, there now exists a significant disconnect between the stringent legal protections state and federal appellate courts have required for proceedings that may result in a deprivation of liberty and what actually happens in bail proceedings in our criminal courts. As we will explain, although the prosecutor presented no evidence that non-monetary conditions of release could not sufficiently protect victim or public safety, and the trial court found petitioner suitable for release on bail, the court's order, by setting bail in an amount it was impossible for petitioner to pay, effectively constituted a *sub rosa* detention order lacking the due process protections

[1] The Workgroup's report concluded that "California's current pretrial release and detention system unnecessarily compromises victim and public safety because it bases a person's liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias." The substance of the report consists of 10 recommendations designed to establish and facilitate implementation of "a risk-based pretrial assessment and supervision system that (1) gathers individualized information so that courts can make release determinations based on whether a defendant poses a threat to public safety and is likely to return to court—without regard for the defendant's financial situation; and (2) provides judges with release options that are effective, varied, and fair alternatives to money bail." (Pretrial Detention Reform, Recommendations to the Chief Justice, Pretrial Detention Reform Workgroup (2017) p. 2.)

constitutionally required to attend such an order. Petitioner is entitled to a new bail hearing at which the court inquires into and determines his ability to pay, considers nonmonetary alternatives to money bail, and, if it determines petitioner is unable to afford the amount of bail the court finds necessary, follows the procedures and makes the findings necessary for a valid order of detention

THE PARTIES' POSITION

Petitioner Kenneth Humphrey was detained prior to trial due to his financial inability to post bail. Claiming bail was set by the court without inquiry or findings concerning either his financial resources or the availability of a less restrictive non-monetary alternative condition or combination of conditions of release, petitioner maintains he was denied rights guaranteed by the Fourteenth Amendment.

Acknowledging that a bail scheme that "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid" (*United States v. Salerno* (1987) 481 U.S. 739 at p. 745 (*Salerno*), petitioner does not claim California's money bail system is facially unconstitutional. However, he maintains that requiring money bail as a condition of pretrial release at an amount it is impossible for the defendant to pay is the functional equivalent of a pretrial detention order. (*United States v. Leathers* (D.C. Cir. 1969) 412 F.2d 169, 171, ["the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all"]; *In re Christie* (2001) 92 Cal.App.4th 1105, 1109 ["the court may neither deny bail nor set it in a sum that is the functional equivalent of no bail"].) Because the liberty interest of an arrestee is a fundamental constitutional right entitled to heightened judicial protection (*id.* at p. 750), such an order can be constitutionally justified, petitioner says, only if the state "first establish[es] that it has a *compelling* interest which justifies the [order] and then demonstrate[s] that the [order is] *necessary* to further that purpose."[2] (*People v. Olivas*

[2] Whether a bail determination violates the due process and equal protection requirements at issue in this case is distinct from the question whether an unattainably

(1976) 17 Cal.3d 236 at p. 251, citing *Serrano v. Priest* (1971) 5 Cal.3d 584, 597; *In re Antazo* (1970) 3 Cal.3d 100, 110-111; *Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785.) Petitioner argues that in order to do this, the state must show and the court must find that no condition or combination of conditions of release could satisfy the purposes of bail, which are to assure defendants' appearance at trial and protect victim and public safety.

As no such showing or finding was made, petitioner asks us to issue a writ of habeas corpus and either order his immediate release on his own recognizance or remand the matter to the superior court for an expedited hearing, with instructions to (1) conduct a detention hearing consistent with article I, section 12, of the California Constitution and the procedural safeguards discussed in *Salerno*, and; (2) set whatever least restrictive, non-monetary conditions of release will protect public safety; or (3) if necessary to assure his appearance at trial or future hearings, impose a financial condition of release after making inquiry into and findings concerning petitioner's ability to pay.

In his informal opposition to the petition the Attorney General asked us to deny the petition. Relying upon the "Public Safety Bail" provisions of section 28, subd. (f)(3), of the California Constitution—which states that "[i]n setting, reducing or denying bail . . . .[p]ublic safety shall be the primary consideration"—the Attorney General distinguished the federal cases petitioner relies upon and argued that the magistrate did not violate petitioner's rights to due process or equal protection by deciding not to further reduce bail or release petitioner on his own recognizance.

However, after we issued an order to show cause, the Attorney General filed a return withdrawing his earlier assertion that the magistrate was not obligated to make any additional inquiry into petitioner's ability to pay under the circumstances of this case.

---

high money bail is also "excessive" under the state and federal Constitutions, as some courts have suggested. (See, e.g., *Pugh v. Rainwater* (5th Cir. 1978) 572 F.2d 1053, 1057 [" '[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment' "].) Petitioner has not advanced this claim, however, and we therefore do not address it.

The Attorney General now agrees with petitioner that a writ of habeas corpus should issue for the purpose of providing petitioner with a new bail hearing. As stated in the return: "The Department of Justice has determined that it will not defend any application of the bail law that does not take into consideration a person's ability to pay, or alternative methods of ensuring a person's appearance at trial. Given this determination, after further deliberations, we withdraw our earlier assertion that the magistrate was not obligated to make any additional inquiry into petitioner's ability to pay under the circumstances of this case."

We shall explain why we agree with the parties that the trial court erred in failing to inquire into petitioner's financial circumstances and less restrictive alternatives to money bail, and that a writ of habeas corpus should therefore issue for the purpose of providing petitioner a new bail hearing.

FACTS AND PROCEEDINGS BELOW

The Underlying Offenses

Petitioner, a retired shipyard laborer, is 63 years of age and a lifelong resident of San Francisco. On May 23, 2017 (all dates are in that year), at approximately 5:43 p.m., San Francisco police officers responded to 1239 Turk Street regarding a robbery. The complaining witness, Elmer J., who was 79 years of age and used a walker, told the officers he was returning to his fourth floor apartment when a man, later identified as petitioner, followed him into his apartment and asked him about money. At one point petitioner told Elmer to get on the bed and threatened to put a pillow case over his head. When Elmer said he had no money, petitioner took Elmer's cell phone and threw it onto the floor. After Elmer gave him $2, petitioner stole $5 and a bottle of cologne and left. Elmer did not know or recognize petitioner. While reviewing the surveillance video with front desk clerks, the officers were informed that the African-American person in the video was petitioner, who lived in an apartment on the third floor of the building. The officers went to petitioner's apartment and arrested him without incident. Petitioner was

subsequently charged with first degree robbery (Pen. Code, § 211),[3] first degree residential burglary (§ 459), inflicting injury (but not great bodily injury) on an elder and dependent adult (§ 368, subd. (c)), and theft from an elder or dependent adult, charged as a misdemeanor. (§ 368, subd. (d).)

The Initial Setting of Bail

At his arraignment on May 31, petitioner sought release on his own recognizance without financial conditions based on his advanced age, his community ties as a lifelong resident of San Francisco and his unemployment and financial condition, as well as the minimal property loss he was charged with having caused, the age of the three alleged priors (the most recent of which was in 1992), the absence of a criminal record of any sort for more than 14 years, and his never previously having failed to appear at a court ordered proceeding. Petitioner also invited the court to impose an appropriate stay-away order regarding the victim who, as noted, lived on a different floor of the same "senior home" in which appellant resided.

The prosecutor did not affirmatively argue for pretrial detention pursuant to article 1, section 12, of the California Constitution, but simply asked the court to "follow the PSA [Public Safety Assessment] recommendation, which is that release is not recommended," and requested bail in the amount of $600,000, as prescribed by the bail schedule, and a criminal protective order directing petitioner to stay away from the victim.

After indicating it had read the Public Safety Assessment Report on petitioner, the trial court stated as follows: "I appreciate the fact that Mr. Humphrey has had a lengthy history of contact here in the City and County of San Francisco. I also note counsel's argument that many of his convictions are older in nature; however, given the seriousness of this crime, the vulnerability of the victim, as well as the recommendation from pretrial

[3] All subsequent statutory references are to the Penal Code unless otherwise indicated. As will be noted, references to "section 12" and "section 28" are to sections 12 and 28 of article 1 of the California Constitution.

services, I'm not going to grant him OR [release on his own recognizance] or any kind of supervised release at this time. I will set bail in the amount of $600,000 and sign the criminal protective orders to [stay] away from [the victim]."[4]

Petitioner's Motion for a Bail Hearing

On July 10, petitioner filed a motion for a formal bail hearing pursuant to section 1270.2[5] and an order releasing him on his own recognizance or bail reduction, claiming that "bail, as presently set, is unreasonable and beyond the defendant's means" and "violates the Eighth Amendment's proscription against excessive bail."

Relying on *In re Christie, supra,* 92 Cal.App.4th at page 1109, which prohibits the setting of bail in an amount "that is the functional equivalent of no bail," and *Lopez-Valenzuela v. Arpaio* (9th Cir. 2014) 770 F.3d 772, 780-781, which discusses authority for the proposition that criteria warranting pretrial detention "satisfy substantive due process only if they are 'narrowly tailored to serve a compelling state interest,' " petitioner's bail motion argued that the substantive due process guarantee of the Fourteenth Amendment entitled him to an individualized determination of his right to be released prior to trial on his own recognizance or bail after he was afforded an opportunity to present evidence relating to any factors that might affect the court's decision whether to release him pending trial, and that his guilt may not be presumed during the bail-setting process.

The motion cited extensive statistical studies and other data showing racial disparities in bail determinations in adult criminal and juvenile delinquency proceedings

---

[4] At the request of defense counsel, the court modified the protective order by deleting the requirement that petitioner stay away from 1239 Turk Street, where petitioner and the victim both lived, and limiting the premises petitioner must stay away from to the fourth floor of the Turk Street address, where the victim lived.

[5] Section 1270.2 provides, as material, that "[w]hen a person is detained in custody on a criminal charge prior to conviction for want of bail, that person is entitled to an automatic review of the order fixing the amount of bail by the judge or magistrate having jurisdiction of the offense. That review shall be held not later than five days from the time of the original order fixing the amount of bail on the original accusatory pleading."

in state and federal courts in all regions of the country, none of which were challenged by the district attorney. A 2013 study of San Francisco's criminal justice system attached as an exhibit to petitioner's bail motion found, among other things, that although booked Black adults appear to be "more likely than booked White adults to meet the criteria for pretrial release," "Black adults in San Francisco are 11 times as likely as White adults to be booked into County Jail" prior to trial. (W. Hayward Burns Inst., *San Francisco Justice Reinvestment Initiative: Racial and Ethnic Disparities Analysis for the Reentry Council, Summary of Key Findings* (2013) p. 2.) The motion argued that "[t]he court should keep these stark facts in mind in setting bail so as not [to] exacerbate any unconscious, implicit or institutional bias that might exist."

The motion for a bail hearing also provided considerable information about petitioner's family and personal history, particularly the relationship between the murder of his father, with whom he was close, when petitioner was 16 years old, petitioner's turn to drugs and subsequent addiction, and his fitful but "life-long" efforts to deal with that problem. While in custody at the San Francisco County Jail from 2005 to 2008, petitioner successfully completed the Roads to Recovery drug rehabilitation program and earned a high school diploma. After he was released from jail petitioner enrolled for nearly two years in San Francisco City College as a participant in the Fresh Start program, and during that period served as mentor for young adults in the community. After serving in that role for seven months, petitioner suffered a relapse that ended his mentoring activities. Near the end of 2015, he voluntarily entered a program called 890 Men's Residential, which is administered by the HealthRIGHT 360 family of programs, a "behavioral health services agency that offers a streamlined continuum of comprehensive substance abuse and mental health services." Petitioner's bail motion included a copy of a letter from the HealthRIGHT program verifying that he had "successfully completed treatment on 5/19/2016."

Petitioner's motion also represented that after he committed the charged offenses he was accepted into the Golden Gate for Seniors program, which was administered by Community Awareness & Treatment Services, Inc. (CATS), "a non-profit organization

serving chronically homeless men and women in San Francisco with multiple problems including substance abuse and mental problems." Golden Gate for Seniors, CATS's oldest program, has 18 beds "that serve homeless men and women who abuse alcohol and drugs in the context of a six-month residential substance abuse treatment program [in which] clients participate in group recovery sessions, individual counseling and case management that link them with benefits, housing and other needed services." CATS accepted petitioner into the Golden Gate for Seniors program with a designated "intake date" of July 13, the day after the date set for the bail hearing. The motion argued that placing petitioner in this residential program instead of jail would ensure supervision and community safety, whereas placement in jail would deny him the opportunity to deal effectively with his substance abuse problem, which is the root of his past criminal conduct and the charged offenses.

The Hearing on the Bail Motion

The hearing on petitioner's bail motion took place on July 12, five days before the date set for the preliminary hearing. At the start of the proceeding defense counsel provided the court a letter from the Golden Gate for Seniors program stating that it had accepted petitioner for a residential placement commencing on July 13, the next day. After defense counsel said he had "laid out all my points in the bail motion" in detail, he emphasized that petitioner had not engaged in criminal conduct for many years, was 63 years of age, had been battling with addiction since he was a teenager, but had recently "made some significant strides," and that he took only five dollars and a bottle of cologne from his victim, who was not physically injured. Finally, counsel reiterated that though this was a "three-strikes" case, petitioner's prior convictions were very old, the most recent having occurred a quarter of a century ago, in 1992. For the foregoing reasons, defense counsel asked the court to release petitioner on his own recognizance, and failing that to be "OR'd to Golden Gate for Seniors."

The prosecutor pointed out that one of petitioner's priors was a felony for which he served a prison sentence, and that under section 1275, the court had to find unusual circumstances in order to deviate from the bail schedule. Asserting that there were no

such circumstances, and the $600,000 previously imposed by the court was the scheduled amount of bail, the prosecutor urged the court not to reduce that amount. Arguing that petitioner's present and past criminal offenses were all committed due to the need to "feed his habit," the prosecutor maintained that his addiction and inability to address it constituted "a continued public safety risk." The prosecutor added that petitioner should be considered "a great public safety risk" because he "followed a disabled senior into his home. He stole from him. He did so in a building that he had access to, [t]hat he resided in." Finally, the prosecutor argued that petitioner was a flight risk because he was exposed to a lengthy prison sentence.

The one-page form risk assessment report submitted to the court by the pretrial services agency, which does not indicate a representative of the agency ever met with petitioner, provides no individualized explanation of its opaque risk assessment of petitioner and no information regarding the availability and potential for use of an unsecured bond, which imposes no costs on the defendant who appears in court, or supervised release programs involving features like required daily or periodic check-ins with the pretrial services agency, drug testing, home detention, electronic monitoring,[6] or other less restrictive release options. Nor, so far as the record shows, did the court ask the pretrial services agency to provide any such information.

In explaining its decision, the trial court stated that it had public safety concerns because "this was a serious crime and serious conduct involved and pretty extreme tactics

---

[6] The number of accused and convicted criminals in the United States who are monitored with ankle bracelets and other electronic tracking devices, such as GPS and radio-frequency units, rose nearly 140 percent over 10 years, according to a survey conducted in 2015 by The Pew Charitable Trusts. More than 125,000 people were supervised with the devices in 2015, up from 53,000 in 2005. (Use of Electronic Offender-Tracking Devices Expands Sharply, Brief from the Pew Charitable Trusts (Sept. 2016). Available at <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/09/use-of-electronic-offender-tracking-devices-expands-sharply> [as of Jan. 25, 2018]; Eisenberg, *Mass Monitoring* (2017) 90 So. Cal. L.Rev. 123; Wiseman, *Pretrial Detention and the Right to be Monitored* (2014) 123 Yale L.J. 1344; Causey, *Reviving the Carefully Limited Exception: From Jail to GPS Bail* (2013) 5 Faulkner L.Rev. 59.)

employed by Mr. Humphrey, if I accept what is in the police report,"[7] noting also that his offenses were similar to those he had committed in the past, "so that continuity is troubling to the court." The court acknowledged that "maybe little was taken," but said "that's because the person whose home was invaded was poor [and] I'm not [going to] provide less protection to the poor than to the rich." The court also felt petitioner's criminal history and the circumstances of the offenses, which the court described as "basically a home invasion," "are captured in the scheduled bail of $600,000. And as [the district attorney] argued, I have to find unusual circumstances to deviate. However, the court was impressed with petitioner's "willingness to participate in treatment, and I do commend that. I cannot see my way to an OR release on that basis, but I do think that is an unusual circumstance that would justify some deviation from the bail schedule." The court also attached significance to petitioner's strong ties to the community, and found that factor also qualified as an unusual circumstance justifying deviation from the bail schedule. Nonetheless, the court believed a high bail was still warranted "because of public safety and flight risk concerns," "and so I'm [going to] modify bail to be $350,000." At no point during the hearing did the court note that, as indicated in the risk assessment report and emphasized by counsel, petitioner had never previously failed to appear at a court ordered hearing.

When the court added an additional condition—that upon release on bail petitioner participate in the Golden Gate for Seniors residential drug treatment program—the public defender observed that petitioner was too poor "to make even $350,000 bail" and would therefore have to remain in custody pending trial and be unable to participate in a residential drug treatment program. The court did not comment on the anomalousness of imposing a condition of release that it made impossible for petitioner to satisfy by setting bail at an unattainable figure.

[7] The police report was not made a part of the appellate record and the trial court did not at the arraignment or subsequent bail hearing identify the statements in the report it apparently relied upon.

The petition for writ of habeas corpus was filed in this court on August 4, at which time petitioner was in custody. We issued an order to show cause on September 1.

DISCUSSION

"Habeas corpus is an appropriate vehicle by which to raise questions concerning the legality of bail grants or deprivations. [Citations.] In evaluating petitioner's contentions, this court may grant relief without an evidentiary hearing if the return admits allegations in the petition that, if true, justify relief. [Citations.] On the other hand, we may deny the petition, without an evidentiary hearing, if we are persuaded the contentions in the petition are without merit. [Citations.]" (*In re McSherry* (2003) 112 Cal.App.4th 856, 859-860.)

Where, as here, the material facts of the case are undisputed and " 'the application of law to fact is predominantly legal, such as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, [the appellate] court's review is de novo.' " (*In re Taylor* (2015) 60 Cal.4th 1019, 1035, quoting *In re Collins* (2001) 86 Cal.App.4th 1176, 1181.)

Petitioner's claims that he was denied due process of law and deprived of his personal liberty on the basis of poverty arise under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and article 1, section 7 of the California Constitution.

I.

The California Bail Process

As noted, the California Constitution contains two sections pertaining to bail: sections 12 and 28 of article I (hereafter section 12 and section 28).

Section 12, like the preceding bail provisions of the California Constitution,[8] "was intended to abrogate the common law rule that bail was a matter of judicial discretion by

[8] The prior bail provision, which immediately prior to 1974 was article I, section 6, stated that: "All persons shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great." This identical provision

conferring an absolute right to bail except in a narrow class of cases." (*In re Law* (1973) 10 Cal.3d 21, 25, citing *In re Underwood* (1973) 9 Cal.3d 345 and *Ex parte Voll, supra,* 41 Cal. at p. 32.) The provision "establishes a person's right to obtain release on bail from pretrial custody, identifies certain categories of crime in which such bail is unavailable, prohibits the imposition of excessive bail as to other crimes, sets forth the factors a court shall take into consideration in fixing the amount of the required bail, and recognizes that a person 'may be released on his or her own recognizance in the court's discretion." (*In re York* (1995) 9 Cal.4th 1133, 1139-1140, fn. omitted)[9]

Subsections (b) and (c) of section 12 provide that a court cannot deny admission to bail to a defendant charged with violent acts or who threatened another with great bodily harm, except on the basis of "clear and convincing evidence" that there is "a substantial likelihood the defendant's release would result in great bodily harm to others." The factors the court must consider in setting the amount of bail are "the seriousness of the

---

was previously contained in article I, section 7, of the California Constitution. (*Ex parte Voll* (1871) 41 Cal. 29, 31; see also *Ex Parte Duncan* (1879) 54 Cal. 75.)

[9] Section 12 provides in full:

"A person shall be released on bail by sufficient sureties, except for:

(a) Capital crimes when the facts are evident or the presumption great;

(b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or

(c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

A person may be released on his or her own recognizance in the court's discretion."

offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case." (§ 12.)

Section 28 establishes and ensures enforcement of 17 rights for victims of criminal acts (art. I, § 28, subds. (f)(1)-(13)), one of which is the right "[t]o have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant." (Art. I, § 28, subd. (b)(3).) With respect to that victim's right, subdivision (f)(3) of section 28, entitled "Public Safety Bail," provides that "[i]n setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary consideration."

The statutes implementing the constitutional right to bail are set forth in title 10, chapter 1 of the Penal Code. (§§ 1268–1276.5.) Under the statutory scheme, a defendant charged with an offense not punishable with death "may be admitted to bail before conviction, as a matter of right," and "[t]he finding of an indictment does not add to the strength of the proof or the presumptions to be drawn therefrom." (§§ 1270.5, 1271.) However, before any person arrested for any specified serious offense may be released on bail in an amount that is either more or less than the amount contained in the schedule of bail for that offense, or may be released on his or her own recognizance, a hearing must be held at which "the court shall consider evidence of past court appearances of the detained person, the maximum potential sentence that could be imposed, and the danger that may be posed to other persons if the detained person is released." (§ 1270.1, subds. (a) & (c).) In determining whether to release the detained person on his or her own recognizance, "the court shall consider the potential danger to other persons, including threats that have been made by the detained person and any past acts of violence. The court shall also consider any evidence offered by the detained person regarding his or her ties to the community and his or her ability to post bond." (§ 1270.1, subd. (c).) Where bond is set in a different amount from that specified in the bail schedule, "the judge or

magistrate shall state the reasons for that decision and shall address the issue of threats made against the victim or witness, if they were made, in the record." (§ 1270.1, subd. (d).)

A person detained in custody prior to conviction for want of bail is entitled, no later than five days from the time of the original order fixing bail, to an automatic review of the order fixing the amount of bail on the original accusatory pleading. (§ 1270.2)

Section 1275, which describes the factors judicial officers are obliged to consider in making bail determinations, tracks the exact language of subdivision (f)(3) of section 28 in declaring that "[i]n setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration." (§ 1275, subd. (a)(1).) Section 1275 additionally states that "[i]n considering the seriousness of the offense charged, a judge or magistrate shall include consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm . . . or possession of controlled substances by the defendant." (§ 1275, subd. (a)(2).) Before a court reduces bail to below the amount established by the applicable bail schedule for specified serious offenses "the court shall make a finding of unusual circumstances and shall set forth those facts in the record." (§ 1275, subd. (c).)

The only requirement in the bail statutes that a court considering imposition of money bail take into account the defendant's financial circumstances is that the court consider "any evidence offered by the detained person" regarding ability to post bond. (§ 1270.1, subd. (c).) Nothing in the statutes requires the court to consider less restrictive conditions as alternatives to money bail.

In the present case, the parties agree that the district attorney did not produce "clear and convincing evidence" that there is "a substantial likelihood" petitioner's release "would result in great bodily injury to others" or that petitioner "threatened another with great bodily harm" and "there is a substantial likelihood" he "would carry

out the threat if released," as required for detention under section 12, and the court did not make such findings. The parties further agree that, as we next explain, the due process and equal protection clauses of the Fourteenth Amendment require the court to make two additional inquiries and findings before ordering release conditioned on the posting of money bail—whether the defendant has the financial ability to pay the amount of bail ordered and, if not, whether less restrictive conditions of bail are adequate to serve the government's interests—and the trial court failed to make either of these inquiries or findings.

II.

The Court Erred in Failing to Inquire Into and Make Findings Regarding Petitioner's Financial Ability to Pay Bail and Less Restrictive Alternatives to Money Bail

Petitioner's claim that the due process and equal protection clauses of the Fourteenth Amendment required the trial court to determine the availability of less restrictive non-monetary conditions of release that would achieve the purposes of bail is based on two related lines of cases.

The first, exemplified by *Bearden v. Georg*ia (1983) 461 U.S. 660 (*Bearden*), does not relate to bail directly but more generally to the treatment of indigency in cases in which a defendant is exposed to confinement as a result of his or her financial inability to pay a fine or restitution. These cases establish that a defendant may not be imprisoned solely because he or she is unable to make a payment that would allow a wealthier defendant to avoid imprisonment. In the second line are bail cases, primarily *Salerno, supra,* 481 U.S. 739, establishing that, because the liberty interest of a presumptively innocent arrestee rises to the level of a fundamental constitutional right, the right to bail cannot be abridged except through a judicial process that safeguards the due process rights of the defendant and results in a finding that no less restrictive condition or combination of conditions can adequately assure the arrestee's appearance in court and/or protect public safety, thereby demonstrating a compelling state interest warranting abridgment of an arrestee's liberty prior to trial.

As we shall describe, the principles underlying these cases dictate that a court may not order pretrial detention unless it finds either that the defendant has the financial ability but failed to pay the amount of bail the court finds reasonably necessary to ensure his or her appearance at future court proceedings; or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or that no less restrictive nonfinancial conditions of release would be sufficient to protect the victim and community.

A.

The question in *Bearden, supra*, 461 U.S. 660, was whether the Fourteenth Amendment prohibits a state from revoking an indigent defendant's probation for failure to pay a fine and restitution. The court held that the trial court erred in automatically revoking probation on the basis that the petitioner could not pay the fine imposed without determining that he had not made sufficient bona fide efforts to pay or that adequate alternate forms of punishment did not exist. In reaching this result, Justice O'Connor noted that "[d]ue process and equal protection principles converge" in the Supreme Court's analysis in cases involving the treatment of indigents in the criminal justice system, but the court "generally analyze[d] the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause." (*Id*. at p. 665, citing *Ross v. Moffit* (1974) 417 U.S. 600, 608-609.)

Justice O'Connor pointed out, however, that in order to determine whether the differential treatment violates the equal protection clause, "one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine. Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as

'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose . . . .' " (*Ross v. Moffit, supra*, 417 U.S. at pp. 666-667, fns. omitted.)[10]

In imposing a judicial responsibility to inquire into the financial circumstances of an allegedly indigent defendant, the *Bearden* court relied heavily on the reasoning of its earlier opinions in *Williams v. Illinois* (1970) 399 U.S. 235 (*Williams*) and *Tate v. Short* (1971) 401 U.S. 395 (*Tate*), both of which advanced the process of mitigating the disparate treatment of indigents in the criminal justice system initially set in motion by *Griffin v. Illinois* (1956) 351 U.S. 12 and *Douglas v. California* (1963) 372 U.S. 353.

In *Williams* the indigent defendant was convicted of petty theft and given the maximum possible sentence of one year imprisonment and a $500 fine. As permitted under an Illinois statute, the judgment directed that in the event of nonpayment of the fine, the defendant was to remain in jail to pay off the obligation at the rate of five dollars per day. The Supreme Court struck the statute as applied to the defendant, holding that "once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." (*Williams, supra*, 399 U.S. at pp. 241-242.) *Tate* was a similar case except that the statutory penalty permitted only a fine.

---

[10] In a footnote, Justice O'Connor pointed out that "[a] due process approach has the advantage in this context of directly confronting the intertwined question of the role that a defendant's financial background can play in determining an appropriate sentence. When the court is initially considering what sentence to impose, a defendant's financial resources is a point on a spectrum rather than a classification. Since indigency in this context is a relative term rather than a classification, fitting 'the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished.' [Citation.] The more appropriate question is whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process." (*Bearden, supra*, 461 U.S. at p. 666, fn. 8.) That statement is as applicable to a bail determination as to the sentencing issue in *Bearden*.

As stated in *Williams*, "On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds. Since only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment." (*Williams, supra,* 399 U.S. at pp. 241-242, fns. omitted, accord, *Tate, supra,* 401 U.S. at pp. 398-399.)

The rule the *Bearden* court distilled from *Williams* and *Tate* is that the state "cannot ' "[impose] a fine as a sentence and then automatically [convert] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." ' [(*Tate, supra,* 401 U.S. at p. 398.)] In other words, if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it. Both *Williams* and *Tate* carefully distinguished this substantive limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine." (*Bearden, supra,* 461 U.S. at pp. 667-668.)

As *Bearden* explained, the Fourteenth Amendment ameliorates, even if it does not cure, the differential treatment it protects against by mandating careful and consequential judicial inquiry into the circumstances. A probationer who willfully refuses to pay a fine or restitution despite having the means to do so, or one who fails to "make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution," may be imprisoned as a "sanction to enforce collection" or "appropriate penalty for the offense." (*Bearden, supra,* 461 U.S. at p. 668.) "But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering

whether adequate alternative methods of punishing the defendant are available." (*Id.* at pp. 668-669.)

Bearden, of course, was dealing with the issue of inability to pay in the context of individuals already convicted and sentenced. Because it was concerned with fines and restitution, the *Bearden* court discussed the measures necessary to satisfy the State's interests in punishment and deterrence. The issues are different in the pretrial bail context. Here the relevant governmental interests are ensuring a defendant's presence at future court proceedings and protecting the safety of victims and the community. The liberty interest of the defendant, who is presumed innocent, is even greater; consequently, as will be further explained, it is particularly important that his or her liberty be abridged only to the degree necessary to serve a compelling governmental interest. (See *Lopez-Valenzuela v. Arpaio, supra,* 770 F.3d at p. 779; *Salerno, supra,* 481 U.S. at pp. 749-750, 755.) When money bail is imposed to prevent flight, the connection between the condition attached to the defendant's release and the governmental interest at stake is obvious: If the defendant fails to appear, the bail is forfeited. (§§ 1269b, subd. (h); 1305, subd. (a).) A defendant who is unable to pay the amount of bail ordered—assuming appropriate inquiry and findings as to the amount necessary to protect against flight—is detained because there is no less restrictive alternative to satisfy the governmental interest in ensuring the defendant's presence. (See *United States v. Mantecon-Zayas* (1st Cir. 1991) 949 F.2d 548, 550; *Brangan v. Commonwealth* (Mass. 2017) 80 N.E.3d 949, 960, 963.)[11] Money bail, however, has no logical connection to protection of the public, as

[11] *United States v. Mantecon-Zayas, supra,* 949 F.2d at p. 550, held that a court may impose a financial condition the defendant cannot meet *if* the court finds such condition bail is reasonably necessary to ensure the defendant's presence at trial. But "once a court finds itself in this situation—insisting on terms in a 'release' order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid *detention* order; in particular, the requirement in 18 U.S.C. § 3142(i) that the court 'include written findings of fact and a written statement of the reasons for the detention.' " (*Ibid.*) To the same effect, *Brangan v. Commonwealth, supra,* 80 N.E.3d at page 963, held that although a defendant does not have a right to "affordable bail," "where a judge sets bail in an amount so far beyond a defendant's

bail is not forfeited upon commission of additional crimes. Money bail will protect the public only as an incidental effect of the defendant being detained due to his or her inability to pay, and this effect will not consistently serve a protective purpose, as a wealthy defendant will be released despite his or her dangerousness while an indigent defendant who poses minimal risk of harm to others will be jailed. Accordingly, when the court's concern is protection of the public rather than flight, imposition of money bail in an amount exceeding the defendant's ability to pay unjustifiably relieves the court of the obligation to inquire whether less restrictive alternatives to detention could adequately protect public or victim safety and, if necessary, explain the reasons detention is required.

Bearden and its progeny " 'stand for the general proposition that when a person's freedom from governmental detention is conditioned on payment of a monetary sum, courts must consider the person's financial situation and alternative conditions of release when calculating what the person must pay to satisfy a particular state interest.' Otherwise, the government has no way of knowing if the detention that results from failing to post a bond in the required amount is reasonably related to achieving that interest." (*Hernandez v. Sessions* (9th Cir. 2017) 872 F.3d 976, 992-993.)

The principles enunciated in *Bearden*, *Williams*, and *Tate* have been rigorously enforced by the courts of this state.

In *In re Antazo, supra,* 3 Cal.3d 100, the two defendants were convicted of arson, and the trial court suspended imposition of sentence upon the condition, among others, that each pay a fine of $2,500 plus a penalty assessment of $625 or, in lieu of payment, serve one day in jail for each $10 unpaid. One defendant paid the fine and assessment and was released. The other defendant, Antazo, was indigent and unable to pay, and was therefore incarcerated. Discharging Antazo from custody, the Supreme Court stated as

---

ability to pay that it is likely to result in long-term pretrial detention, it is the functional equivalent of an order for pretrial detention, and the judge's decision must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty."

follows: "[A] sentence to pay a fine, together with a direction that a defendant be imprisoned until the fine is satisfied, gives an advantage to the rich defendant which is in reality denied to the poor one. 'The "choice" of paying $100 fine or spending 30 days in jail is really no choice at all to the person who cannot raise $100. The resulting imprisonment is no more or no less than imprisonment for being poor . . . .' To put it in another way and in the context of the present case, when a fine in the same amount is imposed upon codefendants deemed equally culpable with the added provision for their imprisonment in the event of its nonpayment, an option is given to the rich defendant but denied to the poor one." (*Id*. at p. 108; accord, *Charles S. v. Superior Court* (1982) 32 Cal.3d 741, 750.)

The court of appeal adopted the same reasoning in *In re Young* (1973) 32 Cal.App.3d 68, in which the petitioner challenged the denial of prison credit for presentence detention that resulted solely from his indigency. The court held that as applied to an indigent defendant who could not afford bail, a statute providing that a prison term commences on delivery of the defendant to prison "operates to create an unconstitutional discrimination and results in overall confinement of persons who are convicted of the same crime who are able to afford bail and so secure liberty and those who cannot do so and are confined. Although the presentence jail time may not be 'punishment' as defined by the Penal Code, it is a deprivation of liberty. The additional deprivation suffered only by the indigent does not meet federal standards of equal protection . . . ." (*Id.* at p. 75; accord, *People v. Kay* (1973) 36 Cal.App.3d 759, 763 [holding that "[a]n indigent defendant cannot be imprisoned because of his inability to pay a fine, even though the fine be imposed as a condition of probation" and instructing the trial court on remand to take into consideration the "present resources of appellants and . . . their prospects" when determining their restitution payments].)

Turning to the present case, petitioner asserts and it is undisputed that he was detained prior to trial due to his financial inability to post bail in the amount of $350,000, an amount that was fixed by the court without consideration of either his financial circumstances or less restrictive alternative conditions of release. The court's error in

failing to consider those factors eliminated the requisite connection between the amount of bail fixed and the dual purposes of bail, assuring petitioner's appearance and protecting public safety. (*Pugh v. Rainwater, supra,* 572 F.2d at p. 1057 [" 'Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.' "].) Due to its failure to make these inquiries, the trial court did not know whether the $350,000 obligation it imposed would serve the legitimate purposes of bail or impermissibly punish petitioner for his poverty. "[W]hen the government detains someone based on his or her failure to satisfy a financial obligation, the government cannot reasonably determine if the detention is advancing its purported governmental purpose unless it first considers the individual's financial circumstances and alternative ways of accomplishing its purpose." (*Hernandez v. Sessions, supra*, 872 F.3d at p. 991.)

B.

Salerno, supra, 481 U.S. 739, which petitioner relies heavily upon, upheld the constitutionality of the federal Bail Reform Act of 1984 (18 U.S.C. § 3141 et seq.) (the Bail Reform Act). That Act provides that "[a] judicial officer . . . before whom an arrested person is brought shall order that such person be released or detained, pending judicial proceedings" (18 U.S. C. § 3141(a)) and that the judicial officer "shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court," subject to specified conditions, "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." (18 U.S.C. § 3142(b).) Thus, if the offense is not made statutorily unbailable, the presumption is release pending trial.[12]

[12] The Bail Reform Act, and the District of Columbia bail statutes (Dist. of Col. Code, §§ 23-1301-1309), "are based on 'bail/no bail' or 'release/no release' schemes, which, in turn, are based on legal and evidence-based pretrial practices such as those found in the American Bar Association's Criminal Justice Standards on Pretrial Release. Indeed, each statute contains general legislative titles describing the process as either 'release' or 'detention' during the pretrial phase, and each starts the bail process by

The United States Supreme Court has long recognized the gravity of the interests abridged by pretrial detention. As the court explained in *Stack v. Boyle* (1951) 342 U.S. 1 (*Stack*), "federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail" because "[t]his traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. [Citation.] Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." (*Id*. at p. 4, fns. omitted.) In his oft-cited concurring opinion, Justice Jackson amplified this point: "The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.[13] To open a way of escape from

---

providing judges with four options: (1) release on personal recognizance or with unsecured appearance bond; (2) release on a condition or combination of conditions; (3) temporary detention; or (4) full detention. Each statute then has a provisions describing how each release or detention option should function. [¶] Because they successfully separate bailable from unbailable defendants, thus allowing the system to lawfully and transparently detain unbailable defendants with essentially none of the conditions associated with release (including secured financial conditions), both statutes are also able to include sections forbidding financial conditions that result in the preventive detention of the defendant—an abuse seen frequently in states that have not fully incorporated notions of a release/no release system." (Schnacke, Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform, National Inst. of Corrections (Sept. 2014) p. 29.)

[13] These are by no means the only adverse collateral consequences of pretrial detention. As has been noted, "[t]he stress of incarceration—or even just the threat of jail time—frequently prompts defendants to plead guilty and give up their right to trial . . . . [I]t 'is a self-fulfilling system; defendants have to plea, and end up with a record,' which permanently labels them as criminal, which in turn further influences judges when setting bail in future cases. Virtually all individuals charged with low-level offenses who face an unaffordable bail amount end up accepting a plea, thereby absolving the state of its

this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death [citation], providing: 'a person arrested for an offense not punishable by death shall be admitted to bail . . .' before conviction." (*Id*. at pp. 7-8 (conc. opn. of Jackson, J.); see also *Gerstein v. Pugh* (1975) 420 U.S. 103, 114, 123 [recognizing that "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, . . . impair his family relationships" and undermine his "ability to assist in preparation of his defense"].)

The Bail Reform Act amended federal law by authorizing courts to make release decisions that not only consider the likelihood an arrestee might flee, as under prior law, but also "give appropriate recognition to the danger a person may pose to others if released." (*Salerno, supra,* 481 U.S. at p. 742.)[14] Although the federal bail system is not based on secured money bail, petitioner relies upon *Salerno* because of the heavy emphasis the opinion places on the extensive safeguards mandated by the Bail Reform Act to assure the accuracy of a judicial assessment that the release of a particular arrestee would endanger public safety**.** These safeguards, which the court relied upon in

---

burden to prove the case beyond a reasonable doubt . . . . 'Individuals who insist on their innocence and refuse to plead guilty get held . . . .' And while the plea might prevent detention altogether or at least allow a return to productivity outside the jail cell, it may also come with a criminal record.' " (Goff, *Pricing Justice: The Wasteful Enterprise of America's Bail System* (2017) 82 Bklyn. L.Rev. 881, 882, fns. omitted.) This article also describes a recent study showing that approximately two-thirds of the households with a family member in jail or prison struggle to meet their most essential needs, "nearly 50% are unable to purchase enough food or pay for housing. For one-third of families who were living above the poverty line before making contact with the criminal justice system, the expenses associated with incarceration or jail time—such as phone, commissary, and travel costs—pushed them into debt." (*Id*. at p. 899, fns. omitted.)

[14] The 1966 Act (Pub. L. No. 89-465, 80 Stat. 214) provided that non-capital defendants were to be released pending trial unless the court determined that such release did not adequately ensure a defendant's appearance. It also required the court to choose the least restrictive alternatives from a list of conditions designed to secure a defendant's appearance. The bail of defendants charged with a capital offense was determined on the basis of different criteria which took public safety into account.

upholding the statute, are relevant to our consideration of the inquiries and findings necessary before a presumptively innocent arrestee may be detained prior to trial.

The defendants in *Salerno* were charged with 35 acts of racketeering activity, including fraud, extortion, gambling and conspiracy to commit murder. At their arraignment, the government moved to have them detained prior to trial on the ground that "no condition of release would assure the safety of the community or any person," and made a detailed proffer of evidence that, among other things, respondents had engaged in wide-ranging conspiracies to aid their illegal enterprises through violent means, and Salerno had personally participated in two murder conspiracies. (*Salerno, supra,* 481 U.S. at p. 743.)

The trial court granted the government's detention motion after concluding that the government had established by clear and convincing evidence that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community," the determinations necessary to order an arrestee's detention under the Bail Reform Act. (*Salerno, supra,* 481 U.S. at pp. 743-744.) The Court of Appeals reversed, finding the Bail Reform Act's " 'authorization of pretrial detention [on the ground of future dangerousness] repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes.' [Citation.] The [Court of Appeals] concluded that the Government could not, consistent with due process, detain persons who had not been accused of any crime merely because they were thought to present a danger to the community." (*Salerno,* at p. 744.)

Rejecting that conclusion, the Supreme Court reasoned that the pretrial detention authorized by the Bail Reform Act is not impermissible punishment but a regulatory measure designed to protect community safety that is constitutionally justified by the "legitimate and compelling" government interest in preventing crime committed by arrestees. (*Salerno, supra,* 481 U.S. at p. 749.) In appropriate circumstances, the court declared, such detention can outweigh an arrestee's liberty interest. (*Id.* at pp. 747-752.)

Salerno described the protections included in the Bail Reform Act as follows: "The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. [Citation]." (*Salerno, supra,* 481 U.S. at p. 750.) "Detainees have a right to counsel at the detention hearing. [Citation.] They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. [Citation.] The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. [Citation.] The Government must prove its case by clear and convincing evidence. [Citation.] Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. [Citation.] The Act's review provisions, [citation], provide for immediate appellate review of the detention decision." (*Id*. at pp. 751-752.)

As an en banc panel of the Ninth Circuit has observed, *Salerno* "concluded that the Bail Reform Act satisfied heightened scrutiny because it both served a 'compelling' and 'overwhelming' governmental interest 'in preventing crime by arrestees' and was 'carefully limited' to achieve that purpose," and "sufficiently tailored because it 'careful[ly] delineat[ed] . . . the circumstances under which detention will be permitted.' " (*Lopez-Valenzuela v. Arpaio, supra,* 770 F.3d at p. 779.)

The Ninth Circuit went on to note that "[i]f there was any doubt about the level of scrutiny applied in *Salerno*, it has been resolved in subsequent Supreme Court decisions, which have confirmed that *Salerno* involved a fundamental liberty interest and applied heightened scrutiny. See [*Reno v.*] *Flores* [(1993)] 507 U.S. [292,] 301-02 . . . (O'Connor, J. concurring); *Foucha v. Louisiana* [(1992)] 504 U.S. 71, 80-83 (Kennedy, J. dissenting). *Salerno* and the cases that have followed it have recognized that '[f]reedom

from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.' *Foucha,* 504 U.S. at 80. Thus, '[t]he institutionalization of an adult by the government triggers heightened substantive due process scrutiny.' *Flores*, 507 U.S. at 316 (O'Connor, J., concurring). As the Court explained in *Salerno,* [*supra,*] 481 U.S. at 755, 'liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.' See also *Zadvydas v. Davis* [(2001)] 533 U.S. 678, 690 ('Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.'); *Foucha*, 504 U.S. at 90 (Kennedy, J. dissenting.) ('As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution.') Thus, [the Arizona constitutional provision prohibiting state courts from setting bail for detainees illegally in the country] will satisfy substantive due process only if they are 'narrowly tailored to serve a compelling state interest.' *Flores*, 507 U.S. at 302 (citing *Salerno*, 481 U.S. at 746.)" (*Lopez-Valenzuela v. Arpaio, supra*, 770 F.3d 772 at pp. 780-781.)

Because the federal bail scheme at issue in *Salerno* is not a money-bail system, the court had no need to address the issues presented by such a system when the applicant for bail is indigent or impecunious. *Turner v. Rogers* (2011) 564 U.S. 431 (*Turner*) is instructive in this regard. *Turner* addressed the question whether a father facing the possibility of incarceration for civil contempt due to his inability to pay a child support order had a right to court-appointed counsel. Noting that the proceeding was civil and therefore required "fewer procedural protections than in a criminal case" (*id*. at p. 442), the court "determine[d] the 'specific dictates of due process' by examining the 'distinct factors' that this Court has previously found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair," namely, "(1) the nature of 'the private interest that will be affected,' (2) the comparative 'risk' of an 'erroneous deprivation of that interest with and without

'additional or substitute procedural safeguards,' and (3) the nature and magnitude of any countervailing interest in not providing 'additional or substitute procedural requirement[s].' " (*Id.* at pp. 444-445, citing *Mathews v. Eldridge* (1976) 424 U.S. 319, 335.)

Turner recognized that the gravity of "the private interest that will be affected" argued strongly for the right to counsel. An indigent defendant's loss of personal liberty through imprisonment demands due process protection, the court declared, because "[t]he interest in securing that freedom, the freedom 'from bodily restraint,' lies at the core of the liberty protected by the Due Process Clause." (*Turner, supra,* 564 U.S. at p. 445, quoting *Foucha v. Louisiana, supra,* 504 U.S. at p. 80.) The court ultimately found this interest outweighed by a combination of three considerations that militated against an automatic right to state-provided counsel in civil proceedings that might result in imprisonment. One of those considerations is particularly significant for our purposes: the availability of "a set of 'substitute procedural safeguards' *Mathews*, [*supra*,] 424 U.S. at 335 . . . , which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty . . . without incurring some of the drawbacks inherent in recognizing an automatic right to counsel." (*Turner, supra*, 564 U.S. at p. 447.)[15] Those safeguards included "(1) notice to the defendant that his 'ability to pay' is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay." (*Id.* at pp. 447-448.) The court made it clear that the "alternative procedural

[15] The other two factors were (1) that a defendant's ability to pay is closely tied to indigence, which is in many cases "sufficiently straightforward" to be determined prior to providing a defendant with counsel; and (2) sometimes the person opposing the defendant is not the government represented by counsel but the custodial parent who is unrepresented by counsel, so that providing the defendant counsel "could create an asymmetry of representation" that would distort the nature of the proceeding. (*Turner, supra,* 564 U.S. at pp. 446-447.)

safeguards" it described were examples, not a complete list of what was required by due process, and that the state could provide procedures "equivalent" to those identified by the court. (*Id*. at p. 448.)

A determination of ability to pay is critical in the bail context to guard against improper detention based only on financial resources. Unlike the federal Bail Reform Act,[16] however, our present bail statutes only require a court to consider a defendant's ability to pay if the defendant raises the issue. (§ 1270.1, subd. (c).) This leaves in the hands of the defendant a matter that is the trial court's responsibility to ensure—that a defendant not be held in custody solely because he or she lacks financial resources. (See *De Luna v. Hidalgo County* (S.D. Tex. 2012) 853 F.Supp.2d 623, 648 ["the absence of any inquiry into a defendant's indigency unless the defendant 'raises' it of his or her own accord does not provide the process due" and "risks that defendants who do not think to 'speak up' during arraignment about their inability to pay fines may be jailed solely by reason of their indigency, which the Constitution clearly prohibits"].) Furthermore, section 1270.1, subdivision (c), applies only where a person arrested for specified offenses (expressly excluding first degree residential burglary, petitioner's offense) is to be released on his or her own recognizance or bail in an amount that is more or less than that specified for the offense on the bail schedule. (§ 1270.1, subd. (a).) While section 1275 identifies factors to be considered by the court in setting, reducing or denying bail, including factors pertaining to whether release of the arrestee would endanger public safety, it does not include consideration of the defendant's ability to fulfill a financial condition of release. Nor does section 1269c, which authorizes the setting of bail in

---

[16] The Bail Reform Act expressly provides that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person." (18 U.S.C. § 3142(c)(2).) Among the factors required to be considered "in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community," are "the history and characteristics of the person, including . . . [¶] . . . financial resources . . . ." (18 U.S.C. § 3142(g)(3).)

amounts greater or lower than that specified in the bail schedule, require any judicial consideration of the arrestee's financial circumstances.

The *Bearden* line of cases, together with *Salerno* and *Turner*, compel the conclusion that a court which has not followed the procedures and made the findings required for an order of detention must, in setting money bail**,** consider the defendant's ability to pay and refrain from setting an amount so beyond the defendant's means as to result in detention.

If the court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose. We believe the clear and convincing standard of proof is the appropriate standard because an arrestee's pretrial liberty interest, protected under the due process clause, is "a fundamental interest second only to life itself in terms of constitutional importance." (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 435; see *Santosky v. Kramer* (1982) 455 U.S. 745. 756 ["This court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money' "]; *Addington v. Texas* (1979) 441 U.S. 418, 427 ["the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence"]; § 12 [clear and convincing evidence required to establish facts necessary for exception to constitutional right to pretrial release in non-capital cases].)

Another protection that *Salerno* identified in the federal Bail Reform Act and *Turner* discussed, express findings and statements of decision (*Salerno, supra,* 481 U.S. at p. 752; *Turner, supra,* 564 U.S. at p. 447), is also of particular importance in ensuring that orders for release on bail do not become de facto detention orders. Although our bail

statutes require statements of reasons to only a limited degree,[17] section 28, subdivision (f)(3), requires that when a judicial officer grants or denies bail or release on a person's own recognizance, "the reasons for that decision shall be stated in the record and included in the court's minutes." The significance of a statement of reasons is discussed in *In re Podesto* (1976) 15 Cal.3d 921, 937-938 (*Podesta*) and *In re Pipinos* (1982) 33 Cal.3d 189 (*Pipinos*). These cases addressed the adequacy of judicial explanations of the reasons for denying release pending appeal, but their guidelines are also useful in the context of pretrial detention. Because the liberty interest of a convicted person awaiting appeal is less than that of an accused person awaiting trial—there is no absolute right to bail on appeal, and the grant of such bail is totally within the trial court's discretion (§ 1272)—[t]he rules governing the setting of bail pending trial must be at least as rigorous as those governing the setting of bail on appeal." (*In re Christie, supra,* 92 Cal.App.4th at p. 1109.)

Podesto upheld section 1272, which governs release after conviction pending probation or appeal, and held that trial courts "should render a brief statement of reasons in support of an order denying a motion for bail on appeal." (*Podesto, supra*, 15 Cal.3d at p. 938.) Explicit judicial findings "serve several worthy purposes: They help to assure a realistic review by providing a method of evaluating a judge's decision or order; they guard against careless decision making by encouraging the trial judge to express the grounds for his decision; and they preserve public confidence in the fairness of the judicial process." (*In re John H.* (1978) 21 Cal.3d 18, 23, citing *Podesto*, at p. 937.)

Pipinos, supra, 33 Cal.3d 189, found insufficient a trial court's statement that the defendant's bail application was denied because he posed a " 'substantial flight risk,' " represented " 'some risk to society,' " and did not have a " 'substantial likelihood of

[17] The bail statutes only require a court to state reasons on the record if it departs from the amount specified on the bail schedule in cases involving enumerated offenses (§ 1270.1, subd. (d)), and to find "unusual circumstances" and "set forth those facts on the record" if it reduces bail below the amount on the bail schedule for a person charged with a serious or violent felony (§ 1275, subd. (c)).

success on appeal.' " The Supreme Court found these comments did not promote the "goal of ensuring that judges engage in careful and reasoned decisionmaking. Once defendant came forward with evidence in support of his application for release . . . the court was duty-bound to articulate its evaluative process and show how it weighed the evidence presented in light of the applicable standards." (*Id*. at p. 198, citing *Podesto, supra*, 15 Cal.3d at p. 938.) The trial court's statement was inadequate because "it does not identify the specific facts which persuaded the court that bail would be inappropriate in this case. The court simply based its denial of bail on the bare conclusions that there was a likelihood the defendant would flee and would continue his criminal activities as a dealer of controlled substances, and that his appeal was meritless." (*Pipinos*, at pp. 198-199.)

With respect to the likelihood of flight, the *Pipinos* court considered the factors noted in *Podesto*: "Because the primary purpose of bail is assurance of continued attendance at future court proceedings [citation], a defendant to qualify for release on appeal must satisfactorily demonstrate that the likelihood of his flight is minimal in light of the following three criteria: '(1) the defendant's ties to the community, including his employment, the duration of his residence, his family attachments and his property holdings; (2) the defendant's record of appearance at past court hearings or of flight to avoid prosecution; and (3) the severity of the sentence defendant faces.' " (*Pipinos, supra*, 33 Cal.3d at p. 199, quoting *Podesto, supra*, 15 Cal.3d at pp. 934-935.) Pipinos satisfied the first two criteria, but the trial court was " 'persuaded that he wouldn't give much pause to flee,' " solely on the ground that he faced a four-year prison term. This was improper, the Supreme Court stated, because *Podesto* requires that one factor be weighed against the others, "and the court's failure to mention the other factors . . . does not permit us to review in what manner, if at all, it balanced defendant's community ties and record of court appearances against the incentive to flight suggested by the prison term.' " (*Pipinos*, at p. 199.) This balancing is required because "otherwise denial of bail would be proper in any case in which a prison term is imposed, regardless of offsetting factors presented by defendant." (*Id*. at p. 200.) Additionally, the absence of balancing

"fails to promote the policy purpose underlying our requirement of a statement of reasons—guarding against careless decisionmaking. Although the court may very well have engaged in careful analysis of the facts and law, its failure to articulate its reasons for finding defendant a flight risk leaves us without the benefit of its analysis." (*Ibid*.)

Pipinos also concluded the trial court's finding that the defendant was a " 'danger to society' " was "deficient with respect to providing a basis for meaningful review and guarding against careless decisionmaking." (*Pipinos, supra,* 33 Cal.3d at p. 200.) The trial court did "not expressly state that there is a probability that defendant will continue to engage in criminal conduct. Instead, the court obliquely refers to defendant's 'basic character flaws,' and bases its conclusion of danger to society on the fact that there is no evidence of a 'metamorphosis.' We may conceivably infer that the court found, based on its assessment of defendant's character, that it was unlikely that defendant would forego his profitable trafficking in controlled substances. However, a primary purpose of the *Podesto* requirement of a statement is precisely to prevent this type of speculative judicial second-guessing, especially when, as here, we are asked to draw inferences as to inferences the trial court might have drawn." (*Ibid*.) "Because of the court's failure to articulate its reasons for finding defendant a danger to the community, we cannot ascertain the manner in which the court exercised its discretion. We do not know if the denial of bail was based upon the circumstances and propensities of the individual defendant, or whether it was based upon precisely the generalizations of future criminality *Podesto*'s standards were meant to prevent. *Podesto* urges caution in denying bail based on the propensities of the defendant and warns courts 'not [to] adopt an ironclad, mechanical policy of denying bail to all who commit a particular crime.' [Citations.]" (*Id*. at p. 201.)

The trial court in the present case explained its reasons to the extent required by the bail statutes, which was only to explain that it found petitioner's community ties and willingness to engage in treatment constituted "unusual circumstances" justifying deviation from the bail schedule. (§§ 1275, subd. (c), 1270.1, subd. (d).) Of greatest significance, it did not explain why, despite commending petitioner for his willingness to

participate in supervised residential drug treatment and ordering participation in such treatment as a condition of release, it simultaneously precluded release by setting an amount of money bail it was told petitioner could not pay.[18] The court's failure to explain the reasoning behind this incongruous order makes it impossible for us to know whether the trial court's determinations that petitioner was dangerous and presented a flight risk were based upon an individualized evaluation of his circumstances and propensities or solely upon "the generalizations of future criminality *Podesto*'s standards were meant to prevent," (*Pipinos, supra,* 33 Cal.3d at p. 201), or even whether the court fully recognized the incongruity of its decision.

III.
Bail Determinations Must be Based upon Consideration of Individualized Criteria

Failure to consider a defendant's ability to pay before setting money bail is one aspect of the fundamental requirement that decisions that may result in pretrial detention must be based on factors related to the individual defendant's circumstances. This requirement is implicit in the principles we have discussed—that a defendant may not be imprisoned solely due to poverty and that rigorous procedural safeguards are necessary to assure the accuracy of determinations that an arrestee is dangerous and that detention is required due to the absence of less restrictive alternatives sufficient to protect the public.

Stack, supra, 342 U.S. 1, illustrates the significance of individualized bail determinations (a point subsequently reiterated in *Salerno, supra,* 481 U.S. at p. 750). The 12 petitioners in *Stack* were charged with conspiring to violate the Smith Act, which made it a criminal offense to advocate the violent overthrow of the government or to organize or be a member of any group devoted to such advocacy. (*Stack,* at p. 3.) After bail was fixed in the uniform amount of $50,000 for each petitioner, they moved to

[18] The stay-away order also suggests internal inconsistency in the court's order, in that it would only be necessary if petitioner was not detained, but this aspect of the order is more readily explained as a safeguard included even in orders for detention, as a protection for the victim in case a defendant is later able to obtain release.

reduce the amount as excessive, submitting statements regarding their individual circumstances and financial resources, none of which was controverted by the government. (*Ibid.*)

The only evidence presented by the government was a showing that four persons previously convicted under the Smith Act in a federal court in another state had forfeited bail. Noting that petitioners were exposed to imprisonment for no more than five years and a fine of not more than $10,000, and that the government did not deny bail had been fixed in a sum much higher than that usually imposed for offenses with like penalties, the court questioned the government's failure to make any factual showing justifying the unusually high amount of bail uniformly fixed for each of the four petitioners. "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon the standards relevant to the purpose of assuring the presence of *that defendant*. . . ." (*Stack, supra,* 342 U.S. at p. 5, italics added.) As Justice Jackson observed, "[e]ach defendant stands before the bar of justice as an individual. Even on a conspiracy charge[,] defendants do not lose their separateness or identity. . . . The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance." (*Id.* at p. 9, conc. opn. of Jackson, J.)

The $600,000 bail initially ordered in this case was prescribed by the county bail schedule, which was also the anchor for the $350,000 reduced bail order.[19] Bail

---

[19] In response to the court's request that he inform the "Clerk of this Court" in writing how the bail schedule amount of $600,000 was calculated, petitioner's counsel stated that he "is unable to explain with any degree of certainty how money bail was calculated" and "because the San Francisco bail schedule incorporates no instructions for how to administer its list of offenses and dollar amounts, different sheriff's employees and different magistrates apply different principles." After consultation with the Attorney General, however, petitioner believes the most likely scenario is as follows: "To avoid 'stacking' bail amounts for different charges arising out of the same incident (a common practice throughout the state and in many cases in San Francisco) the Assistant District Attorney in this case only applied the money bail amount for one of the charges, in this case the residential burglary, because that is the charge with the highest scheduled bail. There were two enhancements applied to that charge (an elderly victim and the

schedules provide standardized money bail amounts based on the offense charged and prior offenses, regardless of other characteristics of an individual defendant that bear on the risk he or she currently presents.[20] These schedules, therefore, represent the antithesis of the individualized inquiry required before a court can order pretrial detention. Bail schedules have been criticized as undermining the judicial discretion necessary for individualized bail determinations, as based on inaccurate assumptions that defendants

---

presence of a person during the burglary), and these amounts ($100,000 each) were added to the total, even though these enhancements arguably constitute 'stacking' since the presence of the victim is counted twice. There were also allegations of four serious priors, each of which would add $100,000 to the total bail amount. However, because two of the priors are from the same date and county, those were counted as one offense for purposes of applying the bail schedule. Therefore, money bail enhancements were added for three serious priors. In sum, the likely breakdown of the $600,000 money bail amount was: [scheduled bail for residential burglary in the amount of $100,000 and $100,000 for each of five enhancement allegations (a person was present in the residence; crime against an elderly victim; and three prior convictions) in 1980, 1986 and 1992).]"

Petitioner's counsel also noted that "nothing on the face of the bail schedule required this computation of money bail. The bail schedule contains no instruction on how financial conditions of release should be calculated, including whether money bail should be 'stacked' or whether prior convictions from the same date should be counted separately or together for the purpose of adding bail enhancements. The schedule offers no instructions for what to do when the presence of a victim would form the basis for several enhancements, one due to the victim's presence and another due to the victim's age."

[20] Superior court judges in each county are required to "prepare, adopt, and annually revise a uniform countywide schedule of bail" for all bailable felony and for all misdemeanor and infraction offenses except Vehicle Code infractions. (§ 1269b, subd. (c).) In adopting the schedule of bail for all bailable felony offenses, "the judges shall consider the seriousness of the offense charged. In considering the seriousness of the offense charged the judges shall assign an additional amount of required bail for each aggravating or enhancing factor chargeable in the complaint, including, but not limited to, additional bail for charges alleging facts that would bring a person within [specified statutes defining certain violent and serious felony offenses]. [¶] In considering offenses in which a violation of [specified provisions of the Health and Safety Codes] is alleged, the judge shall assign an additional amount of required bail for offenses involving large quantities of controlled substances." (§ 1269b, subd. (e).)

charged with more serious offenses are more likely to flee and reoffend,[21] and as enabling the detention of poor defendants and release of wealthier ones who may pose greater risks.[22]

---

[21] Bail schedules are based on the theory that more serious crimes are punished by higher penalties and it is therefore more likely that the defendant will flee and prove dangerous and re-offend if released. However, as a thoughtful San Francisco Superior Court judge who has studied the subject points out, "the evidence does not support the proposition that the severity of the crime has any relationship either to the tendency to flee or the likelihood of re-offending." (Karnow, *Setting Bail for Public Safety* (2008) 13 Berkeley J. of Crim. L. 1, 14.) According to Judge Karnow, "the most exhaustive empirical studies of bail practices in the United States" which he discusses at length, suggest instead "that the severity of the crime cannot be used as a proxy for the danger posed by the defendant if he were released on bail. Accordingly, the current practice by which judges simply follow the bail schedules is, to put it delicately, of uncertain utility." (*Id*. at pp. 15, 16, fn. omitted; see also, Arkfeld, *The Federal Bail Reform Act of 1984: Effect of the Dangerousness Determination on Pretrial Detention* (1988) 19 Pac. L.J. 1435, 1444-1445 [referring to studies by the National Bureau of Standards and Harvard University].)

[22] The Standards for Criminal Justice promulgated by the American Bar Association "flatly rejects the practice of setting bail amounts according to a fixed bail schedule based on charge," because such schedules "are arbitrary and inflexible: they exclude consideration of factors other than the charge that may be far more relevant to the likelihood that the defendant will appear for court dates. The practice of using bail schedules leads inevitably to the detention of some persons who would be good risks but are simply too poor to post the amount of bail required by the bail schedule. They also enable the unsupervised release of more affluent defendants who may present real risks of flight or dangerousness, who may be able to post the required amount easily and for whom the posting of bail may be simply a cost of doing 'business as usual.' " (ABA Standards for Crim. Justice, Pretrial Release (3d ed. 2007) com. to std. 10-5.3 (e).) The Fifth Circuit has agreed, stating in *Pugh v. Rainwater, supra,* 572 F.2d 1053 that "[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty meeting its requirements. The incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." (*Id*. at p. 1057, citing Wisotsky, *Use of a Master Bond Schedule: Equal Justice Under Law?* (1970) 24 Univ. of Miami L.Rev. 808; *The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City* (1972) 8 Crim. Law Bulletin 459; Note, *Bail and its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform* (1974) 9 Valparaiso Univ. L.Rev. 167.) See also *Pierce v. City of Velda City* (E.D. Mo. June 3, 2015) No. 4:15-CV-00570 [2015 U.S. Dist. Lexis 176261] [enjoining the defendant city's "use of a secured bail schedule to set

Petitioner does not facially challenge the use of the San Francisco bail schedule. Nor do we condemn the trial court's consultation of the schedule: Such consultation is statutorily required, because for serious or violent felonies the court cannot depart from the amount prescribed by the schedule without finding unusual circumstances. (§ 1275, subd. (c).) The nature of the present charges against petitioner and his prior offenses are relevant to assessment of his dangerousness, and the schedule provides a useful measure of the relative seriousness of listed offenses. The bail schedule also serves useful functions in providing a means for individuals arrested without a warrant to obtain immediate release without waiting to appear before a judge (§ 1269b),[23] as well as a starting point for the setting of bail by a judge issuing an arrest warrant or for a court setting bail provisionally in order to allow time for assessment of a defendant's financial resources and less restrictive alternative conditions by the pretrial services agency, or if a defendant does not oppose pretrial detention.[24] As this case demonstrates, however, unquestioning reliance upon the bail schedule without consideration of a defendant's ability to pay, as well as other individualized factors bearing upon his or her dangerousness and/or risk of flight, runs afoul of the requirements of due process for a

---

the conditions for release of a person in custody after arrest for an offense that may be prosecuted by [the city]"].)

[23] Under section 1269b, subdivisions (a) and (b), if the defendant has not appeared before a judge on the charge contained in the complaint, indictment, or information, "the bail shall be in the amount fixed in the warrant of arrest or, if no warrant for arrest has been issued, the amount of bail shall be pursuant to the uniform countywide schedule of bail for the county in which the defendant is required to appear. . . ." (§ 1269b, subd. (b).)

[24] While the bail schedules may be particularly useful to overburdened courts in low risk misdemeanor and traffic offenses, allowing arrestees an opportunity to obtain immediate release (especially on weekends and evenings when courts are not in session) and avoiding the need for unnecessary bail hearings, it has been pointed out that the low bail amounts for such offenses "simply serve as an arrest fine or tax on those defendants who can make bail, while detaining those who can't," and swift release could be less onerously facilitated by release on personal recognizance or unsecured bonds. (Carlson, *Bail Schedules, A Violation of Judicial Discretion?* Crim. Justice (Spring 2011) p. 14.)

decision that may result in pretrial detention. Once the trial court determines public and victim safety do not require pretrial detention and a defendant should be admitted to bail, the important financial inquiry is not the amount prescribed by the bail schedule but the amount necessary to secure the defendant's appearance at trial or a court-ordered hearing.

Despite the widespread criticism of bail schedules, setting bail in the amount prescribed by the bail schedule remains the default position in this state,[25] and the practice may well be encouraged by the fact that by declining to depart from the bail schedule a court relieves itself of the statutory duty to state reasons. (See § 1270.1, subd. (d).) For poor persons arrested for felonies, reliance on bail schedules amounts to a virtual presumption of incarceration. According to a San Francisco study, last year 85 percent of the inmates of the county jail were awaiting trial and "[o]f these, 40-50% could be released if they could afford to pay their bail." (The Financial Justice Project, Office of the Treasurer & Tax Collector of the City and County of San Francisco, Do the Math: Money Bail Doesn't Add up for San Francisco (June 2017) p. 4.) While these statistics, corroborated by other recent studies,[26] do not indicate the corresponding percentage of

---

[25] See footnote 23, *ante*.

[26] For example, an analysis of county jail populations in California during 2014-2015 shows that 5,584 persons were booked into the San Francisco County Jail for the mean number of five days although charges were never made against them or were dismissed, and the cost to the county of those detentions, which numbered 28,671 days, was $3,264,766.77. (Human Rights Watch, "Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People (Apr. 2017) p. 43.) The statewide statistics are not materially different. A 2015 study by the California Department of Justice shows that roughly one-third of the 1,451,441 individuals arrested for felonies in this state between 2011 and 2015, 459,9847 were never found guilty of any crime, charges were not even filed against 273,899 of them, and all but a small fraction were detained due to the inability to post the amount of bail set. (Criminal Justice Statistics Center, Cal. Dept. of Justice, Crime in California (2015) p. 49.)

An analysis of 2000-2009 data from the US Department of Justice reveals that California's large urban counties "relied more heavily on pretrial detention of felony defendants (59% detained), compared with other large urban counties in the United States (32% detained), even after accounting for differences in the composition of defendants. But the state still had higher rates of failure to appear in court and higher levels of felony

arrestees who were released pending trial, for the population unable to afford money bail they make a mockery of the Supreme Court's observation in *Salerno* that prior to trial "liberty is the norm." (*Salerno, supra,* 481 U.S. at p. 755.)

In the present case, as we have said, the prosecution did not present *any* evidence, let alone clear and convincing evidence, to establish that "no condition or combination of conditions of release would ensure the safety of the community or any person" (*Salerno, supra,* 481 U.S. at pp. 743-744), thereby justifying abridgment of petitioner's liberty interest while awaiting trial. To the contrary, the prosecution did not dispute that any risk petitioner posed to victim and public safety could be sufficiently mitigated with the conditions of release the court imposed, and the court, by ordering petitioner's release on money bail with these conditions, implicitly so found. The conditions requiring petitioner to participate in the supervised residential drug treatment program and to stay away from the victim, addressed the particular circumstances of petitioner and the offense, but the bail amount was based solely on the bail schedule rather than any individualized inquiry into the amount necessary to satisfy the purposes of money bail in this case. And while the court attempted to acknowledge petitioner's circumstances by lowering the initially set amount of bail, the reduction from $600,000 to $350,000 was ineffectual. The reduction could be meaningful only if the court had reason to believe it possible for petitioner to post bail in the lower amount; but the court did not find or explain such a possibility, and the record suggests that, as defense counsel stated, petitioner was no more able to post bail in the amount of $350,000 than he was to post bail in the amount of $600,000. Nothing in the record suggests petitioner's claim of indigency was not bona fide, and neither the district attorney nor the court questioned the veracity of the claim. The court thus reached the anomalous result of finding petitioner suitable for release on bail but, in effect, ordering him detained (and therefore rendering

---

rearrests during the pretrial period." (Tafoya et al., Pretrial Release in California (May 2017) Public Policy Institute of California, p. 5.)

him unable to participate in the treatment program the court had made a condition of release).

IV.

The Relief to Which Petitioner is Entitled

As we have said, two provisions of the California Constitution bear on the issue of pretrial release on bail: Section 12, establishing the right to pretrial release on bail except in enumerated circumstances, and section 28, making victim and public safety the primary consideration in bail decisions. Section 12, which addresses only the subject of bail, limits the cases in which a defendant is *not* entitled to release to those involving capital crimes or involving certain other felonies if it is established by clear and convincing evidence that release would result in a substantial likelihood of great bodily harm to others. Section 28 establishes a number of rights for crime victims, one of which is the right to have the victim's safety considered in "fixing the amount of bail and release conditions for the defendant" (§ 28, subd. (b)(3)), and several rights shared by victims and the public, including that victim and public safety be the "primary considerations" in "setting, reducing or denying bail." (§ 28, subd. (f)(3).)

The Attorney General, in his return to the order to show cause, argued that these provisions should be "reconcile[d]" by interpreting section 28 as requiring courts to make public safety and safety of the victim the primary considerations in decisions to deny bail, set the amount of bail or release a defendant on his own recognizance, but "not to the extent of completely displacing section 12's bail provisions." The Attorney General maintained that section 28's emphasis on safety considerations applied to setting both the amount of money bail and nonmonetary conditions of release, rejecting petitioner's view that the only relevant consideration in setting money bail (as opposed to nonmonetary conditions of release) is risk of flight.[27] Petitioner urged that there is no need for us to

[27] The Attorney General's return expressed concern that the right to bail established by section 12 could be seen as conflicting with subdivision (b)(3) of section 28. The latter states as follows: "(b) In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights [¶] . . . [¶] (3) To

reconcile the two constitutional provisions because neither is inconsistent with the requirements that a court considering bail must inquire into the defendant's ability to pay and, if the order would result in pretrial detention, afford the procedural protections required by due process and determine by clear and convincing evidence that no less restrictive alternative would satisfy the government's interests. Petitioner argued that safety considerations bear on nonmonetary conditions of release but not on the amount of money bail, which (as earlier explained) is relevant only to protect against flight risk.

For the first time at oral argument, in his second change of position in this case, the Attorney General advanced the view that section 28 authorizes a court to impose a higher amount of money bail on a defendant found to present a risk to public or victim safety than on one who presented no such risk. Stating that his position had "come into greater clarity" over the course of other litigation in the time since the return in this case was filed, the Attorney General further maintained that defendants who would be entitled to bail under section 12 because they are not charged with capital crimes or, under subdivisions (b) or (c) of that section, found by clear and convincing evidence to have a substantial likelihood of inflicting great bodily harm on others, may be found to present a risk to victim or public safety by a preponderance of the evidence and detained prior to trial if they are unable to afford bail and no less restrictive condition of release is adequate to protect public safety. The Attorney General also maintained that a defendant may be detained under section 28 solely to protect against flight. The Attorney General acknowledged that this view of section 28 would effectively eviscerate section 12.

---

have the safety of the victim and the victim's family considered in fixing *the amount of bail* and release conditions." (Italics added.) Responding to petitioner's argument that the court could not consider public safety in deciding the amount of a monetary condition of pretrial release, the Attorney General's return focused on the italicized phrase and noted that, "[b]ecause monetary bail, unlike nonmonetary conditions, is an 'amount' that can be fixed, it makes little sense to view this clause as applying only to nonmonetary conditions. Moreover, the reference to 'release conditions' in that clause would be surplusage if 'bail' and 'release conditions' meant the same thing."

The suggestion that section 28, in effect, impliedly repealed section 12, as we have said, is a significant departure from the positions the Attorney General took in briefing this case. We decline to resolve the issue, raised as it was so late in these proceedings. (*People v. Crow* (1993) 6 Cal.4th 952, 960, fn. 7 [declining to address argument raised for first time at oral argument]; *People v. Barragan* (2004) 32 Cal.4th 236, 254, fn. 5 [declining to address argument first raised in appellant's reply brief]; *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11 ["Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant"].)[28]

---

[28] As the Attorney General explained in his return to the order to show cause, the provenance of section 28 gives no indication it was meant to render section 12 ineffective. The right to bail has been part of the California Constitution since its adoption in 1849. (*People v. Turner* (1974) 39 Cal.App.3d 682, 684.) Until 1982, the exception stated in section 12 and its predecessors was for capital offenses. (See fn. 8, *ante*.) In 1982, the voters enacted Proposition 4, which amended section 12 by adding as exceptions to the right of bail most of the cases now identified in subdivisions (b) and (c) of section 12. (Ballot Pamp., Primary Elec. (June 8, 1982) text of Prop. 4, p. 17.) A competing initiative in 1982, Proposition 8 (the "Victims' Bill of Rights"), would have repealed section 12, made release on bail permissive rather than mandatory and enacted the language that is presently found in section 28, including making public safety "the primary consideration" in "setting, reducing or denying bail." (Ballot Pamp., Primary Elec. (June 8, 1982) text of Prop. 8, §§ 2, 3, p. 33.) After both initiatives passed, the Supreme Court concluded that the provisions of proposed section 28 were preempted by the proposed amendments to section 12, because Proposition 4 received more votes than Proposition 8. (*In re York*, *supra*, 9 Cal.4th at p. 1140, fn. 4; see also, *People v. Standish* (2006) 38 Cal.4th 858, 875-878.)

Subsequently, section 28 was enacted in 2008 as Proposition 9 (the "The Victims' Bill of Rights Act of 2008"). Subdivision (f)(3) of section 28 ("Public Safety Bail") contains precisely the same text as the identically titled subdivision (e) of section 28 in 1982, except that it added "safety of the victim" to public safety as the "primary considerations" in "setting, reducing or denying bail." (Voter Information Guide, General Elec. (Nov. 4, 2008) text of Prop. 9, § 4.1, p. 130; Voter Information Guide (June 8, 1982) text of Prop. 8, § 3, p. 33.) But, unlike the 1982 Victims' Bill of Rights, Proposition 9 did *not* repeal section 12.

The Attorney General agreed in his return to the order to show cause that because Proposition 9 did not eliminate the longstanding right to bail under section 12, its passage in 2008 did not impliedly repeal the right to bail under section 12. (*In re Lance W.* (1985) 37 Cal.3d 873, 886 [presumption against repeal obliges courts to reconcile

For the reasons we have discussed, the trial court erred in setting bail at $350,000 without inquiring into and making findings regarding petitioner's ability to pay and alternatives to money bail and, if petitioner's financial resources would be insufficient and the order would result in his pretrial detention, making the findings necessary for a valid order of detention. Petitioner is entitled to a new bail hearing at which he is afforded the opportunity to provide evidence and argument, and the court considers his financial resources and other relevant circumstances, as well as alternatives to money bail. If the court determines that petitioner is unable to afford the amount of money bail it finds necessary to ensure petitioner's future court appearances, it may set bail at that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose. The court's findings and reasons must be stated on the record or otherwise preserved.

V.

Closing Observations

We are not blind to the practical problems our ruling may present. The timelines within which bail determinations must be made are short, and judicial officers and pretrial service agencies are already burdened by limited resources.

But the problem this case presents does not result from the sudden application of a new and unexpected judicial duty; it stems instead from the enduring unwillingness of our society, including the courts (see, e.g., Foote, *The Coming Constitutional Crisis in*

---

conflicts between constitutional provisions to avoid implying that later enacted provision repeals another existing provision]). The Attorney General pointed out that the proposed repeal of section 12 in Proposition 8 was the reason Propositions 4 and 8 were found contradictory when enacted in 1982. As explained in *People v. Standish*, *supra*, 38 Cal.4th at pages 876-878, Proposition 9 did not mention section 12, and the ballot pamphlet that year did not suggest that the public safety bail provision proposed by Proposition 9 was incompatible in any way with the right to bail provided by section 12.

Bail: I (1965) 113 U. Pa. L.Rev. 959-960, 998), to correct a deformity in our criminal justice system that close observers have long considered a blight on the system.[29]

The problem, as our Chief Justice has shown, requires the judiciary, not just the Legislature, to change the way we think about bail and the significance we attach to the bail process. Though legislation is desperately needed, administration of the bail system is committed to the courts. It will be hard, perhaps impossible, for judicial officers to fully rectify the bail process without greater resources than our trial courts now possess. Nevertheless, the highest judicial responsibility is and must remain the enforcement of constitutional rights, a responsibility that cannot be avoided on the ground its discharge requires greater judicial resources than the other two branches of government may see fit to provide. Judges may, in the end, be compelled to reduce the services courts provide, but in our constitutional democracy the reductions cannot be at the expense of presumptively innocent persons threatened with divestment of their fundamental constitutional right to pretrial liberty.

DISPOSITION

The bail determination is reversed, and the matter is remanded for further proceedings consistent with this opinion.

---

[29] Alexis De Tocqueville, a keen early observer of our criminal procedures, observed in 1835 that our bail system "is hostile to the poor, and favorable only to the rich. The poor man has not always a security to produce . . . ; and if he is obliged to wait for justice in prison, he is speedily reduced to distress. A wealthy person, on the contrary, always escapes imprisonment. . . . Nothing can be more aristocratic than this system of legislation. (De Tocqueville, Democracy in America (Dover Thrift ed. 2017) p. 56.) Tocqueville attributed this anomaly to English law which he thought Americans retained despite the fact that it was "repugnant to the general tenor of their legislation and the mass of their ideas." (*Ibid*.)

_____
Kline, P.J.

We concur:

_____
Stewart, J.

_____
Miller, J.

In re Humphrey on Habeas Corpus (A152056)

Trial Judge:	Hon. Joseph M. Quinn
Trial Court:	San Francisco County Superior Court
Attorneys for Petitioner:	Civil Rights Corps Alec Karakatsanis Jeff Adachi, San Francisco Public Defender Matt Gonzalez Chief Attorney Paul Myslin Deputy Public Defender
Attorneys for Respondent:	Attorney General of California Xavier Becerra Gerald A. Engler Chief Assistant Attorney General Jeffrey M. Laurence Senior Assistant Attorney General Seth K. Schalit Supervising Deputy Attorney General Katie L. Stowe Deputy Attorney General

2017-18 OFFICE ACCOMPLISHMENTS

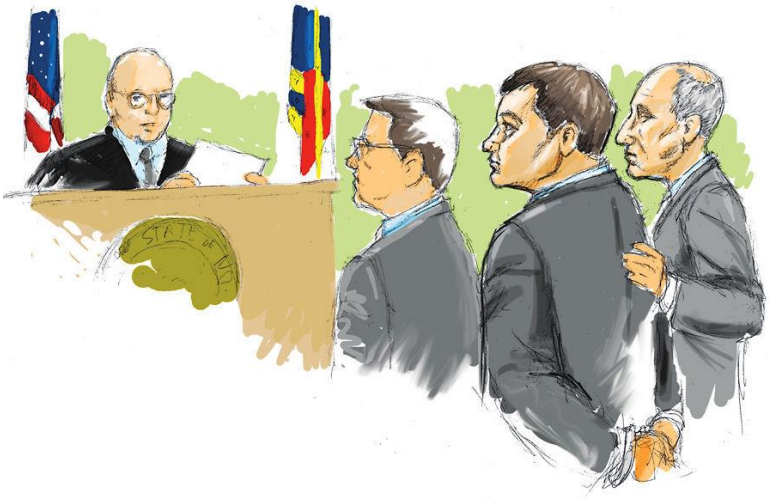
SUCCESS FOR CLIENTS

Trial victories

Guilford APD **Brennan Aberle** was victorious in a trial on charges of constructive possession of drugs where the contraband was found in a backpack with papers tied to Brennan's client found at a relative's house with the client nowhere nearby.

Guilford APD **Wayne Baucino** tried and won a robbery with a dangerous weapon case in which the client was alleged to have robbed a 13-year-old boy working the register of his family store. Video showed the client going into the store several times and getting money from the boy. However, the client testified that the boy owed him money for drugs, and the jury decided he was not guilty.

In a case where his client was charged with first degree murder for setting a deadly fire, **Wayne** convinced a jury to sentence his client to LWOP. The victim's family reportedly found peace in the sentence.



Wayne and his client

New Hanover APD **Russell Davis** persuaded a jury to vote not guilty for a client accused of felony larceny by employee. Two weeks later, Russell obtained an involuntary manslaughter verdict for a client charged with murder who had turned down an offer of a sentence of fewer than 10 years.

Pitt APDs **Matt Geoffrion** and **Taplie Coile** obtained a second degree murder verdict in a case where a young autistic victim was stabbed multiple times. Their 23-year-old client was facing LWOP but was well prepared to testify while being cross-examined by an experienced prosecutor. (Said Regional Defender Tucker Charns, they "tried the hell out of it.")

Guilford APD **Molly Hilburn-Holt** won a trial involving felony assault on an emergency office in a hospital.

Wake APDs **Mike Howell** and **Patrick Koch**, assisted by PD Investigators **Greg Porterfield** and **Jerry Winstead,** achieved a not guilty verdict in a non-capital murder trial by successfully arguing self-defense.

ACD **Vicki Jayne**, with assistance from ACD **Vince** Rabil, AAD **Dan Shatz**, and others, was also able to get a jury to find client guilty of second degree murder in a case involving the death of an 18-month-old child with injuries so severe that the State proceeded on murder by torture.

Guilford APD **Roger Rizo** has been successful in using case law to get many probation violation cases thrown out, leading the prosecutor in that court to refer to Roger as the "king of probation court."

While headed for trial on charges of possession of firearm by a felon and habitual felon, 29B APD **Beth Stang** realized that the felony predicate charge stemmed from an unsigned bill of indictment on a plea from district court. The client was represented by private counsel on another charge, and that attorney filed MARs on the district court "felony" and on a subsequent possession of firearm case based on the same predicate offense. Under the impression that the MARs would be successful, the judge denied Beth's motion to dismiss the possession of firearm charge but then put pressure on the State to "do the right thing." The State offered a plea to attempted possession of a firearm by a felon, to abandon the habitual felon charge, and to continue sentencing until after the MARs were heard. At sentencing, the client's record level was lower by two felonies and he received probation on a Class H felony, whereas he had been facing 9 years on the original charges. (Note: as the plea was being discussed, the client asked the judge to fire Beth for not doing a good job for him. The judge told the client how well Beth and her team were working for him, and even the officers commended them on their work.)

Forsyth APD **Jason Whitler** tried a possession of a firearm/habitual felon case and, despite many adverse rulings from the judge, still managed to get a not guilty verdict from the jury.

Guilford APD **Juan Zuluaga** got a not guilty verdict on a felony worthless check charge where the client had presented a post-dated check for $3,000 to a car dealership, which had agreed to hold the check for few days, and the check came back for insufficient funds. Juan persuaded the jury that the check was not a negotiable instrument but rather a mere promise to pay at a later date under NC law with the help of a special instruction based on Juan's research of case law dating back to the 1930s,

Appellate victories

AAD **John Carella** convinced the NC Court of Appeals in *State v. Mosely*, No. COA17-345, to vacate and remand for sentencing a Class B1 second degree murder verdict on the grounds that evidence was presented that would have supported more than one theory of malice and those theories supported different levels of punishment, rendering the jury's verdict ambiguous.

Appellate Defender **Glenn Gerding** was victorious in *Packingham v. North Carolina*, No. 15-1194, in which the US Supreme Court held that the state's prohibition of registered sex offenders' accessing social media sites violated the First Amendment.

AAD **Paul Green** convinced the NC Supreme Court to reverse his client's conviction for second degree murder based on the trial court's failure to properly instruct the jury on self-defense, in *State v. Lee*, No. 33PA16.

Good outcomes

Guilford APD **Wayne Baucino** and co-counsel obtained an offer of and plea to second degree murder in a case where the client had committed a home invasion robbery and shot a 72-year-old woman in the head.

Wake APD **Caroline Elliot** was successful in getting charges reduced for a woman accused in a high-profile case of aiding her 3-year-old in smoking marijuana and posting it on social media. The client could have faced more than 30 years on the original charge but now would be exposed to 17.

ACDs **Steve Freeman** and **Robert Singagliese** represented a client charged with strangling and burning his daughter and wife, whose hands were bound with duct tape and who had duct tape on her face and neck, after video had captured the client pumping gas into a container that day. Those were not the only bad facts, believe it or not. Steve and Robert discovered that the client had suffered from mental health issues dating back to his school days and developed a good relationship with him, leading to his agreeing to plead to LWOP.

Steve and his co-counsel obtained a second degree murder plea for a client for whom the State was seeking the death penalty for the death of the client's girlfriend's 3-year-old son from head and body injuries. Assisted by OCD Investigator **Richard McGough**, the defense team kept working the case although the client had refused the initial offer of LWOP and were able to get this offer for 30 years active, which the client accepted.

Gaston APD **Andrea Godwin** spent several hours going through discovery on more than 99 charges and, after much effort, convinced the DA office to give deferred prosecution to two teenagers accused of going on a crime spree of stealing hundreds of dollars' worth of cash, laptops, wallets, ID cards, and cell phones.

After Buncombe APD **Virginia Hebert** saw video of her client's being beaten by an Asheville police officer, in a case receiving national attention, and appealed the charge of resisting the officer to superior court, resulting in the DA office's dismissing all 27 charges against the client.

Gaston APD **Stuart Higdon** represented a 31-year-old client accused of first degree murder for the stabbing death of a 61-year-old man. Stuart was able to help the client avoid a life sentence by negotiating a plea for 15-20 years in prison.

Stuart and his client

Pitt APD **Shannon Jarvis** successfully argued that two DWI cases presented in superior court should be dismissed because the State did not follow the proper presentment procedures, and approximately 20 other cases she contended were improperly presented resulted in plea offers favorable to the clients in order to avoid the issue.

Representing a client with mental health issues who was charged federally and in state court for trying to join ISIL and killing a neighbor, for which the State was seeking death, ACD **Vicki Jayne** and her co-counsel were able to obtain life sentences for her client in state court and helped the client get a life sentence in federal court. Vicki and the defense team also worked to make sure that the federal prison got the client's mental health records so that he could get appropriate and needed treatment.

Vicki and another co-counsel got an LWOP plea in a case where the client, with the help of his mother, robbed and killed his 66-year-old aunt in her home. The client had both extensive criminal and mental health histories and at one point wanted to fire his attorneys. With the assistance of excellent mitigation specialist work, the client ultimately agreed to take the plea offer.

2nd District APD **Calvin King** represented a client charged with murder, felony inciting a riot, and AWDISIKI. After many months of negotiation, the murder and assault charges were dismissed, the client pled guilty to inciting a riot for credit for time served, and walked out of court a free man.

District 16A APD **Leonard King** forced the prosecution to endure a two-day probable cause hearing on the issue of whether the investigators coerced a statement from the client, leading them to dismiss the charge of murder of an unborn child.

After the defense team discovered evidence of his client's depression and other mental health issues, ACD **Phil Lane** obtained a plea for his client of felony child abuse in lieu of first degree murder, resulting in a sentence of 80 months active time followed by probation.

In another case, **Phil** also got the prosecutor to agree to a plea to obstruction of justice for 6 to 17 months active in a first degree gang killing case involving deaths of multiple people, including a two-year-old child, despite community outrage about the case.

Gaston APD **Cindy Letorney** represented a 74-year-old man charged with first degree murder for fatally shooting his stepson after his wife was diagnosed with terminal cancer. Cindy arranged for him to plead guilty to involuntary manslaughter, for which he was sentenced to 20 to 30 months in prison but was released from custody after spending more than two years in jail and in a mental hospital.

Cindy and her client

AAD **Hannah Love** uncovered exculpatory evidence that had not been presented in the trial court and negotiated a consent MAR with the DA to vacate her client's conviction for obtaining property by false pretenses. Her client, who had no prior convictions, is now eligible for an expunction and will soon have a clean record.

Gaston APD **Rocky Lutz's** argued that his client could not have reasonably carried out his threat to shoot up his school because he did not have access to a firearm. His client pled guilty to two counts of making a false report of mass violence at an educational property for concurrent sentences of 8-10 months, which could allow him with credit for time served to be released within five months.

ACD **Brooke Mangum** and co-counsel successfully obtained plea offers for and client acceptance of charges of second degree murder, robbery, and attempted robbery in a proverbial

"drug deal gone bad" case where their client used an 18-month-old child as a shield from getting shot by the drug dealer who was then run over by the client as the client was trying to leave the premises.

In another case, **Brooke** and her co-counsel represented a veteran of Iraq and Afghanistan suffering from PTSD who was charged with shooting his wife multiple times in front of their children. Based on the good relationship the defense team developed with the client, he agreed to accept an offer of LWOP.

A previous client of 16A /Chief PD **Jonathan McInnis**, who was able to get the client's first-degree murder charges dismissed, was recognized by the South Strand (Myrtle Beach) Optimist Club for his success in the face of adversity, having gone a year without schooling while he was in custody on his charges and has since "thrived academically, socially, and emotionally" according to his high school counselor.

Wake APD **Emily Mistr** discovered that DMV could not require someone with a DWI driver's license revocation to provide proof of interlock installation in order to get a license reinstatement if the person does not have a registered vehicle. After accompanying several clients to DMV to get them past the front desk when presented with this misconception, her clients were in fact able to get a new license without that proof. Mecklenburg APD **Carson Smith** took Emily's work one step further and drafted a letter for clients to take to DMV explaining the law.

Emily's newly licensed clients

ACD **Lamar Proctor**, in a first degree murder case that entailed his client's shooting someone in the chest during an argument, where there were legitimate arguments for self-defense or accident, was able to have his client plead to involuntary manslaughter with possession of

methamphetamine and possession of an altered gun. The charges were consolidated for sentencing, and the client received 13 months active time.

As of the time of this writing, Durham APD **Shannon Tucker**, assisted by APD **Zach Thayer**, anticipated resolving the oldest outstanding murder case in Durham on May 11th. The case involved a shooting that occurred in September 2011 where Shannon's client was alleged by eyewitness relatives of the victim to have walked up to her paramour, pointing a gun at him, demanding money, and shooting after she claimed he did not give her enough for her homeless children. Shannon litigated destruction of evidence issues involving the victim's wallet and other possessions and was able to get and keep her client out on pre-trial release for a long time. Ultimately, the third ADA on the case offered the client a plea to the bottom of the mitigated range, which would mean with credit for time served only four more years of active time, which the client was willing to accept.

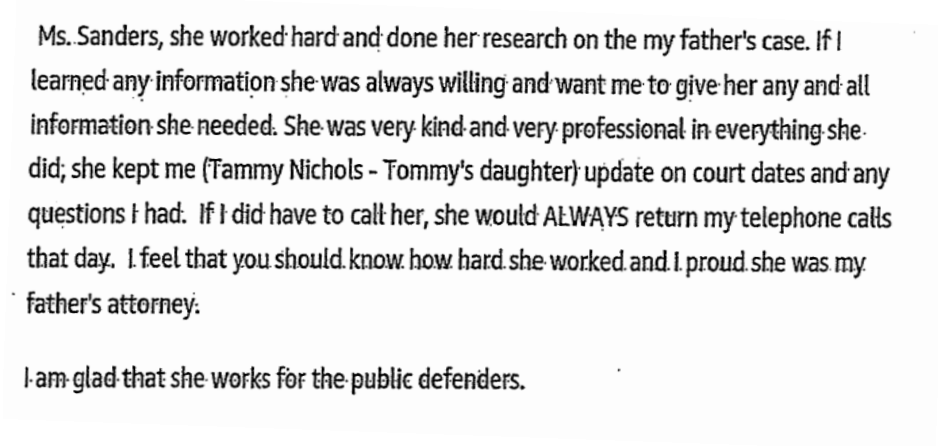
Gaston APD **Eric VanNewkirk** represented a client on multiple counts of second degree sexual exploitation of a minor and taking indecent liberties with a child and was able to convince the State to offer an *Alford* plea to the client, resulting in the court's sentencing the client to 10 to 12 months in prison with four months credit for time served.

Going the extra mile/fighting the good fight

15B APD **Natasha Adams** succeeded in getting her client who is accused of burning a tree on the UNC campus released to his father pending resolution of his case. Natasha noted that going home would allow her client to get necessary mental health treatment.

While Pitt APD **Shannon Jarvis's** client was ultimately sentenced to two years in prison for habitual DWI, Shannon made a good argument for her client that the client had been trying to maintain her long-term sobriety and was suffering from significant mental health issues. Shannon presented that the client would like to get substance abuse treatment in prison and to get out and to be a good mother to her two young children.

Guilford APD **Katie Sanders** was praised in a letter from the daughter of a client, who said:



Ms. Sanders, she worked hard and done her research on the my father's case. If I learned any information she was always willing and want me to give her any and all information she needed. She was very kind and very professional in everything she did; she kept me (Tammy Nichols - Tommy's daughter) update on court dates and any questions I had. If I did have to call her, she would ALWAYS return my telephone calls that day. I feel that you should know how hard she worked and I proud she was my father's attorney.

I am glad that she works for the public defenders.

The letter further included a commendation of the office's receptionist, **Orlando Chacon Rodriguez**, of whom the daughter related:

> I also wanted to add a little special note as well that your receptionist, I believe his name is Orlando. He was very friendly over the telephone and answered any question I had about leaving messages for Katie my lawyer. I have always believe that the one who answers the telephone...that is the first impression for the company and office. I want to thank him as well.

Guilford APD **Richard Wells** spent over 10 hours building a mobile TV/TV cart so that the office can show videos in the courtroom without having to rely on the DA office's equipment and more easily show clients and their families video evidence. (Note: Richard logged this time as "Administrative and Personnel Tasks" in the time study.)

Richard's masterpiece

COLLABORATION

Responding to a request on the APD listserv, Guilford APD **Erin Adler** got an FTA recalled and an old infraction dismissed so that Forsyth APD **Catherine McCormick's** client could get his driver's license restored. Guilford APD **Jennifer Rierson** also offered to help.

Mecklenburg APD **Elizabeth Gerber**, with help from AAD **Danny Spiegel**, highlighted the inequity that clients who could not afford to pay $1,000 restitution up front could not participate in the DA Office's "pay-to-play" deferred prosecution system, which ultimately led the elected DA to abandon the restitution requirement.

Special Counsel **Kristen Todd** and AAD **David Andrews** persisted in getting a reversal of an involuntary commitment order. After Kristen had set the case up for an appeal, David received an adverse opinion from the Court of Appeals affirming the district court's opinion; however, David filed a motion with consultation from Kristen before the mandate issued asking for reconsideration of the opinion and an *en banc* hearing, and the Court of Appeals withdrew their opinion and issued a new one fully reversing the district court order. Additionally, the same week that the new order was issued, Mark Botts at SOG was conducting a 3-day training session for magistrates on civil commitment issues and was able to incorporate the new order into their training to address the current statutory and case law standards for cases involving danger to self.

SERVICE TO THE COMMUNITY

The **16A Public Defender Office** and the DA office will be cohosting two expunction clinics in June, one in Scotland County and one in Hoke.

Gaston APD **Matt Hawkins** continues to be actively involved in his community, currently preparing for his upcoming role in the musical *Hairspray*. A percentage of the proceeds from the show will go to a local nonprofit group, Playing for Others.

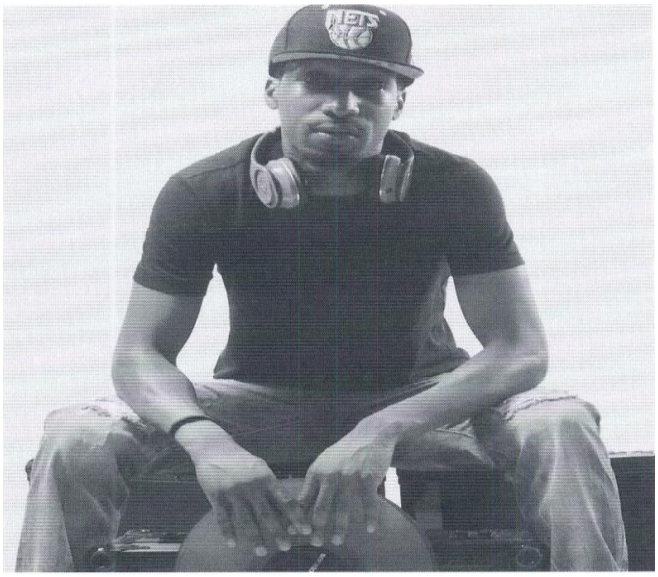
Gaston APD **Stuart Higdon** is a Boy Scout leader with his twin boys. Through local service projects, he encourages his boys as well as other young men to leave places better than they find them. Stuart also has a passion for running and has participated in many marathons and works as one of the coaches in the Run Far program in Charlotte.

Guilford APD **Craig Martin** helped with tornado relief after the devastating storms in that county. He would staff drop-off sites for supplies and give them out to victims, as well as canvassing door-to-door to check on victims.

The **New Hanover County PD Office** has adopted a local school attended by many children living in poverty. This year, under the leadership of APD **Alexis Perkins** and Administrative Assistant **Kimberly Whitehouse**, the office donated over 20 book bags filled with school supplies. This was the initial effort involving this school with additional supplies, activities and support to follow throughout the school year.

Robeson APD **Troy Peters** spoke to the graduating law enforcement class at Robeson Community College.

When not in the courtroom, Gaston APD **James Richardson** uses his talent and love for music to DJ at area events, bringing a lot of energy to both venues.



DJ James

IMPROVING THE SYSTEM

Guilford APD **Brennan Aberle** fought the law and won. His efforts to show the unconstitutionality of the Greensboro anti-panhandling ordinance led the city council to repeal the ordinance.

Brennan was also spotlighted in an article about issues with bail and the NC bail bond industry in an article posted on the NC Policy Watch website.

Cumberland APD **Cindy Black** has worked tirelessly to advocate for the mentally ill charged with criminal offenses and has become an integral part in the county's new mental health treatment court. Additionally, Cindy continues to be involved in Veteran's Treatment Court, working with veterans and attending community events to support them.

Guilford APD **Dave Clark** has written several articles on fines and fees for legal journals, including the State Bar *Journal*, as well as being a speaker on the subject at several seminars. Clients' problems with being able to pay off their monetary court obligations was also highlighted in an article by the Charlotte *Observer*, in which Mecklenburg APD **Seth Bullard**, noting this issue affects more than one of his clients, was quoted as saying, "It just goes to show that this type of thing happens every day. It's a huge problem."

The Buncombe County Veteran's Treatment Court was highlighted in a documentary short in which Chief PD **LeAnn Melton** was featured (at the 8:32 mark).

The Mecklenburg County PD Office hosted a CLE on July 7, 2017 on Probabilistic Genotyping in DNA Cases featuring a presentation by APD **Anthony Monaghan**.

Mecklenburg APD **Leora Moreno** noted the unfairness of criminalizing poverty by jailing noncompliant parents in school truancy cases in an article in the Charlotte *Observer*. She commented, "For someone with money, this would never happen."

Gaston APD **James Richardson** continues to handle Truancy Court along with his regular case load. He works each session with the same courthouse staff each month, and it seems that having the same people involved continues to help improve student attendance in a nurturing manner that builds relationships between students, families, schools, and the community.

Wake APD **Mary Stansell** is serving on the Juvenile Jurisdiction Advisory Committee to help with implementation of Raise the Age as the PD Association's appointee.

Mecklenburg Chief PD **Kevin Tully** was interviewed on the subject of the county's new procedure of having jail visits solely by video. Kevin cited problems with the videos' being recorded and the chilling effect that could have, as well as the "systemic dehumanization of people."

Kevin also participated in a forum on race and justice sponsored by the *Atlantic* magazine.

Wake APD **Jackie Willingham** was quoted in an article by the Marshall Project, "No Mercy for Judges Who Show Mercy," about the new law requiring notice to all entities affected by potential waiver of fines and fees. Jackie noted that all of her clients are poor but she requests waivers in fewer than half her cases, and many have already completed first offender or other programs for which they have had to pay significant amounts.

OFFICE SPACE AND OTHER CALAMITY SURVIVAL

The **1st District PD Office's** Pasquotank office has outlasted several threats to move its office to a smaller space housed with the DA office over a dispute about other counties' contributions (or lack thereof) to office space. Fingers crossed that they can stay in their current space!

After moving to office space in a new building, the **Forsyth PD Office** had to move back out again after a water pipe burst. The office happily got to return to their nice, new space shortly thereafter.

Mecklenburg County suffered a hack that affected many of its computer systems, including those of the court system. The hack was eventually overcome, but Mecklenburg APD **Chrissie Nelson Rotko** pointed out to the media how the outage was affecting her ability to represent her clients.

Chrissie

RECOGNITION AND CELEBRATION

Robeson APD **Dee Glickman** was presented with the high honor of the Gideon's Promise Foot Soldier of the Year Award, which goes to someone each year who best exemplifies the effort to address the issue that criminal justice is this generation's greatest civil rights challenge.

Gideon's Promise Executive Director Jon Rapping, Robeson Chief PD Ronald Foxworth, and Dee

AAD **Paul Green** retired from OAD on April 30, 2018. He plans to continue working on appellate cases on the OAD roster.

Wake APD **Sam Hamadani** and Durham APD **Amanda Maris** were appointed by the Governor to fill vacant district court seats.

Sam **Amanda**

Despite his client's being found guilty and being sentenced to 80-110 years in prison on charges including kidnapping, attempted murder of, and indecent liberties with a 6-year-old, New Hanover APD **Ken Hatcher** received public recognition and thanks by a non-criminal defense attorney for fighting the good fight. His colleague, APD **Max Ashworth**, assisted him with the case.

Max standing with his and Ken's client

Pitt Chief PD **Bert Kemp** was presented the Howard L. Gum Service Award at the NC State Bar Board of Legal Specialization luncheon. Per the Board, "[t]his award is given to a specialty committee member who consistently excels in completing committee tasks. The recipient is highly dedicated to legal specialization, donates his/her time to committee responsibilities, and responds to the needs of the staff and the board in exemplary fashion."

Bert being presented the award

2nd District APD **Calvin King** retired from the office on March 1, 2018.

Durham APD **Barbara Lagemann's** article entitled "Considerations for Criminal Defense Attorneys When Representing Defendants with Immigration Issues" was published in the January edition of the NCAJ *Trial Briefs* magazine.

Guilford APD **Craig Martin** ran for a seat on the Greensboro City Council. Although he was unsuccessful in the primary, he gave it a good effort.

Craig

Mecklenburg APD **Mujtaba Mohammed** recently won the Democratic primary in his bid for State Senate.

Mujtaba

Wake APD **Emily Mistr** received an Alumna of the Year Pro Bono Publico Award from UNC Law School for her work with on driver's license restoration clinics. Her recipient profile noted, ". . . In her spare time, Emily has become [a] leader in North Carolina on the issue of Driver's License Restoration. Her research on the issue has played an integral role in expanding efforts by the North Carolina Justice Center, in conjunction with District Attorneys and judges across the state, to help indigent clients restore their licenses when they are unable to pay costly fines. This spring, Emily joined the Pro Bono Program's trip to Wilmington, N.C., working with students to counsel clients and help restore those client's driver's licenses."

Emily, her fellow award winners, and NC Supreme Court Chief Justice Mark Martin

A fleet-footed team from **OCD** braved adverse conditions and won first place in the Pittsboro Reindeer Run 5K.

The OCD Champs

Cumberland APD **David Smith** received the Order of the Long Leaf Pine for his more than 20 years of service as a public defender and juvenile court counselor.

David

2nd District APD **Mary Catherine Stokes** got married on April 21st. Best wishes to her and her groom!

Wake APD **Deonté Thomas** will be presenting at the National Association of Public Defense (NAPD) in Dayton, Ohio later this month.

Juvenile Defender **Eric Zogry** will be honored in June with the Research/Policy Advocacy Defender of Justice Award by the NC Justice Center, recognizing him as leading the fight for justice.

Guilford LA **Debbie Maschinot** conveyed, "I just wanted to say that the group of PDs we have really work hard for their clients. I think you have to compassion to represent the indigent clients, and we do. I had been with the Public Defender's office now for almost 20 years and have seen a lot of changes. But it's neat to watch these PDs ask other PDs about their cases. It's also cool to see the senior PDs let the younger PDs help them with a trial. Fred is doing a great job as the Public Defender. I'm proud to have been with the Public Defender's Office for 20 years."

The **Robeson PD Office** had several victories this year, as related on the following pages. Robeson AA **Kim Taylor** reflects, "I just wanted to say that I have the best job in the world working with the best Public Defender office ever. I love the assistants here. They go over and beyond. I truly feel blessed to be working with this Public Defender's Office for nearly 20 years. These are the most awesome guys in the universe."

RONALD H. FOXWORTH
PUBLIC DEFENDER

State of North Carolina
General Court of Justice
Defender District 16B

ROBESON COUNTY COURTHOUSE
500 N. ELM STREET
Lumberton, NC 28358
(910) 272-5923
(910) 272-5924 FAX

May 3, 2018

Susan E. Brooks
Public Defender Administrator
Office of Indigent Defense Services
123 W. Main Street – Suite 400
Durham, NC 27701

RE: 2017 Success Stories

Dear Susan:

I am attaching a few of the many 2017 Success Stories of my staff. We live in the poorest county in the state. We have high unemployment and sadly correspondingly high crime rates. We are very much a blue collar office actively engaged in the everyday grind of representing indigent people changed with crime. We take our work seriously and try hard to help everyone.

The everyday grunt work is very much what our office is about. It is not always fun but we are most gratified as we look back over our many successes.

2017 in Review

Gayla G Biggs is a 26+ year employee as an Assistant Public Defender.

- State vs Darrin O Bullock Jr. AWDWIKISI
- DISMISSED

- State vs Vincent G Locklear CONSP SELL/DELIVER MARIJUANA
- DISMISSED

- State vs Timothy J Campbell Jr. AWDWIKISI
- DISMISSED

- State vs Kelly M Hammonds AWDW SI
- DISMISSED

- State vs Bree Locklear — UUMV
- DISMISSED

- State vs Jennie L Locklear — 1st DEGREE MURDER
- DISMISSED

- State vs Camelle D Williams — 1st DEGREE MURDER
- DISMISSED

Jack Moody has more than 25 years of experience as an Assistant Public Defender. His focus is in District Court and primarily traffic matters. He is considered one of the best DWI attorneys in our district. Some of his highlights are as follows:

- State vs Henry Bridgeman — DWI
  Defendant blew .19
  Motion to Suppress was filed and heard
  Judge suppressed all evidence after the stop
  NOT GUILTY

- State vs Reginald Jacobs — DWI
- Defendant blew .22
- Stopped for headlight violation
- Arrested for red, glassy eyes and odor of alcohol
- Officer not certified as to SFST or Alco-sensor
- Arrest as to DWI suppressed
- DISMISSED

- State vs Kaylan Smith — DWI; Consuming less than 21
- Tried DWI .08
- NOT GUILTY
- Pled to Consuming less than 21

- State vs Kelly Scott — DWI; DWLR Not Impaired
- Tried DWI
- NOT GUILTY

- State vs Melissa Pickett — DWI
- Won Knoll Motion
- DISMISSED

- State vs Ivory 17CR 52316 — DWI
- Motion to Suppress Stop: GRANTED
- State offered no other evidence
- DISMISSED at close of State's Evidence

- State vs Angie Thompson DWI
- Wreck
- No car at scene
- Defendant blew .26
- Defendant admitted driving but 3rd party and owner of car left scene
- Pled Not Guilty
- Verdict: NOT GUILTY

- State vs Lois Dennard DWI
- Stopped for Speeding
- Refusal
- NOT GUILTY

- State vs Destiny Tuggle DWI; other Traffic Charges
- Checking Station
- Motion to Suppress Stop
- NOT GUILTY on DWI and other related charges

- State vs Jay Clawson DWI
- Tried DWI
- NOT GUILTY

- State vs Todd McKinley DWI; other Traffic Charges
- Tried DWI and other related charges
- NOT GUILTY

- State vs Ashley M Jacobs M – Larceny; 2nd Degree Trespass
- Entered Rehabilitation Program
- 5 Sparrows [Rehab Prog for victims of Human Trafficking]
- DISMISSED [All Charges]

Erin Swinney is an Assistant Public Defender. She has been with us less than a year and her focus is in District Court, IC's and Juvenile Court. She is adding Non-Compliance Court to her agenda and she is a real go-getter. Some of her highlights are as follows:

- DWLR and other traffic offenses [11 traffic offenses]
- 9 DISMISSALS
- Defendant is now in a position to get license

- DWLR and other traffic offenses [12 traffic offenses]
- 10 DISMISSALS
- Defendant is now in a position to get license

- Probation Violation
- Probation Officer recommended 15 days Active
- Defendant given 48 hours

- Assault on Government Official and 3 counts of Simple Assault
- Reduced to 1 count of Simple Assault

- Juvenile Probation Violation
- Juvenile has an ankle monitor
- Juvenile ran away from group home several times
- Juvenile released to custody of mother

- DWLR and other traffic offenses [10 DWLRs]
- 6 DISMISSALS
- Defendant is now in a position to get license

- Larceny
- DISMISSED

- Assault on Female
- Deferred with Community Service
- Upon completion of Community Service, DISMISSED

- Communicating Threats [2 counts]
- Motion to Continue to obtain DSS records– Denied
- Trial
- NOT GUILTY

- F – B/E/L; Poss Stln Gds
- All charges DISMISSED

Troy Peters is a 20+ year Assistant Public Defender. Troy is a gentle giant. Some of his highlights are as follows:

- State vs Anisha Oxendine — 1st Degree Burglary and Larceny
- Reduced to Misdemeanor B/E
- Probation

- State vs Keemo Pierce — 1st Degree Burglary – 2 counts; B/E; Larceny of MV
- Reduced to Larceny/Time Served
- Rather than Court-Ordered, Defendant voluntarily went to TROSHA

- State vs Charles Gross — B/E Motor Vehicle – 4 counts; Larceny
- Defendant evaluated
- Defendant not competent to proceed
- DISMISSED
- Released to care and custody of parents [Indiana]
- All charges in adjoining county DISMISSED also

- State vs Mario Solomon — Parole/Post Release Violation
- Hearing at CRV
- Defendant released within 24-hrs

Matthew McGregor is a 6 year Assistant Public Defender. Matt started out primarily with District Court, but has fully transitioned to lower level felonies and is also transitioning to more serious felonies. Some of his highlights are as follows:

- State vs Brian Keith Locklear — B/E/L
- Reduced to Misdemeanor B/E/L

- State vs Tommy L Dial — DWI; Other related offenses
- Pretrial Motion to Dismiss DWI
- GRANTED: DISMISSED
- Pled to NOL; Open Container; Left of Center
- Fine and Costs only

- State vs Tommy L Dial — DWI [2ND]
- Tried DWI
- NOT GUILTY

- State vs Casey Locklear — DWI; Drvg w/o Headlamps
- Motion to Dismiss
- GRANTED: DISMISSED

- State vs Christopher Ellerby — F-B/E/L; PSG; OPBFP
- Reduced to Misdemeanor B/E/L
- VD of PSG; OPBFP

- State vs Wayne McKellar — UTTERING; OPBFP
- DISMISSED

- State vs Karen Williams — M-LARCENY
- Motion to Quash [Fail to state a charge]
- GRANTED: DISMISSED

- State vs Robin Mishue — M-LARCENY
- Motion to Quash [Fail to state a charge]
- GRANTED: DISMISSED

Deanna Glickman is an Assistant Public Defender. She has been with us less than 5 years and her focus is in District Court, Non-Compliance Court and Juvenile Court. Deanna is now downing lower level felonies and assisting on some of the more serious felonies. She came to us as a Gideon's Promise attorney almost 3 years ago. is owing a very promising career and she is a real go-getter. Some of her highlights are as follows:

- General Stats for January are nothing short of amazing:
- 8 DISMISSALS
- 3 QUASHED WARRANTS
- 90-96 DISMISSAL

- State vs Amy Evans R/D/O; PDP
- Defendant was eligible for 90-96 but insisted she was not guilty
- Several settings – Officer did not show up under subpoena
- DISMISSED

- General Stats for March:
- 11 DISMISSALS
- 1 Extension to Pay

- State vs Cody M Oxendine F-PV
- Defendant lives with grandfather
- Defendant violated for violating DVPO against his grandfather
- Defendant was referred to DSS Adult Protective Services during original case
- In talking with PO, it was clear that defendant has always lived with his grandfather even after conviction in original case
- Judge heard underlying case and understood the position the client was in
- APS took the defendant's case and assigned a social worker
- PROBATION TERMINATED

- General Stats for July
- 9 DISMISSALS
- 1 QUASHED WARRANT

- State vs DG [Juvenile] 2nd Degree Arson; F-B/E/L; several M's
- Juvenile was in custody
- Secure Custody Hearing
- Juvenile released on electronic monitoring
- Juvenile placed back in custody for violating his monitoring
- Mother refused to allow him to come home
- Discussed mitigation and treatment with juvenile several times at DC
- Juvenile released again on electronic monitoring
- Juvenile placed back in custody again for violating monitoring
- Mother refused to allow him back home again
- DSS refused any involvement
- Placement was difficult due to pending 2nd Degree Arson charge

- Several Secure Custody Hearings
- Negotiated with ADA so juvenile could get into a psychiatric treatment facility
- Felony charges DISMISSED
- 2nd Arson reduced to Injury to Real Property
- Juvenile released to treatment facility

Michael McDonald aka Superman is no longer with us as an Assistant Public Defender, but he left his mark and we miss him dearly. Some of his highlights are as follows:

- State vs Jamie Wilkins — F-POSS COC; DWI; DWLR; PDP; RGO
- Defendant ran into Checking Station
- Officer collected Pepsi defendant using to smoke crack
- Cocaine residue on seats
- Defendant has 3 DWIs in last 10 years
- Cocaine found in vehicle
- Pled to DWI, RGO, PDP
- 7-day sentence suspended for Probation
- Possession of Cocaine; DWLR – DISMISSED
- Defendant picked up new charges – went to club and stole two [2] cellphones and assaulted two [2] officers
- PROBATION

- State vs Sucona Locklear — F – LARCENY
- Defendant employed at Joe Sugar's Clothing Store for Men
- Defendant was a college student
- Defendant admitted stealing clothes
- DD
- Defendant paid restitution
- DISMISSED upon compliance

- State vs Thomas Wilson — PWISD Marijuana; PDP
- Pled PDP, Poss Marij > ½ oz
- DISMISSED: PWISD Marijuana

- State vs Billy Carter — F-POSS COC; PDP
- Pled to PDP
- DISMISSED: F-POSSESSION OF COCAINE
- SENTENCED TO 10 DAYS – CREDIT FOR TIME SERVED

- State vs Darrel Coad — POSS FIREARM BY FELON; PWISD MARIJUANA; UNSEALED WINE/LIQ IN PASS AREA; RPO; PDP

- Pled to RPO [Resisting Pub Off]
- PROBATION
- DISMISSED: PFBF; PWISD MARIJ; UNSEALED WINE/LIQ IN PASS AREA

- State vs Aaron Wells — MAINTN VEH/DWELL/PLACE CS; PDP; PDP; TRAFFICKING OPIUM OR HEROIN; POSS MARIJ UP TO ½ OZ; PWIMSD SCH II CS; PDP; PFBF
- Pled to 1 count PWISD Sch II CS [21 Hydrocodone and Oxycodone Pills] and 2 counts F-Possession Cocaind
- DISMISSED:
  MAINTN VEH/DWELL/PLACE CS
  TRAFFICKING OPIUM OR HEROIN
  POSS MARIJUANA UP TO ½ OZ
  PDP
  SIMP POSS SCH III CS
  POSSESSION OF FIREARM BY FELON

- State vs Zonna C — CAPITAL MURDER
- PJC

Cameron C Bush is a 14-year employee as an Assistant Public Defender. Some of his highlights are as follows:

- State vs Mason S Nantz — M – AWDW; AOF; COMM THR
- DISMISSED

- State vs Romaine Vereen — M – ASLT ON GOV OFF/EMP; RPO
- DISMISSED

- State vs Morris Thompson Whitted II — M – RESISTING PUBLIC OFFICER [RPO]
- DISMISSED

- State vs Michael S Thomas — M – DWLR; FAIL SEC PASS > 16
- DISMISSED

Ronald H Foxworth is the Chief Public Defender. Some of his highlights are as follows:

- State vs Quintin L Mitchell — 1st DEG MURDER; CONSPIR
- DISMISSED @ PCH

- State vs Matthew J Hyatt — 1st DEG MURDER
- 2ND Degree

- State vs James H Oxendine — AWDW SI
- Misd AISI

Sincerely,

Ronald H. Foxworth
Chief Public Defender

Capacity to Proceed in North Carolina

Public Defender Attorney and Investigator Conference 5/16/18

Jill Volin, MD
Chief Psychiatrist, Forensic Services
Broughton Hospital

Reference Materials—Electronic Course Notebook

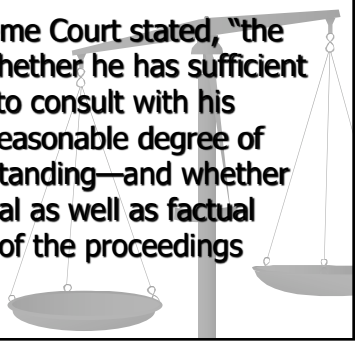
- Detailed explanation of the incapacity to proceed process including involuntary commitment for incapable defendants, explanation of new AOC forms relevant to the process, contact information for Forensic Services and for attorneys at the three NC State Hospitals
- Electronic (fillable) versions of the relevant AOC forms
- Relevant statutes and explanations of recent changes to the statutes

Objectives

- Review the competency/capacity standard.
- Discuss forensic evaluations.
- Explain capacity restoration and re-evaluation at the state hospitals.
- Review procedures for return to court and changes to the NC incapable to proceed (ITP) statutes.

Dusky v. United States
362 U.S. 402 (1960)

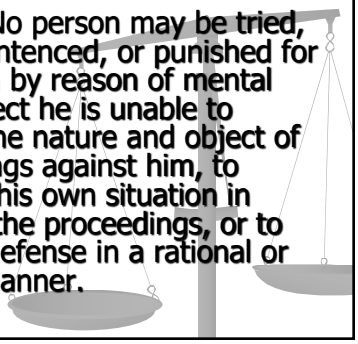
The U.S. Supreme Court stated, "the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."



Definition of Incapacity to Proceed

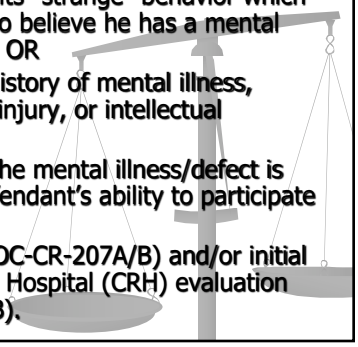
North Carolina General Statutes

§ 15A-1001. No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.



When to Have a Defendant Evaluated

- Defendant exhibits "strange" behavior which leads someone to believe he has a mental illness or defect, OR
- Defendant has history of mental illness, dementia, head injury, or intellectual disability, AND
- It appears that the mental illness/defect is affecting the defendant's ability to participate in his defense.
- Order a local (AOC-CR-207A/B) and/or initial Central Regional Hospital (CRH) evaluation (AOC-CR-208A/B).



Forensic Evaluation Service at CRH

- Conducts evaluations of capacity to proceed and mental status at the time of the offense.
- Most of the ~850 evaluations per year are outpatient. CRH has 8 inpatient pretrial beds to admit defendants, when necessary for completion of the evaluation.
- Dr. Hazelrigg, Evaluation Service Director, assigns the cases to the evaluators based upon workload and expertise.

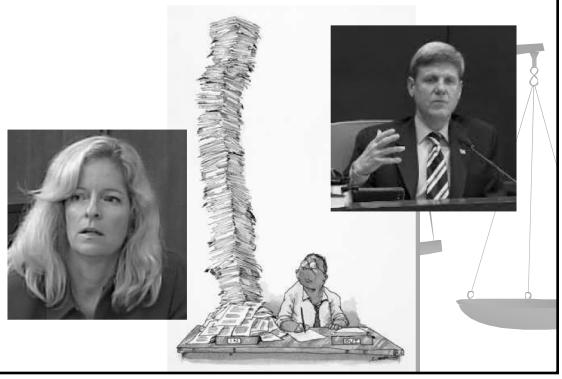
Forensic Evaluation Service
Central Regional Hospital

Mark Hazelrigg, PhD
Director of Forensic Evaluation Service
mark.hazelrigg@dhhs.nc.gov
919-575-7341 (office)
Assigns the evaluations

Chris Terry
919-764-5009 (office)
919-764-5012 (fax)
Schedules the evaluations

Susan Keeton
919-764-2169 (office)
Tracks and disseminates the evaluations

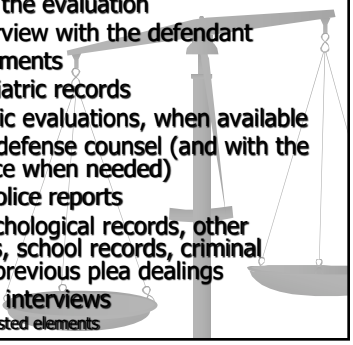
Forensic Evaluations



Capacity Evaluations

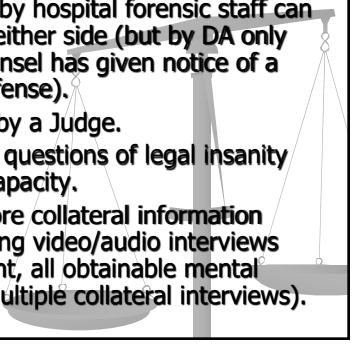
- Includes*:
  - Court order for the evaluation
  - Evaluation interview with the defendant
  - Warrants/indictments
  - Relevant psychiatric records
  - Previous forensic evaluations, when available
  - Interview with defense counsel (and with the DA or DA's office when needed)
  - Investigative/police reports
  - Psychiatric/psychological records, other medical records, school records, criminal history and/or previous plea dealings
  - Other collateral interviews

*May not include all of the listed elements



Mental Status at the Time of the Offense Evaluations (MSOs)

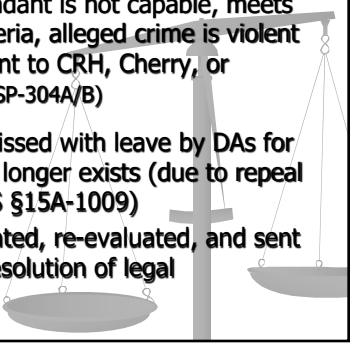
- MSOs performed by hospital forensic staff can be requested by either side (but by DA only after defense counsel has given notice of a mental health defense).
- Must be ordered by a Judge.
- Usually limited to questions of legal insanity and diminished capacity.
- Require much more collateral information (discovery including video/audio interviews with the defendant, all obtainable mental health records, multiple collateral interviews).



Quick Review of ITP Process

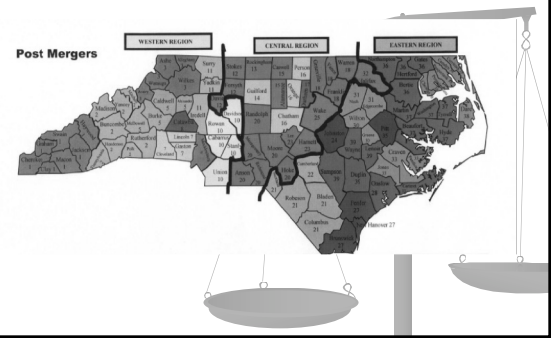
- Court finds defendant is not capable, meets commitment criteria, alleged crime is violent & sends defendant to CRH, Cherry, or Broughton (AOC-SP-304A/B)
- 

VL: Dismissed with leave by DAs for ITPs no longer exists (due to repeal of NCGS §15A-1009)
- Defendant is treated, re-evaluated, and sent back to jail for resolution of legal proceedings



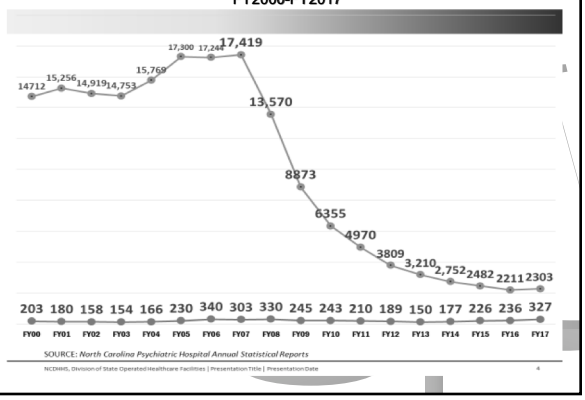
NC State Psychiatric Hospitals

Catchment Areas



NC State Hospital Admissions

FY2000-FY2017



SOURCE: *North Carolina Psychiatric Hospital Annual Statistical Reports*

State Hospital Forensic Coordinators

Holly Manley, MA, LPA
Cherry Hospital
holly.manley@dhhs.nc.gov
919.947.8321 (office)
919.705.5246 (fax)

Elizabeth Jolly, LCSW
Broughton Hospital
elizabeth.jolly@dhhs.nc.gov
828-219-2242 (mobile)
828-433-2341 (office)

April Parker, LCSW
Central Regional Hospital
april.parker@dhhs.nc.gov
919-764-2136 (office)
919-764-2253 (fax)

Capacity Restoration

Capacity Restoration in North Carolina State Hospitals

- North Carolina does not provide community-based or jail-based restoration programs.
- Restoration is achieved via:
  - Psychiatric medication,
  - Capacity restoration classes focusing on general court-related knowledge, and
  - Individual capacity restoration to address individual deficits, and to help the patient/defendant understand court as it relates to his/her specific case.

Capacity Re-evaluations

- Capacity Re-evaluations (after commitment and treatment at a State Hospital) are essentially the same as an initial evaluation, but also include*:
  - Review of the hospital's treatment records and interview with hospital providers.
  - Interview with defense counsel to confirm the pending charges, to discuss potential resolutions to the case, to obtain necessary additional records, and to ask counsel's opinion on whether the defendant can assist.

*May not include all of the listed elements

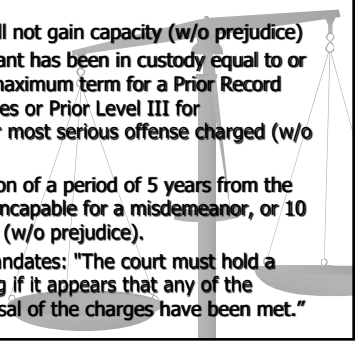
Nonrestorable

- Some defendants, especially those with intellectual disability, brain injury, dementia, and treatment-resistant schizophrenia, may never be restored.
- When the evaluator submits an opinion that the defendant is nonrestorable, the defendant is usually returned to the jail, but could remain hospitalized.
- Regardless of where the defendant is held, the Court must (for alleged crimes after 11/30/13) hold a hearing to address dismissal of the charges when it appears that any of the criteria for dismissal have been met.

Return to Court

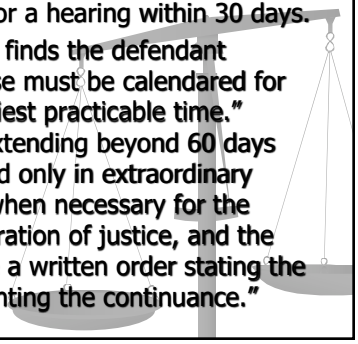
Dismissal of Charges

- NCGS §15A-1008 mandates the court dismiss the charges if:
  - The defendant will not gain capacity (w/o prejudice)
  - When the defendant has been in custody equal to or in excess of the maximum term for a Prior Record Level VI for felonies or Prior Level III for misdemeanors for most serious offense charged (w/o leave), or
  - Upon the expiration of a period of 5 years from the date determined incapable for a misdemeanor, or 10 years for a felony (w/o prejudice).
- NCGS §15A-1007 mandates: "The court must hold a supplemental hearing if it appears that any of the conditions for dismissal of the charges have been met."



NCGS §15A-1007

- Capable defendants returned for court must be calendared for a hearing within 30 days.
- When the Court finds the defendant capable, the case must be calendared for trial "at the earliest practicable time." Continuances extending beyond 60 days "shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance."



Questions?

Capacity to Proceed in North Carolina—Reference Slides

Public Defender Attorney and Investigator Conference 5/16/18

Jill Volin, MD
Chief Psychiatrist, Forensic Services
Broughton Hospital

Reference Slides

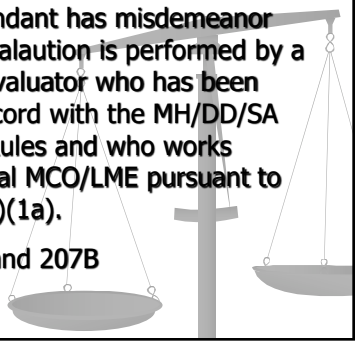
- To explain the Incapacity to Proceed (ITP) process in detail, to include involuntary commitment of incapable defendants.
- To introduce the new incapacity to proceed forms adopted by the AOC on 04/18/18.
- To provide contact information for NC State Hospital Assistant Attorneys General and Special Counsels.

ITP Process in a Nutshell

- A local evaluation (AOC-CR-207A/B) and/or initial CRH evaluation (AOC-CR-208A/B) is ordered.
- The Court finds defendant is not capable, meets commitment criteria, alleged crime is violent & sends defendant to CRH, Cherry, or Broughton (AOC-SP-304A/B).
- Defendant is treated, re-evaluated, and sent back to jail for resolution of legal proceedings .

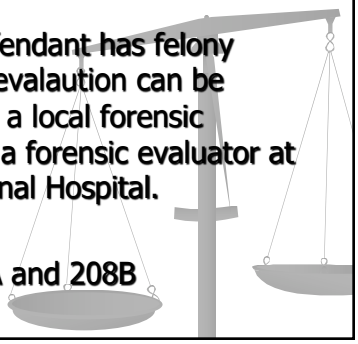
Forensic Evaluations for Defendants with Misdemeanor Charges

- When the defendant has misdemeanor charges, the evalaution is performed by a local forensic evaluator who has been approved in accord with the MH/DD/SA Commission's Rules and who works through the local MCO/LME pursuant to GS 15A-1002(b)(1a).
- AOC-CR-207A and 207B

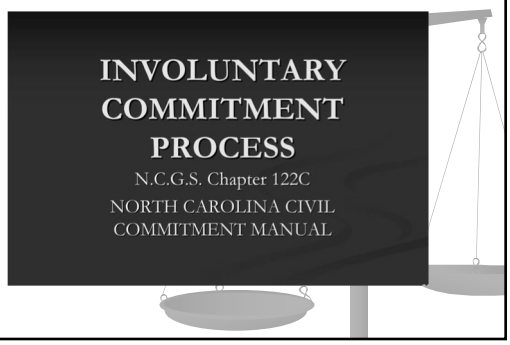


Forensic Evaluations for Defendants with Felony Charges

- When the defendant has felony charges, the evalaution can be performed by a local forensic evaluator OR a forensic evaluator at Central Regional Hospital.
- AOC-CR-208A and 208B



Involuntary Commitment for Incapable Defendants



Committing Incapable Defendants

- In most cases* a local or CRH forensic evaluator opines the defendant is incapable to proceed.
- Then, the Judge finds the defendant is incapable to proceed and determines the defendant is mentally ill and dangerous to self or others.
- Then, the Judge orders an Involuntary Civil Commitment via AOC-SP-304A or 304B.
- Then, the Clerk of Court opens a special proceedings file, and the order is given to the sheriff who takes the defendant into custody to deliver him/her to the State Hospital or mental health center for evaluation.

*Judges may find a defendant incapable to proceed without a forensic evaluation.

Committing Incapable Defendants—Violent vs. Nonviolent Charges

- If the defendant is NOT charged with a violent crime, the sheriff delivers the defendant to a local facility for an exam and the process continues like any other commitment.
- If the defendant IS charged with a violent crime, he is sent directly to one of the three state hospitals—Broughton, Cherry, or CRH — depending upon catchment area. The defendant is examined by a physician upon arrival, but cannot be released without approval by the District Court Judge.

Involuntary Commitment

- The defendant committed as Incapable to Proceed and admitted to the State Hospital must have a commitment hearing in District Court within 10 days.
- If the defendant is charged with a violent crime, the defendant can only be released by a judge's order.
- At the hearing, the State has the burden of proof by clear, cogent, and convincing evidence that the person meets criteria for involuntary commitment: Mentally ill and dangerous to self or others. The standard is NOT whether the defendant has regained capacity to proceed.

Impact of committing ITPs for dangerousness, not for capacity restoration

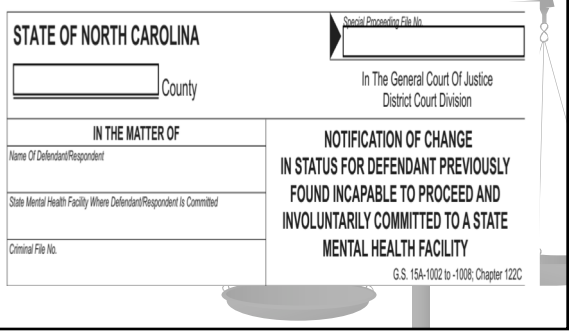
- Sell v. United States (2003): Set criteria for forced medication to restore competency in defendants who are NOT dangerous to themselves or others.
- North Carolina is NOT a Sell state, which means judicial approval is NOT required to forcibly treat incapable defendants.
- North Carolina avoids Sell (at the State Hospitals) because defendants are not committed to restore competency; they are committed because they meet criteria for commitment (mentally ill and dangerousness to self or others).

Impact of committing ITPs for dangerousness, not for capacity restoration

- Jackson v. Indiana (1972): The defendant hospitalized solely as incompetent to stand trial cannot be held longer than "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."
- North Carolina does not have to follow Jackson* because defendants are hospitalized only when they meet commitment criteria, NOT because they are "solely incompetent to stand trial."

*Except when it can be proved that the defendant does NOT meet NC criteria for commitment. See Floyd Brown.

New AOC Forms!!!



STATE OF NORTH CAROLINA

_____ County

Special Proceeding File No.

In The General Court Of Justice
District Court Division

IN THE MATTER OF

Name Of Defendant/Respondent

State Mental Health Facility Where Defendant/Respondent Is Committed

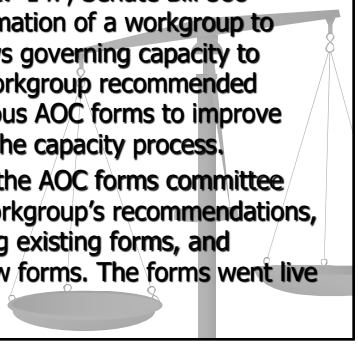
Criminal File No.

NOTIFICATION OF CHANGE IN STATUS FOR DEFENDANT PREVIOUSLY FOUND INCAPABLE TO PROCEED AND INVOLUNTARILY COMMITTED TO A STATE MENTAL HEALTH FACILITY

G.S. 15A-1002 to -1008; Chapter 122C

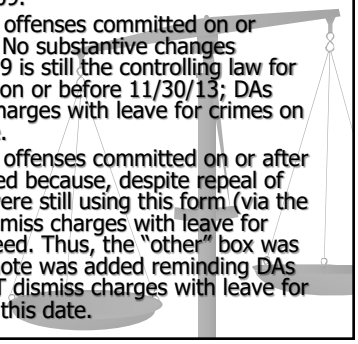
Why do we have new forms?

- Session Law 2017-147, Senate Bill 388 directed the formation of a workgroup to evaluate the laws governing capacity to proceed. The workgroup recommended changes to various AOC forms to improve and streamline the capacity process.
- In March 2018, the AOC forms committee accepted the workgroup's recommendations, including altering existing forms, and creating two new forms. The forms went live on 04/18/18.



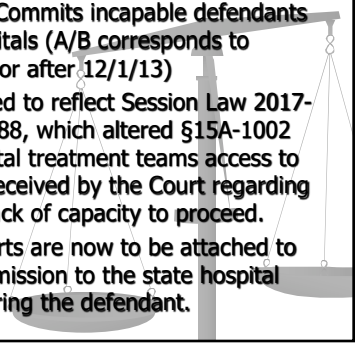
Dismissal Notice of Reinstatement

- AOC-CR-307A/B: These forms, used by DAs to dismiss charges, were changed to reflect the repeal of §15A-1009.
- AOC-CR-307A (for offenses committed on or before 11/30/13): No substantive changes because §15A-1009 is still the controlling law for crimes committed on or before 11/30/13; DAs may still dismiss charges with leave for crimes on or before this date.
- AOC-CR-307B (for offenses committed on or after 12/01/13): Changed because, despite repeal of §15A-1009, DAs were still using this form (via the "other" box) to dismiss charges with leave for incapacity to proceed. Thus, the "other" box was eliminated and a note was added reminding DAs that they may NOT dismiss charges with leave for crimes on or after this date.



Involuntary Commitment Custody Order Defendant Found Incapable to Proceed

- AOC-SP-304A/B: Commits incapable defendants to the State Hospitals (A/B corresponds to crimes before/on or after 12/1/13)
- Both were changed to reflect Session Law 2017-147, Senate Bill 388, which altered §15A-1002 by granting hospital treatment teams access to forensic reports received by the Court regarding the defendant's lack of capacity to proceed.
- The forensic reports are now to be attached to the order for submission to the state hospital tasked with restoring the defendant.



NEW Brand New Forms!

- Two new forms, AOC-SP-310 and AOC-CR-430, were created to improve communication between the State Hospital Assistant Attorney General (AAG) and the Court.
- With AOC-SP-310, the AAG notifies the Court of the results of forensic re-evaluation, notifies the Court if any criteria for dismissal may have been met, and notifies the Court when and if the defendant will return to the custody of the local Sheriff.
- The companion form, AOC-CR-430, directs the Clerk of Court to notify the District Attorney, defendant's attorney, and Sheriff of the change in status so the Court may schedule the defendant's legal proceedings in a manner which complies with statutory time limits (See §15A-1007).

Contact Information

Cherry Hospital Attorneys

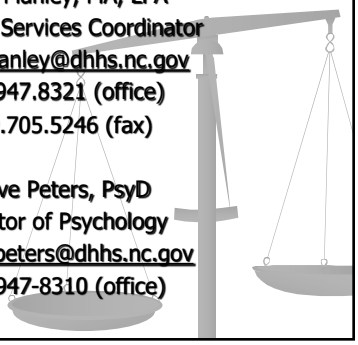
Ben Turnage, JD
Special Counsel
Ben.M.Turnage@nccourts.org
919-947-8504

Marilyn Fuller, JD
Assistant Attorney General
marilynfuller@ncdoj.gov
919-947-8404

Cherry Hospital Forensic Services

Holly Manley, MA, LPA
Forensic Services Coordinator
holly.manley@dhhs.nc.gov
919.947.8321 (office)
919.705.5246 (fax)

Steve Peters, PsyD
Director of Psychology
steven.peters@dhhs.nc.gov
919-947-8310 (office)



Central Regional Hospital Attorneys

Robert P. Stranahan, JD
& Willia G. Mills, JD
Special Counsel
Robert.P.Stranahan@nccourts.org
Willia.G.Mills@nccourts.org
919-764-7110

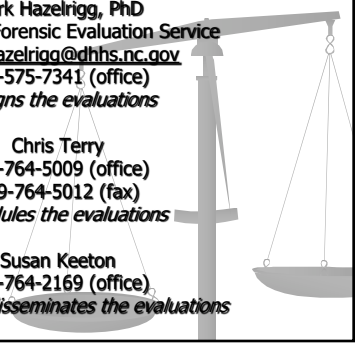
John Tillery, JD
Assistant Attorney General
jtillery@ncdoj.gov
919-764-8404

Central Regional Hospital Forensic Evaluation Service

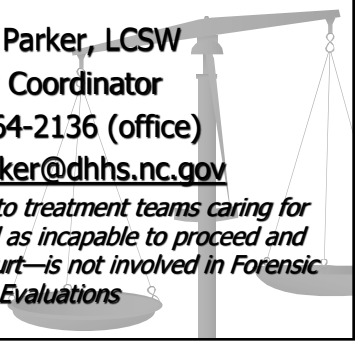
Mark Hazelrigg, PhD
Director of Forensic Evaluation Service
mark.hazelrigg@dhhs.nc.gov
919-575-7341 (office)
Assigns the evaluations

Chris Terry
919-764-5009 (office)
919-764-5012 (fax)
Schedules the evaluations

Susan Keeton
919-764-2169 (office)
Tracks and disseminates the evaluations



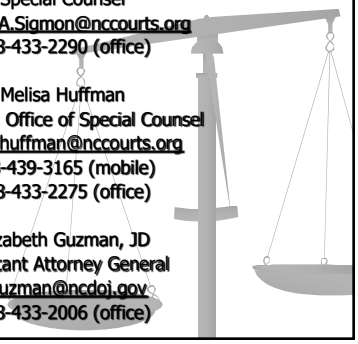
Central Regional Hospital ITP Coordinator



April Parker, LCSW
ITP Coordinator
919-764-2136 (office)
april.parker@dhhs.nc.gov

Provides support to treatment teams caring for patients admitted as incapable to proceed and liaises with the Court—is not involved in Forensic Evaluations

Broughton Attorneys

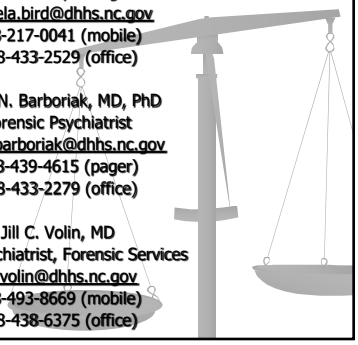


Bert Sigmon, JD
Special Counsel
William.A.Sigmon@nccourts.org
828-433-2290 (office)

Melisa Huffman
Paralegal, Office of Special Counsel
melisa.huffman@nccourts.org
828-439-3165 (mobile)
828-433-2275 (office)

Elizabeth Guzman, JD
Assistant Attorney General
eguzman@ncdoj.gov
828-433-2006 (office)

Broughton Hospital Forensic Evaluators



P. Kristen Bird, PsyD, ABPP
Forensic Psychologist
pamela.bird@dhhs.nc.gov
828-217-0041 (mobile)
828-433-2529 (office)

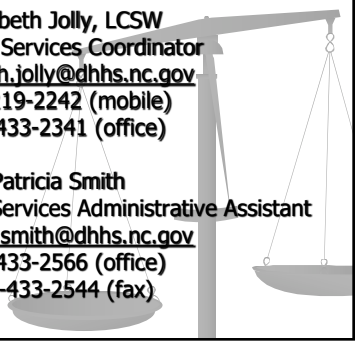
Peter N. Barboriak, MD, PhD
Forensic Psychiatrist
peter.barboriak@dhhs.nc.gov
828-439-4615 (pager)
828-433-2279 (office)

Jill C. Volin, MD
Chief Psychiatrist, Forensic Services
jill.volin@dhhs.nc.gov
828-493-8669 (mobile)
828-438-6375 (office)

Broughton Hospital Forensic Services

Elizabeth Jolly, LCSW
Forensic Services Coordinator
elizabeth.jolly@dhhs.nc.gov
828-219-2242 (mobile)
828-433-2341 (office)

Patricia Smith
Clinical & Forensic Services Administrative Assistant
patricia.smith@dhhs.nc.gov
828-433-2566 (office)
828-433-2544 (fax)



Capacity to Proceed Reference Materials
Jill Volin, MD 5/16/18

1. **Capacity to Proceed in North Carolina—Reference Slides:** explains involuntary commitment for incapable defendants, introduces NEW forms from the AOC as of 4/18/18, and provides contact information for state hospital attorneys and members of forensic services.
2. **AOC-CR-207B:** to order a local forensic evaluation (use version A for crimes on or before 11/30/13).
3. **AOC-CR-208B:** to order an evaluation at Central Regional Hospital (use version A for crimes on or before 11/30/13).
4. **AOC-SP-304B (revised 4/18/18):** to commit an incapable defendant to one of the three NC State Hospitals (use version A for crimes on or before 11/30/13).
5. **AOC-CR-307B (revised 4/18/18):** used by prosecutor to dismiss charges (use version A for crimes on or before 11/30/13).
6. **AOC-SP-310 (new 4/18/18): "**Notification of Change in Status for Defendant Previously Found Incapable to Proceed" in which the AAG notifies the Court of the results of forensic re-evaluation, notifies the Court if any criteria for dismissal may have been met, and notifies the Court when and if the defendant will return to the custody of the local Sheriff.
7. **AOC-CR-430 (new 4/18/18)**: "Notification by Clerk for Defendant Previously Found Incapable to Proceed" directs the Clerk of Court to notify the District Attorney, defendant's attorney, and Sheriff of the change in status so the Court may schedule the defendant's legal proceedings in a manner which complies with statutory time limits.
8. **Article 56 Old Law:** aspects of which are still controlling law for crimes allegedly committed on or before 11/30/13.
9. **Article 56:** reflects the 2013 overhaul of the incapacity statutes (via Session Law 2013-18, Senate Bill 45) and contains the recent change to §15A-1002 (via Session Law 2017-147, Senate Bill 388).
10. **Article 50:** statutes regarding Voluntary Dismissal. Notice that incapacity to proceed is NOT a criterion for Voluntarily Dismissed with Leave (VL) pursuant to the repeal of §15A-1009.
11. **NC AOC Memorandum Re: 2013 Changes to the Law of Incapacity, S.L. 2013-18**, by Whitney Bishop Fairbanks, dated 11/20/13.
12. **North Carolina Department of Health and Human Services Division of Mental Health, Developmental Disabilities and Substance Abuse Services Communication Bulletin #140:** which contains the Guidelines for Treatment of Individuals Involuntarily Committed Subsequent to a Determination of Incapacity to Proceed (as required by Session Law 2013-18, Senate Bill 45).
13. **Session Law 2017-147, Senate Bill 388:** altered §15A-1002 by granting hospital treatment teams access to forensic reports received by the Court regarding the defendant's lack of capacity to proceed.

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

MOTION AND ORDER APPOINTING LOCAL CERTIFIED FORENSIC EVALUATOR

(For Offenses Committed On Or After Dec. 1, 2013)

G.S. 15A-1002

Offense (copy of charging document(s) attached)

MOTION QUESTIONING DEFENDANT'S CAPACITY TO PROCEED

The undersigned moves that the above named defendant be examined to determine whether by reason of mental illness or defect the defendant is unable to understand the nature and object of the proceedings against the defendant, to comprehend his/her own situation in reference to the proceedings, or to assist in his/her defense in a rational or reasonable manner. The specific conduct that leads the moving party to question the defendant's capacity to proceed is as follows:

Date	*Signature*	☐ *Prosecutor* ☐ *Defendant's Attorney* ☐ *Defendant* ☐ *Judge*

Name And Address Of Defendant's Attorney	*District Attorney's Office Address*
Telephone No.	*Telephone No.*

CERTIFICATE OF SERVICE BY MOVING PARTY

I certify that a copy of this Motion was served by:

☐ delivering a copy personally to the
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

☐ depositing a copy, enclosed in a postpaid properly addressed envelope, in a post office or official depository under the exclusive care and custody of the U.S. Postal Service directed to the
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

☐ leaving a copy at the office of the
☐ defendant's attorney with an associate or employee. ☐ prosecutor with an associate or employee.

Name And Title Of Person With Whom Copy Left

Service accepted by:
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

Signature Of Person Accepting Service	*Date Served*
	Signature Of Person Serving
	Title

Original-File Copy - Local Management Entity Copy - Moving Party Copy-Opposing Party Copy-Sheriff
(Over)

ORDER APPOINTING LOCAL CERTIFIED FORENSIC EVALUATOR

A motion questioning the defendant's capacity to proceed having been made and considered, the Court finds that the defendant's capacity to proceed is in question. The Court Orders that:

1. One or more Forensic Evaluators of the Local Management Entity named below, certified by the North Carolina Forensic Services, shall screen the defendant within seven (7) days after receiving this Order and determine the questions set forth in the motion.
2. The Area Director of the Local Management Entity shall cause a written report of findings and recommendations to be submitted to the Court.
3. If the screening examination reveals a need for evaluation by a medical expert which can be done at the Local Management Entity, the evaluator shall arrange for this evaluation and notify the Clerk of Superior Court in writing. The medical expert's evaluation summary shall be transmitted to the Court in the manner described later in this Order. If the defendant is charged with a felony and the screening evaluation reveals that the evaluation by medical experts at the forensic unit of Central Regional Hospital - Butner Campus is needed, the evaluator shall notify the Court immediately. (**NOTE:** *Effective for offenses committed on or after December 1, 2013, an examination at a state facility may not be ordered for a person charged only with misdemeanors.*)
4. The Order required by items 2 and 3 of this report shall be transmitted to the Court in the following manner:
   (a) A brief covering statement (containing only the facts of the examination and any conclusions) shall be prepared in duplicate and enclosed in an envelope addressed to the Clerk of Superior Court in this county.
   (b) Three copies of the complete report shall be prepared. Two copies are to be enclosed in a separate sealed envelope addressed to the attention of the undersigned Judge and marked "confidential," one copy is to be forwarded to defense counsel, or to the defendant, if the defendant is not represented by counsel.
   (c) The envelope containing the covering statement and the sealed envelope addressed to the Judge shall be enclosed in a larger envelope which shall be addressed to the Clerk of Superior Court of this county. All envelopes shall show the file number of the case.
   (d) The Clerk shall open and file the covering statement with the Court file. The complete report shall be retained unopened in the envelope addressed to the undersigned Judge until requested by the Court.
5. The moving party shall immediately advise the Local Management Entity named below of the entry of this Order and shall provide the Local Management Entity with a copy of this Order and the defendant's charging document(s). The moving party shall transmit an additional copy of this Order to the jailer of this county if the defendant is confined.
6. ☐ a. The Sheriff is Ordered to transport the defendant and all relevant documents to the Certified Local Forensic Evaluator designated by the Local Management Entity and return the defendant afterwards.
   ☐ b. The defendant shall present himself/herself to the Certified Local Forensic Evaluator designated by the Local Managment Entity for evaluation.
7. Upon presentation of a copy of this Order by the forensic evaluator, any physician or clinician, licensed health care facility, licensed health care provider, local management entity, area mental health care program, the North Carolina Division of Adult Correction, the North Carolina Division of Juvenile Justice, any county detention facility, or any school district is hereby authorized and required to furnish copies of all records, including school records and records containing information relating to alcohol abuse, drug abuse and psychological or psychiatric conditions, concerning defendant to the forensic evaluator. Nothing herein shall be construed to require record holders to release information in violation of relevant federal law.

Name Of Local Management Entity	*Date*
	Signature Of Judge
	Name Of Judge (Type Or Print)

RETURN OF SERVICE

I certify that this Order was received and served as follows:

☐ By transporting the defendant to the Certified Local Forensic Evaluator designated by the Local Management Entity.

☐ Other: *(specify)*

Date Received		*Signature Of Deputy Sheriff Making Return*
Date Served	*Date Of Return*	*Name Of Deputy Sheriff Making Return (Type Or Print)*
Name Of Sheriff (Type Or Print)		*County Of Sheriff*

CAPACITY DETERMINATION

Following a hearing under G.S. 15A-1002, and a review of the record in this case, including the forensic evaluation of the defendant, the court has determined that *(check one)*

☐ 1. the defendant is **ABLE** to understand the nature and object of the proceedings against him/her, to comprehend his/her own situation in reference to the proceedings, and to assist in his/her defense in a rational and reasonable manner. Accordingly, this matter shall proceed.

☐ 2. by reason of mental illness or defect, the defendant is **UNABLE** to *(check all that apply)* ☐ understand the nature and object of the proceedings against him/her ☐ comprehend his/her own situation in reference to the proceedings ☐ assist in his/her defense in a rational or reasonable manner and therefore the defendant lacks capacity to proceed.

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

Name Of Defendant

MOTION AND ORDER COMMITTING DEFENDANT TO CENTRAL REGIONAL HOSPITAL - BUTNER CAMPUS FOR EXAMINATION ON CAPACITY TO PROCEED

(For Offenses Committed On Or After Dec. 1, 2013)

G.S. 15A-1002

Offense (copy of charging document(s) attached)

NOTE: *In felony cases, a local examination must be ordered before an examination at Central Regional Hospital - Butner campus if the court finds that a local impartial medical expert or forensic evaluator certified under the rules of the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services is available and appropriate. To order a local examination for an offense committed on or before November 30, 2013, use form AOC-CR-207A. To order a local examination for an offense committed on or after December 1, 2013, use AOC-CR-207B.*

NOTE: *The address for Central Regional Hospital - Butner Campus is Forensics Services Unit, Central Regional Hospital - Butner Campus, 300 Veazey Road, Butner, NC 27509. The telephone number is 919-764-5009 and the fax number is 919-764-5012.*

MOTION QUESTIONING DEFENDANT'S CAPACITY TO PROCEED

The undersigned moves that the above named defendant be examined to determine whether by reason of mental illness or defect the defendant is unable to understand the nature and object of the proceedings against the defendant, to comprehend his/her own situation in reference to the proceedings, or to assist in his/her defense in a rational or reasonable manner. The specific conduct that leads the moving party to question the defendant's capacity to proceed is as follows:

Date	*Signature*	☐ *Prosecutor* ☐ *Defendant's Attorney* ☐ *Judge*

CERTIFICATE OF SERVICE BY MOVING PARTY

I certify that a copy of this Motion was served by:

☐ delivering a copy personally to the
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

☐ depositing a copy, enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the U.S. Postal Service directed to the
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

☐ leaving a copy at the office of the
☐ defendant's attorney with an associate or employee. ☐ prosecutor with an associate or employee.

Name And Title Of Person With Whom Copy Left

☐ Service accepted by:
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

Signature Of Person Accepting Service	*Date Served*
	Signature Of Person Serving
	Title

Original-File Copy-Hospital Copy-Moving Party Copy-Opposing Party Copy - Sheriff

(Over)

FINDINGS

This cause was heard before the undersigned judge upon the motion of the person named on the reverse questioning the defendant's capacity to proceed. Having considered the motion, and after hearing evidence, the Court finds that:

☐ 1. The defendant's capacity to proceed ☐ is in question. ☐ is not in question.

☐ 2. The defendant is charged with a felony.
(**NOTE:** *An examination at a state facility may not be ordered for a person charged with misdemeanor(s) only.*)

☐ 3. The defendant has been examined in connection with the current charges by one or more local impartial medical experts or forensic evaluators certified under the rules of the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services.

☐ 4. An examination of the defendant at Central Regional Hospital - Butner Campus to determine the defendant's capacity would be more appropriate under the provisions of G.S. 15A-1002(b)(2) than a local evaluation.

ORDER

It is ORDERED that: *(check all that apply)*

☐ 1. The defendant be committed to Central Regional Hospital - Butner Campus for a period not to exceed sixty (60) days for observation and treatment, pursuant to G.S. 15A-1002, to determine the defendant's capacity to proceed. The moving party shall provide Central Regional Hospital - Butner Campus with a copy of this Order, the defendant's charging document(s) and any local forensic report on the defendant. The Director of Central Regional Hospital - Butner Campus must direct a written report describing the present state of the defendant's mental health to the defense attorney and to the Clerk of Superior Court for the above referenced county. The sheriff of this county shall transfer the defendant and all relevant documents to Central Regional Hospital - Butner Campus and shall return the defendant to this county when notified that the evaluation has been completed.

☐ 2. Upon presentation of a copy of this Order by the forensic evaluator designated by Central Regional Hospital - Butner Campus, any physician or clinician, licensed health care facility, licensed health care provider, local management entity (LME), area mental health program, the North Carolina Division of Adult Correction, the North Carolina Division of Juvenile Justice, any county detention facility, or any school district is hereby authorized and required to furnish copies of all records, including school records and records containing information relating to alcohol abuse, drug abuse and psychological or psychiatric conditions, concerning defendant to the forensic evaluator designated by Central Regional Hospital - Butner Campus. Nothing herein shall be construed to require record holders to release information in violation of relevant federal law.

Upon request of the forensic evaluator designated by Central Regional Hospital - Butner Campus, counsel for the State and defendant shall furnish to the forensic evaluator designated by Central Regional Hospital - Butner Campus such records and information in counsel's possession as the evaluator requests, including but not limited to copies of law enforcement reports, investigations, witness statements, statements by defendant, defendant's medical records, and prior psychiatric or psychological evaluations of defendant. Nothing herein shall be construed to require counsel to divulge any information, documents, notes, or memoranda that are protected by attorney-client privilege or work-product doctrine.

☐ 3. The motion is denied as the defendant's capacity to proceed is not in question.

Name And Address Of Defendant's Attorney	*Date*
	Signature Of Presiding Judge
Telephone No.	*Name Of Presiding Judge (Type Or Print)*

RETURN OF SERVICE

I certify that this Order was received and served as follows:

☐ By transporting the defendant to Central Regional Hospital - Butner Campus.

☐ Other: *(specify)*

Date Received		*Signature Of Deputy Sheriff Making Return*
Date Served	*Date Of Return*	*Name Of Deputy Sheriff Making Return (Type Or Print)*
Name Of Sheriff (Type or Print)		*County Of Sheriff*

CAPACITY DETERMINATION

Following a hearing under G.S. 15A-1002, and a review of the record in this case, including the forensic evaluation of the defendant, the court has determined that *(check one)*

☐ 1. the defendant is **ABLE** to understand the nature and object of the proceedings against him/her, to comprehend his/her own situation in reference to the proceedings, and to assist in his/her defense in a rational and reasonable manner. Accordingly, this matter shall proceed.

☐ 2. by reason of mental illness or defect, the defendant is **UNABLE** to *(check all that apply)* ☐ understand the nature and object of the proceedings against him/her ☐ comprehend his/her own situation in reference to the proceedings ☐ assist in his/her defense in a rational or reasonable manner and therefore the defendant lacks capacity to proceed.

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
District Court Division

IN THE MATTER OF

Name And Address Of Respondent

INVOLUNTARY COMMITMENT CUSTODY ORDER DEFENDANT FOUND INCAPABLE TO PROCEED

(For Offenses Committed On Or After Dec. 1, 2013)

G.S. 15A-1003, -1004; 122C-261, -262, -263

I. FINDINGS

The respondent has been charged in File No._____ with a criminal offense in the above named county and has been found incapable of proceeding to trial under G.S. 15A-1002. The Court considered the opinion of _____ *(name of forensic evaluator)* in the report dated _____ *(list date of report)* as evidence of incapacity to proceed. A copy of the evaluator's report is attached.

Based on the evidence presented, the Court finds that there are reasonable grounds to believe that the respondent is probably mentally ill and either dangerous to self or others or in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness in that *(insert appropriate findings)*

In addition, the Court finds that the respondent

☐ 1. is probably mentally retarded, in that *(insert appropriate findings)*

☐ 2. is charged with a violent crime in violation of G.S._____, in that *(insert appropriate findings)*

NOTE TO JUDGE: *If this finding is made, you must designate a law enforcement agency below to take custody of the defendant upon release from treatment.*

ORDER

To The Sheriff Of _____ County:

1. The Court ORDERS you to take the above named respondent into custody and transport the respondent:
   ☐ a. to a local person authorized by law to conduct an examination, for examination. *(Use when not charged with a violent crime.)*
   ☐ b. directly to the 24-hour facility named below for temporary custody, examination and treatment pending a district court hearing. *(Use when charged with a violent crime.)*
2. The Court further ORDERS that you deliver a copy of the forensic evaluation report referenced in the Findings above, by the forensic evaluator named above, to the 24-hour facility named below.

To The Director Of The 24-Hour Facility Named Below:

The Court ORDERS you to deliver a copy of the forensic evaluation report referenced above to the Assistant Attorney General and the Special Counsel at the program where the respondent is to receive capacity restoration and that report is ordered released to them.

Notice To Hospital, Institution, 24-Hour Facility:
Criminal charges are still pending against the respondent. If defendant-respondent is released he/she must be released to the law enforcement agency named below. If the defendant-respondent is not charged with a violent crime and no law enforcement agency is specified, you may release him/her to whomever you think appropriate. You must examine the defendant-respondent to determine whether he/she has gained the capacity to proceed to trial prior to releasing him/her from custody. A report of the examination must be provided to the court pursuant to G.S. 15A-1002.

Name Of Law Enforcement Agency

Name And Address Of 24-Hour Facility

Or Following Facility Designated By Area Authority:

Date

Signature Of Judge

Name Of Judge (type or print)

NOTE: *Use AOC-SP-910M for involuntary commitment if defendant found not guilty by reason of insanity.*

(Over)

II. RETURN OF SERVICE

☐ I certify that this Order was received and served as follows:

Date Respondent Taken Into Custody	*Time* ☐ AM ☐ PM

A. FOR USE WHEN RESPONDENT NOT CHARGED WITH VIOLENT CRIME

☐ 1. The respondent was presented to an authorized examiner locally available as shown below.

☐ 2. The respondent was temporarily detained at the facility named below until the respondent could be examined by an authorized examiner locally available.

Date Presented	*Time* ☐ AM ☐ PM	*Name Of Examiner*

Name Of Local Facility

☐ 1. Upon examination, the examiner named above found that the respondent did meet the criteria for outpatient commitment. I returned the respondent to his/her regular residence or to the home of a consenting person.

☐ 2. Upon examination, the examiner named above found that the respondent did meet the criteria for inpatient commitment.

- ☐ I transported the respondent and placed the respondent in the temporary custody of the 24-hour facility named below for observation and treatment.
- ☐ I placed the respondent in the custody of the agency named below for transportation to the 24-hour facility.

☐ 3. Upon examination, the examiner named above found that the respondent did not meet the criteria for inpatient or outpatient commitment.

- ☐ I examined the respondent for capacity to proceed to trial and returned him/her to his/her regular residence or the home of a consenting person. *(Use for offenses occurring on or after December 1, 2013.)* (**NOTE:** *Submit report of capacity examination to Clerk of Superior Court in accordance with G.S. 15A-1002.*)

☐ 4. The examiner's written statement ☐ is attached. ☐ will be forwarded.

Name Of 24-Hour Facility	*Date Delivered*	*Time Delivered* ☐ AM ☐ PM	*Date Of Return*
Name Of Transporting Agency	*Signature Of Law Enforcement Official*		

B. FOR USE WHEN RESPONDENT CHARGED WITH VIOLENT CRIME

☐ I transported the respondent directly to and placed him/her in the temporary custody of the facility named below.

Name Of 24-Hour Facility	*Date Delivered*	*Time Delivered* ☐ AM ☐ PM	*Date Of Return*
Name Of Transporting Agency	*Signature Of Law Enforcement Official*		

C. FOR USE WHEN ANOTHER AGENCY TRANSPORTS THE RESPONDENT

☐ I took custody of the respondent from the officer named above, transported the respondent and placed him/her in the temporary custody of the facility named below for observation and treatment.

Name Of 24-Hour Facility	*Date Delivered*	*Time Delivered* ☐ AM ☐ PM	*Date Of Return*
Name Of Transporting Agency	*Signature And Rank Of Law Enforcement Official*		

D. FOR USE WHEN STATE FACILITY TRANSFERS WITHOUT ADMISSION

☐ Pursuant to G.S. 122C-261(f), I took custody of the respondent from the State 24-hour facility named above, where he/she was not admitted, and transported the respondent and placed him/her in the temporary custody of the facility named below for observation and treatment.

Name Of Facility To Which Transferred	*Date Delivered*	*Time Delivered* ☐ AM ☐ PM	*Date Of Return*
Name Of Transporting Agency	*Signature Of Law Enforcement Or State Facility Official*		

STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

NOTE: *Do not use this form for cases covered by G.S. 20-138.4. Use form AOC-CR-339 instead.*

STATE VERSUS

Defendant Name

DISMISSAL
NOTICE OF REINSTATEMENT
(For Offenses Committed On Or After Dec. 1, 2013)

G.S. 15A-302(e), -931, -932

File Number	Count No.(s)	Offense(s)

☐ **DISMISSAL**

NOTE: *Recall all outstanding Orders For Arrest in a dismissed case.*

The undersigned prosecutor enters a dismissal to the above charge(s) and assigns the following reasons:

☐ 1. No crime is charged.

☐ 2. There is insufficient evidence to warrant prosecution for the following reasons:

☐ 3. Defendant has agreed to plead guilty to the following charges:

in exchange for a dismissal of the following charges:

☐ 4. The defendant was charged as the result of ☐ defendant's identity being used without permission. ☐ mistaken identity.
(**NOTE TO PROSECUTOR:** *You must notify the Court of this dismissal. The Court should use AOC-CR-283, Order Of Expunction Under G.S. 15A-147(a1) (Identity Theft Or Mistaken Identification) to expunge charges.*)

☐ 5. Other: *(specify)* ☐ See additional information on reverse.

A jury has not been impaneled nor has evidence been introduced. *(If a jury has been impaneled, or if evidence has been introduced, modify this sentence accordingly.)* _____

☐ **DISMISSAL WITH LEAVE**

The undersigned prosecutor enters a dismissal with leave to the above charge(s) and assigns the following reasons:

☐ 1. The defendant failed to appear for a criminal proceeding at which the defendant's attendance was required and the prosecutor believes that the defendant cannot readily be found.

☐ 2. The defendant has been indicted and cannot readily be found to be served with an Order For Arrest.

☐ 3. The defendant has entered into a deferred prosecution agreement with the prosecutor in accordance with the provisions of Article 82 of G.S. Chapter 15A.

NOTE: *Pursuant to the repeal of G.S. 15A-1009, the prosecutor can no longer dismiss charges with leave for defendants found incapable to proceed.*

NOTE: *This form must be completed and signed by the prosecutor when the dismissal occurs out of court. The better practice is for the prosecutor to complete and sign the form when the charges are orally dismissed in open court.*

*Also, in accordance with G.S. 15A-931(a1), unless the defendant or the defendant's attorney has been otherwise notified by the prosecutor, a written dismissal of the charges against the defendant must be served in the same manner prescribed for motions under G.S. 15A-951. If the record reflects that the defendant is in custody, the written dismissal shall also be served **by the prosecutor** on the chief officer of the custodial facility where the defendant is in custody.*

Date	*Name Of Prosecutor (type or print)*	*Signature Of Prosecutor*

☐ **REINSTATEMENT**

This case, having previously been dismissed with leave as indicated above, is now reinstated for trial.

Date	*Name Of Prosecutor (type or print)*	*Signature Of Prosecutor*

(Over)

ADDITIONAL INFORMATION PERTAINING TO DISMISSAL

The undersigned prosecutor provides the following additional information pertaining to the dismissal entered on the reverse:

Date	*Name Of Prosecutor (type or print)*	*Signature Of Prosecutor*

STATE OF NORTH CAROLINA

_____ County

Special Proceeding File No.

In The General Court Of Justice
District Court Division

IN THE MATTER OF
Name Of Defendant/Respondent
State Mental Health Facility Where Defendant/Respondent Is Committed
Criminal File No.

NOTIFICATION OF CHANGE IN STATUS FOR DEFENDANT PREVIOUSLY FOUND INCAPABLE TO PROCEED AND INVOLUNTARILY COMMITTED TO A STATE MENTAL HEALTH FACILITY

G.S. 15A-1002 to -1008; Chapter 122C

INSTRUCTIONS: *The Assistant Attorney General at a State Mental Health facility completes the NOTIFICATION section below to notify the court:*

- that the defendant/respondent has been re-evaluated and is thought to be capable to proceed or to be non-restorable to capacity; ***and/or***

- that the defendant/respondent's charges may be eligible for dismissal under G.S. 15A-1008(a); ***and/or***

- of the current status of the defendant/respondent's involuntary commitment.

After receiving the notification, the clerk of superior court must complete, place in the criminal case file, and distribute copies of form AOC-CR-430, "Notification By Clerk For Defendant Previously Found Incapable To Proceed." The clerk should ***not*** *place this form AOC-SP-310 in the defendant/respondent's criminal case file. Form AOC-SP-310 should appear only in the defendant/respondent's special proceeding file.*

NOTIFICATION BY ASSISTANT ATTORNEY GENERAL

This is to notify the court of a change in status for the above-named defendant/respondent, who is charged in the above-named county with *(specify offense(s))* _____

_____

_____,

who was previously found by the court to be incapable to proceed to trial pursuant to G.S. 15A-1002, and who was involuntarily committed pursuant to Chapter 122C of the General Statutes of North Carolina.

☐ 1. Pursuant to G.S. 122C-278, the defendant/respondent has been re-evaluated by _____ *(forensic examiner)* on _____ *(date)*. A copy of the examiner's report is attached. The examiner is of the opinion that the defendant/respondent is

- ☐ **CAPABLE** to proceed.
- ☐ **NON-RESTORABLE** to capacity to proceed.

☐ 2. It appears to the Assistant Attorney General that one or more criteria for dismissal may have been met, pursuant to G.S. 15A-1008(a), which states that the court shall dismiss the defendant/respondent's charges upon the **earliest** of the following conditions:

- ☐ when it appears to the satisfaction of the court that the defendant/respondent will not gain capacity to proceed.
- ☐ when as a result of incarceration, involuntary commitment to an inpatient facility, or other court-ordered confinement, the defendant has been substantially deprived of his/her liberty for a period of time equal to or in excess of the maximum term of imprisonment permissible for prior record Level VI for felonies or prior conviction Level III for misdemeanors for the most serious offense charged.
- ☐ upon the expiration of a period of five years from the date of determination of incapacity to proceed in the case of misdemeanor charges or ten years have elapsed from the date of determination of incapacity to proceed in the case of felony charges.

3. The defendant is currently involuntarily committed to the State Mental Health Facility named above. Treating clinicians at that facility recommend that the defendant/respondent's involuntary commitment be

- ☐ Continued. The commitment currently expires on _____ *(date)*. If the defendant is required to appear in court while he/she remains committed, the court may contact the Assistant Attorney General named below to make arrangements for the defendant to attend court hearings.
- ☐ Discontinued. A hearing to discharge the defendant/respondent from the State Mental Health Facility to custody of the _____ County Sheriff is currently scheduled in the _____ County Court on _____ *(date)*.

Date	*Name Of Assistant Attorney General (type or print)*	*Signature Of Assistant Attorney General*

STATE OF NORTH CAROLINA

_____ County

Criminal File No.

Special Proceeding File No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant/Respondent

NOTIFICATION BY CLERK FOR DEFENDANT PREVIOUSLY FOUND INCAPABLE TO PROCEED

G.S. 15A-1002 to -1008; Chapter 122C

NOTIFICATION BY CLERK OF SUPERIOR COURT

The clerk of superior court has received notice via AOC-SP-310 that the above-named defendant, who previously was found by the court to be incapable to proceed to trial pursuant to G.S. 15A-1002, requires review by the court under G.S. 15A-1007 because *(check one)*

☐ the defendant may be capable to stand trial under G.S. 15A-1006 and G.S. 15A-1007.

☐ the defendant's case may be eligible for dismissal under G.S. 15A-1007(c) and G.S. 15A-1008.

Pursuant to G.S. 15A-1006 and G.S. 15A-1007, the undersigned clerk has provided a copy of this completed form to the district attorney of the district that includes the county named above, the sheriff of the county named above, and the defendant's attorney, on the date shown below.

NOTE TO THE DISTRICT ATTORNEY: *Pursuant to G.S. 15A-1007, the court shall hold a supplemental hearing if it has been reported to the court that the defendant/respondent has gained capacity to proceed OR if it appears that any of the criteria for dismissal have been met. If it has been reported that the defendant/respondent has gained capacity to proceed, the district attorney shall calendar the matter for hearing at the next available term of court but no later than 30 days from receipt of this notification.*

NOTE TO THE SHERIFF: *Pursuant to G.S. 15A-1004, when a defendant/respondent accused of a violent crime is placed in the custody of a hospital or other institution in a proceeding for involuntary commitment, the trial court must order that if the defendant is released from that hospital or institution, that he/she is to be released only to the custody of a specified law enforcement agency. If such a defendant/respondent is to be released from a state mental health facility, that facility will notify the specified law enforcement agency so that it may take custody of the defendant/respondent. The agency should take custody of the defendant/respondent as soon as practicable and without unreasonable delay.*

NOTE TO THE CLERK: *Place the original of this form in the defendant/respondent's criminal case file. Place a certified copy in the defendant/respondent's special proceedings case file.*

CERTIFICATE OF SERVICE

I certify that a copy of this Notification was served by:

☐ delivering a copy personally to the ☐ district attorney. ☐ sheriff. ☐ defendant's attorney.

☐ depositing a copy, enclosed in a postpaid properly addressed envelope, in a post office or official depository under the exclusive care and custody of the U.S. Postal Service directed to the ☐ district attorney at the address shown below. ☐ sheriff at the address show below. ☐ defendant's attorney at the address shown below.

District Attorney Address	*Sheriff Address*	*Defendant's Attorney Address*

☐ leaving a copy at the office of the ☐ district attorney with an associate or employee. ☐ sheriff with an officer or employee. ☐ defendant's attorney with an associate or employee.

Name And Title Of Person With Whom District Attorney Copy Left	*Name And Title Of Person With Whom Sheriff Copy Left*	*Name And Title Of Person With Whom Defendant's Attorney Copy Left*

☐ service accepted on the date show below by: ☐ district attorney. ☐ sheriff. ☐ defendant's attorney.

Signature Of Person Accepting Service (District Attorney)	*Signature Of Person Accepting Service (Sheriff)*	*Signature Of Person Accepting Service (Defendant's Attorney)*

Date	*Name Of Clerk (type or print)*	*Signature Of Clerk*	☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

Original - Criminal Case File Copy - Special Proceedings Case File Copy - District Attorney Copy - Sheriff Copy - Defendant's Attorney

(c) An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case. The appeal is to the appellate court that would have jurisdiction if the defendant were found guilty of the charge and received the maximum punishment. If there are multiple charges affected by a motion to suppress, the ruling is appealable to the court with jurisdiction over the offense carrying the highest punishment.

(d) A motion to suppress evidence made pursuant to this Article is the exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1979, c. 723.)

§ 15A-980. Right to suppress use of certain prior convictions obtained in violation of right to counsel.

(a) A defendant has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel if its use by the State is to impeach the defendant or if its use will:

(1) Increase the degree of crime of which the defendant would be guilty; or
(2) Result in a sentence of imprisonment that otherwise would not be imposed; or
(3) Result in a lengthened sentence of imprisonment.

(b) A defendant who has grounds to suppress the use of a conviction in evidence at a trial or other proceeding as set forth in (a) must do so by motion made in accordance with the procedure in this Article. A defendant waives his right to suppress use of a prior conviction if he does not move to suppress it.

(c) When a defendant has moved to suppress use of a prior conviction under the terms of subsection (a), he has the burden of proving by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel. To prevail, he must prove that at the time of the conviction he was indigent, had no counsel, and had not waived his right to counsel. If the defendant proves that a prior conviction was obtained in violation of his right to counsel, the judge must suppress use of the conviction at trial or in any other proceeding if its use will contravene the provisions of subsection (a). (1983, c. 513, s. 1.)

Article 54.

§§ 15A-981 through 15A-990: Reserved for future codification purposes.

Article 55.

§§ 15A-991 through 15A-1000: Reserved for future codification purposes.

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

Article 56.

Incapacity to Proceed.

§ 15A-1001. No proceedings when defendant mentally incapacitated; exception.

(a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

(b) This section does not prevent the court from going forward with any motions which can be handled by counsel without the assistance of the defendant. (1973, c. 1286, s. 1.)

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

(a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.

(b) When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed. If an examination is ordered pursuant to subdivision (1) or (2) of this subsection, the hearing shall be held after the examination. Reasonable notice shall be given to the defendant and prosecutor, and the State and the defendant may introduce evidence. The court:

(1) May appoint one or more impartial medical experts, including forensic evaluators approved under rules of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, to examine the defendant and return a written report describing the present state of the defendant's mental health; reports so prepared are admissible at the hearing and the court may call any expert so appointed to testify at the hearing; any expert so appointed may be called to testify at the hearing by the court at the request of either party; or
(2) In the case of a defendant charged with a misdemeanor only after the examination pursuant to subsection (b)(1) of this section or at any time in the case of a defendant charged with a felony, may order the defendant to a State facility for the mentally ill

for observation and treatment for the period, not to exceed 60 days, necessary to determine the defendant's capacity to proceed; in the case of a defendant charged with a felony, if a defendant is ordered to a State facility without first having an examination pursuant to subsection (b)(1) of this section, the judge shall make a finding that an examination pursuant to this subsection would be more appropriate to determine the defendant's capacity; the sheriff shall return the defendant to the county when notified that the evaluation has been completed; the director of the facility shall direct his report on defendant's condition to the defense attorney and to the clerk of superior court, who shall bring it to the attention of the court; the report is admissible at the hearing.

(3) Repealed by Session Laws 1989, c. 486, s. 1.

(b1) If the report pursuant to subdivision (1) or (2) of subsection (b) of this section indicates that the defendant lacks capacity to proceed, proceedings for involuntary civil commitment under Chapter 122C of the General Statutes may be instituted on the basis of the report in either the county where the criminal proceedings are pending or, if the defendant is hospitalized, in the county in which the defendant is hospitalized.

(c) The court may make appropriate temporary orders for the confinement or security of the defendant pending the hearing or ruling of the court on the question of the capacity of the defendant to proceed.

(d) Any report made to the court pursuant to this section shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge, with a covering statement to the clerk of the fact of the examination of the defendant and any conclusion as to whether the defendant has or lacks capacity to proceed. A copy of the full report shall be forwarded to defense counsel, or to the defendant if he is not represented by counsel provided, if the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney. Until such report becomes a public record, the full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except as directed by the court. Any report made to the court pursuant to this section shall not be a public record unless introduced into evidence. (1973, c. 1286, s. 1; 1975, c. 166, ss. 20, 27; 1977, cc. 25, 860; 1979, 2nd Sess., c. 1313; 1985, c. 588; c. 589, s. 9; 1989, c. 486, s. 1; 1991, c. 636, s. 19(b); 1995, c. 299, s. 1; 1995 (Reg. Sess., 1996), c. 742, ss. 13, 14.)

§ 15A-1003. Referral of incapable defendant for civil commitment proceedings.

(a) When a defendant is found to be incapable of proceeding, the presiding judge, upon such additional hearing, if any, as he determines to be necessary, shall determine whether there are reasonable grounds to believe the defendant meets the criteria for involuntary commitment under Part 7 of Article 5 of Chapter 122C of the General Statutes. If the presiding judge finds reasonable grounds to believe that the defendant meets the criteria, he shall make findings of fact and issue a custody order in the same manner, upon the same grounds and with the same effect as an order issued by a clerk or magistrate pursuant to G.S. 122C-261. Proceedings thereafter are in accordance with Part 7 of Article 5 of Chapter 122C of the General Statutes. If the defendant was charged with a violent crime, including a crime involving assault with a deadly weapon, the judge's custody order shall require a law-enforcement officer to take the defendant directly to a 24-hour facility as described in G.S. 122C-252; and the order must indicate that the defendant was charged with a violent crime and that he was found incapable of proceeding.

(b) The court may make appropriate orders for the temporary detention of the defendant pending that proceeding.

(c) Evidence used at the hearing with regard to capacity to proceed is admissible in the involuntary civil commitment proceedings. (1973, c. 1286, s. 1; 1975, c. 166, s. 20; 1983, c. 380, s. 1; 1985, c. 589, s. 10; 1987, c. 596, s. 5.)

§ 15A-1004. Orders for safeguarding of defendant and return for trial.

(a) When a defendant is found to be incapable of proceeding, the trial court must make appropriate orders to safeguard the defendant and to ensure his return for trial in the event that he subsequently becomes capable of proceeding.

(b) If the defendant is not placed in the custody of a hospital or other institution in a proceeding for involuntary civil commitment, appropriate orders may include any of the procedures, orders, and conditions provided in Article 26 of this Chapter, Bail, specifically including the power to place the defendant in the custody of a designated person or organization agreeing to supervise him.

(c) If the defendant is placed in the custody of a hospital or other institution in a proceeding for involuntary civil commitment, the orders must provide for reporting to the clerk if the defendant is to be released from the custody of the hospital or institution. The original or supplemental orders may make provisions as in subsection (b) in the event that the defendant is released. If the defendant was charged with a violent crime, including a crime involving assault with a deadly weapon, and that charge has not been dismissed, the order must require that if the defendant is to be released from the custody of the hospital or other institution, he is to be released only to the custody of a specified law enforcement agency. If the original or supplemental

orders do not specify to whom the respondent shall be released, the hospital or other institution may release the defendant to whomever it thinks appropriate.

(d) If the defendant is placed in the custody of a hospital or institution pursuant to proceedings for involuntary civil commitment, or if the defendant is placed in the custody of another person pursuant to subsection (b), the orders of the trial court must require that the hospital, institution, or individual report the condition of the defendant to the clerk at the same times that reports on the condition of the defendant-respondent are required under Part 7 of Article 5 of Chapter 122C of the General Statutes, or more frequently if the court requires, and immediately if the defendant gains capacity to proceed. The order must also require the report to state the likelihood of the defendant's gaining capacity to proceed, to the extent that the hospital, institution, or individual is capable of making such a judgment.

(e) The orders must require and provide for the return of the defendant to stand trial in the event that he gains capacity to proceed, unless the charges have been dismissed pursuant to G.S. 15A-1008, and may also provide for the confinement or pretrial release of the defendant in that event.

(f) The orders of the court may be amended or supplemented from time to time as changed conditions require. (1973, c. 1286, s. 1; 1975, c. 166, s. 20; 1983, c. 380, s. 2; c. 460, s. 2; 1985, c. 589, s. 11.)

§ 15A-1005. Reporting to court with regard to defendants incapable of proceeding.

The clerk of the court in which the criminal proceeding is pending must keep a docket of defendants who have been determined to be incapable of proceeding. The clerk must submit the docket to the senior resident superior court judge in his district at least semiannually. (1973, c. 1286, s. 1.)

§ 15A-1006. Return of defendant for trial upon gaining capacity.

If a defendant who has been determined to be incapable of proceeding, and who is in the custody of an institution or an individual, gains capacity to proceed, the individual or institution must notify the clerk in the county in which the criminal proceeding is pending. The clerk must notify the sheriff to return the defendant to the county for trial, and to hold him for trial, subject to the orders of the court entered pursuant to G.S. 15A-1004. (1973, c. 1286, s. 1.)

§ 15A-1007. Supplemental hearings.

(a) When it has been reported to the court that a defendant has gained capacity to proceed, or when the defendant has been determined by the individual or institution having custody of him to have gained capacity and has been returned for trial, the court may hold a supplemental hearing to determine whether the defendant has capacity to proceed. The court may take any action at the supplemental hearing that it could have taken at an original hearing to determine the capacity of the defendant to proceed.

(b) The court may hold a supplemental hearing any time upon its own determination that a hearing is appropriate or necessary to inquire into the condition of the defendant.

(c) The court must hold a supplemental hearing if it appears that any of the conditions for dismissal of the charges have been met. (1973, c. 1286, s. 1.)

§ 15A-1008. Dismissal of charges.

When a defendant lacks capacity to proceed, the court may dismiss the charges:

(1) When it appears to the satisfaction of the court that the defendant will not gain capacity to proceed; or

(2) When the defendant has been substantially deprived of his liberty for a period of time equal to or in excess of the maximum permissible period of confinement for the crime or crimes charged; or

(3) Upon the expiration of a period of five years from the date of determination of incapacity to proceed in the case of misdemeanor charges and a period of 10 years in the case of felony charges. (1973, c. 1286, s. 1.)

§ 15A-1009. Dismissal with leave when defendant is found incapable of proceeding.

(a) If a defendant is found by the court to be incapable of proceeding and the charges have not been dismissed pursuant to G.S. 15A-1008, a prosecutor may enter a dismissal with leave under this section.

(b) Dismissal with leave results in removal of the case from the docket of the court, but all process outstanding, with the exception of any appearance bond, retains its validity, and all necessary actions in the case may be taken.

(c) The prosecutor may enter the dismissal with leave orally in open court or by filing the dismissal in writing with the clerk. If the dismissal is entered orally, the clerk must note the nature of the dismissal in the case records.

(d) Upon the defendant becoming capable of proceeding, or in the discretion of the prosecutor when he believes the defendant may soon become capable of proceeding, the prosecutor may reinstitute the proceedings by filing written notice with the clerk, with the defendant and with the defendant's attorney of record.

(e) A dismissal with leave entered under this section is no longer in effect if the court later dismisses the charges pursuant to G.S. 15A-1008.

(f) Nothing in this section shall limit or prohibit the court from dismissing criminal charges pursuant to G.S. 15A-1008 upon motion by the defendant or upon the court's own motion. (1983, c. 460, s. 1.)

§ 15A-1010: Reserved for future codification purposes.

Article 57.

Pleas.

§ 15A-1011. Pleas in district and superior courts; waiver of appearance.

(a) A defendant may plead not guilty, guilty, or no contest "(nolo contendere)." A plea may be received only from the defendant himself in open court except when:

(1) The defendant is a corporation, in which case the plea may be entered by counsel or a corporate officer; or

(2) There is a waiver of arraignment and a filing of a written plea of not guilty under G.S. 15A-945; or

(3) In misdemeanor cases there is a written waiver of appearance submitted with the approval of the presiding judge; or

(4) Written pleas in traffic cases, hunting and fishing offenses under Chapter 113, and boating offenses under Chapter 75A are authorized under G.S. 7A-146(8); or

(5) The defendant executes a waiver and plea of not guilty as provided in G.S. 15A-1011(d).

(6) The defendant, before a magistrate or clerk of court, enters a written appearance, waiver of trial and plea of guilty and at the same time makes restitution in a case wherein the sole allegation is a violation of G.S. 14-107, the check is in an amount provided in G.S. 7A-273(8), and the warrant does not charge a fourth or subsequent violation of this statute.

(b) A defendant may plead no contest only with the consent of the prosecutor and the presiding judge.

(c) Upon entry of a plea of guilty or no contest or after conviction on a plea of not guilty, the defendant may request permission to enter a plea of guilty or no contest as to other crimes with which he is charged in the same or another prosecutorial district as defined in G.S. 7A-60. A defendant may not enter any plea to crimes charged in another prosecutorial district as defined in G.S. 7A-60 unless the district attorney of that district consents in writing to the entry of such plea. The prosecutor or his representative may appear in person or by filing an affidavit as to the nature of the evidence gathered as to these other crimes. Entry of a plea under this subsection constitutes a waiver of venue. A superior court is granted jurisdiction to accept the plea, upon an appropriate indictment or information, even though the case may otherwise be within the exclusive original jurisdiction of the district court. A district court may accept pleas under this section only in cases within the original jurisdiction of the district court and in cases within the concurrent jurisdiction of the district and superior courts pursuant to G.S. 7A-272(c).

(d) A defendant may execute a written waiver of appearance and plead not guilty and designate legal counsel to appear in his behalf in the following circumstances:

(1) The defendant agrees in writing to waive the right to testify in person and waives the right to face his accusers in person and agrees to be bound by the decision of the court as in any other case of adjudication of guilty and entry of judgment, subject to the right of appeal as in any other case; and

(2) The defendant submits in writing circumstances to justify the request and submits in writing a request to proceed under this section; and

(3) The judge allows the absence of the defendant because of distance, infirmity or other good cause.

(e) In the event the judge shall permit the procedure set forth in the foregoing subsection (d), the State may offer evidence and the defendant may offer evidence, with right of cross-examination of witnesses, and the other procedures, including the right of the prosecutor to dismiss the charges, shall be the same as in any other criminal case, except for the absence of defendant. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; c. 626, s. 1; 1983, c. 586, s. 3; 1987, c. 355, s. 4; 1987 (Reg. Sess., 1988), c. 1037, s. 64; 1995 (Reg. Sess., 1996), c. 725, s. 5.)

§ 15A-1012. Aid of counsel; time for deliberation.

(a) A defendant may not be called upon to plead until he has had an opportunity to retain counsel or, if he is eligible for assignment of counsel, until counsel has been assigned or waived in accordance with Article 36 of Chapter 7A of the General Statutes.

(b) In cases in the original jurisdiction of the superior court a defendant who has waived counsel may not plead within less than seven days following the date he was arrested or was otherwise informed of the charge. (1973, c. 1286, s. 1.)

§§ 15A-1013 through 15A-1020: Reserved for future codification purposes.

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

Article 56.

Incapacity to Proceed.

§ 15A-1001. No proceedings when defendant mentally incapacitated; exception.

(a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

(b) This section does not prevent the court from going forward with any motions which can be handled by counsel without the assistance of the defendant. (1973, c. 1286, s. 1.)

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

(a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.

(b) (1) When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed. If an examination is ordered pursuant to subdivision (1a) or (2) of this subsection, the hearing shall be held after the examination. Reasonable notice shall be given to the defendant and prosecutor, and the State and the defendant may introduce evidence.

(1a) In the case of a defendant charged with a misdemeanor or felony, the court may appoint one or more impartial medical experts, including forensic evaluators approved under rules of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, to examine the defendant and return a written report describing the present state of the defendant's mental health. Reports so prepared are admissible at the hearing. The court may call any expert so appointed to testify at the hearing with or without the request of either party.

(2) At any time in the case of a defendant charged with a felony, the court may order the defendant to a State facility for the mentally ill for observation and treatment for the period, not to exceed 60 days, necessary to determine the defendant's capacity to proceed. If a defendant is ordered to a State facility without first having an examination pursuant to subsection (b)(1a) of this section, the judge shall make a finding that an examination pursuant to this subsection would be more appropriate to determine the defendant's capacity. The sheriff shall return the defendant to the county when notified that the evaluation has been completed. The director of the facility shall direct his report on defendant's condition to the defense attorney and to the clerk of superior court, who shall bring it to the attention of the court. The report is admissible at the hearing.

(3) Repealed by Session Laws 1989, c. 486, s. 1.

(4) A presiding district or superior court judge of this State who orders an examination pursuant to subdivision (1a) or (2) of this subsection shall order the release of relevant confidential information to the examiner, including, but not limited to, the warrant or indictment, arrest records, the law enforcement incident report, the defendant's criminal record, jail records, any prior medical and mental health records of the defendant, and any school records of the defendant after providing the defendant with reasonable notice and an opportunity to be heard and then determining that the information is relevant and necessary to the hearing of the matter before the court and unavailable from any other source. This subdivision shall not be construed to relieve any court of its duty to conduct hearings and make findings required under relevant federal law before ordering the release of any private medical or mental health information or records related to substance abuse or HIV status or treatment. The records may be surrendered to the court for in camera review if surrender is necessary to make the required determinations. The records shall be withheld from public inspection and, except as provided in this subdivision, may be examined only by order of the court.

(b1) The order of the court shall contain findings of fact to support its determination of the defendant's capacity to proceed. The parties may stipulate that the defendant is capable of proceeding but shall not be allowed to stipulate that the defendant lacks capacity to proceed. If the court concludes that the defendant lacks capacity to proceed, proceedings for involuntary civil commitment under Chapter 122C of the General Statutes may be instituted on the basis of the report in either the county where the criminal proceedings are pending or, if the defendant is hospitalized, in the county in which the defendant is hospitalized.

(b2) Reports made to the court pursuant to this section shall be completed and provided to the court as follows:

(1) The report in a case of a defendant charged with a misdemeanor shall be completed and provided to the court no later than 10 days following the completion of the examination for a defendant who was in custody at the time the examination order was entered and no later than 20 days following the completion of the examination for a defendant who was not in custody at the time the examination order was entered.

(2) The report in the case of a defendant charged with a felony shall be completed and provided to the court no later than 30 days following the completion of the examination.

(3) In cases where the defendant challenges the determination made by the court-ordered examiner or the State facility and the court orders an independent psychiatric examination, that examination and report to the court must be completed within 60 days of the entry of the order by the court.

The court may, for good cause shown, extend the time for the provision of the report to the court for up to 30 additional days. The court may renew an extension of time for an additional 30 days upon request of the State or the defendant prior to the expiration of the previous extension. In no case shall the court grant extensions totaling more than 120 days beyond the time periods otherwise provided in this subsection.

(c) The court may make appropriate temporary orders for the confinement or security of the defendant pending the hearing or ruling of the court on the question of the capacity of the defendant to proceed.

(d) Any report made to the court pursuant to this section shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge, with a covering statement to the clerk of the fact of the examination of the defendant and any conclusion as to whether the defendant has or lacks capacity to proceed. If the defendant is being held in the custody of the sheriff, the clerk shall send a copy of the covering statement to the sheriff. The sheriff and any persons employed by the sheriff shall maintain the copy of the covering statement as a confidential record. A copy of the full report shall be forwarded to defense counsel or to the defendant if he is not represented by counsel. If the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney, as provided in G.S. 122C-54(b). Until such report becomes a public record, the full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except the report and the relevant confidential information previously ordered released under subdivision (b)(4) of this section shall be released as follows: (i) to clinicians at the program where the defendant is receiving capacity restoration; (ii) to clinicians designated by the Secretary of Health and Human Services, and (iii) as directed by the court. Any report made to the court pursuant to this section shall not be a public record unless introduced into evidence. (1973, c. 1286, s. 1; 1975, c. 166, ss. 20, 27; 1977, cc. 25, 860; 1979, 2nd Sess., c. 1313; 1985, c. 588; c. 589, s. 9; 1989, c. 486, s. 1; 1991, c. 636, s. 19(b); 1995, c. 299, s. 1; 1995 (Reg. Sess., 1996), c. 742, ss. 13, 14; 2013-18, s. 1; 2017-147, s. 1.)

§ 15A-1003. Referral of incapable defendant for civil commitment proceedings.

(a) When a defendant is found to be incapable of proceeding, the presiding judge, upon such additional hearing, if any, as he determines to be necessary, shall determine whether there are reasonable grounds to believe the defendant meets the criteria for involuntary commitment under Part 7 of Article 5 of Chapter 122C of the General Statutes. If the presiding judge finds reasonable grounds to believe that the defendant meets the criteria, he shall make findings of fact and issue a custody order in the same manner, upon the same grounds and with the same effect as an order issued by a clerk or magistrate pursuant to G.S. 122C-261. Proceedings thereafter are in accordance with Part 7 of Article 5 of Chapter 122C of the General Statutes. If the defendant was charged with a violent crime, including a crime involving assault with a deadly weapon, the judge's custody order shall require a law-enforcement officer to take the defendant directly to a 24-hour facility as described in G.S. 122C-252; and the order must indicate that the defendant was charged with a violent crime and that he was found incapable of proceeding.

(b) The court may make appropriate orders for the temporary detention of the defendant pending that proceeding.

(c) Evidence used at the hearing with regard to capacity to proceed is admissible in the involuntary civil commitment proceedings. (1973, c. 1286, s. 1; 1975, c. 166, s. 20; 1983, c. 380, s. 1; 1985, c. 589, s. 10; 1987, c. 596, s. 5.)

§ 15A-1004. Orders for safeguarding of defendant and return for trial.

(a) When a defendant is found to be incapable of proceeding, the trial court must make appropriate orders to safeguard the defendant and to ensure his return for trial in the event that he subsequently becomes capable of proceeding.

(b) If the defendant is not placed in the custody of a hospital or other institution in a proceeding for involuntary civil commitment, appropriate orders may include any of the procedures, orders, and conditions provided in Article 26 of this Chapter, Bail, specifically including the power to place the defendant in the custody of a designated person or organization agreeing to supervise him.

(c) If the defendant is placed in the custody of a hospital or other institution in a proceeding for involuntary civil commitment, the orders must provide for reporting to the clerk if the defendant is to be released from the custody of the hospital or institution. The original or supplemental orders may make provisions as in subsection (b) in the event that the defendant is released. The court shall also order that the defendant shall be examined to determine whether the defendant has the capacity to proceed prior to release from custody. A report of the examination shall be provided pursuant to G.S. 15A-1002. If the defendant was charged with a violent crime, including a crime involving assault with a deadly weapon, and that charge has not been dismissed, the order must require that if the defendant is to be released from the custody of the hospital or other institution, he is to be released only to the custody of a specified law enforcement agency. If the original or supplemental orders do not specify to whom the respondent shall be released, the hospital or other institution may release the defendant to whomever it thinks appropriate.

(d) If the defendant is placed in the custody of a hospital or institution pursuant to proceedings for involuntary civil commitment, or if the defendant is placed in the custody of another person pursuant to subsection (b), the orders of the trial court must require that the hospital, institution, or individual report the condition of the defendant to the clerk at the same times that reports on the condition of the defendant-respondent are required under Part 7 of Article 5 of Chapter 122C of the General Statutes, or more frequently if the court requires, and immediately if the defendant gains capacity to proceed. The order must also require the report to state the likelihood of the defendant's gaining capacity to proceed, to the extent that the hospital, institution, or individual is capable of making such a judgment.

(e) The orders must require and provide for the return of the defendant to stand trial in the event that he gains capacity to proceed, unless the charges have been dismissed pursuant to G.S. 15A-1008, and may also provide for the confinement or pretrial release of the defendant in that event.

(f) The orders of the court may be amended or supplemented from time to time as changed conditions require. (1973, c. 1286, s. 1; 1975, c. 166, s. 20; 1983, c. 380, s. 2; c. 460, s. 2; 1985, c. 589, s. 11; 2013-18, s. 2.)

§ 15A-1005. Reporting to court with regard to defendants incapable of proceeding.

The clerk of the court in which the criminal proceeding is pending must keep a docket of defendants who have been determined to be incapable of proceeding. The clerk must submit the docket to the senior resident superior court judge in his district at least semiannually. (1973, c. 1286, s. 1.)

§ 15A-1006. Return of defendant for trial upon gaining capacity.

If a defendant who has been determined to be incapable of proceeding, and who is in the custody of an institution or an individual, has been determined by the institution or individual having custody to have gained capacity to proceed, the individual or institution shall provide written notification to the clerk in the county in which the criminal proceeding is pending. The

clerk shall provide written notification to the district attorney, the defendant's attorney, and the sheriff. The sheriff shall return the defendant to the county for a supplemental hearing pursuant to G.S. 15A-1007, if conducted, and trial and hold the defendant for a supplemental hearing and trial, subject to the orders of the court entered pursuant to G.S. 15A-1004. (1973, c. 1286, s. 1; 2013-18, s. 3.)

§ 15A-1007. Supplemental hearings.

(a) When it has been reported to the court that a defendant has gained capacity to proceed, or when the defendant has been determined by the individual or institution having custody of him to have gained capacity and has been returned for trial, in accordance with G.S. 15A-1004(e) and G.S. 15A-1006, the clerk shall notify the district attorney. Upon receiving the notification, the district attorney shall calendar the matter for hearing at the next available term of court but no later than 30 days after receiving the notification. The court may hold a supplemental hearing to determine whether the defendant has capacity to proceed. The court may take any action at the supplemental hearing that it could have taken at an original hearing to determine the capacity of the defendant to proceed.

(b) The court may hold a supplemental hearing any time upon its own determination that a hearing is appropriate or necessary to inquire into the condition of the defendant.

(c) The court must hold a supplemental hearing if it appears that any of the conditions for dismissal of the charges have been met.

(d) If the court determines in a supplemental hearing that a defendant has gained the capacity to proceed, the case shall be calendared for trial at the earliest practicable time. Continuances that extend beyond 60 days after initial calendaring of the trial shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance. (1973, c. 1286, s. 1; 2013-18, s. 4.)

§ 15A-1008. Dismissal of charges.

(a) When a defendant lacks capacity to proceed, the court shall dismiss the charges upon the earliest of the following occurrences:

(1) When it appears to the satisfaction of the court that the defendant will not gain capacity to proceed.

(2) When as a result of incarceration, involuntary commitment to an inpatient facility, or other court-ordered confinement, the defendant has been substantially deprived of his liberty for a period of time equal to or in excess of the maximum term of imprisonment permissible for prior record Level VI for felonies or prior conviction Level III for misdemeanors for the most serious offense charged.

(3) Upon the expiration of a period of five years from the date of determination of incapacity to proceed in the case of misdemeanor charges and a period of 10 years in the case of felony charges.

(b) A dismissal entered pursuant to subdivision (2) of subsection (a) of this section shall be without leave.

(c) A dismissal entered pursuant to subdivision (1) or (3) of subsection (a) of this section shall be issued without prejudice to the refiling of the charges. Upon the defendant becoming capable of proceeding, the prosecutor may reinstitute proceedings dismissed pursuant to

subdivision (1) or (3) of subsection (a) of this section by filing written notice with the clerk, with the defendant, and with the defendant's attorney of record.

(d) Dismissal of criminal charges pursuant to this section shall be upon motion of the prosecutor or the defendant or upon the court's own motion. (1973, c. 1286, s. 1; 2013-18, s. 5.)

§ 15A-1009: Repealed by Session Laws 2013-18, s. 6, effective December 1, 2013.

§ 15A-1010. Reserved for future codification purposes.

Article 50.

Voluntary Dismissal.

§ 15A-931. Voluntary dismissal of criminal charges by the State.

(a) Except as provided in G.S. 20-138.4, the prosecutor may dismiss any charges stated in a criminal pleading including those deferred for prosecution by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time. The clerk must record the dismissal entered by the prosecutor and note in the case file whether a jury has been impaneled or evidence has been introduced.

(a1) Unless the defendant or the defendant's attorney has been notified otherwise by the prosecutor, a written dismissal of the charges against the defendant filed by the prosecutor shall be served in the same manner prescribed for motions under G.S. 15A-951. In addition, the written dismissal shall also be served on the chief officer of the custodial facility when the record reflects that the defendant is in custody.

(b) No statute of limitations is tolled by charges which have been dismissed pursuant to this section. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1983, c. 435, s. 5; 1991, c. 109, s. 1; 1997-228, s. 1.)

§ 15A-932. Dismissal with leave when defendant fails to appear and cannot be readily found or pursuant to a deferred prosecution agreement.

(a) The prosecutor may enter a dismissal with leave for nonappearance when a defendant:

(1) Cannot be readily found to be served with an order for arrest after the grand jury had indicted him; or

(2) Fails to appear at a criminal proceeding at which his attendance is required, and the prosecutor believes the defendant cannot be readily found.

(a1) The prosecutor may enter a dismissal with leave pursuant to a deferred prosecution agreement entered into in accordance with the provisions of Article 82 of this Chapter.

(b) Dismissal with leave for nonappearance or pursuant to a deferred prosecution agreement results in removal of the case from the docket of the court, but all process outstanding retains its validity, and all necessary actions to apprehend the defendant, investigate the case, or otherwise further its prosecution may be taken, including the issuance of nontestimonial identification orders, search warrants, new process, initiation of extradition proceedings, and the like.

(c) The prosecutor may enter the dismissal with leave for nonappearance or pursuant to a deferred prosecution agreement orally in open court or by filing the dismissal in writing with the clerk. If the dismissal for nonappearance or pursuant to a deferred prosecution agreement is entered orally, the clerk must note the nature of the dismissal in the case records.

(d) Upon apprehension of the defendant, or in the discretion of the prosecutor when he believes apprehension is imminent, the prosecutor may reinstitute the proceedings by filing written notice with the clerk.

(d1) If the proceeding was dismissed pursuant to subdivision (2) of subsection (a) of this section and charged only offenses for which written appearance, waiver of trial or hearing, and plea of guilty or admission of responsibility are permitted pursuant to G.S. 7A-148(a), and the defendant later tenders to the court that waiver and payment in full of all applicable fines, costs, and fees, the clerk shall accept said waiver and payment without need for a written reinstatement

from the prosecutor. Upon disposition of the case pursuant to this subsection, the clerk shall recall any outstanding criminal process in the case pursuant to G.S. 15A-301(g)(2)b.

(e) If the defendant fails to comply with the terms of a deferred prosecution agreement, the prosecutor may reinstitute the proceedings by filing written notice with the clerk. (1977, c. 777, s. 1; 1985, c. 250; 1994, Ex. Sess., c. 2, s. 1; 2011-145, s. 31.23B; 2011-192, s. 7(o); 2011-391, s. 63(a); 2011-411, s. 1.)

§§ 15A-933 through 15A-940. Reserved for future codification purposes.

NORTH CAROLINA
ADMINISTRATIVE OFFICE
of the COURTS

Legal and Legislative Services Division
Peter E. Powell
Legal and Legislative Administrator
PO Box 2448, Raleigh, NC 27602
T 919 890-1300 F 919 890-1914

Memorandum

TO: Superior Court Judges
District Court Judges
Clerks of Superior Court
District Attorneys
Public Defenders

FROM: Whitney Bishop Fairbanks, Assistant Legal Counsel

DATE: November 20, 2013

RE: 2013 Changes to the Law of Incapacity, S.L. 2013-18

During its 2013 long session, the General Assembly enacted S.L. 2013-18 (S.B. 45, An Act to Amend the Laws Governing Incapacity to Proceed), which makes changes to the law of incapacity.[1]

Scope of this Memorandum
While S.L. 2013-18 (The Act) made some changes to the law governing civil commitment, the focus of this memorandum is changes to the law of incapacity that affect criminal proceedings.[2] The changes are discussed in three categories: before capacity determination (e.g., capacity examinations, hearings to determine capacity, etc.); capacity determination (e.g., hearings and orders, etc.); and after capacity determination (e.g., civil commitment of respondent/defendant, dismissal, etc.).[3]

Effective Date and Form Changes
The Act is effective December 1, 2013 and applicable to offenses committed on or after that date. Except where noted, the new procedures discussed in this memo should be implemented only if the alleged offense was committed on December 1, 2013 or later. Because many of the changes in The Act are procedural in nature, pegging its applicability to an offense date means two sets of date dependent procedures. For example, Section 6 of The Act repeals G.S. 15A-1009, which allows the district attorney to dismiss with leave

[1] The terms incompetent and incapable are sometimes used interchangeably, but the terms have distinct legal definitions. Incompetent refers to an individual who has been adjudicated incompetent to make or communicate important decisions pursuant to the procedures in G.S. Chapter 35A, "Incompetency and Guardianship." This memo will use the terms capacity or incapacity to describe a criminal defendant's ability to proceed to trial, not competency.
[2] Full text of the enacted bill is available at http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S45v4.pdf.
[3] Because G.S. 7B-2401 makes several incapacity provisions applicable to proceedings where a child is alleged to be delinquent, many of the changes discussed in this memo also affect juvenile delinquency proceedings.

pending charges when a defendant is found incapable of proceeding. Since The Act is inapplicable to offenses committed on November 30 or earlier, the DA may dismiss a charge with leave if it occurs before November 30 but not if it occurs on December 1 or later.

To accommodate this, the NCAOC has created A and B iterations of many of the forms associated with capacity challenge procedures. Court officials and staff should use iteration A of forms when the alleged offense date is November 30 or earlier and iteration B when it is December 1 or later. The lettered forms will be available on the NCAOC forms page December 1, 2013.[4]

Form	11/30/2013 or earlier	12/1/2013 or later
Motion and Order Appointing Local Certified Forensic Evaluator	AOC-CR-207A	AOC-CR-207B
Motion and Order Committing Defendant to Central Regional Hospital-Butner Campus for Examination on Capacity to Proceed	AOC-CR-208A	AOC-CR-208B
Dismissal Notice of Reinstatement	AOC-CR-307A	AOC-CR-307B
Petition and Appointment of Defense Counsel for Committed Respondent Charged with a Violent Crime	AOC-SP-210A	AOC-SP-210A
Involuntary Commitment Custody Order Defendant Found Incapable to Proceed	AOC-SP-304A	AOC-SP-304B

Before Capacity Determination

Capacity Examinations

The Act revises G.S. 15A-1002(b)(1) and (2) to restrict the examination options available to the court. While the court still is authorized to order the defendant examined for capacity to proceed, it no longer is authorized to commit a person who is charged with misdemeanors only to a state facility for the mentally ill for a capacity examination. Because The Act's effective date is based on the date of commission, the court's examination options are unchanged if the offense is alleged to have occurred on or before November 30.

The Act does not alter the court's authority to order a defendant to a state facility for the mentally ill in cases where the defendant's alleged offenses include a felony. The Act also does not alter the defendant's right to move the court for funds for an independent evaluation or the court's authority to grant such a motion regardless of the class of the pending charge.

[4] The NCAOC forms page can be found at http://www.nccourts.org/Forms/FormSearch.asp.

Authorized action	Felony on or before 11/30/2013	Felony on or after 12/1/2013	Misdemeanor on or before 11/30/2013	Misdemeanor on or after 12/1/2013
Order local forensic evaluation	✓ AOC-CR-207A	✓ AOC-CR-207B	✓ AOC-CR-207A	✓ AOC-CR-207B
Commit to state facility *after* local evaluation	✓ AOC-CR-208A	✓ AOC-CR-208B	✓ AOC-CR-208A	✗
Bypass local evaluation & commit to state facility	✓ AOC-CR-208A	✓ AOC-CR-208B	✗	✗
Conduct hearing without examination	✓	✓	✓	✓

Release of Relevant Confidential Information

New G.S. 15A-1002(b)(4) requires a presiding judge who orders the examination of a defendant also order the release of "relevant confidential information" to the examiner. The new subsection contains a non-exhaustive list of records that may contain "relevant confidential information" including medical, mental health, and school records.

The court must give the defendant notice and opportunity to be heard before it orders the release of confidential information. It also must determine that the information is relevant, necessary, and unavailable from any other source.

G.S. 15A-1002(b)(4) does not relieve the court of duties imposed by privacy rules found in federal statutes and regulations—e.g., The Health Insurance Portability and Accountability Act of 1996. Federal privacy rules, generally speaking, prohibit or limit the use or disclosure of protected information held by covered entities.

A lengthy discussion of federal privacy rules is beyond the scope of this memorandum. The question for a judge presiding in a capacity proceeding will be whether or not her order meets minimum disclosure requirements for a particular type of record. In some cases, a court order will satisfy a federal privacy rule; in others, specific findings are required before disclosure is allowed. A record holder who believes disclosure would subject it to liability pursuant to a federal privacy rule may seek guidance from the court by asking the court to set aside or modify its original order, which may require an *in camera* review of the records.

Reports to the Court

There is no statutory timeline for conducting an examination; however, for offenses committed after December 1, 2013, detailed timelines for providers to submit examination reports to the court can be found in new subsection G.S. 15A-1002(b2). (Article 56 of Chapter 15A does not contain timelines for completing and submitting capacity examination reports to the court for offenses committed before December 1, 2013.) Deadlines for initial capacity examination reports are triggered when the examiner completes the capacity examination and are as follows:

- ten days for misdemeanor offenses when the defendant is in the sheriff's custody;
- twenty days for misdemeanor offenses when the defendant is not in the sheriff's custody; or
- thirty days for felony offenses.

The exception to the "triggered by completing the examination" rule is reports generated by independent examiners appointed in response to challenged capacity reports. In those cases, the report is due to the court within sixty days of the court order allowing the independent examination.

Subsection (b2) also allows the court to extend the time within which a report must be completed and submitted when there is good cause. The time may be extended in multiple additional increments of 30 days. However, the combined extensions may not total more than 120 days beyond the original due date.

The Act also amends G.S. 15A-1002(d) to require the clerk to send a copy of the report's covering statement (cover sheet noting that an exam occurred and that the examiner believes the defendant capable or incapable) to the sheriff whenever a defendant is in the sheriff's custody. The sheriff must maintain a copy of the covering statement as a confidential record.

Capacity Determination

The Act makes two potentially significant changes to capacity determination hearings. First, The Act amends G.S. 15A-1002(b1) to permit the practice of stipulating to a defendant's capacity while outlawing the practice of stipulating to a lack of capacity. Second, the amendment to subsection (b1) also requires that a judge include in her order "findings of fact to support its determination of the defendant's capacity."

After Capacity Determination

Involuntarily Commitment Proceedings

While Article 56 of Chapter 15A continues to authorize a judge to initiate involuntary commitment proceedings whenever she finds a defendant incapable of proceeding, The Act makes several tweaks to related criminal and civil procedures. The Act amends G.S. 15A-1004(c) to require the court to order the defendant—now defendant/respondent—re-evaluated for capacity to stand trial in the criminal proceeding before he can be released from the hospital's custody.[5] The procedures for submitting subsequent capacity examination reports to the court are the same as those found in G.S. 15A-1002.

Revised G.S. 15A-1006 requires the clerk to notify the district attorney, the defendant's attorney, and the sheriff when a defendant previously found incapable of proceeding is determined by the examiner to have regained capacity. (For offenses committed before December 13, 2013, G.S. 15A-1006 requires the clerk notify only the sheriff.) The clerk also must notify the district attorney when the defendant has been returned for trial, which triggers the district attorney's responsibility to calendar the matter for hearing at the next available term of court or within thirty days.

Supplemental Proceedings

Effective for offenses committed on or after December 1, 2013, dismissal of the criminal charge by the court pursuant to G.S. 15A-1008(a) is mandatory whenever a condition of dismissal is present. While The Act reorganizes the conditions of dismissal, it makes substantive changes to one condition only. As rewritten, G.S. 15A-1008(a)(2) (formerly G.S. 15A-1008(2)) now requires the court to dismiss a criminal proceeding when the defendant has been deprived of liberty as the result of a court order for a period of time equal to the maximum term of imprisonment permissible for a person with a prior record level VI for a felony offense or prior conviction level III for a misdemeanor offense.

Significant revisions were approved by the criminal forms subcommittee for the form used when counsel believes a respondent may be eligible for judicial dismissal of pending criminal charges, AOC-SP-210.

[5] AOC-SP-304B incorporates this change with a new check box requiring an affirmative order that relevant confidential records be released to the screener.

(Formerly titled "Petition and Appointment of Defense Counsel for Committed Respondent Charged with a Violent Crime.) As currently available, the AOC-SP-210 duplicates the AOC-CR-224 (Order of Assignment or Denial of Counsel). It also does not reflect the correct procedure when a defendant is alleged to have committed murder, which is to use the AOC-CR-427 (Notice and Determination of Counsel in First Degree Murder). To eliminate duplication, NCAOC made the following changes to the SP-210: deleted the appointment section, inserted references to appropriate related forms, and renamed it to reflect its new status as a petition only.[6]

In Section 6, The Act repeals G.S. 15A-1009, which allows the district attorney to dismiss with leave a criminal proceeding against a defendant found incapable of proceeding.[7] However, judicial dismissals pursuant to G.S. 15A-1008(a)(1) (defendant unlikely to regain capacity) and (a)(3) (period of years since determination of incapacity) are "without prejudice to the refiling of the charges" and are, therefore, functionally similar to dismissal with leave by the district attorney.

With the repeal of G.S. 15A-1009, the General Assembly also eliminated the provision that terminated a defendant's bond obligation when the district attorney dismissed a case with leave. Despite the similarities between G.S. 15A-1008(a)(1), (a)(2) and G.S. 15A-1009, the judicial dismissal sections do not contain a directive about a defendant's bond obligation. There now is no provision in the General Statutes for the effect of a dismissal with leave on a defendant's outstanding bond obligation.[8] A judicial dismissal pursuant to G.S. 15A-1008(a)(2) is "without leave" and, therefore, terminates any bond obligation the defendant may have.

Please share this memorandum with others in your office, county, or district, as you deem appropriate. The NCAOC will post a copy of this memorandum to the Legal memos section of the North Carolina Courts Intranet under the "Criminal" heading.[9]

For automation, record keeping, and procedural questions arising from S.L. 2013-18, please contact your county's NCAOC field support staff, or the NCAOC's Procedural Help Desk.

Please note that the NCAOC is not permitted to provide legal advice to persons such as law enforcement officers and private attorneys who are not Judicial Branch officers and employees.

---

[6] The form was also split into A and B iterations. The B iteration reflects the change in language in G.S. 15A-1008 from discretionary to mandatory dismissal.

[7] The State still may elect to voluntarily dismiss without leave under G.S. 15A-932 when the defendant is found incapable of proceeding.

[8] For a detailed discussion of the effect of judicial dismissals pursuant to G.S. 15A-1008 on a defendant's bond obligation see Troy Page's memorandum of November 20, 2013, "Bond Forfeiture Legislation – December 2013."

[9] This and other memos related to criminal law can be found at https://cis1.nccourts.org/intranet/aoc/legalservices/.

2013 Changes to Capacity Proceedings (Effective for Offenses Committed on or After December 1, 2013)

N.C.G.S.	Title	Bill §	Summary of Change
Clerk			
15A-1002(d)	Determination of incapacity	1	Clerk must send copy of covering statement to sheriff when defendant is in sheriff's custody
15A-1006	Return of defendant for trial	3	Clerk must provide written notice to district attorney, defendant's attorney, and sheriff when a defendant is determined to have regained capacity
15A-1007	Supplemental hearings	4	Clerk must notify district attorney when defendant who has regained capacity has been returned for trial
Judge			
15A-1002(b)(1)	Determination of capacity	1	Court may call the appointed expert to testify at the capacity hearing with or without the request of either party
15A-1002(b)(2)	Determination of capacity	1	Court may order only "local forensic" when a defendant is charged with misdemeanor offenses only
15A-1002(b)(3)	Determination of capacity	1	Court must order the release of relevant, confidential information to examiner
15A-1002(b1)	Determination of capacity	1	Court must include findings of fact to support its capacity determination in its order
15A-1004(c)	Safeguarding defendant	2	Court must order defendant-respondent subject to involuntary commitment proceedings be re-examined for capacity to proceed before release from custody
15A-1008	Dismissal of charges	5	Court must dismiss criminal charges when any of condition of dismissal is present
Clerk/Judge/Examiner			
15A-1002(b2)	Determination of capacity	1	Examiners must complete and submit capacity evaluations to clerk within specified number of days
15A-1002(b2)	Determination of capacity	1	Allows limited extensions of time within which examiner must complete and submit a report
Judge/District Attorney			
15A-1008(c)	Dismissal of charges	5	Establishes when dismissal is issued "without prejudice to the refiling or charges" or "without leave"
District Attorney/Defense Attorney			
15A-1009 [repealed]	Dismissal with leave	6	District attorney no longer authorized to dismiss with leave charges when defendant found incapable
15A-1007(a)	Supplemental hearings	4	District attorney must calendar matter for hearing at the next available term of court or within 30 days of receiving notification from clerk that defendant who has regained capacity has been returned for trial
15A-1002(b1)	Determination of capacity	1	Parties may not stipulation to incapacity but may stipulate to capacity

North Carolina Department of Health and Human Services
Division of Mental Health, Developmental Disabilities and Substance Abuse Services

Pat McCrory
Governor

Aldona Z. Wos, M.D.
Ambassador (Ret.)
Secretary DHHS

Dave Richard
Division Director

December 3, 2013

To:
Joint Legislative Oversight Committee Members on HHS
Commission for MH/DD/SAS
Consumer/Family Advisory Committee Chairs
State CFAC
Advocacy Organizations and Groups
NC Association of County Commissioners
County Managers
County Board Chairs
NC Council of Community Programs
State Facility Directors
LME/MCO Directors
LME/MCO Board Chairs
DHHS Division Directors
Provider Organizations
MH/DD/SAS Professional Organizations and Groups
MH/DD/SAS Stakeholder Organizations and Groups
NC Association of County DSS Directors

From: Dave Richard

Communication Bulletin # 140: Forensic Evaluator Guidelines

Session Law 2013-18, Senate Bill 45, *An Act to Amend the Laws Governing Incapacity to Proceed,* required the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services ("Commission") to adopt rules which require that forensic evaluators appointed pursuant to N.C.G.S. § 15A-1002(b) meet the following requirements:

1. Complete all training requirements necessary to be credentialed as a certified forensic evaluator; and
2. Attend annual continuing education seminars that provide continuing education and training in conducting forensic evaluations and screening examinations of defendants to determine capacity to proceed at trial and in preparing written reports required by law. [S.L. 2013-18, S.B. 45, Section 9]

The Commission has proposed to amend existing Rule 10A NCAC 27G .6702, *Operations (Forensic Screening and Evaluation Services for Individuals of All Disability Groups*, as well as Rule 10A NCAC 27H, Section .0200, *Training and Registration of Forensic Evaluators* and adopt these amendments as temporary rules. These amendments, as proposed for adoption by the Commission, are available on the Office of Administrative Hearings ("OAH") website (http://www.ncoah.com/rules/). Once the adoption process is complete, the rules will have an effective date of December 1, 2013 and will be accessible on the OAH website at this location: http://reports.oah.state.nc.us/ncac.asp.

S.L.2013-18, S.B. also required the Commission to adopt guidelines for the treatment of individuals who are involuntarily committed following a determination of incapacity to proceed and a referral pursuant to N.C.G.S. § 15A-1003. [S.L. 2013-18, S.B. 45, Section 10] The legislation mandated that the guidelines require a treatment plan that uses best practices in an effort to restore the individual's capacity to proceed in the criminal matter at issue. [S.L. 2013-18, S.B. 45, Section 10] Pursuant to legislation, the guidelines were required to be adopted by December 1, 2013.

www.ncdhhs.gov • www.ncdhhs.gov/mhddsas/
Tel 919-733-7011 • Fax 919-508-0951
Location: 325 N. Salisbury St. • Albemarle Building • Raleigh, NC 27603
Mailing Address: 3001 Mail Service Center • Raleigh, NC 27699-3001
An Equal Opportunity / Affirmative Action Employer

The guidelines for the treatment of individuals involuntarily committed subsequent to a determination of incapacity to proceed, as adopted by the Commission are provided below.

Guidelines for Treatment of Individuals Involuntarily Committed Subsequent to a Determination of Incapacity to Proceed as Adopted by the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services [Required by S.L. 2013-18, S.B. 25, *An Act to Amend the Laws Governing Incapacity to Proceed*]

Individuals may be involuntarily committed to a secure facility following a determination of incapacity to proceed ("ITP"). Their treatment plans shall address restoration of the capacity to proceed in their criminal proceedings. The treatment team, in conjunction with the individual, will develop plans that specify interventions which utilize best practices. Interventions shall address mental health difficulties as well as educational and/or cognitive deficits that are barriers to attaining capacity to proceed. The initial master treatment plan or subsequent revisions shall address the ITP patient's three major areas of deficit as follows:

1. Understanding the nature of the charges and proceedings (e.g., ability to comprehend the roles of courtroom personnel, and understand courtroom proceedings);
2. Comprehension of his/her situation in reference to the proceedings (e.g., ability to name specific charges, indentify potential pleas and legal consequences); and
3. Assisting with his/her defense in a rational and reasonable manner (e.g., tolerate stress of proceedings, convey information about his/her case to his/her attorney in a rational manner).

Current best practice methods include multi-modal interventions that are tailored to the treatment needs of the ITP patient which may be related to psychiatric disorder and/or cognitive disabilities. Interventions may include the following:

1. Prescription of psychotropic medications.
2. Psycho-education that focuses on charges, courtroom proceedings, sentencing, plea bargaining, role of court personnel and assisting with one's defense.
3. Group treatment that includes discussion, readings, videos, role playing and mock trials. This may include additional educational supports for defendants with learning disorders, communication disorders, Traumatic Brain Injuries ("TBI") or Intellectual/Developmental Disabilities ("I/DD").
4. Individual treatment which includes addressing specific deficits and discussion of the ITP patient's understanding of his/her specific criminal case.
5. Peer Support from individuals who have had similar experiences.

At the discretion of the treatment team, consultation will be utilized for the development of an individualized restoration program when an individual's needs are identified as needing specialized programming.

Each treatment plan revision shall reflect the individual's current status related to capacity. Except with individuals where a formal re-evaluation of capacity has resulted in the opinion that the defendant is non-restorable, treatment plan revisions shall identify specific deficits and interventions for overcoming those deficits in the treatment plan.

cc: Secretary Aldona Wos, M.D.
Robin Cummings, M.D.
Matt McKillip
Adam Sholar
Ricky Diaz
DMH/DD/SAS Executive Leadership Team
DMH/DD/SAS Management Leadership Team
Susan Morgan
Denise Thomas
Kaye Holder
Pam Kilpatrick
Laura White
Mark Hazelrigg, Ph.D. ABPP
David Hattem, Ph.D.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2017-147
SENATE BILL 388

AN ACT TO ALLOW REPORTS RECEIVED BY THE COURT ON THE LACK OF CAPACITY TO PROCEED TO BE SHARED WITH TREATMENT PROVIDERS AND TO STUDY THE LACK OF CAPACITY TO PROCEED PROCESS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1002(d) reads as rewritten:

"(d) Any report made to the court pursuant to this section shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge, with a covering statement to the clerk of the fact of the examination of the defendant and any conclusion as to whether the defendant has or lacks capacity to proceed. If the defendant is being held in the custody of the sheriff, the clerk shall send a copy of the covering statement to the sheriff. The sheriff and any persons employed by the sheriff shall maintain the copy of the covering statement as a confidential record. A copy of the full report shall be forwarded to defense counsel or to the defendant if he is not represented by counsel. If the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney, as provided in G.S. 122C-54(b). Until such report becomes a public record, the full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except the report and the relevant confidential information previously ordered released under subdivision (b)(4) of this section shall be released as follows: (i) to clinicians at the program where the defendant is receiving capacity restoration; (ii) to clinicians designated by the Secretary of Health and Human Services, and (iii) as directed by the court. Any report made to the court pursuant to this section shall not be a public record unless introduced into evidence."

SECTION 2. The Department of Health and Human Services shall convene a workgroup to evaluate the laws governing the lack of capacity to proceed process, including the impact of the laws on the limited resources of the community mental health system, hospitals, state psychiatric hospitals, local law enforcement, court system, jails, crime victims, and criminal defendants. The workgroup shall be comprised of criminal justice and mental health experts who work directly with individuals who have been determined to lack the capacity to proceed and shall include at least one representative from each of the following groups, agencies, or organizations:

(1) The Attorney General or his designee.
(2) The Director of the Administrative Office of the Courts or his designee.
(3) The President of the Conference of District Attorneys or his designee.
(4) The President of the Association of Defense Attorneys or his designee.
(5) The President of the Sheriff's Association or his designee.
(6) The President of the District Court Judges Association or his designee.
(7) The President of the Superior Court Judges Association or his designee.
(8) A forensic expert from a State Psychiatric Hospital.
(9) An advocate for individuals who have been determined to lack the capacity to proceed.

SECTION 3.(a) Preliminary report. – The Department of Health and Human Services shall present preliminary findings of the workgroup to the following stakeholder organizations:

(1) North Carolina Sheriff's Association.
(2) North Carolina Psychiatric Association.
(3) North Carolina Council of Community Programs.
(4) North Carolina Conference of District Attorneys.
(5) North Carolina Hospital Association.
(6) North Carolina Association of County Commissioners.
(7) National Alliance on Mental Illness.
(8) North Carolina Indigent Defense Services.

SECTION 3.(b) Final report. – After consultation with these stakeholder organizations, the workgroup shall finalize recommendations for improvements to the system, including any legislative proposals, and the Department of Health and Human Services shall report to the Joint Legislative Oversight Committees on Health and Human Services and on Justice and Public Safety by February 1, 2018. The report shall include findings and recommendations on the following:

(1) Issues within the system that impact an individual who lacks capacity to proceed to trial and the process to determine capacity.
(2) Issues that create barriers within the system that negatively impact service providers, including jails, courts, hospitals, and law enforcement agencies, in their efforts to serve an individual who lacks the capacity to proceed.
(3) Solutions to reduce the number of persons who lack the capacity to proceed; the number of persons who are referred to the State psychiatric hospitals; and the number of stays in the hospitals beyond the clinical needs of the person who lacks the capacity to proceed.

SECTION 4. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 27th day of June, 2017.

s/ Daniel J. Forest
President of the Senate

s/ Tim Moore
Speaker of the House of Representatives

s/ Roy Cooper
Governor

Approved 4:17 p.m. this 20th day of July, 2017

CAROLINE ELLIOT, APD WAKE CO.

ATTORNEY-CLIENT PRIVILEGE & THE RULE OF CONFIDENTIALITY

OVERVIEW

- What does attorney-client privilege actually cover? Where does the doctrine come from?
- Is it broader or narrower in scope than the ethical rule of confidentiality?
- What are our best practices in terms of what we should be doing in protecting our clients' confidential information?
- What should we clearly NOT do?

STATE V. RICHARDSON

- On March 21, 2017, 7 felony indictments are issued for Teresa Holliday and Tony Richardson. They are each charged with:
  - 3 counts of Altering Court Records or Entering Unauthorized Judgments (Class H)
  - 3 counts of Accessing Government Computers with the Intent to Defraud (Class F)
  - 1 count of Felony Obstruction of Justice (Class H)

TONY RICHARDSON: 3 DWI CHARGES

- 12CR218853 - DWI #1
  - 8/19/2012: Date of offense
  - Defendant hires Joe Schmo to represent him
  - 12/6/2013: Richardson pleads guilty, through Mr. Schmo, to DWI

TONY RICHARDSON: DWI #2

- 13CR227952
  - 11/14/2013: Date of offense (BEFORE he pleads to previous DWI)
  - 2/2/2015: Clerk ML's computer used to show a NG plea and verdict of DC - backdated to 4/21/2014
  - 4/17/2015: Clerk Sharon Leonard reinstates charge due to "clerk error"
  - 5/15/2015: Clerk BA's computer used to show a NG plea and verdict of DC - backdated to 4/21/2014

TONY RICHARDSON: DWI #3

- 14CR204767
  - 2/28/2014: Date of Offense
  - 11/12/2014: Court date - calendar originally marked with a continuance to 1/7/2015; this is later whited out and marked "NG"
  - 12/29/2014: Clerk JB's computer used to show a verdict of NG - backdated to 11/12/14

JOHNSTON COUNTY ACCIDENT

- 9/9/2015: Richardson involved in Johnston Co. wreck where other driver injured - Richardson flees the scene and then calls Teresa Holiday to come pick him up
  - LEO finds Richardson and Holiday - Richardson is charged and spends 30 days in jail before bonding out
  - Charging officer from DWI #3 sees coverage of Johnston Co. accident on TV and sends email to DA in Wake Co. asking why it was showing a NG - says he doesn't remember ever going to trial in that case

INVESTIGATION INTO DISMISSALS

- 10/14/2015: Wake Co. DA asks for SBI investigation
  - SBI interviews many in Wake Co. Clerk's Office
- 6/6/2016: SBI requests interview with Mr. Richardson - he declines
- 6/7/2016: Teresa Holiday resigns from Clerk's office
- 6/13/2016: Richardson's DWIs #2 & #3 are reinstated
- 9/23/2016: DA in Johnston Co. sees mention of Teresa Holiday in wreck report & contacts SBI investigators
- 10/20/2016: SBI interviews Teresa Holiday who confesses & says Richardson forced her to dismiss the charges
- 2/8/2017: Teresa Holiday records phone calls with Richardson and gives them to SBI
- 3/21/2017: Indictments issued & Teresa given a pre-arranged unsecured bond

PLEA NEGOTIATIONS

- Plea offer for Richardson:
  - Guilty to 3 counts of Altering Court Records (H), 3 counts of Accessing Govmt Computers (w/o Intent to Defraud) (H), Obstruction of Justice (H)
  - Sentenced to 4 consecutive active sentences, total of 32-__ months
- Case set for trial November 2017
- DA discloses plea deal for Teresa:
  - She is offered a plea to 3 counts of Altering Court Records, with sentencing left open.

SBI INTERVIEW OF JOE SCHMO

13 [redacted] said he believed someone was paid off to falsify the court documents because Richardson made insinuations he knew high ranking officers at the Raleigh Police Department and he could make the DWI charges against him go away. [redacted] said he told Richardson to calm down because they were going to win their case. *

This interview concluded at 9:12 a.m.

CVC:mcs

MOTION TO SUPPRESS

- Motion to keep out Paragraph 13 because it is attorney-client privileged.
- Motion to keep out most of the rest of his statement because it's improper when viewed in light of paragraph 13. He's already revealed privileged information, so it creates the appearance of impropriety to allow Mr. Schmo to testify to any detailed information about his representation of Richardson and actions he took in the course of that representation.
  - Acknowledged that that information didn't meet 5-part test.

ATTORNEY-CLIENT PRIVILEGE

- Extremely narrow
- A legal doctrine; not enforceable by the State Bar or any other body - a violation of the attorney-client privilege means that the evidence is not admissible in court
  - A violation of the attorney-client privilege could ALSO be a violation of the ethical duty of confidentiality, but separate considerations
- Case law: can there be an in camera review of material purportedly privileged

ATTORNEY-CLIENT PRIVILEGE: 5-PART TEST

- In re Investigation of the Death of Miller, 357 NC 316 (2003) – *Miller I*
- To establish attorney-client privilege, party asking for the privilege must show:
  - Relation of attorney and client existed at the time the communication was made;
  - Communication was made in confidence;
  - Communication relates to a matter about which the attorney is being professionally consulted;
  - Communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated; AND
  - Client has not waived privilege.

A-C PRIVILEGE: CRIME-FRAUD EXCEPTION

- Burden shifts to party opposing privilege to show that the crime-fraud exception exists, once the privilege is established (probable cause standard)
- Party seeking exception must present circumstances sufficiently strong for a reasonably cautious person to believe the conversation was made for the purpose of promoting or continuing criminal activity.
- Client must have both gotten advice about a crime or scheme, and then used that advice in furtherance of the crime in order for the exception to apply.

PROPER PURPOSE VS. CRIME FRAUD EXCEPTION

- 4th prong of *Miller I* test:
  - Communication was made in the course of giving or seeking legal advice ***for a proper purpose***, although litigation need not be contemplated.
- This can get confusing – because some courts have conflated the 2 principles and said that if the communication is being obtained for the purpose of a fraud or scheme, then it's not for a proper purpose and privilege doesn't apply.
- 2 separate inquiries
  - Important because the burden shifts

ATTORNEY WORK PRODUCT

- Fact vs. opinion work product
  - Fact work product: transaction of the factual events involved
    - To obtain, must show:
      - A substantial need, AND
      - An inability to secure the substantial equivalent of the materials without undue hardship
  - Opinion work product: actual thoughts and impressions of attorneys
    - "Enjoys near absolute immunity and can only be discovered in very rare and extraordinary circumstances"
    - Witness interviews fall in category of opinion work product

WORK PRODUCT: CRIME-FRAUD EXCEPTION

- Required prima facie showing:
  - Client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme; AND
  - Documents containing the privileged materials bear a close relationship to the client's existing or future scheme to commit a crime or fraud
- For opinion work product, must ALSO show that the attorney knew of or participated in the crime or fraud
  - If attorney not involved, then limited to fact work product

ETHICAL RULES: RULE 1.6 – CONFIDENTIALITY

- Rule 1.6 (a): shall not reveal information acquired during professional relationship with a client unless client gives informed consent, disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
- Rule 1.6 (b): may reveal protected information to extent lawyer reasonably believes necessary:
  - (1) To comply with the Rules of Professional Conduct, the law, or court order;
  - (2) To prevent the commission of a crime by the client;
  - (4) To prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used

RULE OF CONFIDENTIALITY

- Comment 2: why confidentiality is important and why the rules allowing disclosure should be restricted
  - Support trust from the attorney-client relationship
  - Public policy: want clients to seek legal advice; want clients to follow legal advice
  - Clients come to attorneys to determine what is deemed to be legal and correct
  - "Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."

RULE OF CONFIDENTIALITY

- Comment 3: besides the State Bar, the way to enforce and give effect to confidentiality rules and the principle of confidentiality are the attorney-client privilege and work-product doctrine
  - Attorney-client privilege and work-product doctrine are very tailored and narrow and apply only to matters communicated in confidence by the client to the lawyer.
  - Rule of confidentiality applies to all information acquired during the representation, whatever its source.

BACK TO RICHARDSON

- Motion to Suppress
- Hearing with testimony of Joe Schmo
- Supplemental Memorandum of Law by defense
- Judge gives ruling the morning of trial

ATTORNEY-CLIENT PRIVILEGE AND THE RULE OF CONFIDENTIALITY

JUDGE'S RULING

With regard to the fourth prong of the test, the communication must relate to communications between the attorney and the client for a proper purpose. While communications concerning the client's own criminal culpability in his defense are privileged, the Court went on to look at whether that proper purpose related to communications involving the client's future illegal activity, obstruction of justice, or activity directly or indirectly aided a third party in some illegal activity. In this case, the Court finds that the statements were statements about a potential future illegal activity of the client and obstruction of justice. Had these statements been made and nothing else occurring, the Court would be hard pressed to find that they were not protected by the attorney-client privilege. However, the fact that it appears that the conduct which was spoken about did, in fact, occur, albeit with someone other than in law enforcement but at the clerk's office, that the Court takes note of Rule 1.6 of the

ATTORNEY-CLIENT PRIVILEGE AND THE RULE OF CONFIDENTIALITY

JUDGE'S RULING

- Basically:
  - Because Joe Schmo's name was in ACIS as Mr. Richardson's attorney, he was being used in the furtherance of the scheme and thus the communication was NOT attorney-client privileged
  - If the incorrect verdicts had stayed in the computer, others would see Mr. Schmo's name as having attained that verdict for Mr. Richardson, so Schmo was used in furtherance of scheme
- My Thoughts:
  - Would have made more sense to say that the test for privilege was met, but crime-fraud exception applied

ATTORNEY-CLIENT PRIVILEGE AND THE RULE OF CONFIDENTIALITY

JUDGE'S RULING

- Also noted in his ruling that Rule 1.6 of Professional Rules of Conduct allowed, but didn't require, Mr. Schmo to break the privilege.
- In his Order, made a Conclusion of Law that the disclosure was permitted under Rule 1.6(b)(4) of Ethical Rules.

ATTORNEY-CLIENT PRIVILEGE AND THE RULE OF CONFIDENTIALITY

APPEAL?

- Question of Interlocutory appeal:
  - Unclear, but makes sense in these general situations where you're trying to prevent disclosure in the first place
  - Both DA and Judge agreed we had the right to an interlocutory appeal
- When we said we were appealing, DA agreed not to introduce that evidence.

ATTORNEY-CLIENT PRIVILEGE AND THE RULE OF CONFIDENTIALITY

FINAL RESULT OF RICHARDSON

- NG of 1st set of Altering Court Records & Accessing Government Computers.
- NG of Obstruction of Justice
- Gu of 2nd & 3rd set of Altering Court Records & Accessing Government Computers
- Sentenced to total of 26 months, with 10 months to be served concurrently with active portion of sentence already serving from Johnston Co. conviction. Will do additional 16 months, which is half of what plea offer was.

ATTORNEY-CLIENT PRIVILEGE AND THE RULE OF CONFIDENTIALITY

BEST PRACTICES: MY OPINION

- This looks bad. Don't do it.
- You will NEVER get in trouble by claiming privilege, and only turning over the information when ordered to by the Court. This will protect you ethically and legally.
- What could Joe Schmo could have said if he was worried about his name and services being involved?
  - I don't recall ever having a trial in this matter.
  - I don't have any documentation of there being a trial.

Wellness and Mindfulness for Attorneys and Professionals in the Legal Field

Sarah E. Nagae
Nexsen Pruet, PLLC
Raleigh, NC
snagae@nexsenpruet.com
(919) 653-7824

The first thing to go was sleep
But I didn't complain because I didn't need sleep

The next things to go were my friends and hobbies
But I didn't complain because I needed my work more than I needed my friends and hobbies

The next things to go were my marriage and my family
But I didn't complain because I believed my work served a greater good

Finally, I had nothing left, and nothing and no one to save me from myself.

– Steve Angel[1]

I. Achieving Wellness as Attorneys

As attorneys, many of us feel like we are under continual, intense pressure. While this may be true, we also have the intellect and determination needed to take care of ourselves and to ensure that the pressure does not overwhelm us. With adequate self care, we can be *both* attorneys *and* healthy, happy people.

In this paper, we first discuss why attorneys are vulnerable to particular physical and mental health disorders and to substance abuse. We then look closely at depression, which occurs at a particularly high rate among attorneys. After discussing the signs and symptoms of depression, we discuss how to help yourself or others who may be suffering from this disease, including using mindfulness and one mindfulness practice, meditation. My goal to to encourage you to reflect on your our own health behaviors, determine if they are contributing to or detracting from your happiness and success, and, if so, identify realistic changes that you can make to increase your personal and professional fulfillment.

[1] Steven M. Angel, *The Burnout Pandemic: Accommodating Workaholism in the Practice of Law*, Oklahoma Bar Association, December 11, 2010; http://www.okbar.org/members/worklifebalance/articles/burnoutangel.aspx. Excerpted with permission from the author.

II. The Scope of Health Issues Among Attorneys

Studies on the health status of lawyers have primarily focused on mental health and indicate that rates of depression and suicide among attorneys are higher than among the general population. One study conducted in the early 1990s found data suggesting that white male lawyers in the U.S. between the ages of 20 and 64 were more than twice as likely to die by suicide than were their peers working in other professions.[2]

Another study, this one conducted in 1997 in Canada, found the suicide rate for attorneys to be six times higher than for the average population. Suicide ranked as the third-leading cause of death among attorneys, behind only cancer and cardiac arrest.[3] In our own state, a quality of life survey by the North Carolina Bar Association released in 1991 found that almost 12% of respondents said they contemplated suicide at least once a month.[4]

Looking at depression, a 1990 study by researchers affiliated with Johns Hopkins University found that lawyers suffer from major depressive disorder at a rate 3.6 times higher than their non-lawyer counterparts.[5] In that study, lawyers had the highest rate of depression among all the 104 occupational groups surveyed.[6] Further, the 1991 NCBA survey found that 24% of lawyers said that they had experienced symptoms of depression at least three times per month during the past year.[7]

---

[2] *See On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, Patrick J. Schiltz, at 879-880 and note 56, http://www.integrityseminar.org/wp/wp-content/uploads/2015/02/Being_Happy_Healthy_Ethical_Member.pdf *citing* Carol A. Burnett et al., *Suicide and Occupation: Is There a Relationship?* at 2 (Nov. 19-22, 1992).
[3] Legal Profession Assistance Conference Lawyer Suicide Study, Canadian Bar Association (1997).
[4] *North Carolina Bar Association*, REPORT OF THE QUALITY OF LIFE TASK FORCE AND RECOMMENDATIONS 4 (1991).
[5] William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32(11) J. OCCUPATIONAL MED. 1079-87 (1990).
[6] *Id.*
[7] *North Carolina Bar Association*, REPORT OF THE QUALITY OF LIFE TASK FORCE AND RECOMMENDATIONS 4 (1991).

In addition to depression, anxiety disorder is also significantly associated with suicidal ideation (having thoughts about how to kill oneself) and suicide attempts.[8] When North Carolina lawyers were questioned about their experience of anxiety, over 25% of respondents reported that they had felt physical symptoms of extreme anxiety at least three times per month during the past year.[9] Some studies estimate that 40% of lawyers struggle with anxiety, which is twice the rate of the general population.[10]

Statistics indicate that lawyers also struggle with alcohol and drug abuse at a disproportionately high rate. For example, lawyer assistance programs report that 50%-75% of lawyer discipline cases nationwide involve chemical dependency.[11] A recent survey study of US attorneys found that 21% self-reported that they are problem drinkers.[12] Taken together, research indicates that attorneys suffer from mental health disorders and substance abuse at higher rates than non-attorneys. The next section explores possible reasons for this discrepancy.

III. What Makes Lawyers Vulnerable to Health Issues

High rates of depression and suicide among lawyers as compared to the general population indicates that lawyers are at particular risk of mental health disorders. Studies show that chronic stress can take a toll on physical health as well, by increasing risk of heart disease, weakening immunity and possibly damaging other systems.[13] In addition,

[8] U.S. Department of Health and Human Services (HHS) Office of the Surgeon General and National Action Alliance for Suicide Prevention. *2012 National Strategy for Suicide Prevention: Goals and Objectives for Action*. Washington, DC: HHS, September 2012 at page 117, http://www.surgeongeneral.gov/library/reports/national-strategy-suicide-prevention/full_report-rev.pdf.
[9] Footnote 7, supra.
[10] North Carolina Lawyers' Assistance Program, http://www.nclap.org/anxiety/.
[11] *Id.*
[12] Substance abuse and mental health issues are a growing problem for the legal profession, say experts. Martha Middleton, ABA Journal 12/1/15. http://www.abajournal.com/magazine/article/substance_abuse_and_mental_health_issues_are_a_growing_problem_for_the_lega
[13] *How stress affects your health*, American Psychological Association, http://www.apa.org/helpcenter/stress.aspx.

many people try to alleviate the unpleasant feelings of stress by drinking, overeating, smoking and other unhealthy behaviors.

While lawyers face the typical stresses of modern life such as meeting deadlines, caring for children and elderly parents and paying bills, we are also affected by some stressors unique to the legal profession. These include requirements that can only be met by working excessively long hours, having to account for how we spend our time, often in .1 hour increments, the emphasis on profitability, acrimonious encounters with opposing counsel, responsibility for high-stakes cases and the perfectionistic and competitive tendencies shared by many attorneys, to name a few. In short, lawyers exist in a sphere where there is continual pressure to look like we are in control and have everything coolly handled, yet, in reality, much is out of our control and unknown.

As these factors are well documented and discussed elsewhere,[14] we will focus on how these pressures can effect attorneys' day-to-day lives. Some attorneys describe a pattern of gradually closing one's life off to sources of happiness as they spend more and more time working. One former lawyer remembers his decent into depression and eventually complete burnout as starting with the giving up of sleep and gradually resulting in the relinquishment of everything that didn't involve his work. This attorney writes:

> Instead of eight hours of sleep a night I was able to get by on six hours and finally four hours. The next things to go were my hobbies. I didn't have time for reading, so I stopped reading for fun. I didn't have time to take off from work so I stopped taking vacations. Then I stopped socializing because I didn't have time to waste away from work. Then I suffered through a divorce and the loss of my family.

[14] See *Lawyers and Their Elusive Pursuit of Happiness: Does it Matter?*, Daniel S. Bowling, III, Duke Forum for Law & Social Change, Vol 7:37 (2015) at note 9.

> For the next 10 years, the chief source of joy in my life was winning a case. Finally, in 2003, I had nothing left to give, hit a wall and crashed and burned.[15]

As this excerpt makes clear, lawyers can become caught in a spiral of demanding work and intense stress. Prioritization of work often means foregoing the activities needed to stay physically healthy, such as regular exercise, making or buying healthy meals, spending time with friends and family and simply doing things that we enjoy. This pattern is tricky because lawyers are often rewarded for the long hours and the sacrificing of other parts of their lives. However, the lawyer who maintains a narrowed focus on work and an unforgiving pace for a long period of time may be seriously damaging other parts of his or her life. Over time, neglecting exercise, proper nourishment, relaxation and simply doing things that are fun can easily lead to weight gain, muscle loss, nutritional deficiencies and diseases such as heart disease and diabetes.

To cope with the excessively high levels of stress that can accompany the practice of law, some attorneys rely on self-medicating with alcohol or other drugs. Alcohol may help to alleviate anxiety and blunt the discomfort of stressful thoughts and feelings. Alcohol can also help attorneys who are naturally introverted feel more at ease in some social situations. Of course, any pleasant effects produced by the consumption of alcohol quickly wear off. But, the temporary relief supplied by alcohol can become something that is sought after again and again resulting, over time, in addiction. Lawyers who have dropped activities that were once sources of pleasure and fun in their lives, or who do not participate in fun activities outside of work, may be especially vulnerable to the allure of

---

[15] Steven M. Angel, *The Burnout Pandemic: Accommodating Workaholism in the Practice of Law*, Oklahoma Bar Association, December 11, 2010, accessible at http://www.okbar.org/members/worklifebalance/articles/burnoutangel.aspx. Reprinted with permission.

alcohol as it may be one of the only ways the attorney can relax and escape from the stresses and problems of legal practice.

Eventually, allowing work to consume the joyful parts of one's life can lead to what some call "burnout," and what often meets the clinical definition of depression. This state is characterized by a loss in motivation to work and lack of ability to concentrate. Also common are feelings of being trapped in your current situation and not having options to change your job situation or reduce the pressure and expectations that come with it. Alcohol and substance abuse can exacerbate symptoms of burnout and depression and can also cause disconnection between the attorney and his or her family, friends and colleagues. In the most extreme cases, some lawyers consider suicide, as they have become incapable of seeing viable options for relief of their pain and can no longer envision a happy, or even just not-miserable, professional future. The good news is that we can learn to spot the warning signs of burnout and depression in ourselves and in others and work to avoid this downward spiral.

IV. Depression

A. Types of Depression and Symptoms

As we all occasionally feel sad, down or angry, it can be difficult to know when your feelings are normal and when what you are feeling can be considered "depression." Normal feelings of sadness, lethargy, or both are temporary and pass within a couple of days. With depression, the feelings last much longer and interfere with daily life. Also, there feelings are present even when, externally, things seem to be going well and the person has not suffered a recent loss.

There are several forms of depressive disorders, two common ones of which are major depression and persistent depressive disorder. Major, or clinical, depression is defined as a period of two weeks or longer in which mood is depressed most of the day, particularly in the morning, and there is a loss of interest in normal activities and relationships.[16] Other symptoms might include:

- Fatigue or loss of energy almost every day
- Feelings of worthlessness or guilt almost every day
- Impaired concentration, indecisiveness
- Insomnia or hypersomnia (excessive sleeping) almost every day
- Markedly diminished interest or pleasure in almost all activities nearly every day (called anhedonia, this symptom can be indicated by reports from significant others)
- Restlessness or feeling slowed down
- Recurring thoughts of death or suicide
- Significant weight loss or gain (a change of more than 5% of body weight in a month)

On average, an untreated episode of major depression lasts several months; however, episodes can last any length of time.

A second classification of depression is persistent depressive disorder ("PPD," previously called dysthymia). PPD symptoms are less severe symptoms than those accompanying major depression, but, with PPD, the depressed mood lasts much longer: at least 2 years. PPD is diagnosed when two or more of the following symptoms are present almost all of the time:

- Feelings of hopelessness
- Too little or too much sleep

[16] American Psychiatric Association, *The Diagnostic and Statistical Manual* (5th ed.) Washington, D.C. (2013).

- Low energy or fatigue
- Low self-esteem
- Poor appetite or overeating
- Poor concentration

People with PDD will often take a negative or discouraging view of themselves, their future, other people and life events. Problems often seem hard to solve.

There is no single cause of depression and no sure way to prevent it. Depression develops due to a combination of genetic, biological, environmental (job, relationships, family, and economic and social influences) and psychological factors. Depressive illnesses are disorders of the brain and involve altered biochemistry: scans show that the brains of people who have depression look different than those of people without depression. Specifically, the parts of the brain involved in mood, thinking, sleep, appetite and behavior appear different than in people without PPD.

The great news is that depression is treatable. Medication, psychotherapy and other methods have been proven to greatly help people with depression, even in the most severe cases. The earlier that treatment can begin, the more effective it is.

A note about gender: men and women often experience depression differently. Typically, women feel what we think of as the more traditional symptoms such as feelings of sadness, worthlessness and excessive guilt. In contrast, men are more likely to feel excessively tired and irritable, to lose interest in once-pleasurable activities and to have difficulty sleeping. Men may also be more likely than women to turn to alcohol or drugs to cope with the symptoms of depression.

B. How to Help Yourself or Others Experiencing Depression

While we have limited control over the occurrence of depression, there are definite actions that can be taken when depression has taken ahold. Or, as well stated by Dr. Richard O'Connor in the video *A Terrible Melancholy: Depression in the Legal Profession*, "Depression isn't your fault, but it is your responsibility."[17]

How can I help myself if I am depressed?

- Contact LAP, the North Carolina Lawyer Assistance Program, at http://www.nclap.org; 919-719-9267 or info@nclap.org or BarCARES, a confidential, short-term intervention program provided through the NCBA, at 1-800-640-0735 or www.barcares.org.
- Don't wait to get evaluated or treated. Research shows that the longer you wait, the greater your impairment from depression can be down the road.
- Try to spend time with other people and confide in a trusted friend or relative. Try not to isolate yourself, and let others help you.
- Try to be active and exercise. Go to a movie, a ballgame or another event or activity that you once enjoyed (but don't beat yourself up if you just don't feel like it).
- Expect your mood to improve gradually, not immediately. Often during treatment for depression, sleep and appetite will begin to improve before your depressed mood lifts.
- Postpone important decisions, such as getting married or divorced or changing jobs, until you feel better. Discuss decisions with others who know you well and have a more objective view of your situation.
- Remember that positive thinking will replace negative thoughts as your depression responds to treatment.
- Continue to educate yourself about depression.[18]

[17] Bar Association of Erie County, viewed at https://vimeo.com/14303016.

[18] List adapted from *What Is Depression*, National Institute of Mental Health, accessible at: https://www.nimh.nih.gov/health/topics/depression/index.shtml

Often people do not know that they are depressed so they do not ask for or get the right help. Attorneys in particular doubt that they are "really depressed." They tell themselves that they should be able to deal with whatever they are feeling or going through by themselves. This resistance to seeking treatment is one reason why it is important to let people know that depression is a medical problem – a biochemical imbalance – and not a weakness. And, as a medical problem, depression can be treated.

How can I help someone else if I think they may be depressed?[19]

- Encourage or help them make an appointment with a psychiatrist and a counselor/therapist.
- Offer to drive them to the doctor or counselor or help them make arrangements to get to the appointment.
- Offer emotional support, understanding, patience, friendship, and encouragement.
- Spend time with them however you can. Invite them for walks, outings, to the movies, and other activities. Be gently insistent if your invitation is refused.
- Don't dismiss their feelings or thoughts, even if they do not sound rational to you or seem to make sense to you.
- Point out facts and realities. If it seems like they are seeing their situation from skewed perspective, explain how you see things differently.
- Take remarks about suicide seriously; do not ignore them and do not agree to keep them confidential. Report them to the person's therapist or doctor if you think that your friend or colleague will be reluctant to discuss them.
- Encourage participation in some activity that once gave pleasure such as hobbies, sports, religious, or cultural activities.
- Do not push the depressed person to undertake too much too soon; too many demands may increase feelings of failure.

[19]Adapted from Assisting the Depressed Lawyer, Ann D. Foster, Texas Bar Journal, Vol. 70, No. 3.

- Eventually with treatment, most people get better. Keep that outcome in mind and keep reassuring the depressed person that with time and help, he or she will feel better.
- Call LAP or BarCARES to get names and phone numbers of therapists or psychiatrists and give the person this information.

Do not assume that someone else is taking care of the problem. Attorneys are reluctant to get involved in the personal lives of colleagues, but it is important that negative thinking, inappropriate behavior or physical changes that indicate someone may be suffering from depression be addressed as quickly as possible.

V. Mindfulness and Meditation

Research has shown that developing the mental quality of mindfulness may help to alleviate some of the symptoms of depression, anxiety and other stress-related mental health disorders. Some definitions of mindfulness are:

- "The quality or state of being conscious or aware of something" (Google definition).
- "A mental state achieved by focusing one's awareness on the present moment, while calmly acknowledging and accepting one's feelings, thoughts, and bodily sensations, used as a therapeutic technique." (Google definition).
- "The psychological process of bringing one's attention to experiences occurring in the present moment." (Wikipedia). "The term "mindfulness" is a translation of the Pali term *sati*, which is a significant element of Buddhist traditions. In Buddhist teachings, mindfulness is utilized to develop self-knowledge and wisdom that gradually lead to what is described as enlightenment or the complete freedom from suffering." (Wikipedia).

Mindfulness has been studied by researchers in the fields of clinical psychology and psychiatry. Research began in the 1970s and there has been a surge in interest since 1990s with a plethora of studies and mega-analyses. Studies have found reduction in depression symptoms, stress and anxiety and positive effects in the treatment of drug addiction. Studies have also found physical and mental health benefits in healthy adults and children. Three such studies are excerpted below.

Paulus, Martin P (2016). *"Neural Basis of Mindfulness Interventions that Moderate the Impact of Stress on the Brain". Neuropsychopharmacology. 41 (1): 373.*

> Mindfulness-based stress reduction (MBSR) has been proposed for almost every psychiatric condition. In a meta-analysis (Sedlmeier et al, 2012), mindfulness interventions had medium to large effect sizes for changes in emotionality and relationship issues, medium effect sizes for measures of attention, and small effect sizes for cognitive measures. MBSR has been associated with increased cortical thickness in the insula and somatosensory cortex, which can be associated with reduction of worry, state anxiety, depression, and alexithymia (Tang et al, 2015). Moreover, changes after mindfulness training in the insula have been related to increase in interoceptive awareness, i.e. the ability to monitor afferents from inside the body, which is emerging as an important construct for anxiety disorders and addiction (Paulus and Stewart, 2013).
>
> https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4677133/

Khoury, Bassam; Sharma, Manoj; Rush, Sarah E; Fournier, Claude (2015). *"Mindfulness-based stress reduction for healthy individuals: A meta-analysis"*. Journal of Psychosomatic Research. 78 (6): 519–28.

> Results suggested large effects on stress, moderate effects on anxiety, depression, distress, and quality of life, and small effects on burnout. When combined, changes in mindfulness and compassion measures correlated with changes in clinical measures at post-treatment and at follow-up.
>
> http://www.jpsychores.com/article/S0022-3999(15)00080-X/pdf

Hofmann, Stefan G; Sawyer, Alice T; Witt, Ashley A; Oh, Diana (2010). *"The effect of mindfulness-based therapy on anxiety and depression: A meta-analytic review*". Journal of Consulting and Clinical Psychology. 78 (2): 169–83.

> In patients with anxiety and mood disorders, this intervention was associated with effect sizes (Hedges's g) of 0.97 and 0.95 for improving anxiety and mood symptoms, respectively. These effect sizes were robust, were unrelated to publication year or number of treatment sessions, and were maintained over follow-up. Conclusions: These results suggest that mindfulness-based therapy is a promising intervention for treating anxiety and mood problems in clinical populations.
>
> http://psycnet.apa.org/doiLanding?doi= 10.1037% 2Fa0018555

In the talk accompanying this manuscript, we will discuss ways of cultivating mindfulness, including the accessible and effective technique of meditation. We will discuss how to start and maintain a meditation practice.

VI. Closing

Stress is a naturally-occurring pattern of thoughts and feelings that energizes us to act, speak, move and do things that need to be done. However, when stress levels rise above normal and stay elevated for long periods, our mental and physical health suffers and it is time to seek help. Many attorneys regularly work under conditions of extremely high pressure. Learning how to take care of ourselves is the key to working in these environments and staying healthy. Fortunately, self-care can be learned and readily implemented.

One tested way to reduce stress and lower your risk of mental health disorders is to cultivate a feeling of connectedness to others. Thus, the mere fact that we, as attorneys, are coming together to discuss these issues could lead to a greater sense of connectedness and itself improve our health.

Resources

In a Crisis

- Call 911.
- Call the National Suicide Prevention Lifeline at **1-800-273-TALK (8255),** available to anyone 24 hours a day, 7 days a week. All calls are confidential. *http://www.suicidepreventionlifeline.org*

Lawyer-Focused Resources in North Carolina

- North Carolina Lawyer Assistance Program (NCLAP)
  919-719-9267, Email: info@nclap.org
  Regional counselors: Raleigh and Areas East - 919-719-9267
  Piedmont Area - 919-719-9290
  Charlotte and Areas West - 704-910-2310

- BarCARES of North Carolina
  919-659-1453, Email: kbarbour@ncbar.org

Articles

How Lawyers Can Avoid Burnout and Debilitating Anxiety, ABA Journal, 7/1/15, Leslie A. Gordon, accessible at: http://www.abajournal.com/magazine/article/how_lawyers_can_avoid_burnout_and_debilitating_anxiety

Lawyer Suicide: Find a Ray of Sunshine Through a Dark Cloud, Scott M. Weinstein, Ph.D., The Florida Bar News, March 1, 2015. Accessible at: http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/5c5dc6e5081d87cf85257df5004a43cc!OpenDocument

On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, Patrick J. Schiltz, Vanderbilt Law Review, May 1999. Accessible at: http://faculty.law.miami.edu/mcoombs/Schlitz.htm.

The Burnout Pandemic: Accommodating Workaholism in the Practice of Law, Steven M. Angel, accessible at: http://www.okbar.org/members/worklifebalance/articles/burnoutangel.aspx

General Information on Suicide

American Foundation for Suicide Prevention: https://www.afsp.org/preventing-suicide/find-help

Interesting Infographics

Mental Health Facts in America Infographic. From National Alliance on Mental Illness, accessible at: at http://www.nami.org/Learn-More/Mental-Health-By-the-Numbers

Suicide Facts at a Glance 2015. From National Center for Injury Prevention and Control, Division of Violence Prevention, Centers for Disease Control and Prevention (CDC). Accessible at: http://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.pdf

Mindfulness/Meditation

The Mindful Lawyer, Robert Zeglovitch, ABA Newsletter, 2006:
https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/mindfullawyer.html

To Be Happy, Stay in the Moment, Matt Killingsworth, TED Conferences, LLC, 2011:
https://www.ted.com/talks/matt_killingsworth_want_to_be_happier_stay_in_the_moment

Be Still and Listen: Mindfulness for Lawyers, Nancy A. Werner, Michigan Bar Journal, 2012:
http://www.michbar.org/file/barjournal/article/documents/pdf4article1987.pdf

10 Steps to Add Meditation to Your Law Practice, Jenna Cho, Lawyerist.com, 2015:
https://lawyerist.com/how-to-be-a-lawyer-and-meditate-daily/

Resilience Requires Recharging, Paula Davis-Laack, Law Practice Today, 2017:
http://www.lawpracticetoday.org/article/resilience-requires-recharging-unplug-when-busy/

If You Aspire to Be a Great Leader, Be Present by R. Hougaard and J. Carter, 2017:
https://hbr.org/2017/12/if-you-aspire-to-be-a-great-leader-be-present?utm_campaign=hbr&utm_source=twitter&utm_medium=social

National Task Force on Lawyer Well Being, American Bar Association, 2017:
(see p. 52, section on Mindfulness Meditation and footnoted resources):
https://www.americanbar.org/.../ThePathToLawyerWellBeingReportRevFINAL.pdf